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Diversity and Perspectives

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September 2011

Editorial Board



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## PREFACE

This publication is issued in conjunction with the first international conference organised by the Doctoral School for European Integration and Baltic Sea Region Studies at the University of Latvia on 26-27 September 2011.

The theme of the publication and conference *“European Integration and Baltic Sea Region: Diversity and Perspectives”* relates to global and regional interaction of political, economic, social and other dimensions in these processes. During the past years qualitative changes in regional integration including, for example, development of macro regions in the EU have taken place. As the world is becoming ever more integrated - mutual ties between regional, national and international communities are strengthening. This calls for development of a solid platform for advanced studies that offer added value within and across disciplines of social sciences and humanities.

The Doctoral School is an institution launched to support young scholars during their research training, to provide a space for the exchange of ideas and to prepare for the job market. As the name of the doctoral school suggests special attention is paid to integration of the Baltic States into the EU, regional cooperation and socio-economic development in the Baltic Sea area. Implementation of the School's programme is decidedly inter- and multidisciplinary. The School is integrated into the various research structures at the University of Latvia, and cooperates with other education- and research establishments in the country, in the EU and non-EU countries.

This first volume issued by the Doctoral School is a collection of papers that is representative of the research themes pursued by young as well as experienced scholars connected directly with the School.

Contributing scholars to this volume share their research findings from the perspectives of different disciplines, such as economics, management science, law, political science, sociology, regional sciences and humanities. Inter- and multidisciplinary are the distinguishing features of this volume as they map out the ongoing, complex and interrelated processes of legal, cultural and socio-economic integration in Europe and the Baltic Sea Region.

This volume together with the conference presents a platform for further research and implementation of suggested recommendations both contained in the papers and arising from the discussions at the conference.

The editors gratefully acknowledge the support of the European Regional Development Fund and Social Fund, as well as support from the Doctoral School and University of Latvia.

The organisation of this international and interdisciplinary conference was made possible through generous support by the Centre for European and Transition Studies and Jean Monnet Centre of Excellence at the University of Latvia, The Hochschule Wismar, University of Applied Sciences: Technology, Business and Design, Nordic Council of Ministers' Office in Latvia, and Baltisch-Deutsches Hochschulkontor.

*Editors*



## Part I

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# GLOBALISATION AND THE FUTURE OF THE STATE

**Elina Apsite<sup>1</sup>**

## **WILL THEY RETURN? LATVIAN IMMIGRANTS IN THE UNITED KINGDOM**

### **Abstract**

There was a number of Latvians - mostly labour migrants, who emigrated just after the EU enlargement in 2004. Consequently some migrants returned during the years of the economic boom in Latvia, however, emigration from Latvia increased again since 2008, when the global economic downturn discouraged many potential return migrants.

In this paper, results are based on an analysis of Latvian emigrants to the UK. Using a popular website, data was collected from a comprehensive web-based survey. This methodology provides insight to emigrant characteristics and return plans.

Overall, the findings indicate that large proportions of respondents both male and female are more likely to stay in the UK. However, analysis distinguishes a proportion of persons who would be in favour of return. Also the context of the current economic conditions in Latvia dictates both uncertainty and unemployment thus creating a risk of an on-going “myth of return” for the ones who are abroad.

**Keywords:** Latvia, emigration, return migration, the United Kingdom

### **Introduction**

In recent years permanent stays abroad have converged several times. Similar to other countries, Latvia remains under pressure of population loss as' continued

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The research was promoted with the support of the European Union Social Fund project “Support of Doctoral Studies at the University of Latvia”.

emigration of many young and highly-skilled people is worrisome. As a solution only improved domestic conditions can reduce pressures to emigrate and increase incentives to return home' (Zetter, 1999). However, it is crucial to find investigate who is abroad as well as what is the target group for return incentives.

'Myth of return' (King, 2000) is mostly used when talking about refugees and argues that 'emigrants in exile have limited access to the material and symbolic representation of the past, which then is reconstructed and preserved in a mythical form and becomes the basis for subsequent strategies of adjustment and transition (Zetter, 1999). Return can also be understood both as 'an aspiration fuelled by the memory of and emotional attachment to the distant homeland and as the reason pushing many individual migrants to engage in transnational practices, thus consolidating transnational social fields (Sinatti, 2011).

It is argued (Pinger, 2007) that 'migration is most beneficial if is temporary, i.e. if migrants leave their country with the intention to return some day for good'. Furthermore, 'temporary migrants try to transfer as much consumption as possible to the time after their returns, while permanent migrants are more induced to save and spend their money in the foreign country' (Pinger, 2007).

In the context of Latvia, where initial emigration motives are often related to economic reasons, the initial plan to earn for a specific goal and fulfil one's initial plans can often remain unfulfilled leaving space for only potential return migrants, as 'some returnees appear as actors of change' (Cassarino, 2004). The myth of return as the myth of 'home' or the myth of return home include contrasting aspirations of 'belief' in return and 'hope' of return (Zetter, 1999) to their homeland however one's aspirations cannot always be realised in real life. The 'myth of return' (King, 2000) or the hope to return one day can be maintained for a long period of time without any practical action because 'immigrant relationships, identities and belonging are seen to operate in the borderless world' (O'Connor, 2010) where return for the individual is not essential.

For Latvians access to European labour markets before 2004 was limited. The enlargement of the European Union in 2004 initiated the flow of mostly labour migrants to the UK. Despite the fact that Sweden also did not restrict their labour market to the new member states, the UK and Ireland experienced the highest inflow of Eastern European migrants. 'Almost 70% of the immigrants from the new accession EU10<sup>2</sup> countries which joined the EU at the same time as Latvia in 2004 have been absorbed by the UK and Ireland since 2003' (Kahanec et al, 2009); most of them Poles.

After a couple of years in the EU, Latvia experienced years of economic boom between 2006 and 2007 and as a result, a number of emigrants returned to Latvia. However, the situation worsened again, and since 2008 the global economic downturn has discouraged many potential return migrants. Moreover, since then the emigration numbers according to the UK registers from Latvia have even increased.

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<sup>2</sup> Cyprus, Malta, Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, and Slovenia were the 10 countries that joined the EU on May 1, 2004.

However, Latvia is one of 'the former Soviet Union countries where official statistical data registering outflow of people are typically scarce and often misleading' (Danzer, 2009). Thus statistics are obtained from the destination country. According to NINo registrations there are around 81 thousand immigrants from Latvia that entered the UK in period between 2002 - 2010. Among those, around 41 thousand male and 40 thousand female immigrants with Latvian origin, but with no trace about returns as 'destination countries, for their part, are traditionally more concerned about monitoring entries than about monitoring departures, making them poorly equipped to provide accurate numbers of migrants living in the country at any particular time' (Thomas-Hope, 1999).

For the purpose of this discussion, this article will address the differences between male and female Latvian emigrants to the UK. It will consider their motives and reasons for initial emigration, importance and involvement in migrant's social networks and aspects of experiences they value as important. It will also examine the differences between migrants who left Latvia just after the enlargement and migrants who emigrated after 2008 showing who are more likely to remain in the UK and who return to their country of origin.

This paper is structured in the following way: Section two summarizes the theoretical discussion on return migration. Section three describes the data used in this research and the methods of analysis. Section four discusses the results and Section five concludes and gives space for discussion on the matter.

## Theoretical points

Return migration is defined by the International Organization of Migration (IOM) as 'the process of a person returning to his/her country of origin or habitual residence'. Some immigrants plan to return, while others do not. 'For various reasons, some of them return to their country of origin and especially the highly-skilled can stimulate or support knowledge-based economic development'(Klagge and Klein-Hitpaß, 2010). 'Some individuals who emigrate will return to apply their acquired skills in the home' (Dustmann et al, 1999) country. Because the benefits of return migration are most if migrants are 'abroad for a short period of time, send back remittances, and return with new skills and links to industrial countries that lead to increased trade and investment'(Martin et al, 2006).

In the literature Cassarino (2004) has written about return migration as a 'subprocess of international migration has been subject to various approaches that offer contrasting sets of propositions'. It has been viewed through the neoclassical economics, the new economics of labour migration, structuralism, transnationalism and social network theory.

The neoclassic approach by (Todaro, 1969) is based on 'the notion of wage differentials between receiving and sending areas, as well as on the migrant's expectations for the higher earnings in the host country' and further elaborated by (Cassarino, 2004; Borodak and Tichit, 2009) 'migrant returns if he fails to maximize his expected earnings abroad or if he is forced to return back. He is seen as an individual

who maximizes not only his earnings but also the duration of their stay abroad to achieve permanent settlement and family reunification. People in this position often do not come back as long as the differential of expected wage between the origin and foreign country is positive; return migration is constrained or is indicative of the migration plan failure'. Conversely the new economic of labour migration views return migration (Cassarino, 2004)' as the logical outcome of a "calculated strategy", defined at the level of the migrant's household, and resulting from the successful achievement of goals and targets'. This approach to return migration goes (Stark et al, 1997) 'beyond a response to negative wage differentials'.

Literature discussing this matter relates to assumption that 'migrants have a stronger preference for consumption at home than abroad (Klagge and Klein-Hitpaß, 2010). Dustmann et al. (2006) found that return migration may be optimal if the host country currency has a higher purchasing power in the home country, and if there are higher returns in the home economy on human capital, acquired in the host country.

Further social network theory is elaborated as 'Eastern European migrants strongly rely on the migrant's social networks' (White and Ryan, 2008). Social network theory (Cassarino, 2004) views 'returnees as being the bearers of tangible and intangible resources or actors who gathers the resources needed to secure and prepare for the return to the homeland by mobilizing resources stemming from the commonality of interests available at the level of social and economic cross – border networks and they maintain strong linkages with their former place of settlement'.

Network theory (Church et al, 2002) 'articulates importance of network membership as networks are selectively organized', it requires a voluntary act from the actor himself as well as the consent of other members and the formation and maintenance of networks require long-standing interpersonal relationships, as well as the regular exchange of mutually valuable items between actors (Cassarino, 2004).

Although it is now far easier than it used to be for people to move from one place to another, and for migrants to keep in contact with family and friends spread across several countries (Haour – Knipe and Davis, 2008) 'migration patterns are increasingly circular, with people moving back and forth between countries of origin, transit and destination, returning home, and then frequently migrating on again'. Taylor (1999) has argued that social bonds and the feeling of being part of one (transnational) community also explain why migrants tend to remit substantial amounts of money to non-migrants—whereas neo-classical, individual-centred approaches towards migration leave no room for remittances. 'Transnational networks not only facilitate migration but also encourage and enable return' (Burrell, 2009). Remittances are money or goods that are transmitted to households back home by people working away from their communities of origin (Maphosa, 2007).

According to Pinger (2009) there are three reasons migrant return plans make a crucial difference for the migrant sending country, rendering them an important issue of investigation:

- Both savings and remittances repatriated to the home country are likely to be higher if the migrant plans to return some day and continues to entertain strong

emotional linkages with his family. This is intuitive, because returnees at least partly benefit from their remittances after return, such that remittances can be considered a special form of savings. Also, remittances of temporary migrants are often higher, because the nuclear family stays in the home country.

- Only if a migrant returns, the respective sending country can benefit from the skills and experience acquired abroad;
- Migrant's decision to leave home and family for a journey to the unknown reveals that migrants are open to new experiences, prone to take risks and willing to alter their economic situation.

Moreover, King (2000) reveals that 'return migration is usually driven by a complex mixture of economic, social, family and political factors'. First involving push factors in the country in which the migrant is living, such as economic downturn or unemployment, or pull factors from the region of origin, such as economic development and higher wages. In the adverse order these were events occurring in Latvia. Even though some migrants returned to Latvia during the economic boom years between 2006 – 2007 economic recession initiating in year 2008 pushed many previous return migrants and non-migrants from their origin in order to find employment and in addition to everyday costs cover the monthly mortgage payments.

Secondly, social motives like (King, 2000) 'racism or xenophobia, or difficulties integrating in the destination country' are not crucial for return decision for Latvians in the UK. For them pull factors like homesickness, or the prospect of enhanced status when one has returned, for example, through being able to launch a business venture, build a new house, or contribute to the community attract more returnees.

Thirdly, (King, 2000) 'family or life cycle factors such as finding a spouse, having one's children educated 'at home' and in one's native language, or retiring' are important aspects for Latvian migrants however empirical evidence suggests that household strategy often benefit to emigration and reunification rather than return.

Finally, (King, 2000) 'political pushes may range from limitations initiated by the host country. However 'political pull factors are policies to encourage and facilitate return on the part of the home country, such as tax benefits, social assistance, and housing grants' are extremely important to introduce in Latvia in order to be able to attract some returnees. These respectively are the most often mentioned lacking pull factors for potential returnees.

## Data and Method of analysis

The findings discussed in this paper are based on an analysis of data from the web-based survey collected in March 2010 via popular social networking website in Latvia. Original data set consists of responses from 1000 Latvians who at the time of survey were living in the UK. However further in the analysis responses from 228 male and 587 female respondents are used as those meets the criteria for the analysis. Respondents are from 16 to 63 years old. Gender inequality in the sample is described by the female activity as Internet users and often their time capacity to participate in such surveys.

Survey with 19 questions was posted to all Latvians who according to their IP<sup>3</sup> addresses were located in the UK. Further sample stratification was not performed as there is no additional information known about the persons. First question of the survey was a selection question which excluded those who were only visiting in the UK. And further various questions revealed socio-demographic characteristics, emigration motives, reasons, social network activities, and experience valuation.

Particular websites were chosen as data sources as they contain approximately 2.6 million registered website users who mostly are Latvians based in Latvia and abroad. It is currently the largest social networking website in Latvia. Websites play important part in everyday life of Internet users in Latvia and is frequently used as a tool of communication instead of e-mail<sup>4</sup> transnationally. Despite some limitations this web-based survey is comprehensive data set which allows following wide range of matters related to the emigration from Latvia.

The analysis developed in this paper focuses mainly on the different patterns of male and female migrant potential return strategies mostly exploring their initial emigration motives, involvement in migrant's social networks and experience valuations gained abroad.

Two models of binary logistic regression were created as the data analysis method - one for male and the other for female respondents. The analysis of the data was performed in the SPSS software and further Backward method allowed to select most suitable variables to construct the best model for the predictions. The following variables were included in the initial data set: age, education, and employment status however those did not proved to be statistically significant. Yet, set of statistically significant variables alter for Table 1 and Table 2. But main groups of those for both male and female were: reasons for emigration with sub groups need for financial resources, mortgage payments in Latvia and unemployment before emigration, social networks more precisely presence of family and non-family members abroad and particularly children, parents and partners, entertaining and business activities with other co-ethnics, and experiences in the UK like valuation of independent life, family creation, important contacts. Additionally two variables that were statistically significant only for male respondents: year of emigration period prior the crisis between 2004 -2007 and since the crisis between 2008 - 2010, and motives (economic, family reunification, students and adventure seekers). Reference groups for Table 1 and Table 2 are market Ref. and for the majority variables were chosen to indicate positive answer of the question.

## Who will stay and who return

Both regression analyses for male and female migrants show differences for their likelihood of return. There are three main categories of variables with different subgroups that are statistically significant and common for both male and female

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<sup>3</sup> Internet ProtocolAddress

<sup>4</sup> Social networking website: <http://www.draugiem.lv>

respondents - reasons for emigration from Latvia in the first place, social networks maintained while living in the UK and valuation of the experiences they have gained while abroad. Additionally for males also length of stay, main motives are statistically significant.

Overall, describing female return decision is not age, education, employment status, length of stay abroad or initial motive related (see Table 1).

**Table 1.** Female (n=587) probability to return from the UK to Latvia: results from Binary Logistic regression

		B	Sig.	Exp(B)
<i>Migration reasons</i>				
Unemployment in Latvia before emigration	No	,680	,002	1,974
	Yes (ref)			
<i>Social networks</i>				
Together with children	No	-,534	,010	,586
	Yes (ref)			
Together with parents	No	-,765	,019	,465
	Yes (ref)			
<i>Experiences in the UK</i>				
Independent life	Not important	-1,918	,000	,147
	Very important (ref)			
Family creation	Not important	-1,085	,000	,338
	Very important (ref)			
Constant		1,336	,001	3,802
-Log likelihood	639,753			
Chi-square	166,338			
Cox&Snell R Square	.247			
Nagelkerke R Square	.330			
Overall percentage	73,6			

\*\*\* p<0.01; \*\*p<0.05

One of the findings regarding emigration reasons for female respondents is that those who in Latvia before emigration were unemployed in comparison to the employed persons are more likely to stay in the UK. This reflects the economic conditions in Latvia, level of uncertainty, often emotions as anger and blame that accompany the decision to stay abroad. However, as found by several studies migration is often an inefficient strategy for avoiding unemployment in the first place as only those 'people having skills that are required on the labour market can make use of migration' (Lundholm, 2007). Thereafter even those emigrants from Latvia who have certain qualifications and education often in the UK are employed as 'low-skilled and

low-paid labour' (Paruts, 2011). This is a majority of all Latvian migrants in the UK. In contrast those female who in Latvia were employed and had some level of security are more prone to come back. This result might indicate that the decision to return is mostly related to economic factors which are different in the study on Lebanese return migrants where 'emotional factors seem to have dominated the emigrants' decision to return in most of the cases' (Stamm, 2006). Such reasons as mortgage payments and pure need for finance were not statistically significant for women in the migration decision making process.

The second most important aspect of positive return migration for females is informal social networks in the UK and more precisely according to the model female migrants who in the UK are with children or parents are more likely to return in comparison to those who are without children and parents. Surprisingly, persons with often complete families are more likely to return. These results are contradictive with the finding on Lebanese migrants where their 'social network compositions show a tendency of orientation to their host country, as their embeddedness into a host country based social network deepened with the birth of children abroad' (Stamm, 2006). But it agrees with the finding on Irish immigrants in Australia found by (O' Connor, 2010) 'physical absence during family events and crisis was found to be particularly important for women who felt homesick'. Common time with other non-family members or business activities does not contribute to the model for female respondents. Thus female networks usually are more family based and smaller than for male.

Results regarding important experiences in the UK female respondents who in the UK enjoyed experience of independent life in comparison to those who did not think that this experience was important are more likely to return. Independent life in this context is financial freedom and possibility to afford purchasing things that were not accessible before as well as often emotional freedom after break-up or unwanted relationships in the origin. This experience shows statistically significant for both male and female.

Female migrants however as mentioned before are not involved as much as males in the non-family social networks and do not value importance of contacts which most often are employment and business related.

Females who valued experience of family creation abroad as very important are more willing to return to Latvia. But here the fact of co-ethnic marriages and intermarriages might bring additional discussion on return plans. However women who did not manage or did not need to create a family abroad are more likely to stay in the UK. Those mostly are single women who are in the life cycle before family creation thus are not interested in returning before family creation as they might see more opportunities in this field in the UK.

Furthermore analysis of male respondents showed similarities as well as important distinctions related to the Latvian context. Even though the sample for male migrants is smaller there are list of variables that showed statistically significant differences from female migrants.

**Table 2. Male (n=228) probability to return from the UK to Latvia: results from Binary Logistic regression**

		B	Sig.	Exp(B)
<i>Emigration year</i>				
	2004 -2007	1,355	,001	3,878
	2008 – 2010(ref)			
<i>Migration reasons</i>				
Need for financial resources	No	,736	,046	2,088
	Yes (ref)			
Mortgage payments	No	-,908	,041	,403
	Yes (ref)			
<i>Emigration motives</i>				
	Economic		,019	
	Family	-,636	,180	,529
	Students, adventure seekers (ref)	,528	,329	1,695
<i>Social networks</i>				
Together with non-family members	No	,864	,016	2,372
	Yes (ref)			
Living together with other Latvians	No	,727	,037	2,069
	Yes (ref)			
Business with other Latvians	No	-1,559	,058	,210
	Yes (ref)			
Spending time with other Latvians	No	1,208	,002	3,346
	Yes (ref)			
<i>Experiences in the UK</i>				
Important contacts	Not important	-1,003	,011	,367
	Very important (ref)			
Independent life	Not important	-2,017	,000	,133
	Very important (ref)			
Constant		1,075	,259	2,931
-Log likelihood	230,636			
Chi-square	85,159			
Cox&Snell R Square	.312			
Nagelkerke R Square	.416			
Overall percentage	76,8			

\*\*\*p&lt;0.01; \*\*p&lt;0.05

Similar to the results for female migrants also for male migrants- age, education and employment status is not with statistical significance in the model.

Regarding reasons, males, however were noticeably more concerned about the financial aspects and they emigrated because of financial obligations and need to earn more and pay for the mortgage payments in homeland. Unlike women who had unemployment in Latvia as a key reason for initial migration decision male respondents are more likely to return if they have monthly mortgage payments in Latvia comparing to those who do not have monthly payments. It significantly increases the likelihood of return as it has been found by Massey and Espinosa (1997) 'migrants who owned land in the origin were much more likely to go home than those who did not'. Possibly not pure unemployment was the actual reason, but salary decrease starting with the economic downturn and even low-skilled labour work in picking and packing factory or construction in the UK offered decent salary. Male emigrants who would be more likely to return are male who initially had urgent need for finance and bank loans in comparison to those who did not have either.

Importance of migrant social networks for male respondents is even higher than for female although model does not show distinction of family members as statistically significant. But male migrants who emigrated as part of family reunification strategy are less likely to return in comparison to students and labour migrants. Not being together with friends and acquaintances increases likelihood of return in comparison to those who have many other persons they know around. Also if the person is not living or spending time together with others co-ethnics decreases the likelihood of staying abroad if compared with migrants who live and spend their leisure time together with other Latvians often in the same dwelling. However persons with established businesses in the UK are more prone to return and possibly invest in their homeland in the same line with (Gruzevskis, 2004) who argues that 'return-migrants bring back new labour and management culture as well as earned income, thus, increasing household expenditure and savings' and (Thaut, 2009) 'enhancing economic growth'.

Regarding the experiences migrants value the most the same as for female migrant for those who found experience of independent life not important are less likely to return in comparison to those who thought that it was important for them. And secondly different from the female group those male migrants who value new contacts established abroad are more prone to return as they might possibly be connected with business activities. In addition one of the experiences male migrants do not recognise as important is family creation abroad. This means that male migrants often have families back at home following several scenarios- family reunification abroad, return or common experience of 'broken' and separated families.

One of the most important findings which turned out be significant only for male migrants is that the context of Latvia and the time scale emigration decision was made. Those who moved to the UK between years 2004 – 2007 are more likely to return to Latvia than the ones who moved under crisis circumstances between years 2008 – 2010. It means that latter migrants consider economic and social conditions in Latvia not welcoming and they do not link their future lives with their origin, but

concentrate on settling in the host country and possibly are not considering return migration.

## Conclusions

This paper set out to analyse the possible outcomes for potential Latvian return migrants from the UK considering different aspects of male and female emigrant lives. The point of departure for this analysis was the assumption that contextual changes in Latvia set different conditions thus encouraging or limiting possibilities of return and maintaining myth of return home alive. As argued in the research on Lithuanian migrants by (Gruzevski, 2004) 'emigration cannot and should not be stopped. Rather, efforts must be targeted at managing the process through policies that ultimately curb the emigration rate and encourage return-migration'. Even more to make people stay in the country of origin (Straubhaar, 1992) has said 'people should feel confident at home and see a perspective, participate in political and social activities and in the economic growth. Otherwise the migration propensity increases'. Because the process of return migration in most cases is a (Stamm, 2006) 'long-term and well planned undertaking, but some emigrants return spontaneously and without any previous return considerations'.

The same as for Latvian migrants also 'return-migration rate for Lithuanians is difficult to estimate' (Thaut, 2009). According to the empirical evidence of Latvians in the UK less than half of respondents are planning to return. However a study on EU10 immigrants in the UK just after accession and before the economic downturn tentatively asserts that a "significant proportion" of immigrants only stay in the UK for a few months before they return home' (Portes and French, 2005).

Also another research by (Gruzevskis, 2004) on tendencies of Lithuanians prior to EU accession comments that, 'Lithuanian emigrants do not usually work in the host country for long periods, most stay for only one year or less'. It has also been found that 'the return migrants are invariably men. Consequently, it was the women who relinquished their careers and thereby their economic independence to remain with her children in the new country for the 'good of the family' (Waters, 2010). Women who abroad have enjoyed experience of independent life and created a family are more willing to return to Latvia opposite women who did not manage or did not need to create a family. Furthermore male group do not recognise family creation abroad important meaning that male migrants often have families back home and initial emigration motives was economic.

For example, it has been found that Irish migrants in Australia (Ong, 1999) that 'limiting aspirations of return migration is observed with retention of carrier, financial, and lifestyle achievements being contingent on remaining in place in the host country, duration of residence and duration of absence from origin mitigate the likelihood of permanent return'. In the case of Latvia, this is only partially true because it seems that the ones who are financially stable with families and have been abroad for more than three years are more prone to come back unlike those who

emigrated to the UK along with the economic downturn and most often with the financial obligations and unemployment in Latvia.

Furthermore one of the crucial points describing the return plans is length of time spent in the UK. Contrary to other findings for example in case of Mexican-US migration authors Massey and Espinosa (1997) found that 'the probability of a migrant returning to Mexico dropped over time'. As well as results on Lithuanian migrants described by (Thaut, 2009) where findings indicates that 'the longer they stay abroad, the more likely Lithuanian emigrants are to establish roots in the host-country'. This however is opposite to results found for male migrants who moved to the UK between years 2004 – 2007 who are more likely to return to Latvia than the ones who moved under crisis circumstances between years 2008 – 2010. It means that economic and social conditions are not welcoming for later emigrants and they do not link their future lives with their origin, but concentrate on settling in the host country.

According to the empirical evidence less than half of respondents are planning to return. And as argued by (Gruzevskis, 2004) 'motives of return migrations, as well as the factors which explain variation in migration durations is important for designing optimal migration policies' which is topical subject for Latvia due to population decline and ageing. Possibility and conditions that would attract return migrants to Latvia is crucial as main proportion of emigrants is young part of population aged 20 – 30 years old.

Although the case of Latvian migrants shows some common knowledge about return strategies there are some significant differences among genders as well as other case studies.

There are noticeable differences between return plans for male and female emigrants which indicate that large proportions of the Latvian population that are currently living in the UK are more likely to stay in the UK. Analysis also distinguishes proportion of persons who would be in favour of return. However in context of economic conditions, uncertainty and unemployment in the country of origin there is a high possibility for on-going "myth of return".

Return migration or lack of recent return migration to Latvia as well as possible policy and countries' strategy improvement regarding the topic is intense and this study reveals several important messages for both male and female emigrants that can serve as a substantial material for the further discussion.

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**Ilze Buligina<sup>1</sup>**

## **MODERN APPROACHES TO THE PUBLIC ADMINISTRATION OF TECHNOLOGICAL RESEARCH – ON REFLEXIVE ETHICAL GOVERNANCE**

### **Abstract**

The paper addresses the approaches and tasks for public administrations in relation to modern technological developments. Due to the high degree of risk and uncertainty of technological developments and their potentially adverse effect on human lives, ethics is becoming an increasingly important aspect of good governance. Based on actual research within the framework of the European Union 7<sup>th</sup> Framework Project “The Ethical Governance of Technologies”, the paper presents implications and conclusions regarding governance arrangements in EU (FP7) public research management. By presenting the results of textual analysis (legal and policy documents, reports and other documents), and the outcomes of empirical data analysis (such as interviews with EU officials), the paper attempts to link the conceived EU approach on ethics in public administration of technological research with its implementation in practice.

**Keywords:** public administration, ethics in technological research, risks and uncertainties, reflexive governance, learning

### **Introduction**

The scientific and technological progress of the 21<sup>st</sup> century offers new opportunities for enhancing various aspects of living and social interaction, especially in relation to innovative applications of information and communication technologies (ICT). At the same time, this raises new questions for public administrations regarding ethics, and these ethical issues in technical research and development are often hard to identify and deal with. This has been proved by various cases in recent history regarding the public administration of research, for example, the research on

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genetically modified organisms (GMO)<sup>2</sup>, where the resulting controversies and ethical issues had a broad resonance in society.

Such fields of study and application as the ICT (e.g. neuroelectronics), nuclear research, nanotechnology already have and in future will have an impact on society, as has been pointed out, for example, by the European Group of Ethics in Science and New Technologies (EGE)<sup>3</sup> in its report *Citizens Rights and New Technologies*: “ICT is increasingly pervasive, transforming people’s lifestyles, identities, and choices on many levels,” (p. 7).

Consequently, the ethical challenges accompanying this research can no longer be attributed to the research community only, but have to be addressed with the ethical interests of the whole of the society in mind. For public research administrations and management, therefore, there is an immediate task, comprising the creation and implementation of new and effective mechanisms to address these new ethical challenges, given the unprecedented and potentially adverse impact the new technological developments can have on peoples’ lives. As has been pointed out in the Report of the Expert Group “Global Governance of Science:<sup>4</sup> “The loss of deference to expertise reinforces the need to construct new models of governance for a more skeptical age.”<sup>5</sup> Consequently, this paper attempts to highlight the ways that ethics can become part of good governance in public research administration and management.

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<sup>2</sup> According to Goujon and Dedeurwaerdere, the GMO case showed that the nature of simple risk assessment and the use of the precautionary principle was insufficient to understand the actual impact that the GMOs would have on the European society. The way the GMOs were imposed on the society and the reaction it caused was not predicted by any scientific analysis (Goujon and Dedeurwaerdere, 2009).

<sup>3</sup> The European Group of Ethics in Science and New Technologies is an independent, pluralist and multidisciplinary body which advises the European Commission on ethical aspects of science and new technologies in connection with the preparation and implementation of Community legislation or policies ([http://europa.eu.int/comm/european\\_group\\_ethics/index\\_en.htm](http://europa.eu.int/comm/european_group_ethics/index_en.htm)), observed 12.05.2011

<sup>4</sup> Report of the Expert Group on Global Governance of Science to the Science, Economy and Society Directorate, directorate-General for Research, European Commission “Global Governance of Science”, European Commission, 2009.

<sup>5</sup> Furthermore, the Report indicates: “Finding ways to involve the public and other stakeholders across a spectrum of activities – including the assessment and management of risks, uncertainties, ethics and the funding of research – is key to the construction of successful governance. Connections with the public should no longer be viewed as exercises in better communications from a privileged elite. Policy makers increasingly recognize that deliberation is a cornerstone of good governance. What global deliberative governance might look like nevertheless remains unclear” (p. 27).

## Research context and research methods

The present research was carried out within the framework of the European Union 7<sup>th</sup> Framework (FP7) Project EGAIS (The Ethical Governance of Technologies)<sup>6</sup>. The theoretical framework used within the EGAIS project was based on the theory of governance developed by the Louvainist school<sup>7</sup>, in connection with its theory on the action of a norm<sup>8</sup>. At the same time, it should be noted that, given the limited scope of this paper, our aim is not to present details of the research findings within the EGAIS project, but instead to deal with some broader implications regarding governance arrangements in EU (FP7) public research management, which will form the basis of our conclusions.

<sup>6</sup> The research within the EU EGAIS project was carried out under the supervision of Professor Philippe Goujon, research director at University of Namur, Belgium. For EGAIS project see <http://www.egais-project.eu/>

<sup>7</sup> The Louvainist school is linked to the Catholic University of Louvain, it is currently a well known and recognised school of governance. The theoretical approach of our research was based on the large amount of work done by Lenoble and Maesschalck in the Centre de Philosophie du Droit (CPDR) at the University of Louvain. According to Lenoble and Maesschalck, “every norm aims to institute a way of life that is judged to be rationally more acceptable” (Lenoble and Maesschalck, 2003, pp.91-93).

<sup>8</sup> The term “action of a norm” is being used according to Lenoble and Maesschalck, specifically referring to their work “Toward a theory of governance: Action of norms, Kluwer Law International, 2003. The reason for this choice was determined by the used theoretical approaches within the EGAIS project, and was also directly linked to the specific features of our research problem. We were interested in the construction of an *ethical* norm and in the conditions of the application of an *ethical* norm, and the Louvainist school has developed a theory on the action of a norm. This allowed us to adjust the concepts of the Louvainist school to our own research needs (in the development of the theoretical framework), since our research problem was exactly to address the conditions for a reflexivity which can have a real impact.

In other schools and theoretical approaches that we identified, the primary concern was with the identification (not construction) of an ethical norm, and the conditions for ethical reflexivity were generally pre-supposed. In current more traditional approaches, expertise tends to be the indisputable source of normativity, and the existing and potential problems are often confined to the expert perspectives only. The ethical theoretical approach to be used is traditionally chosen by experts involved in the decision making process, and the (cognitive) framing is determined by their specific field of expertise. If reduced in such a way, the issue of ethical acceptability is transformed to the mere social acceptance of the technology. Therefore, there is a need to investigate and reflect on the governance conditions that allow for an ethical reflexivity inside the project itself, and thus allow overcoming the limits of the existing ethical offer with its endeavour to give answer to the ethical demands.

The theory of governance developed by the Louvainist school directly addresses the problem of the conditions for the effectiveness of a norm expression. Therefore, it was used as a theoretical background for our approach in the analyses regarding the conditions for the effectiveness of the ethical norm expression, which is the central problem of our research. Our proposed framework allowed us to investigate and reflect on the ethics and governance conditions inside the project, seeing the process of the production of an ethical norm and its further application within the context of the project itself.

The research methods used were; 1) textual analysis – legal and policy documents, reports and other documents, in order to generate normative analysis (the conceived respective EU policy); 2) empirical data gathering and analysis, such as interviews with EU officials in order to generate normative and descriptive analysis (for relating policy making to its actual implementation, as conceived by the EU officials) and, 3) the case study of FP7 EGAIS project (based on a questionnaire survey analysis from existing EU project data) - for testing the results of the implementation of the respective EU policy.

## Conclusions from research findings

In public research administration ethics cannot be reduced to mere moral or legal authority, given the specific conditions - the high degree of risk and uncertainty of today's technological culture<sup>9</sup>. Consequently, the role of policy makers and public administrators is to secure adequate *reflection* on the legal and moral foundations of controversial issues in today's scientific and technological developments.

Addressing ethical issues in public administration of technological research is predominantly rooted in the expert approach (including the European Group of Ethics which is the key advisory body to the European Commission regarding ethics in research and technological development). The ethical expertise in general terms is the key source recognised in the process of the implementation of the FP7 ethical framing (within the existing legal framework), and top-down approaches are still predominant. Acknowledging the increasing role and importance of policy deliberation and public discussion as part of ethical and reflexive governance, special emphasis should be put on the operation of learning, since without learning, true reflexivity cannot be implemented.

## General research background

Regarding modern technological research, the realization is coming in people of not a far away future when the environment around us will include various devices capable to detect human presence or collect data without us being aware of it, and “unwanted data matching with detriment effects on privacy may take place due to digital convergence coupled with the ever-increasing tracking and collecting of data about individual European citizens, through online activities, ambient technologies, RFID and biometrics<sup>10</sup>”. There are more examples that show – today's technologies are not neutral, they have and potentially can have increasing effect on human integrity, security and welfare. It is therefore not surprising that the Charter of the Fundamental

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<sup>9</sup> According to Bijker, modern technological culture is “so permeated by science and technology that it cannot be properly understood without a careful analysis of the particular roles of science and technology” (Bijker, 2009, p.7).

<sup>10</sup> As pointed out in the publications of the European Group of Ethics in Science and New Technologies (which is an advisory body to the European Commission) “Ethically speaking” [http://ec.europa.eu/european\\_group\\_ethics/publications/index\\_en.htm](http://ec.europa.eu/european_group_ethics/publications/index_en.htm), observed 01.06.2011

Rights of the European Union <sup>11</sup> addresses the rights of European citizens regarding physical and mental integrity, security and personal data protection<sup>12</sup>. This should make the public administration in technological research increasingly aware of the existing and potential ethical aspects in technological development. This also makes the public administrations look for ways to deepen their understanding of these challenging and their possible solutions.

The public administrations must be aware of the complicated nature of the task of addressing the impacts of the new technologies, as “ICT does not only involve technological aspects, but also epistemology, since the main component of ICT is information which represents data, information, and knowledge” (Sembok, 2003, p. 244). We find us in a completely new environment. A comprehensive approach needs to be found in dealing with new technologies and their ethically often ambiguous nature. Therefore we shall show that technological developments not only create challenges for the society but also contribute to new forms of societal involvement in addressing these arising ethical challenges. Consequently, public administrations have to re-think their governance approaches not only because of democratic considerations but mostly due to the direct, often not unambiguous, impact the new technologies are having on the lives of people.

## Identified need for new modes of governance

The new technological challenges today clearly have implications beyond the field of science and technology alone. They are linked to the political and administrative processes where deliberation is needed inside these circles and beyond, thus calling for new and innovative modes of governance.

Not only the growing desire of society to be involved in decision making mechanisms is becoming more visible, but also the public administrators have become increasingly aware that the public has and must have a role in the decision making process regarding the development of new technologies. As pointed out in the Report by the European Commission (EC)<sup>13</sup> “a deliberative approach to the policy-making process would complement and connect with deliberative mechanisms outside policy” (p.10).

As our research shows - in today’s ongoing discussion regarding the issue of good governance, and increasing attention is already being paid to the ability of the governance approaches to address modern technological challenges with their

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<sup>11</sup> Charter of the Fundamental Rights of the European Union (2000/C 364/01), Official Journal of the European Communities C 364/1

<sup>12</sup> Article 3 of the Charter stipulates that “everyone has the right to respect for his or her physical and mental integrity”, Article 6 stipulates that “everyone has the right to liberty and security of person”, addresses the rights of the European citizens also in a new and more specific way (Article 8 stipulates that “everyone has the right to the protection of personal data concerning him or her; such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law; Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified”).

<sup>13</sup> Understanding Public Debate on Nanotechnology. Options for Framing Public Policy, 2010.

inherent ethical aspects. As pointed out by Goujon and Dedeurwaerder “it has to be accepted that in order to face these challenges and the risks and dangers attendant upon the spectacular growth of the techno-sciences, we need to rethink our modes of governance in science and technology” (Goujon & Dedeurwaerder, 2009, p. 1). Since ethics is related to values, this is clearly not an easy task.

Our studies within the EGAIS project have shown that there is a marked ethical dimension within EU ICT research<sup>14</sup>, and our research indicates that there is also a marked awareness on these issues among the public research administrators in the EU<sup>15</sup>. The deliberation on the ethical framing of the EU policy making inside the European Commission represents strong awareness regarding ethical challenges in technological research that need to be addressed. However, the real challenge, as it seems to us, is how to translate this awareness and understanding into practice<sup>16</sup>, due to various legal, economical, political, social and other constraints. To do this, commitments are necessary not only from technology development teams but equally, or even more, from policy makers and public administrators. As public policy is accountable<sup>17</sup> to society, it is also responsible for introducing mechanisms, including knowledge assessment mechanisms, in addressing challenges which are relevant to the society.

Thus, on the one hand, there is a need for a continuous shift for a real participatory approach in public policy making. Here we would like to refer to the current tendency in public policy making of the involvement of a broad spectrum of stakeholders, including the involvement of the wider public. On the other hand, there is a need for a political and policy deliberation, since these processes are interlinked and depend on each other<sup>18</sup>. As pointed out by Hajer and Wagenaar, “there is a move

<sup>14</sup> The study of addressing ethical issues in emerging ICT (from a theoretical perspective and from the point of view of practical implementation) has been carried out within the EU 7<sup>th</sup> Framework EGAIS project. The author of the paper used the results of the EGAIS project as a case study for her research.

<sup>15</sup> This conclusion was made following a range of interviews with EU research administrators in the European Commission.

<sup>16</sup> As had been pointed out by one of our interviewees professor Simon Rogerson (who was contracted by the European Commission as the external expert for drafting the FP7 Ethical Guidelines), ethical issue is now on the political agenda, now the task is to give it a content.

<sup>17</sup> The quality or state of being accountable; *especially* : an obligation or willingness to accept responsibility or to account for one's actions, <http://www.merriam-webster.com/dictionary/>, observed 07.06.2011

<sup>18</sup> According to Von Schomberg, there are three levels of deliberation regarding public policy. The first level concerns a broad political deliberation, which assumes a political consensus on the need for long term planning when it engages in foresight exercises. In the second level one can identify deliberation at the policy level which immediately builds upon outcomes of political deliberation. A third deliberation level, the science/policy interface, is of particular interest since it qualifies the input of a diverse range of knowledge inputs, e.g. those of the scientific community, stakeholders and possibly the public at large by applying foresight (scenario workshops, foresight techniques/ studies/ panels etc. In Von Schomberg, R., (2007) *From Ethics of Technology to Ethics of Knowledge Assessment* in Goujon et al. (eds) *The information society: innovation, legitimacy,*

from familiar topography of formal political institutions to the edges of organizational activity, negotiations between sovereign bodies, and inter-organisational networks that challenge the established distinction between public and private” (Hajer & Wagenaar, 2003, p. 3).

However, regarding the governance of technological development, nowadays we still have to refer to the currently predominating separation between scientific and ethical communities, with the scientific expertise often being the main source of normativity, where top-down approaches are still characteristic, and where there is no clear answer how to deal with multiple sources of normativity the public policy is facing today<sup>19</sup>. Moreover, the typical approach in the EU policy making in addressing the ethical issues of technological development is by risk assessment and management, and this is often based on traditional scientific expertise<sup>20</sup>.

Consequently, there is a risk that little space is left for genuine reflexivity<sup>21</sup> in dealing with technological development; this concerns also the issue of ethics. Thus, answers should be sought regarding how to create a comprehensive ethical governance framework for technology development, and what features of public research policy and administration would lead to such reflexive governance, the ultimate goal of this search being the interests of the society at large.

## Practice – ethical framing of the EU Seventh Framework Program

As the specific focus of our research has been the ethical framework in the policy approaches and implementation of the EU Seventh Framework Program<sup>22</sup> (FP7).

The FP7 has recognized the need to pay attention to ethics in research - it has been made mandatory for all research projects to address ethical issues according to set guidelines. The Decision No 1982/2006/EC, Article 6 of the European Commission stipulates: “All the research activities carried out under the Seventh Framework Program shall be in compliance with fundamental ethical principles”.

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ethics and democracy (In honour of Professor Jacques Berleur s.j.). New York: IFIP, Springer Boston.

<sup>19</sup> We have come to these conclusions through our empirical studies within the EGAIS project, when analysing the relevant EU reports and interviews with EU officials.

<sup>20</sup> According to our empirical study and analysis within EGAIS project

<sup>21</sup> Reflexivity is an important term within our work, and we give it a specific meaning. According to Goujon and Dedeurwaerdere, reflexivity may be defined as the “capacity of actors and institutions to revise basic normative orientations in response to the evolution of economic, technological or political systems and to shortcomings in current modes of regulation (Goujon and Dedeurwaerdere, 2009, p.1).

<sup>22</sup> EU 7<sup>th</sup> framework program is one of the EU major research funding instruments with total budget over 50 billion Eur.

However, based on evidence available, there is a concern that not all FP7 technological projects sufficiently address the arising ethical issues<sup>23</sup>, and particularly governance of ethics is missing. Another concern is if reflexivity is part of the governance process, since without genuine reflexivity, true democracy cannot be implemented in a way that the interests of the society are addressed in an appropriate way, with the ethical imperative respected<sup>24</sup>.

At the same time, as to our knowledge, there are no solutions provided how to particularly secure that ethical reflexivity becomes part of the governance approaches of the FP7 projects. To have more insight into this, it is important to investigate the ethical framing of the FP7 and its mechanisms for ethical reflexivity in the governance of the ICT research projects. This was important for addressing our actual research problem in relation to the conditions for ethical reflexivity<sup>25</sup> within FP7 ICT research projects, as part of the respective EU policy.

Our research was targeted at the analysis of the EU conception, implementation and assessment of ethical reflexivity in the governance of FP7 research projects. Taking into consideration that the FP7 research projects with their ethical framing represent the outcome of the implementation of the respective EU research policy, and in order to be able to have a critical perspective on the problem, the ethical reflexivity and its effectiveness are studied at two levels:

- 1) The level of EU research policy - with its normative<sup>26</sup> conception and representation of this normative conception in policy and legal documents; and
- 2) The level of EU research projects. The second level was used for testing how this normative concept was being translated into practice. Specifically we relied on the results obtained from the FP7 EGAIS project implementation. The EGAIS project was used as a case study, since it had already produced an analysis of the effectiveness and reflexivity of ethics and governance in Ambient Intelligence projects of the EU Framework program.

As our overall research was carried out as part of the EGAIS project research, within our studies we were relying on the same theoretical approaches and concepts,

<sup>23</sup> This was supported by our case study on the EU FP7 EGAIS project research

<sup>24</sup> This term of ethical imperative is linked to the issue of “normative horizon” (that is, the ideal goal for how the world should be) and the relationship of ethics with context. It is supposed that ethics should be free of any contextual constraints, so that it can aim at ethical normative horizon. This is being referred to as the “ethical imperative” (ETICA project, deliverable 4.1., p.4).

<sup>25</sup> The term “ethical reflexivity” is being used as referred to in the EGAIS project as “an uncomfortable reflexivity that seeks to go beyond the confession/absolution tendencies of some forms of reflexivity, and, in acknowledging the impossibility of a thoroughly transparent and nameable knowledge of oneself, accepts “the uncomfortable task of leaving what is unfamiliar, unfamiliar”

<sup>26</sup> Normative is contrasted here with its antonym, positive, when describing types of theories, beliefs or statements. A positive statement is a falsifiable statement that attempts to describe ontology. A normative statement, on the other hand, is a statement regarding how things “should or ought to be”. Such statements are impossible to prove or disapprove.

as developed and used in the overall EGAIS project (with the necessary adjustments regarding our own research problem), in order to secure the methodological consistency and comparability of results obtained. At the same time, it should be pointed out that our research was a completely original and independent study. It was related to the domain that had not been studied within the EGAIS project itself, namely, the ethical framing of the respective EU policy and its governance arrangements.

Thus, on the one hand, by definition we had to restrict ourselves to a certain theoretical approach in our work. On the other hand, we had been able to benefit from this situation, since the broader context of the EGAIS project and the availability of its produced research results (regarding the ethical framing in the implementation of FP7 projects) enabled us to encompass a much broader scope for analysis than it would have been possible outside an actual project context. Thus, throughout our research we will be referring to the EGAIS project and pointing out the specific connotations and implications for our specific research.

Within our research, in order to be able to present a critical perspective, we carried out a normative and descriptive analysis:

- 1) in the normative analysis we relied on the relevant normative and policy documents, as well as empirical data that represent the conceived EU ethical governance framing itself;
- 2) in the descriptive analysis we relied on the collected empirical data regarding the implementation of the relevant EU ICT research policy, as well as on the case study of the EGAIS project. By this we were aiming at finding out how the EU normative framing functions in practice in EU ICT project implementation and assessment. This was used for testing the efficiency and limits of the respective EU normative framing;
- 3) within the critical perspective we analyze how normative and functional aspects of ethical governance relate and what are the outcomes of it. We also analyzed how the outcomes of our analysis relate to our theoretical framework and possibly see its limits. The contextualization of the ICT research projects as part of relevant EU research policy administrative framework enabled us also to draw some broader general conclusions. Based on the findings, we were able to present a critical perspective and, if not produce recommendations, then at least attempt to indicate some direction for improved EU policy and administrative approaches and procedures in relation to issues of FP7 ethical governance.

Being conscious of the enormous challenge of such a research, as well as being aware of the limited scope of the present work, we would like to point out that definitive answers to our problem are impossible by definition. Therefore, by

having analyzed the conditions for reflexive ethical governance in the respective EU policy administration, we have contributed to raising this research question – for the attention of the respective EU public research administrators and for other stakeholders involved<sup>27</sup>.

As an important outcome of our research we would like to introduce the concept of “learning”<sup>28</sup>. It followed from our textual and empirical analysis that integrating learning throughout the process of technological development allows for the broadening of views beyond the technical aspects, raising also the questions regarding values. It should also allow for the suppression of the border between the technological and ethical communities, so that there is a relationship between the context and the construction of the ethical norm in technological development. We had been able to come to a conclusion that only through the operation of learning ethical reflexivity can be assured in an effective way allow the public administrations for the proposition of a more reflexive ethical governance approach in technological research<sup>29</sup>.

Additionally, it should be noted that the present paper did not aim at presenting the details of analysis carried out within the framework of the theory of governance developed by the Louvainist school. Instead, we were referring to this theory to justify our theoretical standpoint in the analyses of our research problem on the conditions for the effectiveness of the ethical norm expression. Parallel to this, we have attempted to argue that less formal and less obvious normative domains of initiatives and practices have been extended in Europe “by a broad shift away from direct and

<sup>27</sup> As pointed out by Makrydemetres, „the imperative for responsiveness to civil society calls for an increased awareness and readiness to adapt to changing values and conditions in society at large, and stresses the need for an overall ‘external’ or societal accountability of state authorities and administration”. In „Dealing with Ethical Dilemmas in Public Administration: the ėALIRġ Imperatives of Ethical Reasoningġ, In *International Review of Administrative Sciences*, 2002 68: 251, p.13.

<sup>28</sup> Referring to the EGAIS project – a double loop learning theory which pertains to learning to change underlying values and assumptions. The focus of the theory is on solving problems that are complex and ill-structured and which change as problem-solving advances. Double loop theory is based upon a “theory of action” perspective outlined by Argyris & Schon. This perspective examines reality from the point of view of human beings as actors. Changes in values, behavior, leadership, and helping others, are all part of, and informed by, the actors’ theory of action. An important aspect of the theory is the distinction between an individual’s espoused theory and their “theory-in-use” (what they actually do); bringing these two into congruence is a primary concern of double loop learning. Typically, interaction with others is necessary to identify the conflict. There are four basic steps in the action theory learning process: (1) discovery of espoused and theory-in-use, (2) invention of new meanings, (3) production of new actions, and (4) generalization of results. Double loop learning involves applying each of these steps to itself. In double loop learning, assumptions underlying current views are questioned and hypotheses about behavior tested publically. The end result of double loop learning should be increased effectiveness in decision-making and better acceptance of failures and mistakes. <http://tip.psychology.org/argyris.html>

<sup>29</sup> As pointed out by Salminen and Ikola-Norrback: “In administration, it is important that the good governance principles improve the citizens’ trust in administration and improve the legitimacy of the politico-administrative system. Trust can diminish, if administration is experienced to be too distant and ineffective”. In *Trust, good governance and unethical actions in Finnish public administration*, p.3.

explicit modes of regulation towards ‘soft’, non-legally binding instruments, such as codes of practice, fiscal incentives, audit and reporting measures – in short, by the shift from legislatively authorised *government* to administratively implemented *governance*<sup>30</sup>. Our textual and empirical analysis (structured interviews with public research administrators from the European Commission) has given us evidence for such conclusions.

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## BALTIC COUNTRIES IN THE EU AND IN THE EURO AREA UNDER THE ECONOMIC CRISIS

### Abstract

In this paper we analyze economic activity and trade of the Baltic countries – EU member states (i.e. Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden) making up ca. 30 % of EU-27 GDP and almost 40 % of the euro area GDP. We used UNCTAD data for the years 1999 – 2009 to measure economic performance of these countries, with the focus on the current economic crisis. The changes of GDP and GDP per capita as well as real growth rates of the EU – Baltic countries are analyzed. Furthermore, the trade in goods and services is measured. Additionally, the changes of the economic openness are discussed, as it is essential for evaluation of the respective countries' gains from the international trade. The economic performance of the analyzed countries is presented in a broad perspective of the results achieved by the whole European Union (EU-27) and the euro area.

**Keywords:** economic integration, monetary union, international trade, economic crisis

### 1. Introduction

In this paper we analyze the economic activity and trade of the Baltic countries who are also EU member states: (i.e. Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden. For the needs of this paper, they will be referred to as “EU-Baltic countries”). These countries make up ca. 30% of the total GDP of the EU-27 and almost 40% of the GDP of the total euro area. However, this group is far from being homogenous. Some countries are big, whereas others are small. Among them are the so-called “old” EU members and the “new” ones, which became part of the EU in 2004. Some have thus far remained outside the euro area, whereas others are members of the European Monetary Union. The economic performances

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of all these countries will be compared, with a focus on the current economic crisis. Furthermore, the paper will focus on a comparison of the performances of the new EU Member States with the old ones. The economic performance of the EU-Baltic countries is presented in a broad perspective of the results achieved by the whole European Union (EU-27) and the euro area.

The changes of GDP and GDP *per capita*, as well as the real growth rates of the EU-Baltic countries will be analyzed. Furthermore, the trade in goods and services will be measured. Additionally, the changes of the economic openness will be discussed, as this assessment will be essential for an evaluation of the respective countries' gains from international trade.

For the purposes of this paper, UNCTAD data for the years 1999 to 2009 are used (see <http://www.unctad.org>). The paper begins its assessment with the year 1999, when the post-communist Baltic countries were in the adjustment period preceding their accessions to the EU and when the euro area was created. As a detailed analysis of the economic activity in all indicated years is beyond the scope of this paper, the focus will solely be on the selected years. First, the achievements of Estonia, Latvia, Lithuania, and Poland in the year of their accession to the EU (2004) will be discussed (simultaneously with the performance of the other mentioned EU-Baltic countries). Then, the changes in economic performance during the economic crisis (2008-2009) will be analyzed.

The authors of this paper expected to observe increased trade levels of the new EU members in accordance with trade effects of economic integration. We predicted that the GDP of those countries will grow faster than the GDP of the old EU members, which will, in effect, lead to the convergence of both groups of countries. The growth of trade in the euro area countries (Germany, Finland, and – since 2011 – Estonia) is expected because of the endogeneity of optimal currency areas. We expected to observe growth of trade of other EU members along with trade creation and trade diversion effects as well.

This paper is organized as follows: Section two illustrates the theory of trade effects that result from preferential trade agreements and monetary union<sup>3</sup>; section three is an analysis of economic performance measured by GDP and GDP *per capita*, as well as real growth rates of the EU-Baltic countries; and section four discusses trade in goods and services and the degree of openness of the countries to trade is analyzed. In all cases the performance of the EU-Baltic countries is compared with the respective performance of the EU as a whole and the euro area. This analysis is followed by conclusions in the last section.

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<sup>3</sup> We are aware of the fact that the scope of regional agreements is broader than preferential trade agreements or monetary unions. However, the limited scope of this paper forced us to concentrate on trade effects of these two extreme institutional forms of regional integration only.

## 2. Trade effects of economic integration

Static and dynamic trade effects of preferential trade agreements are presented based on an example of a free trade area (FTA). It is justified to limit our analysis to FTA as trade effects are present already on this level of economic integration. We also analyze the direct and indirect trade effects of the monetary union representing the advanced form of economic integration fulfilled, among others, in the euro area being part of the EU.

### 2.1. Trade effects of preferential trade agreements

Static trade effects of economic integration are analyzed, *inter alia*, by Baldwin and Wyplosz (2009). In their analysis, they assume the perfect competition and analyze two small countries integrated regionally (Home (H) and Partner (P)) and a third country deprived of trade preferences (Rest of the World, (RoW)). Baldwin and Wyplosz claim that by removing the tariffs on imports from a trade partner (P), the prices in the home country (H) fall more than when non-discriminatory tariffs are used. The border prices in country P increase, as does the volume of imports from P to H (the last illustrating the trade creation effect).

As a result, the domestic prices in country H fall. This in turn leads to the reduction of border prices of goods imported from the RoW. The volume of export supply from the RoW to H declines. This phenomenon is known as trade diversion (from RoW to P). Leaving the customs duties of member states at various levels can lead to trade deflection (defined as a change of import streams in favour of a member country with the lowest national tariff).

What seems to be the main dynamic effect of preferential trade agreements is the more effective use of increasing returns to scale resulting from market integration. This leads to a decrease in unit costs. The results are either lower prices or increased profits, depending on the characteristics of the integrated market. The integration of national markets appears to be also associated with a better allocation of production factors, a deeper specialization of production and, consequently, an increased efficiency of production and international competitiveness of goods manufactured in the integrated area. More intense competition among producers from integrating economies seems to result in a further reduction of prices.

Economic integration can reduce the uncertainty of transactions undertaken by economic subjects from the integrated area, which, as a result, may help to intensify foreign investment and trade. Therefore, a further intensification of competition and an increase of the array of goods and varieties of differentiated products available on the market is the consequence of this.

In the long run, the additional benefit of being a part of a regional grouping may be the accelerating technological progress and innovation. Regionalization in fact contributes to the spread of knowledge among the economies of member states.

## 2.2. The impact of a monetary union on trade of participating countries

According to the theory of optimum currency areas (see Mundell, 1961, McKinnon, 1963, DeGrauwe, 2000, Baldwin and Wyplosz, 2009), the balance of costs and benefits associated with membership in a monetary union may vary. In our opinion, most of the participation costs are concentrated in the macroeconomic sphere, while the benefits are focused in the microeconomic one. The latter are often related to the intensity of the international cooperation of integrating countries, especially with the volume and characteristics of their foreign trade, both before and after the monetary union is established.

Monetary union affects trade between member states in both direct and indirect way. There are two main sources of direct gains from its creation<sup>4</sup>. The first one is the elimination of the transaction costs of the national currencies' exchange. The second one is the elimination of exchange rate risk, which arises from uncertainty about the future exchange rates.

The transaction costs of trade include both national currencies' exchange and administrative costs associated with currency conversion transactions. They are mainly borne by the companies co-operating with foreign partners and by consumers buying foreign goods and services cheaper. The elimination of currency exchange costs means larger gains from the monetary union. At the same time, however, companies are exposed to more intense competition in the integrated market. After the prices drop (because of tougher competition, lower costs, etc.), there is an increase in demand and a larger proportion of it is satisfied by import than before: trade creation effect appears.

The elimination of exchange rate volatility affects the substantive and geographic structure of trade. Decline in transaction costs and, consequently, lower prices and higher demand are likely to lead to an increase in quantities demanded, especially in case of differentiated goods, some of which are imported. The number of available varieties increases. Due to the occurrence of transaction costs in relations with third countries, a monetary union may contribute to the geographic changes in trade pattern in favour of member states (consumers and investors replace expensive goods from the third countries with cheaper imports from countries of the monetary union, leading to the trade diversion effect).

Another direct benefit of the monetary union and a factor that intensifies trade is the elimination of nominal exchange rate volatility and the stabilization of

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<sup>4</sup> There are also direct costs of creation of the monetary union. These are one-time (necessary) costs of entry. They include a.o. the cost of implementation of information systems, the cost of processing financial data and preparation of new tariffs, safeguards against forgery of the common currency and rounding of prices after the adoption of this currency. Similarly to most theorists, we ignore these costs.

exchange rates in transactions among countries forming a monetary union (for more information see Hooper and Kohlhagen, 1978)<sup>5</sup>.

Apart from the direct benefits, there are also indirect benefits and costs of a monetary union. One of them is the elimination of price discrimination in member states. A common currency increases market transparency. Producers, exporters, importers and consumers get more information on prices, which are directly comparable across the union. This allows for the changes in the characteristics and quantity of demand to be more predictable. As a result, the increased competition and a decrease of margins and prices are observed (see Baldwin, 2006, 63). It intensifies intra-industry trade as well. Less uncertainty and greater transparency of the market allows long-term decisions to be more accurate. The consequence is a general increase of the efficiency of firms that remain on the market.

Another indirect effect of a monetary union concerns the position of the common currency on the international market. The common currency is likely to gain greater international importance than the national currencies that the member states had before the creation of the union. The common currency is used by a larger area, which makes it less exposed to speculative attacks. Its credibility within the international monetary system also increases. As a result, trading partners from the monetary union may be considered more reliable than those who remain outside. It particularly benefits those member countries whose national currencies are relatively weak. At the same time, however, their competitive positions may deteriorate (like in the case of currency appreciation), which may cause a drop in their exports.

The aforementioned intense competition and lower prices within the monetary union have a positive effect on the competitive position of exporters and the general reliability of the member states in external relations as well. At the same time, however, participation in a union with a strengthening currency may worsen the competitive position of exporters from the union against third countries.

The extent to which the member countries gain from the participation in the monetary union may depend on the openness of their economies to trade. Along with increasing openness, the gains from participation in a monetary union are rising, especially because of the elimination of trade costs related to the use of many volatile national currencies (this view is supported by representatives of Keynesian economics). An alternative approach to the trade costs and benefits of monetary integration is advocated in the monetarist economics. According to its representatives, the monetary policy cannot prevent effects of asymmetric shocks. Consequently, it is irrelevant whether a country participating in a monetary union is open or not. Countries gain from monetary integration and they intensify their mutual trade, even if initially their economies are not open. The monetarist view is therefore compatible to the idea of endogeneity of optimum currency areas. According to Frankel and Rose (1997), even if countries are not open *ex ante*, they may gain as the monetary integration itself contributes to the increased openness of its members' economies.

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<sup>5</sup> The situation is different if an exporter perceives an exchange rate risk as a source of potential profits (see De Grauwe, 1988). We do not take such a scenario into consideration.

### 3. Economic activity of the EU members from the Baltic region

The purpose of this paper is to analyze the economic activity of the EU members located in the Baltic Sea region. This analysis is based on their nominal GDP and GDP *per capita* (in USD at current prices and current exchange rate), as well as on the annual growth rates of real GDP and GDP *per capita* (GDP *pc*), measured in constant 2005 USD. Our research covers selected years of the period between 1999 and 2009.

We are aware of the fact, that the EU-Baltic countries are dominated by Germany, whose GDP was equal to 74% of the GDP of the whole grouping in the year 1999, and equal to 69% in 2009 (in the year 1999 the second large was Sweden with the share in regional GDP equal to 12,5%; in 2009 it was Poland with the share of 9%)<sup>6</sup>

*Table 1.* GDP in current prices, in billions USD

Country	1999	2004	2008	2009
Denmark	174	245	341	310
Estonia	6	12	24	19
Finland	130	189	270	238
Germany	2 144	2 745	3 635	3 330
Latvia	7	14	34	26
Lithuania	11	23	47	37
Poland	168	253	529	431
Sweden	259	362	488	406
<b>EU Baltic</b>	<b>4 898</b>	<b>5 847</b>	<b>7 376</b>	<b>6 806</b>
European Union (EU-27)	9 156	13 187	18 299	16 374
Euro area	6 875	9 775	13 575	12 467

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

In the years 1999-2008, all analyzed countries, as well as the whole EU and the euro area, experienced increases in nominal GDP (see Table 1). All of them recorded a decrease in GDP in the year 2009 as well. In the years 1999-2009, the highest growth in nominal GDP was recorded by Latvia and Lithuania – both post-Soviet

<sup>6</sup> This high rank of Poland can be perceived as a confirmation of its slow convergence with the old EU members as well as the fact that in the year 1999 Polish GDP made up 7,8 % of German GDP and in the year 2009 this share raised to almost 13 %).

countries which have not yet entered the euro area. The third best result was achieved by Estonia (a member of the euro area since 2011). Poland experienced slower growth when compared with those small post-Soviet EU countries, but still its growth was approximately two times faster than that of all old EU members from the analyzed region, as well as the whole EU-27 and the euro area.

A comparison of GDP growth rates in the EU-Baltic countries during the whole period (1999–2009), as well as after the Eastern EU enlargement and before the current crisis (2004–2008) proves the catching up process of the post-communist countries from the region. In both periods mentioned, the new EU Member States experienced much faster growth in nominal GDP than the old EU countries (three-digit rates versus two-digit ones). The slowest growth rate was noted between 2004 and 2008 in Estonia, as it adjusted its economy in preparation for its accession to the euro area.

*Table 2. Annual growth rates of real GDP, average annual growth rate of real GDP in the period 2000–2009, in %*

	2000 - 2009	1999	2004	2008	2009
Denmark	1,18	2,56	2,30	-0,87	-4,74
Estonia	5,59	-0,30	7,23	-5,06	-13,90
Finland	2,53	3,90	4,11	0,92	-8,02
Germany	0,98	2,01	1,21	0,99	-4,72
Latvia	6,23	3,25	8,68	-4,24	-17,95
Lithuania	6,30	-1,07	7,35	2,93	-14,74
Poland	4,36	4,52	5,34	5,13	1,65
Sweden	2,40	4,66	4,23	-0,41	-5,14
European Union (EU-27)	1,72	3,08	2,53	0,51	-4,24
Euro area	1,49	2,97	2,18	0,44	-4,11

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

If we consider the annual real changes in GDP (see Table 2), we can see that during all the analyzed periods the EU-Baltic countries (as well as the EU-27 and the euro area) continued to grow, but at different rates. The fastest growth (over 5,5 % yearly average) was experienced by the post-Soviet countries, i.e. Latvia, Lithuania and Estonia. Poland noted slower annual growth of 4,36 %. The fastest growing old EU member in this region was Finland, with an annual growth rate of 2,53 %. In 1999, Poland had an annual GDP growth of 4,52 %, and was ranked eighth among the EU-27 (and second in the Baltic region). Among the members of the EU-27 with the lowest GDP growth were Estonia and Lithuania, who both displayed negative growth rates. In the EU accession year (2004), Poland experienced economic

growth exceeding 5% (yet better results in the Baltic region were achieved by Estonia and Lithuania, who both enjoyed rapid GDP growth after difficult pre-accession adjustments). During the crisis (2009), Poland was the only country to achieve a positive annual growth rate<sup>7</sup>. Poland's good economic performance was also seen in the first year of crisis (2008), when its growth rate of real GDP was more than five times higher than that of Germany and ten times higher than the EU-27 average. In 2008, the economic crisis affected a few old EU members together with Estonia and Latvia (generally Estonia had very unstable GDP, though it grew quickly throughout the first decade of the 21<sup>st</sup> century).

In the period of 1999-2008, the EU-27 experienced higher growth rates of real GDP than the euro area. This was the direct result of the faster growth of the new EU Member States not participating in the euro area. The new EU-Baltic countries experienced much higher growth rates than the old ones. However, in 2009, those countries (with the exception of Poland) also noted steep drops in real GDP (with Estonia and Latvia having already experienced negative growth rates in 2008).

**Table 3.** GDP per capita at current prices and current exchange rates in thousands USD

Economy	1999	2004	2008	2009
Denmark	32,73	45,30	62,44	56,69
Estonia	4,14	8,92	17,57	14,37
Finland	25,23	36,14	50,99	44,69
Germany	26,13	33,32	44,18	40,53
Latvia	3,05	5,97	14,91	11,50
Lithuania	3,11	6,56	14,24	11,21
Poland	4,36	6,61	13,89	11,31
Sweden	29,25	40,15	52,97	43,90
European Union (EU-27)	18,99	26,91	36,83	32,86
Euro area	21,91	30,40	41,42	37,89

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

An analysis of GDP *per capita* (*pc*) reveals convergence between the new and the old EU-Baltic countries as well. In all analyzed years, Denmark had the highest GDP *pc*. In 1999, the poorest country in the sample was Latvia, with a GDP *pc* that was more than ten times lower than that of Denmark (Sweden held the second rank until 2008; in the last year of analysis this rank was achieved by Finland). In the year

<sup>7</sup> It was the only country with the positive growth rate of real GDP not only among the analyzed countries, but among all members of the EU-27 as well.

2009, the difference between Denmark's GDP *pc* and GDP *pc* of the poorest country (Lithuania) shrunk two times.

**Table 4.** Annual growth rates of real GDP *pc*, average annual growth rates of real GDP *pc* in the period 2000-2009, in %

Economy	2000 - 2009	1999	2004	2008	2009
Denmark	0,91	2,15	2,01	-1,11	-4,95
Estonia	5,83	0,44	7,49	-4,96	-13,83
Finland	2,20	3,68	3,81	0,52	-8,38
Germany	0,96	1,98	1,13	1,08	-4,61
Latvia	6,86	4,11	9,38	-3,82	-17,61
Lithuania	7,03	-0,35	7,86	4,02	-13,85
Poland	4,47	4,67	5,47	5,20	1,73
Sweden	1,90	4,65	3,67	-0,90	-5,60
European Union (EU-27)	1,36	2,94	2,12	0,19	-4,52
Euro area	0,98	2,72	1,59	0,03	-4,47

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

In the 2000-2009 period, the real GDP *pc* of all new EU members from the Baltic region grew much more rapidly than that of the old ones, as well as more than that of the whole EU and the euro area (see Table 4). The fastest growth was experienced by Lithuania (average annual rate of 7,03%), who seems to have been affected relatively little during both crisis years (2008 and 2009) when compared with its neighbors, Estonia and Latvia (both having negative growth rates in the crisis years). Poland again was the only EU Member State that achieved a positive growth rate during the crisis.

It is worth mentioning that in the analyzed sample Finland and Sweden represent two scenarios of economic strategies, though they are relatively similar (Scandinavian countries with similar GDP *pc*). Finland, however, is a member of the euro area, whereas Sweden is not. From the data in Tables 1-4, it is clear that in the analyzed period Finland's nominal GDP grew more rapidly than Sweden's did. It also evident that Finland experienced a less significant drop during the crisis (in 2009 it was -12%, compared with Sweden's decrease of -16,8%). The comparison of the average annual growth rates of real GDP still gives the Finnish GDP an advantage over the Swedish one (growth rate by 0,13 p.p. higher than that of Sweden), but in the analyzed years of 1999, 2004 and 2009, Sweden experienced higher annual growth rates (in 2009 the difference was 2,88 p.p.). Finland was also the old EU-Baltic member that experienced the largest losses in real GDP *pc* during the economic crisis (their losses were considerably larger than these suffered by Sweden, who has remained outside the

euro area). Swedish national exchange rate policy seemed to have coped better with the crisis than the common monetary policy of the euro.

#### 4. Trade performance of the EU members from the Baltic region

In this section we will analyze the trade in goods and services of the EU-Baltic countries in comparison with the trade of the whole EU and the euro area. We comment on export and import separately as both streams of trade changed in a different way. An additional advantage of using the separate export analysis is the (simultaneous) possibility to approach the international competitive position of a country (group of countries). Changes in the openness of the analyzed countries will also be discussed.

*Table 5. Shares in world imports, in %*

Economy	1999	2004	2008	2009
Denmark	0,8	0,7	0,7	0,7
Estonia	0,1	0,1	0,1	0,1
Finland	0,5	0,5	0,6	0,5
Germany	8,1	7,5	7,2	7,4
Latvia	0,1	0,1	0,1	0,1
Lithuania	0,1	0,1	0,2	0,1
Poland	0,8	0,9	1,3	1,2
Sweden	1,2	1,1	1	0,9
<b>EU Baltic</b>	<b>11,7</b>	<b>11</b>	<b>11,2</b>	<b>11</b>
European Union (EU-27)	40	39,6	37,4	36,6
Euro area	30,3	29,8	27,9	27,6

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

The majority of the EU- Baltic countries had relatively stable shares in the total world imports (see Table 5). Exceptions were Germany, Sweden and Poland. In the analyzed period the first two countries lost a part of their shares whereas Poland increased its share of the total world import (especially after its accession into the EU). No other EU-Baltic country achieved a result comparable to that of Poland.

*Table 6. Shares in world exports, in %*

Economy	1999	2004	2008	2009
Denmark	0,9	0,8	0,7	0,7
Estonia	0,1	0,1	0,1	0,1
Finland	0,7	0,7	0,6	0,5
Germany	9,5	9,9	8,9	9
Latvia	0	0	0,1	0,1
Lithuania	0	0,1	0,1	0,1
Poland	0,5	0,8	1,1	1,1
Sweden	1,5	1,3	1,1	1,1
<b>EU Baltic</b>	<b>13,2</b>	<b>13,7</b>	<b>12,7</b>	<b>12,7</b>
European Union (EU-27)	41,3	40,9	36,5	36,7
Euro area	32,4	32,2	28,5	28,7

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

Over the whole period of analysis, Poland's shares in the world import were higher than in the world export (compare data in Tables 5 and 6). However, Poland increased its share in the world export more than its respective share in imports, which indicates an improvement of its international competitive position. In the year 2009, Poland's share in the world export was exactly the same as the respective share of Sweden (see Table 6). However, both countries went toward this final result after having started at different initial positions. In the year 1999, Sweden's share of world exports was equal to 1,5%, whereas the share of Poland was only 0,5%. Poland's share in world exports has not decreased, even in the year of the economic crisis (2009). Germany increased its share of the total world exports by 0,1% (in the first year of the crisis, however, it lost 1 p.p. of its share). Generally, the EU countries from the Baltic region were in a relatively good economic condition even during the economic crisis.

The next step in our analysis is a discussion about the openness of the EU countries from the Baltic region. For the purpose of this study, "openness" is measured differently than it is usually done in the literature. We calculate only the shares of the total export in GDP, as opposed to taking the sum of the export and import and dividing them by GDP). Measuring the openness the way we propose allows for simultaneous use of the same data for analysis of changing international competitiveness of analyzed countries.

The majority of the EU- Baltic countries were more open to export than the EU euro area as a whole (see Table 7). Our calculations show that Estonia was the most open country in this group (with shares of export in GDP fluctuating between 46,7% and 52,8%). In the year 1999, Poland was the least open country (with a share of 16,3%). In the years 2004, 2008 and 2009 it was Latvia (29,1%, 30% and 29,3% respectively). During the analyzed period Poland's openness to export increased the

most dramatically of the whole sample, as it almost doubled (a slightly slower growth than that of Lithuania in the years 1999-2008). In case of Poland, the dominating part of these increases appeared before its EU accession (in the period 1999 – 2004: 13,3 p.p.), whereas in Lithuania they lasted continuously until the year 2008.

*Table 7. Share of exports in GDP, in %*

Economy	1999	2004	2008	2009
Denmark	28,9	31,4	34,1	30,0
Estonia	52,8	49,2	52,6	46,7
Finland	32,5	32,5	35,5	26,2
Germany	25,4	33,1	39,6	33,5
Latvia	23,6	29,1	30,0	29,3
Lithuania	25,1	41,2	49,8	44,5
Poland	16,3	29,6	32,1	31,1
Sweden	32,8	34,0	37,4	32,1
European Union (EU-27)	25,8	28,5	32,1	27,8
Euro area	27,0	30,2	33,8	28,5

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

*Table 8. Intra EU exports as share of total exports, in %*

Economy	1999	2004	2008	2009
Denmark	65,3	64,6	63,7	61,5
Estonia	76,9	72,9	63,4	60,0
Finland	63,1	56,2	55,9	55,5
Germany	64,0	64,7	63,7	62,9
Latvia	77,7	73,0	73,0	71,6
Lithuania	71,4	67,2	60,4	64,3
Poland	81,8	80,3	77,9	79,4
Sweden	62,1	58,7	59,7	58,2
European Union (EU-27)	67,7	67,9	66,7	66,3
Euro area	68,7	68,4	66,8	66,5

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

Another way to approach the openness and intensity of the mutual integration of the analyzed countries is to discuss their intra-EU export<sup>8</sup>. As seen in Table 8, the EU-Baltic countries had a dominating share of the intra-EU exports during the

<sup>8</sup> This time we concentrate on export acknowledging the fact that in intra EU trade an export of one member state is an import of the other.

whole period of analysis. Already in the year 1999, even the states liberalizing their trade with the EU during the adjustment process before their 2004 accession, traded with the EU-27 countries very intensively. The shares of the internal exports of all new EU-Baltic countries decreased after accession. In our opinion this confirms the improvement of their international competitiveness due to the EU-accession. This was illustrated by large inflows of FDI and the adoption of EU norms and standards. The old EU-Baltic countries had either relatively stable or falling shares of the total intra-EU exports and even during the crisis they did not engage especially intensively in trade within the integrated area.

*Table 9. Shares in total world imports of services, in %*

Economy	1999	2004	2008	2009
Denmark	1,27	1,5	1,7	1,57
Estonia	0,06	0,08	0,09	0,08
Finland	0,53	0,66	0,83	0,7
Germany	9,76	8,86	7,95	7,83
Latvia	0,05	0,05	0,09	0,07
Lithuania	0,05	0,07	0,12	0,09
Poland	0,48	0,6	0,83	0,74
Sweden	1,57	1,49	1,45	1,41
<b>EU Baltic</b>	<b>13,77</b>	<b>13,31</b>	<b>13,06</b>	<b>12,49</b>
European Union (EU-27)	42,99	44,16	42,19	41,3
Euro area	31,85	32,41	30,85	30,68

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

The last parts of the analysis takes into account the exports and imports of services. We can compare them with the imports and exports of goods (see data from Tables 5 and 6 and from Tables 9 and 10). During the analyzed period the old EU-Baltic countries, as well as the whole EU and the euro area, noticed higher shares in the import of services than in the import of goods. However, at the same time, all the new EU-Baltic countries observed much lower shares in import of services than in import of goods. Since the year 2004, the EU-27 and the euro area had higher shares in export of services than in export of goods (see Tables 6 and 10). Among the EU-Baltic countries, such a result was achieved only by Denmark, Latvia and Lithuania. Germany and Poland observed continuously lower shares in export of services than in export of goods throughout. The other EU-Baltic countries seemed to increase their engagement in export of services more than in export of goods.

*Table 10. Shares in total world exports of services, in %*

Economy	1999	2004	2008	2009
Denmark	1,39	1,59	1,86	1,61
Estonia	0,1	0,12	0,13	0,13
Finland	0,45	0,66	0,82	0,73
Germany	5,83	6,44	6,72	6,77
Latvia	0,07	0,08	0,12	0,11
Lithuania	0,08	0,11	0,12	0,11
Poland	0,58	0,59	0,91	0,85
Sweden	1,38	1,7	1,86	1,8
<b>EU Baltic</b>	<b>9,88</b>	<b>11,29</b>	<b>12,54</b>	<b>12,11</b>
European Union (EU-27)	44,8	47,31	46,51	45,27
Euro area	31,86	33,26	32,44	32,12

Source: own calculation based on: <http://www.unctad.org> [4.05.20110]

## 5. Conclusions

An analysis of the economic and trade performances of the EU-Baltic countries reveals a convergence of the new and the old EU Member States. During analyzed period (1999 – 2009) the differences in GDP in both groups of countries diminished considerably. The new members are becoming increasingly more involved in international trade, both intra- and extra-EU. We can observe several positive trade effects as a result of their EU accession. At the same time, we hardly notice the appearance of trade diversion, considering the dropping intra-EU export shares. Trade effects observed in the economies of the new countries who entered the EU in 2004 seem much larger than the trade effects seen as a result of the participation of Finland and Germany in the euro area.

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## **POLITICAL RESPONSIBILITY AND ITS CONNECTION WITH THE COUNTERSIGNATURE INSTITUTE**

### **Abstract**

Nowadays there is no question whether political figures who lead the country should or should not be responsible for their actions and words in public. At the same time there is a discussion of what are the limits of being responsible as a politician and more important – as the Head of the State.

The topic takes a great deal of analysis about the connection between countersignature institute, which in public-law means a second signature on the Head of the State's Act, (Būmanis, Dišlers, Švābe, 1933, p. 17514. – 17516.) and political responsibility, especially focusing on the constitutional situation in the Republic of Latvia. In legal science several European Union Member state leaders are declared not to be politically responsible. Still the amount of the Head of the State's powers develop, as well as discussions about the content of such irresponsibility and possibility to reduce it's dimension. In this article I try to reveal the purpose of countersignature institute which is directly connected with the presumption that the Head of the State is not politically responsible.

**Keywords:** Countersignature institute, Head of the State, political responsibility, signature

### **1. Countersignature institute**

The presumption that the Head of the State is not politically responsible is one of the countersignature institute's elements. Countersignature means that the Head of the State's Act demands second signature which is made by the Prime minister or the minister who's ministry is mostly relevant to the Act's content. The second signature has three meanings.

At first, the Head of the State's Act countersignature confirms that the Act is taken in accordance with established procedure. Thus, the Head of the State does

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not have the opportunity to adopt acts unlawfully. The second signature indicates the coherence of action.

Secondly, countersignature notes the validity of an act. With a signature the minister approves that it has received his consent. It reveals an important aspect of the countersignature institute which is in conditional form. If the Head of the State has not gained support from the co-signatory minister, it will not come into force.

Thirdly, the Head of the State's countersignature institute is closely linked to the presumption that the Head of the State is not politically responsible (Баглай, Туманов, 1998, p. 226.– 227.) In constitutional law countersignature is a guarantee that the Head of the State is not politically responsible. The minister's signature on the Head of the State's act means that the minister takes full responsibility for co-signatory. However, it should be pointed out that such comparison cannot be considered complete.

## 2. Presumption of the Head of the State's political irresponsibility and its development

Nowadays, it is more likely to observe society's increasing desire to be informed about the ongoing political processes in the country. This interest includes necessity to find out who is responsible for certain action. Liability issue has become even more popular because of several corruptive scandals. Such events have exposed the necessity of ministerial responsibility if their actions have not been appropriate.

Speaking about terminology, it should be noted that it would be more appropriate to formulate the concept "politically irresponsible" as "not politically responsible". Using grammar translation the present concept's name may make a mistaken impression that the Head of the State may be irresponsible. It means that he cannot take responsibility for his actions and subsequent consequences. Such interpretation can be addressed to the characterization of a person, but it should not be used in law terminology when speaking about the Head of the State. For example, Article 53's first paragraph of Constitution of the Republic of Latvia states that political responsibility for the fulfilment of presidential duties shall not be borne by the President.<sup>2</sup>

By countersigning the Head of the State's Act, the minister accepts to be responsible for it. Countersignature institute means the requirement of accountability for the content, form and execution of the Head of State's Act.

Presumption that the Head of the State is not politically responsible and its' development should be viewed in conjunction with the evolution of the countersignature institute.

<sup>2</sup> Article 53: Political responsibility for the fulfilment of presidential duties shall not be borne by the President. All orders of the President shall be jointly signed by the Prime Minister or by the appropriate Minister, who shall thereby assume full responsibility for such orders except in the cases specified in Articles 48 and 56. Latvijas Republikas Satversme (*Constitution of the Republic of Latvia*): LR likums. Latvijas Vēstnesis, 1993. gada 1. jūlijs, Nr.43.

Countersignature institute is closely associated with the development of legal machinery which requires the officials to take responsibility for their acts. The first signs of this institute can be found during the reign of Byzantine Emperor Justinian I (*Mego Justinian I*) (Enciklopēdiskā Vārdnīca, 1991, p. 280) when the emperor's decisions reflected his wishes. These decisions were confirmed by the signature of his closely related officials. Those persons who passed the imperial order without quaestor's signature were punished as document forgers.<sup>3</sup> Similarly, in the Middle Ages the second signature and a stamp on the document also exercised the function of proof (Di lers, 1923, p. 98). It is considered to be a prerequisite of the countersignature institute's establishment with an aim to avoid fraud. In an absolute monarchy system responsibility was the missing element in medieval Europe. As a result, the shape of a countersignature was formally acquired, but it did not reflect the essence of the institute – to assert the legality of acts.

Theoretically it is not possible to speak about responsibility in an absolute monarchy, because power was concentrated in the hands of a ruler who had no responsibility for his actions. The Head of the State also rescued his advisors from the responsibility. These advisors were executors of the Head of the State's will. As a result none was responsible for the Head of the State's acts. That is the reason why the countersignature institute could present its' essence only in a legal monarchy where responsibility was required. Therefore the professor from University of Latvia Kārlis Dišlers rightly points out that the countersignature institute has come from legal monarchy (Dišlers, 1923, p. 98.-107.).

The constitutional practice of the United Kingdom and the Republic of France gave new horizons for the development of the countersignature institute and the presumption that the Head of the State is not politically responsible.

When the legal system developed, necessity rose to reinforce the limitation of monarch's power, as well as ministerial liability. Foreign legal literature has analyzed the meaning of political responsibility. For example, English lawyer William Blackstone developed research work about it in the 18<sup>th</sup> century. In the end, British state theory was introduced to the principle that the Head of the State is not politically responsible and the minister is responsible for the signed act. The essence of this principle is in the *common law* system, in The Bill of Rights (1689) and its appendix – 1701 Act of Settlement<sup>4</sup> which aims to protect the monarch's arbitrary, (Tarkow Naamani, 1943, p. 547) reinforcing the role of parliament. It can be explained by the fact that the United Kingdom did not recognize the traditional separation of powers theory (Barendt, 1998, p. 34.-40.). Strengthening the position of parliament, it was necessary to introduce legal institution that would help to limit the monarch's broad prerogatives. Therefore countersignature institute grants that responsibility for monarch acts take his advisers (ministers). Countersignature institute draws attention

<sup>3</sup> Justiniana I 114.noveles (novellae CXIV). Available: <http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Corpus/Nov114.htm>

<sup>4</sup> Troņa mantošanas akts (*Act of Settlement*). Available: <http://www.worldfreeinternet.net/parliament/settlement.htm>

to the foundation of a modern principle (Алексеев, 1910, p. 116). It is based on a circumstance that “the king can not act alone” (Barendt, 1998, p. 110.-116.).

The other country which gave a significant contribution to the countersignature institute, including the presumption that the Head of the State is not politically responsible, was France. At the beginning of the French Revolution, the 2 November Act 1789 was adopted (Di lers, 1923, p. 98). By this law countersignature got its’ legal form. This law established legal means to limit the discretion of the Head of the State. Countersignature was related to all Head of the State’s Acts and the Minister council’s decisions. No royal command nor the council’s decision could free the minister from liability (Di lers, 1923, p. 99). The development of the countersignature institute proves that ministers were liable for all Head of the State’s Acts.

Focusing on the meaning of political responsibility within the president’s institute itself, it should be noted that it is not recognized neither by the Constitution, nor by state law theories. This can be explained by the fact that the president’s institute in the end of evolution has excluded the monarch’s institute. (Balodis, 2004) Since the presumption that the Head of the State is not politically responsible was closely related to the monarch institute, it can be concluded that the president institute has “inherited” this presumption. However, the President’s accountability issue should be assessed differently. Otherwise, historical presumption would not be evaluated by time changes. It would lead to the situation when the presumption that the Head of the State is not politically responsible, may not reflect the true situation in the country.

In the legal state, it is impossible to adopt laws or act without indicating the person who is responsible for them. Generally in the republic form there is no need for countersignature institute, because there is no such institute who would be irresponsible. Liability arises from the election of all institutes, which is considered to be a republican principle. (Di lers, 1923, p. 100) Consequently, responsibility for one’s actions is a hallmark of the republic. From my point of view, it should be evaluated how the previously mentioned is connected to the presumption that the Head of the State is not politically responsible for his actions. Therefore it is crucial to analyze the concept “political responsibility” and come to a conclusion if the Head of the State’s political responsibility is also possible in a republic.

### **3. The definition of the concept “political responsibility”**

“Responsibility” is seen as a moral and legal ability to be aware of the consequences of one’s actions (Būmanis, Dišlers, Švābe, 1928, p. 1032). The concept of “political responsibility” as the scope of liability (Politiskā Enciklopēdija, 1987, p. 61.-62.) should be viewed in conjunction with the term “responsibilities” (Garner, 2004, p. 932.). This means that responsibility takes the form of his assigned duties. As pointed out by Yale University professor of jurisprudence Christopher Kutz, the basis of liability arises from social, moral, political relations and their ideals. The most difficult task is to determine the limit of liability limit, because responsibility has a moral aspect (Coleman, Shapiro, 2002, p. 587).

Unlike other forms of liability, political responsibility stands on its own merits. In particular, political responsibility deals with the consequences of one's work which the person had known before and in case the result fulfills, its effect is dismissal from office (Coleman, Shapiro, 2002, p. 384). Political responsibility is usually addressed to ministers who as the highest executive body are responsible to the parliament (Pleps, Pastars, Plakane, 2004, p. 290.-292.). For example, in a direct democracy the government is politically responsible to citizens. The opposite situation can be viewed in a constitutional monarchy where ministers are politically accountable to the monarch. In a presidential republic, ministers are responsible to the president (Glick, 1989, p. 54.-57.). While in a parliamentary republic or monarchy ministers are politically accountable to the parliament.

The scope of liability is also closely linked with the state model – presidential, parliamentary or semi-presidential. For example, in a presidential republic (for example, the United States of America) the President deals with extensive powers, which lead to the government's responsibility to the President. In a presidential republic the President is both – the Head of the State and the Head of the government. Thus in a semi-presidential state model, as it is in French Republic, the government has two leaders – the President and the Head of the government who has close links with the parliament.

In a parliamentary state model like in the one in the Republic of Latvia, the President appears to have limited powers. As a result the President has more representative functions. The President has the confidence of the parliament and is not directly related to any of the powers. Countersignature institute is especially well-suited in parliamentary republics. One of the main reasons for its application in practice is the reduction of the Head of the State's responsibility to stabilize the state apparatus. In such matters it is noted that the Head of the State's political responsibility is unnecessary because ministers are responsible to the parliament. So far this has not been answered a question whether "useless" means that the Head of the State for its acts is not politically responsible? If the answer to the question is positive, such argument should not give a rise to the Head of the State's irresponsible behavior or deliberate decisions which are contrary to national interests.

Nowadays in European Union Member States the presumption that the Head of the State is not politically responsible does not work effectively. For example, Article 53's second paragraph of Latvian Constitution states that all Presidents' orders have to be also signed by the Prime Minister or by a minister who shall thereby assume full responsibility for such order, except in two cases – by inviting a person to draw up the Cabinet and suggesting to dissolve the Parliament. This rule shows that countersignature is demanded only for the President's orders, but the presumption that the Head of the State does not take political responsibility requires that each act which is adopted by the Head of the State requires countersignature.

The Constitutional Court of the Republic of Latvia in the judgement of 16 October, 2006 stated that "Constitutional executive power in the Republic of Latvia is the Cabinet [...]. The President, who bears no political responsibility, the Constitution grants certain executive functions, but also these functions are required

to implement with the Cabinet member's consent. [...] Those executive functions which in the Constitution *expressis verbis* are trusted to the President are also subject to the Cabinet's will by countersignature institute. It means that in the Republic of Latvia countersignature institute is widely applied to the President's executive functions."<sup>5</sup>

Such regulation leaves open a question, what happens to those President's acts which are not subject to the countersignature? One of the most prominent examples is the President's right to pardon. This right is fulfilled individually by the President, overlooking the clemency file and coming out with a decision. It would be unlikely that the President has no responsibility for the work, acts content and its consequences.

The President is legally responsible (constitutional responsibility) for his actions, but this responsibility will occur only if he violates the Constitution. The Constitutional Committee has come out with its ideas about the possibilities how to strengthen the President's institute (Valsts prezidenta Konstitucionālo tiesību komisija, 2011, p. 161.-167.). The Constitutional Committee suggested working out a different regulation which would pay more attention to the constitutional responsibility, as well as decide what the procedure would be like (Valsts prezidenta Konstitucionālo tiesību komisija, 2011, p. 125.-132.). The concept "political responsibility" includes more than the Constitution violation, because it deals also with moral principles. Political responsibility has a dual nature – direct and indirect. For example, in the Republic of Latvia for the President's acts, which are not countersigned by the minister or the Prime minister, the President shall be indirectly responsible.

Professor K. Di lers indicated that it may be a questionable belief that countersignature institute itself can exclude the President's political responsibility. He distinguishes the responsibility to the Parliament and to the people (Di lers, 2004, p. 121.-122.). According to the Republic of Latvia Constitutional Article 51 the Parliament in a closed session may dismiss the President. On the other hand, people express their support to the President when it decides of the dissolution of the Parliament if the President has proposed to dissolve it. In this case there are no principles how to determine that the President has violated and neglected national or public interests. It means that currently, from the negative point of view, the Parliament can easily decide on the President's dismissal. One way is to replace political responsibility with constitutional responsibility. Thus in such case may be reduced the Parliament's power, as the supreme institute in parliamentary state, to decide whether to dismiss or not the President from his office.

To conclude it should be noted that the presumption that the Head of the State is not politically responsible does not clearly reflect the current situation in European Union Member States. The Head of the State's political responsibility reflects itself as duties that he is obliged to obey. These duties are declared by the Constitution. At the same time the Head of the State has to respect national or public interests.

<sup>5</sup> Sk. Satversmes tiesas (*the Constitutional Court of the Republic of Latvia*) 2006.gada 16.oktobra sprieduma lietā Nr.2006-05-01 "Par Radio un televīzijas likuma 46. panta sestās, septītās, astotās un devītās daļas atbilstību Latvijas Republikas Satversmes 58. un 91. pantam" 15.3. punktu

Countersignature institute is an instrument through which the minister who has countersigned the Head of the State's Act takes responsibility for it. But in those cases when the Head of the State makes a decision alone, he must deal with indirect responsibility. At the same time it is difficult to measure the limit of this responsibility, because it is closely related to moral aspects.

## Conclusions

1. Presumption that the Head of the State is not politically responsible demands that each Act of the Head of the State must be countersigned by a minister who takes responsibility for it. This presumption is closely connected to the countersignature institute. Still this institute should not be thought as the presumption's that the Head of the State is not politically responsible guarantee. Countersignature proves that the act has been adopted in a certain procedure and that it is in force.
2. Instead of the concept "politically irresponsible" it would be more appropriate to use a different formulation – "not politically responsible".
3. The presumption that the Head of the State is not politically is closely connected with the the countersignature institute and its' evolution. Historically this presumption was linked with a monarch institute. The president's institute has "inherited" the presumption that the Head of the state is not politically responsible, but the president's accountability issue should be assessed differently. The amount of responsibility is committed to the state's model – presidential, parliamentary of semi-presidential.
4. The Head of the State's political responsibility reflects itself as duties that he is obliged to obey and which are declared in the Constitution. The Head of the State has to respect national or public interests. In those cases when the Head of the State makes a decision alone, he deals with an indirect responsibility.

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**Gunta Pastore<sup>1</sup>**

## **EUROPEANIZATION OF FOREIGN POLICY OF THE NEW MEMBER STATES: THE CASE OF LATVIA**

### **Abstract**

The aim of the study is to examine the EU membership impact on the Latvian foreign policy. It aims at exploring changes of the Latvian foreign policy motivated by the EU adaptation pressures, and the intervening factors. The main interest is to see how domestic actors explain the extent of EU impact on the national foreign policy. In doing this, the impact of the EU Common Foreign and Security Policy on Latvia will be examined from the perspective of the Europeanization concept and the rational choice and sociological institutionalism. The socialization of national representatives participating in the EU decision making as well as interaction of the domestic actors producing changes will be examined.

**Keywords:** Europeanization; foreign policy; domestic actors; Latvia

### **Introduction**

The EU has an ambition to be a global actor. Its ability to speak in one voice requires coherent policies of the member states. Nevertheless, the diversity within the EU after the last enlargement has increased, and the newcomers bring new interests and preferences at the EU level. It has raised interest among scholars to explore the EU policies of the new member states.

This study aims to examine the EU impact on the Latvian foreign policy. From the Europeanization perspective, Latvian foreign policy is an area of particular interest. The EU accession was highly politically motivated and grounded in security considerations. It indicates that participation in the EU Common Foreign and Security Policy (CFSP) for the country is of vital importance. It is of interest to see to what extent the membership has empowered this crucial policy area for Latvia - small and geopolitically vulnerable country.

Latvian foreign policy's pre-accession agenda was aimed at gaining EU membership, and redefining the state away from the East, towards Europe (Galbeart

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2006, p. 451). With the membership, there has been fundamental shift in Latvian foreign policy, while at the same time we see a number of interesting continuities despite the 'normalization' (Mälksoo 2005).<sup>2</sup> Competing logics in the Baltic Sea region mean that while Latvia's foreign policy objectives may overlap with other EU and NATO member states, this may not necessarily be the case. The lack of convergence is the biggest hurdle for Latvian foreign policy (Galbearth 2006, p.444).

Scholars as Shimmelfenning and Sedelmeier (2005, p. 7) argue that Europeanization in the Central and Eastern Europe is a far-reaching process. The domestic factors can be a source of non-convergence in foreign policy. The Europeanization of foreign policy may be reversible if, for example, a member state falls back on its own resources and individual strategies if domestic actors oppose EU-inspired changes.

In the case of Latvia, scholars have focused on the Europeanization as a EU impact on social and political processes (Ozolina and Tisenkopfs 2005). Besides, they have explored the EU influence on the Latvian public administration (Reinholde 2005) and the sources of preference formation of the Baltic States' European policy (Vilpišauskas 2011). With regard to specific EU policies, the first pillar area, e.g., economic, cohesion and social policies have been analyzed (Muravska 2009; Akule 2007), as well as the Europeanization of the Latvian foreign aid policy (Timofejevs-Henriksson 2010). This study aims to fill the gap in the existing research by exploring the impact of the EU on Latvian foreign policy. This study is also willing to introduce further empirical evidence to the existing limited literature on Europeanization in the foreign policy process and outcomes in the EU new member states.

The aim of this study is to explore changes of the Latvian foreign policy motivated by the EU adaptation pressures, and the intervening factors. It is also of interest to see how the domestic actors explain the extent of EU impact on the national policy. In doing this, the study seeks the answer to the following questions:

- How has EU membership influenced the foreign policy of Latvia?
- What is the role of domestic actors in response to the EU adaptation pressures?

The point of departure of the study is the review of the previous research about the Europeanization, including rapidly growing studies on the Europeanization of the national foreign policies. The literature review is a necessary basis for the theoretical approach and the empirical study.

## 2. The review of previous research

The review of the literature, firstly, will discuss the development of the Europeanization concept and its application in the EU first pillar area. Different Europeanization *definitions, dimensions, causal mechanisms* and *outcomes* will be reviewed. Acknowledging the methodological limits of the concept of Europeanization,

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<sup>2</sup> Cited by Galbreath (2006., p 444)

it will proceed with reviewing of the New Institutionalism approach - the rational choice and sociological institutionalism. Subsequently, the Europeanization in the foreign policy area will be discussed by focusing on definitions, dimensions, mechanisms and outcomes at the national foreign policy.

### *2.1. The concept of Europeanization – richness of definitions*

For scholars, Europeanization has been the research subject for almost thirty years, examining mainly the 'supranational' EU first pillar impact on its members. The main aim has been to explore the causal significance of the EU for the domestic change. Under the time, the concept has been developed in many different ways, resulting in danger of its conceptual stretching (Radaelli 2000, p. 1). The usage of the Europeanization has even been put into the question (Olsen 2002, p.922). Nevertheless, scholars continue to employ the concept, while at the same time asking of whether the Europeanization is 'still fashionable, yet useless' (Moumoutzis 2011, p. 1).

### *2.2. The definitions and dimensions of Europeanization*

What is Europeanization? It includes a number of possible definitions. It could be understood as the globalization or Westernization which, is more historical approach to the problem of what Europeanization, actually means (Olsen 2002, p. 926). Europeanization has been explored also as a matter of cultural diffusion, process of adaptation of the institutions or adaptation of policy and policy process (Featherstone and Radaelli 2003, p. 6).

A more traditional approach of what Europeanization means is the EU integration process on the various national political systems of EU member states. One of the most typical is explaining it as the EU impact on its member states in terms of structural changes, variously affecting actors and institutions, ideas and interests (Featherstone and Radaelli, 2003, p. 13).

The pioneer of introducing the Europeanization concept is considered to be Ladrech (1994). He offered the first operational definition stating that Europeanization is 'an incremental process reorienting the direction and shape of politics to the degree that EC political and economic dynamics become part of the organizational logic of national politics and policy making'.

Many scholars have further developed Ladrech's definition. Radaelli (2000) redefined the Europeanization by emphasizing not only organization adaptation but adding the norms and values. According to Radaelli (2000, p. 4), Europeanization is 'a process of (a) construction, (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the making of the EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures and public policies'.

Olsen (2002, p. 923.-924.) distinguishes at least five different meanings on Europeanization and wonders if, despite of being fashionable, the concept is useful. He

identifies (1) changes of external territorial boundaries; (2) development of institution of governance at the EU level; (3) penetration of national and sub-national levels of governance; (4) exporting norms of political governance and organization that are peculiar to the to the EU beyond its owns territory; (5) political project aiming at a unified and politically stronger Europe.

In parallel to the debate of the definitions of Europeanization, there is ongoing discussion about whether Europeanization is one-direction or two-direction process. From the beginning, Europeanization scholars focused on the national adaptation to the EU pressures the *top-down* ('downloading') process. Later on, they started to apply Europeanization as the two way process, which includes the *bottom-up* ('uploading') dimension or the projection of the national policies at the EU level. Furthermore, the *cross-loading* dimension has been distinguished which is explained as combination of top-down and the bottom-up dimensions.

*The top-down dimension* is used to explain the adaptation of the national structures and processes in response to the EU pressure. Thus Europeanization represents the approach or 'reception'. *The bottom-up process* is understood as the projection of the national ideas, preferences and models from national to the supranational level. *The cross-loading* means a process of identity and interest convergence.

### 2.3. *The mechanisms of Europeanization*

Methodologically, the main challenge is *how to measure the impact* and how to integrate agency in explaining change (i.e. to what extent domestic actors are responsible for change) (Radaelli, 2000, p. 16). There are different understandings about the mechanisms of EU impact on member states and domestic responses to pressures for change from EU.

Cowles, Caporaso and Risse (2001, p. 3) suggest the *goodness of fit* between the EU and the domestic level and the adaptation pressure as a main mechanism for producing changes. Nevertheless, scholars argue that Europeanization can occur even without adaptation pressure through such mechanism as *changing of domestic opportunity structures* which leads to a redistribution of resources between domestic actors, and *framing domestic beliefs and expectations* which changes the beliefs of domestic actors (Knill and Lehmkuhl, 2002).

M.Smith (2000, p. 617) suggests four mechanisms for Europeanization: (1) elite socialization; (2) bureaucratic reorganization; (3) constitutional change; (4) public support for European political co-operation. He argues that historical experiences, power resources, key relationships, institutional mechanisms and government types affect the EU pressure.

Börzel and Risse (2003) propose the following framework. Firstly, there should be an adaptation pressure, which comes from misfit between the EU and domestic level. Secondly, there are two possible ways to proceed, which are based on two theoretical frameworks – rationalist choice institutionalism and sociological institutionalism. These two theoretical frameworks, as explained by Héritier (2001, p. 3) to measure Europeanization are grouped along two dimensions in terms of their theoretical

foundations - actor-based (rational choice) institutionalism and institution-based (historical, sociological, and constructivist) approach. The actor-based institutionalism explains the impact on member states in terms of *rational strategic action* of corporate actors with specific preferences in distinct institutional contexts that limit and/or facilitate the pursuit of these strategies and establishes a systematic connection between domestic political conditions and incentives to comply with European policy demands (Heriter, 2001, p. 3.-4.). The institution-based approach accounts for changes in terms of gradual adaptation to changing institutional rules and norms by applying 'logic of appropriateness' (March and Olsen 2005).

The actor-based institutionalism argues that mismatch between European policy demand and national policies generate pressure to adjust. Variations of domestic structures (defined in terms of veto points) lead to distinct national responses to the same external pressure. Given the need to adjust, a large number of veto points – in a politically decentralized political system - will make policy adjustment more difficult to introduce, while a low number of veto points will facilitate policy adjustment. The institutions do not determine actions but leave the scope for strategic and tactical choices of actors. In this way, the actors' preferences and beliefs have to be introduced in order to account for a policy outcome. *Actors* operating in a particular institutional context are – public and private, individual and corporate actors with specific preferences and normative and cognitive views have at stake in a particular policy area and seek to influence the process according to their goals within the limits imposed by institutional prescriptions (Heriter, 2001). Individual or collective actors influencing the change are called *veto players*. If we know the preferences of veto players, the position of status quo and the identity of agenda setter (the sequence of move of different actors) we can predict the policy outcome of the policy-making process (Tsebelis 2002, p. 2.- 3.).

#### 2.4. *Degrees of the Europeanization*

It is important not only to explore the direction of the domestic change but also the magnitude of change caused by the EU pressures. Börzel and Risse (2003) introduce the following degrees of change – (1) inertia or lack of change, (2) absorption or modest change as well as (3) transformation or high degree of change.

### 3. Europeanization of foreign policy

For a long time, there was no interest in applying the Europeanization concept in the area of foreign policy. It has been explained by the unique nature of the national foreign policy, which lies in the center of state's sovereignty. The jealousy about sovereignty explains why the CFSP still works through intergovernmental bargaining (Major, 2005). Nevertheless, rapid developments in the EU CFSP raised interest to apply Europeanization to the foreign policy as well. Europeanization as a process of the domestic adaptation in foreign policy gained a widespread usage with the Maastricht Treaty in 1991 (Featherstone, 2003).

Although CFSP it is much more voluntary and non-hierarchical cooperation framework, scholars agree that Europeanization occurs in this area as well (Bulmer and Radaelli 2004). As minimum, participation in the CFSP affects the institutional procedures by which governments make decisions (Smith, M 2000). White (1999) argues that national foreign policies are not replaced by the CFSP but the context in which they operate, the process through which they are made, and their outputs all show clearly growing impact of Europeanization. Moreover, White (1999) concludes that traditional International Relations theory and Foreign Policy Analysis cannot explain this phenomenon.<sup>3</sup>

Manners and Whitman (2000) are mentioned as the beginners. Although not explicitly, through applying the Foreign Policy Analysis, they define the national foreign policy as ' (1) adaptation through EU membership; (2) socialization of FP makers; (3) domestic factors in process; (4) bureaucratic factors; (5) the EU context as a constriction or as an opportunity; (6) special relations and interests at the national level. They conclude that (1) national foreign policies are separable but no longer separate from the EU context; (2) there is some socialization effect but not complete; (3) domestic, European and foreign policies have become difficult to differentiate in this multi-level political system.

Tonra (2001, p. 8) defines the impact of the CFSP on the national level as: '(1) access to more information; (2) unparallel access to international decision-makers; (3) expansion and restructuring of administration and development of positive and dynamic diplomatic culture'. He identifies the Europeanization of foreign policy as ' transformation in the way in which national foreign policies are constructed, in the ways in which professional rules are defined and pursued and the consequent internalization of norms and expectations arising from the complex system of collective European policy making'.

Jørgensen (2004) introduces several different meanings of Europeanization in the foreign policy area: (1) *adaptation* - how national foreign policies have been changed, transformed and adapted as a result of European integration; (2) *elevation* of some aspects of foreign policy to the level of EU policy making; (3) *empowerment* of bulk of member states who are enabled to conduct foreign policy that goes beyond their own borders. Weaver (1994) underlines the particular nature of the foreign policy where 'the statesman is located in the midst of domestic policy from where he collects the motives and drives for a foreign policy which is then conveyed to the outside world.' The development of the CFSP accordingly is defined as a 'system of external relations, a collective enterprise through which the national actors conduct partly common, and partly separate, international actions. This is intensive system of external relations in which the cooperating actors intervene'. (Hill and Wallace 1996)

According to Wong (2007, p. 328), the EU membership changes the substance of national foreign policy, and European norms, interests and identities replace the national ones. Hill and Wong (2011, p. 23) in their comparative study about the

<sup>3</sup> (Tonra 2001; Wong 2005, 2007; Smith 2004; Major 2008; Hill and Wong 2011; Pomorska 2005, 2011; Jokela 2011; Brommesson 2009; Moumoutzis 2011).

foreign policies of ten member states within the CFSP argue that 'Europeanization is considered a relevant concept in the area of foreign policy, despite the lack of the restrictive legal regime and the limited scope for initiative by the Commission'.

### 3.1. *Definitions and dimensions of Europeanization of the foreign policy*

Wong (2007, p. 325) argues that Europeanization should be understood as a reciprocal relationship between the EU and its member states where the key dimensions are (1) *top-down* or adaptation to the EU pressures and (2) *bottom-up* Europeanization. The Europeanization in these two key dimensions leads to two different outcomes – the projection of national policy preferences at the EU level, and changes of national foreign policy due to EU stimuli and pressures (Flers and Muller, 2010, p. 8). In addition to these two dimensions, Hill and Wong (2011, p. 20) introduce the third dimension - the '*cross-loading*', which is result of above two dimensions.

The *top-down* dimension is explained as the adaptation of EU norms and the policy convergence. It includes harmonization and transformation of a member state to the needs and requirements of EU membership. The indicators of the *top-down* dimension are (a) increasing salience of European political agenda, (b) adherence of common objectives, (c) common policy obligations taking priority over national domains reserves, (d) internalization of EU membership and its integration process ('EU-ization') and (e) organizational and procedural change in national bureaucracies (Hill and Wong 2011, p. 2). The *bottom-up* dimension is explained as the national projection. The indicators of this dimension are (a) state attempt to increase national influence in the world, (b) attempt to influence foreign policies of other member states, (c) state uses EU as cover/umbrella and (d) national foreign policy uses the EU level as a multiplier (Hill and Wong 2011, p. 2). The *identity reconstruction or cross-loading* dimension is explained as the result of both previous dimensions. The indicators of this dimension are (a) the emergence of shared norms and values among policy-making elites in relation to international politics (Hill and Wong 2011, p. 2).

On the other hand, Moumoutzis (2011, p. 4) argues that the discussion on 'uploading/ down/loading' has created more problems than it has resolved. He believes that the concept is useful if only it has *one face*. If the two levels interact and change simultaneously, it is not impossible to determine the direction of causality. Therefore Europeanization should be defined as the *top-down* and 'a process of incorporation' at a domestic level. He also argues that *uploading* refers to the outcome of the process. Moumoutzis (2011, p. 6) offers the following revised definition of Radaelli (2000, p. 4) by formulating the Europeanization as 'a process of incorporation in the logic of domestic (national or sub-national) discourse, political structures and public policies of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined in the EU policy processes'.

### 3.2. *Mechanisms of Europeanization*

Cowles, Caporaso and Risse (2001) suggest the ‘goodness of fit’ between the EU and the domestic level as a main mechanism for producing changes. Nevertheless, scholars argue that Europeanization can occur even without adaptation pressures through such a mechanism as *changing of domestic opportunity structures* and *framing domestic beliefs and expectations*. As the academic literature demonstrates, different scholars apply different mechanisms, and there is no uniform approach.

It is necessary to understand which mechanisms are more appropriate in the foreign policy area. Could the same mechanisms for the first pillar area be applied in the foreign policy? There is no one approach in explaining the domestic impact of the EU. Some scholars identify the institutional level of misfit to adapt to the EU measures between European and domestic arrangements as the most important variable in explaining change. Some emphasize the extent to which EU policies have altered domestic opportunity structures (Knill and Lehmkuhl, 2002). Other scholars focus on both – the institutional compatibility and domestic opportunity structures (Knill, 2001; Cowles, Caporaso and Risse, 2001; Börzel, 1999). Scholars like Checkel (2001) focus on cognitive impact of the EU on beliefs and expectations of actors to account for domestic change.<sup>4</sup>

The institution-based or sociological institutionalism argues that the main causal mechanism producing domestic changes is the *socialization* of the foreign policy representatives in the framework applying ‘logic of appropriateness’. These actors become convinced about the properness of the EU norms and, subsequently, are able to persuade those domestic actors, which are against to adopt the EU requirements. The rational choice, institutionalism, emphasizes the strategic behavior of the actors in order to pursue their preferences which are fixed.

M.E. Smith (2000, p. 617) introduces a framework for measuring change in the national foreign policy by defining the following mechanisms of domestic adaptation: (1) elite socialization; (2) bureaucratic reorganization; (3) constitutional change; (4) increase in public support. This approach includes polity and politics but not policy, therefore Hill and Wallace (2004) point on the transformed context in which member states operate - ‘habits of cooperation, accepted advantages of shared information, responses to common threats, cost saving through increased collaboration have all significantly altered patterns of national policy-making’. They consider that it is possible to redefine the national interests and identities in the context of European integration, which is sociological institutionalism or constructivism approach.

Moumoutzis (2011, p. 17) refers to the concept of ‘*strategic usage*’ according to which ‘public officials may find it useful to employ the institutional cooperation. Therefore the alternative to the socialization model is *incorporation of EU practices and procedures into the national foreign policy as a result of strategic calculation*. It is possible to construct such models without introducing the state-as-a-unitary-actor assumption and treat the preferences of different actors as a matter of empirical investigation

<sup>4</sup> Cited by Hèritier (2001, p. 4.)

(Hollis and Smith 1986, p. 273, 278) , (as cited by Moumoutzis 2011, p. 11). According to this explanation, the national foreign policy goals are not transformed as a result of Europeanization. National foreign policy makers engage in strategic calculation in an attempt to maximize the fixed foreign policy preferences and secure specific foreign policy goals. They consider the consequences of alternative courses of action (the costs and benefits) and choose the relevant EU foreign policy practices and procedures because they allow for such maximization and offer means to achieve goals more effectively (Moumoutzis 2011, p. 17).

### 3.3. *Degrees of Europeanization in foreign policy*

Hill and Wong (2011, p. 5) distinguish the following degrees of the Europeanization of the national foreign policies: 1) *significantly* Europeanized; 2) *willing* to Europeanize, but still a partial or slow process; 3) *Erratic* in the degree of Europeanization, either over time or between issue-areas; 4) *consistently instrumental* in the approach to Europeanization; 5) *resistant* to Europeanization; 6) de-Europeanizing – trying to get rid itself of any perceived restrains; 7) never significantly Europeanized.

## 4. Conclusions

The review the literature about Europeanization, particularly, in the area of foreign policy demonstrates that there is a great variety in understandings of the Europeanization concept. In order to establish the analytical framework for this study, it is necessary to draw the borders of this concept. The literature demonstrates that the national foreign policies are exposed to ‘numerous intervened and competing incentives stemming from the domestic and international spheres’ (Major 2005, p. 187). It also shows that in order to properly understand national foreign policy it is necessary to put greater attention to domestic factors, a need to ‘bring the domestic back’ (Zürn and Checkel 2005, p. 1045). The literature also shows that from the empirical research perspective it could be difficult to explore the Europeanization as a three dimensional process.

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Alexander Pfannkuche<sup>1</sup>

## **BOOM AND BUST IN THE BALTIC STATES: WHAT HAPPENED TO THESE ECONOMIES AND WHAT SHOULD BE DONE NOW?**

### **Abstract**

This paper investigates the recent economic evolutions in the Baltic States. After the Global Financial Crisis the States of Estonia, Latvia and Lithuania are facing high unemployment rates and only moderate growth perspectives. It is argued, that economic policy has restricted taking into account the constraints of small states. The recent economic strategy of internal devaluation is reviewed from a macroeconomic perspective. The main finding of this paper is that the chosen strategy is likely not helping to reduce unemployment in a short-term, but can be supportive for future growth perspectives via the enhancement of a transformation process into an innovation-driven economy.

**Keywords:** Baltic States, Economic Policy, Global Financial Crisis

### **I. Introduction**

For the past two years, the Baltic States of Estonia, Latvia and Lithuania have been caught in a fatal recession. The Global Financial Crisis (GFC) has hit these economies particularly hard: the overall output declined at a double-digit figures rate and unemployment increased. A full recovery in economic and social terms seems to be a long time off. Although contractions in Gross Domestic Product (GDP) came to an end in 2010 (Estonia and Lithuania, but not for Latvia) the future growth prospects for the Baltic States are moderate. On the contrary, the high unemployment rates in Baltic States are likely to become a persistent problem within the coming years. This paper attempts to identify the impacts of the recent macroeconomic strategies to cope with the crisis. A macroeconomic analysis is used to explain past developments and highlights feasible future strategy to regain stability and sustainability in terms of economic development. First, it is necessary to overlook the recent macroeconomic situation in the Baltic States (see table 1).

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**Table 1.** Selected Economic Indicators for Baltic States from 2009 to 2015

	2009	2010*	2011*	2016*
<b>Estonia</b>				
Real GDP	-13.9	3.1	3.3	3.6
Consumer Prices	-0.1	2.9	4.7	2.5
Current Account Balance	4.5	3.6	3.3	-3.7
Unemployment	13.8	16.9	14.8	-
<b>Latvia</b>				
Real GDP	-18.0	-0.3	3.3	4.0
Consumer Prices	3.3	-1.2	3.0	1.9
Current Account Balance	8.6	3.6	2.6	-2.6
Unemployment	19.0	17.2	15.5	-
<b>Lithuania</b>				
Real GDP	-14.7	1.3	4.6	3.6
Consumer Prices	4.3	1.2	3.1	2.5
Current Account Balance	4.5	1.8	-0.9	-3.3
Unemployment	17.8	16.0	14.0	-

\* Projections

Source: IMF (2010): World Economic Outlook, April 2011.

Following the latest forecasts of the IMF's World Economic Outlook (April 2011), GDP recovery to pre-crisis levels can be achieved around 2014/15 at the earliest. This prediction considers average output declines of 20 % in the recession years compared to future growth perspectives of 3 to 4 %.

The growth of consumer prices is projected to become positive in a very moderate way, oscillating around the European Central Banks inflation target of two percent. Before the crisis, Baltic economies were net importers with negative current account balances up to double-digit values. In 2009, the decline in imports was much stronger than the decline in exports, resulting in a positive current account balance. This crisis induced situation that should be phasing out in the next years, as imports to Baltic economies began increasing again. A profound challenge for policy makers in Baltic States will be the reduction of unemployment. Rising unemployment stopped growing at the end of 2010. For the recovery of labor markets, which should be seen as a dependent market, several obstacles can be identified, when one looks at the economic policy constraint of the Baltic States. These constraints are equal parts external (economic interconnections with no or very limited access to national policy) and internal (economic interactions due to chosen national policies) in nature. To distinguish various kinds of factors the next chapter identifies economic characteristics of small states, such as the Baltic's derived from theory.

## II. Theoretical assumptions on the size of small states

Small states, such as the Baltic States, share some inherent economic characteristics highlighted in research. On the one hand they were supposed to suffer from disadvantages resulting from the small size of their internal markets. Given this situation it is more difficult for small states to develop into a diversified economy. On the other hand small states were able to exploit quick decision-making processes and benefit from flexibility and transparency. This allows them to concentrate on global niche markets, especially in the service sector, where economies of scale are not that important. Furthermore, they have a pronounced ability to attract mobile factors of production (capital and qualified labor) and to offer favourable conditions, without having to fear countervailing measures by the heavyweights of the world economy (Dehejia and Genschel, 1999 / Katzenstein, 2003 / Qureshi and te Velde, 2007).

However, their high degree of specialization usually implies a high degree of openness and often also a strong focus of small states on a few select partners in international business (Armstrong and Read, 2002). This can contribute to a high degree of vulnerability to exogenous factors and a high volatility in terms of economic performance: a “mocha cup” effect (it takes only a light shake to make a mess of things). In the case of the Baltic States following of these theoretical assumptions are held to be true:

- Small size of markets and a medium level diversification of economy. In all Baltic States Population is below 5 Million (CIA, 2010).
- High stake in service sector. In all Baltic States Service Sector expanded to over 70 % as share of GDP (CIA, 2010).
- Flexible institutions, especially financial markets. Baltic States share low levels of regulation, corporate and business taxes and union density on labor markets (WEF, 2010).
- High degree of openness focussing on trading partners in Scandinavian and Western Europe. The degree of openness in 2009 (Export + Import/GDP) was 1.26 in Estonia, 0.91 in Latvia and 1.21 in Lithuania (Eurostat, 2010). The main trading partners (> 10 % of export or import share) in Estonia are Finland, Sweden and Germany. In Latvia and Lithuania - Russia, Germany and Poland are dominating partners in trade. Interregional trade between the three Baltic States is of high importance as well (CIA, 2010).
- “Mocha cup” effect: High volatility of GDP, unemployment and price level. From 2002 to 2008 Baltic States achieved GDP growth rates over 10 % a year and an impressive reduction in unemployment. Nevertheless, inflation boosted at double digit-figure rates. Within one year (2009) output declined and unemployment soared up to 20 % in all countries. Growth of consumer prices stopped or even became negative (EBRD, 2010).

These “stylised facts” can be interpreted as a result of the transition path the Baltic States followed after regaining their independence in 1991. The Baltic economies were hit harder by the breakup of the Soviet Union than the most other countries in Central and Eastern Europe (CEE). Structural reforms like wide-ranging price

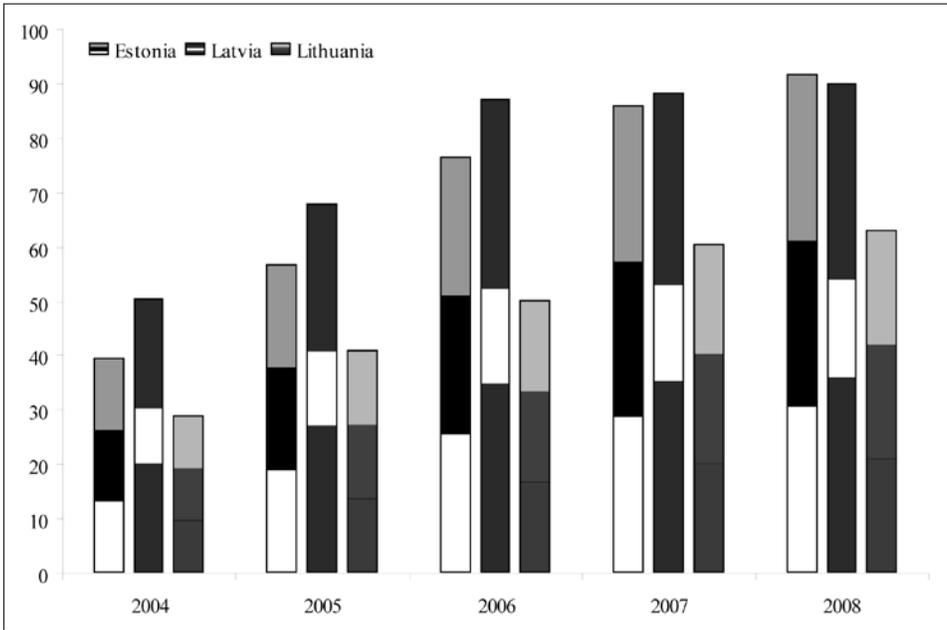
and trade liberalization and privatization were undertaken quite early and flanked by fixed exchange rate regimes. This strategy established a basis for a speedy economic recovery at the turn of the millennium. On the other hand, the implementation of the structural approach (often called 'shock therapy') released imminent dangers particularly the unregulated character of financial markets.

In the 1990's Baltic States had virulent phases of recessions and booms, including banking crisis. After entering the pre-accession stage to the Eurozone in 2004 (and for Estonia the introduction of the Euro in 2011) the pegging of the local currencies to the Euro a new boom phase began which was ended sharply at the beginning of the Global Financial and Economic Crisis End of 2008. This development will be reviewed in the next chapter.

### **III. Baltic Boom and Bust**

To understand the recent macroeconomic situation and policy decisions one has to review the last decade of the Baltic economic evolution. After the economic drawback due to the financial turmoil of the Russian Crisis 1998-99 the Baltic States quickly recovered via reorientation of business relationships: A realignment process from Russian to Scandinavian trade partners. This Nordic Integration was particularly strong in financial markets, especially in the banking sector. The sine qua non of the millennium boom was the integration process with the European Union (EU) in political (via the enlargement process 2004) and economic terms (via the entry into the EU's exchange rate mechanism in 2005). These evolutions boosted private sector confidence and business climate. The economic upswing at the beginning of the millennium expanded to a boom due to financial markets. Credit demand increases sharply because of high permanent income expectations and cheap credits offered by the supply side. The Nordic banks flooded the Baltic capital markets with euro-dominated loans valued at low real borrowing rates (Purfield and Rosenberg, 2010). As a consequence the debt position of households and corporates in Baltic States increased constantly (see Figure 1).

Figure 1. Domestic credit to private sector (in per cent of GDP)



Source: EBRD, Structural Change Indicators, 2011

Beneath the rising debt position the millennium boom in Baltic States was boosted to a high extent via Foreign Direct Investment (FDI) inflows. As can be seen in table 2, the high growth of FDI inflows accelerated within the last decade. In 2008, the FDI inward stock of the Baltic States was about five to six times higher than in 2000. Compared to GDP, the stock of foreign capital has a share of 69 % in Estonia (with 29 % of GDP outward stocks), 34 % in Latvia (with 3 % outward stock), and 27 % in Lithuania (with 4 % outward stock) in 2008. These data attest a relatively high percentage share of foreign finance in GDP. This should not indicate a significant problem. Other CEE-countries, like Poland, had high shares of FDI as well, but the combination of overall debt makes the difference.

Table 2. FDI stocks in Baltic counties

	FDI inward stock (mill. \$)		FDI inward stocks as % of GDP	
	2000	2008	2000	2008
Estonia	2.645	15.962	47	69
Latvia	2.084	11.477	27	34
Lithuania	2.334	12.847	20	27

Source: UNCTAD, World Investment Report 2009, pp. 251, 255.

The last main factor that got hit so hard within the GFC was the accelerating inflation within boom times. Inflation overleapt double digit values and pushed economy-wide wage growth. As a consequence wage growth exceeded productivity growth and led to increasing unit labor costs and decreasing competitiveness. Factors of production (Labor, Capital and Investment) concentrated on the booming non-tradable sectors, especially real estate, construction, financial services and retail. At the beginning of 2008 Baltic economies eventually overheated. This may be truer for Latvia and Estonia than for Lithuania due to its more moderate growth rates and higher absorptive capacity of its larger economy (Purfield and Rosenberg, 2010).

The slowdown of economic activity in Baltic States started before GFC became relevant outside of the United States in late summer 2008. In the first half, real activity decelerated in Latvia and Estonia due to deflation of earnings outlook in the real estate sector; the bubble started to burst. Growth rates of inflation and wages remained high, leading to a profound loss in international competitiveness. In this critical situation the GFC took off with the bankruptcy of Lehman's in September 2008. In all countries the Crisis spread its way via the financial system in a devastating way through two different channels:

- The precipitate credit crunch to investment; and
- The crash in consumption caused by debt inflation in private consumer credits.

These two evolutions were direct causes of the freeze-up of global financial flows and the decreasing volume in world trade, which impacted also domestically-owned banks. The contradiction in international trade is, of course, hard to offset for small open economies like those of the Baltic countries. Although the Baltics were net importers before the crisis, declining sales in export markets put a lot of pressure on Baltic enterprises. Each of these three above-mentioned macroeconomic problems had the potential to cause recessionary tendencies. The Baltic States were hit by all. In the case of Estonia and Latvia, it even happened simultaneously. In Lithuania, the negative outcomes of the crisis were felt first in the investment sector. In the following weeks and month macroeconomic situation worsened: bankruptcy and unemployment soared, exports decreased sharply due to the fact that main Baltic trading partners (Nordic Countries and Russia) were hit hard by the crisis themselves. Government expenditure was reduced due to declines in tax revenues which aggravated the contradiction of private demand. Raising unemployment led to decreasing nominal wages, further delimited private consumption.

In this situation the combination of external necessities (orientation toward openness to trade) and past economic frame decisions (transition via shock-therapy, euro adoption dogma) left less room for policy makers in Baltic Countries to cope with the crisis. However, the economies of Estonia, Latvia and Lithuania were able to regain macroeconomic stability and avoided a breakdown of their financial system in summer 2009. On financial markets Baltic government's assisted crisis-ridden banks with providing liquidity via lowering reserve requirements and policy rates. The fact that Nordic parent banks stood to their subsidiaries relieved pressure from banking sector as well. In the real sector the start-up in global trade helped to raise

exports and industrial production again. Nonetheless private demand remained weak and unemployment rates still high. The next chapter will discuss the possibilities for policy makers to deal with the pre-crisis situation in the context of sustainable future growth perspectives.

#### IV. Coping with the Crisis

When hit by a global recession economies with an orientation toward foreign trade often used the devaluation of their currencies to keep the worst from happening. In 2009 Poland showed how effective this instrument can still be employed. At the peak of decreasing external demand the Polish Zloty depreciated against the euro, exports remained stable and devaluation helped Poland to regain their export competitiveness. For more than one reason a devaluation of the Baltic currencies would be reasonable as well. In times of high growth the fairly uncontrolled lending activity of foreign banks, i.e. very large inflows of liquidity, resulted in an overshooting of private consumption and a spiral of demand-driven inflation combined with increasing wages. As a result, the Baltic States have lost ground in international competitiveness: Compared to 2009 performance of Baltic States in the Global Competitiveness Report (2010) decreased. Estonia lost 3 ranks (2009=32 / 2010=35), Latvia 14 ranks (2009=54 / 2010=68) and Lithuania 9 ranks (2009=44 / 2010=53).

When the Global Financial Crisis began, their economies nearly collapsed due to simultaneously deteriorating stability of the countries' financial markets and decreasing world demand. In this very situation the Baltic States were facing high unemployment and needed to regain their competitiveness, but the ability to devalue their currency is not possible under the European Exchange Rate Mechanism (ERM) II regime. Fiscal policy is both not applicable (restrictions of the stability and growth pact) and sensible in the face that external devaluation is impossible. Fiscal stimulus without devaluation of the currency could harm competitiveness once more when the goal of activating weak private demand overshoots. Even in a scenario were Baltic Economies would exhaust or exceed the ERM II fluctuation margins the devaluation of the exchange rate bears other risks, too. Taking into account the enormous euro-dominated debt positions of corporates and households (figure 1) a weaker exchange rate against the euro would dramatically reduce private sector worth. The consequences could be a new wave of bankruptcy and private insolvencies which could lead to a new financial crisis. The redundancy of the positive effect on competitiveness is another weak point in the strategy of external devaluation. Due to the high degree of imports and the high integration of Baltic producers in international value chains the exchange rate pass-through is assumed to be very high. For this and other reasons policy makers in Estonia, Latvia and Lithuania decided to pursue an alternative approach to get their economies out of the recession: an internal devaluation.

Recently the Baltic States are trying to regain their competitiveness via internal devaluation. This can only be achieved via decreasing labor costs and moderate growth of the inflation rate. Both cannot be influenced by policy makers directly, but governments can support the change in real wages with cuts in public spending,

balanced public accounts and maintaining flexible labor market institutions. Inflation in small countries is mostly influenced by demand-driven booms and import prices and is therefore an outcome of labor market processes (demand-led inflation) and world markets (imported inflation). In the recent situation this strategy might not be helpful to reduce unemployment in a timely manner. Nevertheless it offers one great advantage: The ability to restore confidence among international investors. The Baltic States greatly benefited from large FDI inflows during the last decade. Although the abrupt drop-off in FDI at the beginning of the crisis aggravated the output decline, the financial system of the Baltic States did not collapse. FDI can play a major role in the long-run evolution of Baltic enterprises via backward and forward linkages and can strengthen the ability to learn new methods of production from foreign companies. In times of globalization small states are best off with specialization in world markets and the implementation of their own innovations. In the current situation this may take some time and while innovation-driven growth is not unleashed immediately the recovery from crisis is likely to persist. Over the next couple of years the Baltic States may face persistently high levels of unemployment and a worsening in social conditions.

## V. Conclusions

The Baltic economies achieved outstanding benefits in transition within the last decade. Comparing the situation now with the Russian crisis it can be stated that within this period the economic and social conditions of Estonia, Latvia and Lithuania plainly improved. But going more into detail the past decade showed the risks for small open economies in times of globalization and uncontrolled capital markets. The Global Financial Crisis was of course an exogenous shock. But the very hard outcomes of the Crisis have to be seen alongside with internal imbalances built up in millennium boom:

- High private debt position
- Demand-driven inflation
- Loss in competitiveness

Now, within the pre-crisis situation a chance for re-structuring of the economies is possible. To regain international competitiveness should be the major goal for economic policy in the Baltic States. This means not only reduction of unit-labor-costs but to focus on innovation policies. Sustainable economic growth for the Baltic States can be achieved best with the re-structuring of the economy into an innovation-driven economy. To achieve this long-term goal the governments of the Baltic States should support entrepreneur activities in the service sector. Fiscal policy would be well advised to act anti-cyclical in order to cushion the negative economic and social outcomes of the recent recession. At the same time a national innovation strategy has to be implemented to promote private engagement in research and development. From the authors perspective only the consequently promotion of private efforts in research and developments will ensure the successful restructuring into an innovation-driven

economy. This goal will take time, but it seems to be the best way for a sustainable economic and social development in the Baltic States.

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## Part II

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# LEGAL AND HISTORICAL ASPECTS OF EUROPEAN INTEGRATION

**Marta Abula<sup>1</sup>**

## **PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION IN THE EUROPEAN UNION CONTEXT**

### **Abstract**

The purpose of this paper is to examine the procedure of interim measures in international commercial arbitration. The main purpose of applying interim measures in international arbitration proceeding is to ensure that it will be possible to enforce the final judgment. In this paper a brief analysis will be provided regarding procedural tribulations of interim measures in international arbitration. Universal legal doctrines and international practice will also be examined.

**Keywords:** international arbitration, interim measures, enforcement

### **Introduction**

This paper will address the issue of interim measures<sup>2</sup> in international commercial arbitration. Interim measure is a relief or remedy to safeguard the rights of parties to a dispute pending its final resolution.<sup>3</sup>

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<sup>2</sup> The term “interim measures” is preferred. There is a wide range of terminologies: provisional, conservatory, protective or preliminary measures. Due to its widespread use “interim measures” are rapidly identifiable. Nonetheless other expressions can be used without changing the meaning.

<sup>3</sup> Yesilirmak, Ali. Provisional measures in international commercial arbitration. Hague: Kluwerlaw, 2005: p.5.

The growth of arbitration as a dispute resolution mechanism and the necessity to protect international trade and business makes regulation of interim measures in the EU of utmost importance. As there is no minimum standard for interim measures in arbitrations taking place in the EU, there are threats not only to arbitration friendly legal environments but also to attracting foreign investment. When speaking about international business, one of the concerns of a party is a stable legal environment. Lacking the regulation of interim measure could lead to doubts about protecting the rights of party from non EU countries. Furthermore, nowadays the assets of a party can be moved easily to offshore accounts; thus, creating opportunities to act in bad faith. The concerns of non existent mutual legal environment in EU, makes this subject essential to analyze and actualize for further discussions.

Due to the complexity and extent of such subject, it is important to outline from the outset the approach to be taken. Hence, this paper will focus on three main issues regarding interim measures, notably those demanding a clear legislative framework:

1. The possibility of arbitral tribunals ordering interim measures in EU countries;
2. The relation between state courts and tribunals; and
3. The enforcement of arbitral ordered interim measures in EU countries.

The debate of the availability of arbitral ordered interim measures results, from the absence of a legal provision addressing this issue. Therefore, it is necessary to have to go one step behind and ask – Are arbitrators empowered to order interim relief in EU countries? If so, what kind of interim measures can be decided by arbitrators?

This lack of consensus creates an open space for discussion, which results in uncertainty that weakens arbitration as the best dispute resolution mechanism available in international trade.

The Latvian Civil law procedure dates back to 1998. The regulation on arbitration is set in Chapter Nr.78. Academics, as well as practitioners recognize the need to amend it in order to overcome some of its weaknesses, thus providing the Latvian legal system with a modern arbitration law.

This paper is based on arbitration practice, national laws and international instruments such as the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as the UNCITRAL Model Law) and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the New York Convention) analyses. Mainly, an analytical analysis method will be applied.

## **1. The possibility of arbitral tribunals ordering interim measures in EU countries**

It is now commonly accepted that arbitrators have the power to order interim measures during the course of arbitration. It is further stated that arbitrators are

the “*natural judge*” for interim measures<sup>4</sup>. It was argued that the “*principle of party autonomy should determine who has the authority to award interim relief*”<sup>5</sup> – that is correct whenever parties can freely choose between two different jurisdictions. Nonetheless, in the absence of an express legislative provision granting such powers, a lack of consensus emerges. This lack of consensus creates an open space for discussion, which results in uncertainty that weakens arbitration as the best dispute resolution mechanism available in international trade.

The underlying theoretical discussion as to the source of arbitrator’s powers to grant interim relief is very interesting. Are the powers to grant interim measures inherent to arbitrators?<sup>6</sup> Or such powers can only be called upon on arbitrators whenever an express legislative provision so provides?<sup>7</sup> Or acknowledging the existence of an international arbitral legal order<sup>8</sup>, arbitrators’ powers to grant interim relief are to be found on such an order? This latter approach endorses a delocalized view of arbitration which sustains that international arbitration is not bound to any national legal system.

The idea of an arbitral legal order is based on the application of the method of international rules by arbitrators. The specific feature of such rules is the systematic application of compared law resources. Upon comparison of different countries’ legal regimes, as well as of the arbitral practice developed by international arbitrators, an assessment on the existence of an undisputed acceptance of arbitrators’ powers to grant interim relief is made. Almost all legislations recognize arbitrators’ power to order interim measures. Latvian and Italian law is an exception. Equally, most institutionalized arbitration centers expressly empower arbitrators to order interim measures which, not surprisingly, result in the existence of a significant number of reported cases dealing with requests for interim relief.<sup>9</sup>

It is important to understand that the existence of a transnational arbitral legal order is not merely a theoretical issue. Such understanding has far reaching consequences in arbitral practice. In a recent landmark decision<sup>10</sup>, the French Court de Cassation (FCC) upheld that international arbitral awards are not anchored to any national legal system and consequently such awards are to be considered as international judicial decisions. In the *Putrabali* case, the FCC formulated theoretical

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<sup>4</sup> Yesilirmak, Ali. Provisional measures in international commercial arbitration. Hague: Kluwerlaw, 2005: p.49.

<sup>5</sup> Drahozal, Christopher. Party Autonomy and Interim Measures in International Commercial Arbitration. ICCA Congress Series n. 11, 2003:p.179.

<sup>6</sup> Donovan, Francis Donald. The scope and enforceability of provisional measures in international commercial arbitration - A survey of jurisdictions, the work of Unictal and proposals for moving forward. ICCA Congress Series n. 11, 2003.

<sup>7</sup> Besson, Sébastien. Arbitration and Human Rights. ASA Bulletin, Vol. 24 n. 3, 2006.

<sup>8</sup> Gaillard, Emmanuel. Aspects philosophiques du droit de l’arbitrage international. RCADI 327, 2007.

<sup>9</sup> International Chamber of Commerce Bulletin Vol. 11/1, spring 2000.

<sup>10</sup> Cour de Cassation, arrêt 1021 [29/6/2007] 1.ère chambre civile

arguments to support the enforcement in another country of an international arbitral award that had been set aside in the country where it was rendered. The FCC sustained that international arbitral awards are not attached to any national legal order, thus considering that such awards are based on an arbitral legal order.

This break in the vision of arbitration may settle the grounds towards a definitive '*coming of an age*' in the realm of international arbitration. The application of these concepts remains crucial in the current debate. One can argue that regardless of express legislative recognition, the powers to decide on a request for interim relief are called upon on arbitrators as a result of the acceptance of an international arbitral legal order, thus rendering ineffective prohibition similar to the one existing in the Italian and Latvian legislation.

Accordingly the legal framework addressing the availability of interim measures in international arbitrations taking place in Latvia shall acknowledge such understanding by expressly vesting arbitrators with the power to grant interim measures, thus providing a clear legislative framework.

Similarly, to the recent trends expressed in the legislations of different countries<sup>11</sup> and to the approach adopted by the UNCITRAL Model Law<sup>12</sup>, arbitrators shall have the competence to grant interim measures whenever requested by the parties to the arbitral proceedings.

This power shall be subject to party autonomy – arbitrating parties are free to decide whether the tribunal shall have competence to grant interim measures or not. Such provisions shall be construed as an opt-out clause. Whenever parties do not expressly exclude tribunal's powers, they will be empowered to rule on interim relief whenever requested by a party. This is in line with Article 17(1) of the UNCITRAL Model Law. This article shall provide inspiration for the Latvian legislator.

Specific features of international arbitrations also recommend that the power of arbitrators to order interim measures shall not be restrictively understood. Therefore, such powers shall be widely available. Effectively, parties to international arbitrations often come from different legal backgrounds and choose to arbitrate under a neutral regime. Parties shall be free to request from arbitrators, interim measures available in the set of rules chosen to decide the substantive dispute or to govern the arbitral proceedings. Accordingly, the legal framework shall not restrict arbitrators' powers to grant interim relief to measures available in Latvia.

The evolution that took place in the last twenty years, whether in legal regimes or in arbitral practice regarding arbitrators' powers to order interim measures remains deeply intertwined with the arguments that have been put forth by practitioners and

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<sup>11</sup> E.g. Art. - 23 of the Spanish law of arbitration of 2003, Section 25/4 of the Swedish Arbitration Act of 1999, art. - 183 of the Swiss Private International Law Act, art. - 1041 of the German ZPO, art. - 593/1 of the Austrian Arbitration Act. In the Dutch arbitration act, art. - 1051 and in the English arbitration act 1996 [hereinafter EAA of 1996] – Arbitrators' competence to grant interim relief depends on a previous party agreement.

<sup>12</sup> Art. - 17/1 of the UNCITRAL Model Law on International Commercial Arbitration.

commentators. In his work on provisional measures, Yesilirmak<sup>13</sup> has rounded up at least nine arguments providing a strong support in favor of the availability of interim measures from a tribunal. Undeniably, in most cases, tribunals will certainly be the adequate forum where to obtain interim relief.

Whenever parties agree to have their disputes settled by means of arbitration, it is understandable that for most of the interim measures requested arbitrators are better suited to decide the opportunity and relevance of the requested measures.

In addition, one of the reasons why parties choose to arbitrate is the confidentiality that arbitral proceedings may provide. The disclosure of a request for an interim measure before a court is likely to endanger the desired confidentiality. To support the competence of arbitrators to grant interim measures definitely embraces a view where arbitrators and tribunals are not diminished in relation to courts. In international arbitrations, tribunals are the appropriate forum to decide the disputes and they shall have the power to decide all questions submitted to them. The already mentioned “inherent debilities” shall be fought with a closer interaction with courts, recognizing parties the right to request interim relief in two different jurisdictions depending on their needs.

Much of the analysis has been centered in interim measures seeking the attachment of assets, once some of the inner limitations of arbitration are here particularly felt. Notwithstanding, in international arbitral practice requests for an effective seizure of assets are not amongst the most requested measures<sup>14</sup>.

## 2. The relation between state courts and tribunals

The above considerations lead us to the question of which “*fora*” shall be deemed competent to decide on a request for interim measures, and to the relation between courts and tribunals, as correctly noted, “*swings between forced cohabitation and true partnership.*”<sup>15</sup> Legislators’ task is to find the best formula to achieve balance between these two jurisdictions by providing the most suitable legal framework for parties to international arbitrations.

The main question is if national courts can decide a request for interim measures in presence of arbitration agreement and the tribunals’ power to order interim relief?

To recognize the competence of tribunals to grant interim measures provides two options:

- To exclude courts’ competence to decide any request for interim measures, thus supporting an exclusive arbitral jurisdiction; and
- To decide for a shared competence of jurisdictions.

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<sup>13</sup> Yesilirmak, Ali. Provisional measures in international commercial arbitration. Hague: Kluwerlaw, 2005: p.49-54.

<sup>14</sup> International Chamber of Commerce Bulletin Vol. 11/1, spring 2000.

<sup>15</sup> Redfern, Alan, Hunter, Martin et Allia. Law and practice of international commercial arbitration. London: Sweet and Maxwell, 2004: p.7-01.

The moment when the request for interim relief is formulated is relevant. The request may be prior to the definitive settlement of the tribunal or, during the course of arbitral proceedings. At first sight, prior to the settlement of the tribunal, courts' exclusive competence seems the only solution. Nonetheless, in institutionalized arbitration, different approaches may be taken. For instance, the ICC offers arbitrating parties under its procedural rules a pre-arbitral referee.

The first hypothesis does not provide an effective solution and is not an elected solution in any legislation. In fact, it does not appear to be a wise legislative solution to rely exclusively on tribunals to obtain interim relief.

A cursory approach could consider such solution as the most favorable towards the arbitral jurisdiction, therefore strengthening arbitrators' powers. That solution might even have the opposite effect to what would be sought by the legislator.

To support tribunals' exclusive jurisdiction to grant interim relief would undeniably weaken the possibility of a party to avail of some important interim measures, such as the seizure of assets with a third person (e.g. the attachment of bank accounts). Moreover, for strategic legitimate reasons, parties to arbitral proceedings may prefer to request interim relief from a court. For example, in situations where the requested measure is so urgent that a court may prove to be a more appropriate venue to obtain the requested relief. This is also present in cases where a party to the proceedings needs the requested measure to be ordered "*ex parte*".

If the legislative framework were to provide that, after the tribunal is constituted the only "*forum*" where to request interim measures were the arbitral one, parties might find that arbitrating in such a venue could deprive them of some powerful measures in order to protect their rights. Consequently, interim measure shall be available in both "*fora*". Courts and tribunals shall have concurrent jurisdiction to rule on applications for interim relief.

One point is now reasonably clear - the fact that a party in an arbitration agreement may request an interim measure to a court, does not in any sense, constitute a waiver of the arbitration agreement. Notwithstanding the fact that a request for interim measures was made to a court, parties shall have their substantive dispute settled by arbitrators according to their prior agreement. This principle is set forth in the Article 9 of the UNCITRAL Model Law.

The shared competence between courts and tribunals to rule on a request for interim measures may be organized under two different approaches:<sup>16</sup>

- The free-choice model; and
- The court-subsidiarity model.

The free-choice approach is the model underlying the UNCITRAL Model Law and has been adopted in some countries<sup>17</sup>. This model states that, the party requesting interim relief can freely choose between the two available jurisdictions.

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<sup>16</sup> Schaefer, Jan K. New Solutions for interim measures of protection in international commercial arbitration: English, German and Hong Kong law compared. Available in [www.ejcl.org](http://www.ejcl.org), 1998.

<sup>17</sup> E. g. in Germany.

Section 1033 of the German ZPO states that is not incompatible with the arbitration agreement for a court to order an interim measure of protection. German law does not restrict parties' right to address the court's obtainment of a decision regarding interim measures, thus leaving within the sphere of party autonomy the decision regarding the election of the most convenient "*fora*".

More restrictive seems to be the court-subsidiarity approach. This approach can be visible in the EAA of 1996.<sup>18</sup> Section 44/5 states that "In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".

Apparently, for a court to have competence to decide a request for an interim measure, one or both conditions have to be fulfilled: whenever the tribunal has no power to order such relief or, if the tribunal is unable to act effectively. Consequently, the party applying to court has to overcome what can be described as an "*effectiveness*" test. As Schaeffer<sup>19</sup> noted, the court-subsidiarity approach shifts interim measures as far as possible to the realm of arbitration notwithstanding. Two critics may be endorsed to this approach.

Firstly, the "*effectiveness*" test may act as a burden to the applicant for interim relief. Not only will the party have to prove the requirements of the measure requested, the applicant will have to prove that the application to court is more effective than the resort to the tribunal as well. In practical terms, it may not be an easy task to justify why a party finds that an application to court may be more effective than a demand for interim measures from a tribunal.

Secondly, there is the issue of certainty. What if a court renders assistance and latter on it is found that the resort to the tribunal would be as effective as the resort to the court. Will such decision be set aside?

Consequently the desired approach shall be the free-choice model because it is the one that better serves party autonomy. It shall be the applicant party deciding which "*fora*" best suits the needs for the requested interim relief. As already seen, numerous reasons may be invoked by the parties to request measures from a court. Whether they are tribunals' "inherent debilities"; or the need for an urgent procedure which is better decided in court; or even for pure strategic reasons, parties shall have the possibility requesting the intended measures before a court.

An important remark can be addressed to this approach. It is said that a party may try to sabotage the arbitral proceedings by applying to courts.<sup>20</sup> That is undeniable, and the legal framework shall set clear rules to prevent any dilatory intentions such as the imposition of penalties to parties acting with "*mala fide*" by enabling courts to

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<sup>18</sup> Court of Appeal [civil division], 24/05/2005, EWCA Civ. 618, 2 Lloyd's Rep 494 [Cetelem S.A V. Roust Holdings].

<sup>19</sup> Schaefer, Jan K. New Solutions for interim measures of protection in international commercial arbitration: English, German and Hong Kong law compared. Available in [www.ejcl.org](http://www.ejcl.org), 1998.

<sup>20</sup> Yesilirmak, Ali. Provisional measures in international commercial arbitration. Hague: Kluwerlaw, 2005: p.7.

request appropriate security in connection with the requested measure; or by ruling on a duty to disclose immediately to the tribunal any interim measures requested to courts.

The legal framework for international arbitration shall ensure that, once the essential choices are made, parties will be free to shape the proceedings according to their needs. The Latvian legislator should consider the adoption of the free-choice model as the best way to set the standard for international arbitration regarding this particular issue.

### 3. The enforcement of arbitral ordered interim measures in the EU

Among the important questions when addressing the availability, scope and extent of interim measures in this context, is the possibility to enforce such arbitral decisions. The widespread recognition of arbitrators' powers to grant interim relief in international arbitrations, leads to the question of the enforceability of their decisions.

One can argue that, decisions rendered by international arbitrators are often complied with and therefore, no need for enforcement procedures will often be necessary. Moreover, the fact that arbitrators may draw negative inferences from parties' failure to comply should suffice to prevent a party from disrespecting the arbitral ordered relief. Although in most cases this may be correct, it is also true that in some situations it may not be enough to protect parties seeking interim relief from arbitrators.

In fact, once tribunals lack the power to enforce their decisions, especially when such enforcement is envisaged abroad, the need for assistance of national courts of the State where the enforcement is sought may reveal to be fundamental.

The possibility of having decisions on interim measures covered by the mechanisms available in the New York Convention has been the subject of discussion. For some authors, such decisions cannot be considered "awards". For example, final and binding decisions are not enforceable under the New York Convention.<sup>21</sup> The recent trend considers decisions on interim measures as awards (interim awards – once they do not decide the substantive issue in dispute) which, accordingly may be enforced or set aside in courts. Differently, other commentators will argue that such decisions shall be considered awards and consequently can be enforced under the

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<sup>21</sup> Karrer, Pierre. Interim measures issued by arbitral tribunals and the courts: Less theory, please. "International arbitration and the courts: The never ending story", Ed. Albert Jan Van Der Berg, 2000: p.108, Redfern, Alan, Hunter, Martin et Allia. Law and practice of international commercial arbitration. London: Sweet and Maxwell, 2004: p.7-16, Carlevaris, Andrea. The enforcement of interim measures. "Interim measures in international commercial arbitration", Association for International Arbitration, 2007: p.19-20.

regime of the New York Convention.<sup>22</sup> The lack of consensus demonstrates that the regime foreseen in the New York Convention is not able to provide an undisputed mechanism on which parties to international arbitrations can rely to enforce decisions on interim measures.<sup>23</sup>

In the 2006 amendments to the UNCITRAL Model Law this issue was addressed and the result was article 17 H) and I). Article 17 H)/1 states that interim measures issued by tribunals shall be recognized as binding and therefore, enforceable irrespective of the country where such enforcement is sought. A wide principle of recognition and enforcement of decisions on interim measures is provided in UNCITRAL Model Law. This strong statement avoids the question of labeling such decision as an award or as an order or any other figure and therefore, is suitable to become an undisputed principle on this subject once it is adaptable to different legal judicial traditions. Article 17 H) /2 foresees the duty to disclose all information to the competent court, and /3 rules on the possibility of courts demanding proper security. In addition to the criteria set forth in Article 36, new grounds for refusal are now provided under Article 17/I. The intention of the drafters was to provide further grounds for refusal.

The main criticism to be addressed to this approach is the philosophy underlying the decision. In fact, the grounds set forth in the New York Convention were thought to be applicable to final awards. The need for enforcement of interim measures shall follow a different approach. Decisions on interim relief demand urgent implementation otherwise its effects are likely to be lost. On the other hand, such decisions are provisional by nature, meaning they totally depend on the arbitrations' outcome; therefore the control of such enforcement shall not be as tight as the one foreseen for final awards.

Bearing such characteristics in mind, a speedy mechanism for implementation should have been foreseen. Probably the best way to achieve such a result would be through an amendment to the New York Convention.

In the EU context, the *Van Uden Case*<sup>24</sup> is important. In this case, the Rotterdam court was asked to award interim payments in respect of a debt claim that was being determined in arbitration. The European Court of Justice ruled that this application for provisional measures was a "civil and commercial matter" for the purposes of the Regulation, and jurisdiction should be allocated under Article 31 (provisional, including protective, measures), notwithstanding the substantive arbitration proceedings on foot.

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<sup>22</sup> Kojovic, Tijana. Court enforcement of arbitral decisions on provisional relief – How final is provisional? *Journal of International arbitration* Vol. 18, n. 5, 2001.

<sup>23</sup> Yesilirmak, Ali. *Provisional measures in international commercial arbitration*. Hague: Kluwerlaw, 2005: p.260-262.

<sup>24</sup> European Court of Justice Case C-99/96 – *Van Uden v. Deco-Line*.

## Conclusion

The regulation of possibility of arbitral tribunals ordering interim measures in EU countries varies diversely. There is no clear concept of enforcement of interim measures in EU countries if the decision had been made in a non EU country. There is no strict line in competence between arbitrations and state courts in EU. In general, there are too many unresolved issues concerning interim measures in the context of EU, thus making unpredictable and for international trade and business unfriendly legal environment.

This paper sought to address main issues that have not received much attention from Latvian commentators, mainly due to the fact that Latvia can not be considered as a relevant venue for transnational arbitrations, in a moment when the need for change or amendments to the actual legislative framework is undeniable to fully integrate in EU.

The suggestions made, far from being definitive, aim to settle further grounds for discussion in the context of Latvia to completely integrate in EU. Internationally discussions among academics and practitioners are already in limelight thus proofing the importance of subject and the need to change the confusing regulation existing in different EU countries.

The underlying idea is for Latvia to provide parties in international arbitration with a clear legislative framework thus aiming to become an attractive forum among other EU countries in the context of international arbitration. In the context of EU there should be a minimum international standard for all EU countries thus making the international trade and business relationships with non EU parties effective and more predictable. Interim measures do not concern only legal issues but strongly affect economical growth of EU and each of its member states as they can prevent useless awards without an opportunity to enforce them. Undeniably, every EU country has a unique legal background that should be respected; thereby, discussions on the subject are necessary on harmonization of regulation on interim measure in international arbitration.

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**Diana Apse<sup>1</sup>**

## **THE DEVELOPMENT OF TRENDS IN UNDERSTANDING AND APPLYING THE SUBSIDIARY SOURCES OF LAW**

### **Abstract**

This article examines such subsidiary sources of law, as the dissenting opinion of judges and ombudsmen's opinions and conclusions. The paper examines the development in the understanding and application of the sources of law as well the growth in their significance, thus contributing to the classification of the sources of law.

The author offers her own classification regarding the place of the subsidiary sources in the hierarchy of the sources of law. The above-mentioned sources sometimes act as a doctrine, while in other cases they approach the judicature. Depending on the significance, they can also have the status of a primary source.

This report also examines the change in the attitude of the professional judicial culture over recent years, regarding their application of sources, their introduction and publishing of the instances where it had not previously taken place. The author deals with the psychological, subjective, and qualitative aspects of law source development.

**Keywords:** dissenting opinion, ombudsmen opinion (conclusion), judicature – case-law

### **Introduction**

The principles of equality, freedom, and justice require daily weighing of the preferred values. Within these principles limits are found the following features of the current age: equality rather than the sameness of rights; otherness and limits to its proposition and the aggressive imposition of one's values.

Assistance to the complicated legal questions is provided by the classic sources of law: laws, general principles of law, customs, judicature, doctrine, and documents leading to the creation of a legal norm. However, larger significance is acquired

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through the application of other subsidiary sources in the development of judicial thought.

The latest conclusions regarding the classification of the sources of law state that the sources of law are to be divided into two categories. The first category is the self-contained sources of law, which include primary sources (such as regulatory acts) and additional sources such as general principles of law, common law, EU, ECHR, Constitutional Court judicature. The second category represents the subsidiary sources comprising of judicature, doctrine, and documents leading to the creation of a legal norm. In the author's opinion, the group "and other subsidiary sources of law" should be distinguished as supporting aids.

Besides, the conclusions about the classification of the sources of law are changing and developing along with an understanding of the classification. As it follows from the conclusion of Daiga Rezevska, Associate Professor at the University of Latvia, judicature represents effective, legal, consequential, and similar court decisions. Judicature, both in the courts of general jurisdiction as well as the Court of Justice of the European Union, European Court of Human Rights, and Constitutional Court, is a source of law in every branch of the judicial system of Latvia. It does not matter whether the legislature has formulated its status in a written legal act, as the source of law, or a democratic and law-governed state is the sovereign rather than the legislature. The CJEU, ECHR, and the Constitutional Court judicature is the source of law with a binding power, which requires an indefinite range of people and its applicability is made effective by force (if the court, when making the judgement, has not taken this into account, a higher instance court will quash the judgement). The judicature can then be applied several times – in all cases when the respective judicial issue is faced. Thus, the judicature of these courts is to be included in the subsidiary source section of the self-contained sources of law, next to the other generally binding unwritten sources of law.<sup>2</sup> (Rezevska, 2010, pp.28, 31.)

The third group, "Other supporting aids," could comprise of the dissenting opinion of judges, ombudsmen conclusions, and other sources. Other sources includes; the decisions of the judges' collegiums of the Constitutional Court, Court Senate Assignments Sitting decisions, and individual decisions by the state notary of the Enterprise Register, which have been commented by well-known branch experts.

In this paper, the author will examine closely the dissenting opinions of judges, to check whether they belong to the third group. This analysis will be based on the experiences within Latvia.

Julia Laffranque, Associate Professor of European Law at the University of Tartu and judge at the European Court of Human Rights, has indicated that the Anglo-American judicial literature distinguishes disagreement and the dissenting opinion. During the proceedings, a disagreement might suggest that a disagreement of one or several court members to the majority opinion. The disagreement by a judge may, however, not always create a dissenting opinion, i.e., the formulation

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<sup>2</sup> Rezevska (2010, pp. 28, 31). Cf. Iljanova (2003, p. 19).

of the disagreement as a dissenting opinion. In the Federal Constitutional Court of Germany (*Bundesverfassungsgericht, BverfG*), a distinction is made between the substance of the dissenting opinion (*abweichende Meinung*) and its presentations as an opinion, i.e. its procedural form (*Sondervotum*). The concurring opinion (German *abweichende Meinungen der Begründung*, French *opinion concordante*) is an opinion where the judge agrees with the result of the judgement, but not with the reasoning<sup>3</sup> (Laffranque, p.163.).

## Dissenting opinion in the Constitutional Court

Latvia's Constitutional Court practices does not publish many judges dissenting opinions. However, since 1997, dissenting opinions have been published in fourteen cases.<sup>4</sup> While analyzing the previously mentioned opinions by their contents and classifying them, two collegial disagreeing dissenting opinions can be found (*Election* case no. 2000-03-01 and *Free-port* case no.2007-11-03).<sup>5</sup> In these opinions, judicial policy prevails over the judiciary's conclusions and doctrine. In one case - no.2002-20-0103, the so-called *State Secret* case, disagreeing opinions can be found by judges Lepse, Ušacka, however, not collegial ones. In these dissenting opinions, the prevalence of the doctrine is visible. Further on, there are disagreeing dissenting opinions in two cases 2003-04-01 and 2003-05-01 where judge Lepse explains the unacceptability of the *action popularis* idea, in the context of the constitutional complaint dominated by the doctrine. The disagreeing opinion by judge Jelagins, on the position of an international agreement in the hierarchy of legal norms in case no. 2004-01-06, is prevailed by the doctrine. Then there is the disagreeing opinion by judge Jelagins, in the case on the election right restrictions – case no. 2005-13-1006, where the doctrine and judicial policy stand out remarkably. This is followed by judge Branta's disagreeing opinion in *Maternity allowance* case no. 2006-10-03 mostly dominated by judiciary conclusions and the doctrine. After that there is the disagreeing opinion by judge Balodis, in the so-called *Lepse* case no. 2007-03-01, that can be considered an essential contribution to the teaching of judicial method, as the majority opinion supports the correction of shortcomings of judicial policy character and the *contra legem* development method. Judge Balodis sees the opportunity to follow the *extra*

<sup>3</sup> Laffranque (2003, p.163), the author also indicates that the general term “dissenting opinion” (Estonian *eriarvamus*) is used to denote both the dissenting and concurring opinion. The Act on the legal proceedings for the constitution revision distinguishes the judge who does not agree with the court decision and the judge who does not agree with the reasoning behind the formation of a verdict. Terminologically, no distinction is made between the contents of the dissenting opinion and its procedural form. In Estonia it might be necessary to introduce a new term to denote the dissenting opinion in its general sense and differentiate more clearly between the disagreement and dissenting opinion, *ib*, p. 166, see also Black's Law dictionary (1979), also Roellecke G. *Sondervoten* (2001, p.365).

<sup>4</sup> See for more: Apse (2007, pp.101-111).

<sup>5</sup> Here and further on with case numbers, <http://www.satv.ties.gov.lv/lietas> (examined 20.05.2011).

*legem* method (the law-imminent development of law) and offers to equal the legal situation to the one governed by the disputed norm. Besides, this solution is more compliant with the power distribution requirement.

This list of disagreements is continued by the disagreeing judge Kruma's opinion in the *Border agreement case* no. 2007-10-0102 dominated by the doctrine. This dissenting opinion by itself represents an outstanding doctrine.

Further there are the disagreeing opinions by judges Balodis and Skudra in the *Freeport case* no. 2007-11-03. These opinions have been severely criticized in the doctrine for preferring the grammatical wording of the norm to fundamental rights. The doctrine stresses the need to establish the contents of the norm, as a general principle of law, by applying the methods recognized by law theory and thus, restricting the development of the fundamental rights content.<sup>6</sup>

The disagreeing opinion by judge Kruma in the *Maskavas Street case* no. 2008-03-03 has been praised in the doctrine as the opinion states that "...in the context of the current constitutional law theory the references to foreign judicature, particularly the ones made to acquire support to one's approach, may have questionable legitimacy. The decisions of constitutional courts must comply with the traditions and values of national law systems." (Čepāne, 2010, p.86)

This is followed by the disagreeing dissenting opinion by judge Jelagins in case no. 2008-35-01 – the so-called *Lisbon agreement case* dominated by the doctrine. The chronology is continued by the partly disagreeing dissenting opinion by judge Kutris in the case of the *State pension and allowance disbursement* no. 2009-44-01, where he disagrees with a part of the argumentation reasoning that the legitimate expectation assessment criteria, indicating that in legal relations that affect a child and in all actions regarding children, the children's rights and interests have priority. For the time being, the chronological list of dissenting opinions is concluded by the disagreeing opinion by judge Balodis in the *Public Procurement case* no. 2009-77-01, where the judge substantiates that the court should have continued the consideration of the compliance with the disputed Article 92 of the Constitution. The opinion is deeply rooted in previous law practice, developed by the Constitutional Court.

All together dissenting opinions can be found in thirteen cases of the Constitutional Court; in one case there is a partly dissenting opinion. Most often, the opinions expressed considerable objections to the majority judgement as well as innovative ideas on how an outstanding doctrine, in its interaction with the corresponding judicature, exemplifies the might to correct legislature errors and prevent further errors in judgement. The biggest added value is the facilitation of debates and interaction between the subsidiary sources and their representatives, leading to the crystallization of valuable conclusions in judicial thought.

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<sup>6</sup> See for more: Pleps (2010, p.51), Čepāne (2010, pp.79-86).

## Dissenting opinions in the Supreme Court

Outside the Supreme Court, signs that the the institute of the dissenting opinion needing updating were first heard in 2005, when the Chairman of the Supreme Court, Andris Guļāns, indicated at a conference that “in the effective legislation there are no norms that would govern the opportunity for the judge who has stayed in the minority during the reasoning to express his dissenting opinion in the procedural order. The issue has a particular topicality in the Senate that represents the final instance of court.” (Guļāns, 2005, p.6).<sup>7</sup>

Only the Amendments to the Civil Procedure Law of 25 February, 2009, part 5, section 472, envisaged<sup>8</sup> the opportunity to express one’s dissenting opinion in a written form within 15 days after the compilation of a full text of the judgement; the dissenting opinion must be enclosed with the case. The amendments do not provide for the introduction of compulsory publication of dissenting opinions with the Senate judgements that have been made in enlarged composition.

This is followed by the dissenting opinion of Aldis Laviņš in case no. SKC-11/2010, which was adjudicated in an enlarged composition on 12 May, 2010.<sup>9</sup> The opinion states that the civil right principle, positivised in section 1003 of the Civil Law, limits the application of the principle of defending the acquirer in good faith that follows from section 994 of the Civil Law and section 1 of the Landbook Law. Consequently, in accordance with section 1041 of the Civil Law, the legal owner, having lost his possession as a result of a criminal act is entitled to reclaim it, even from the third acquirer of the possession in good faith. Thus, it can be agreed through the appellation instance judgement, that the claim is to be satisfied, such as the A.S.’s heir is entitled to claim ownership to the contested flat and even if the condition that the defendants were the acquirers in good faith, cannot be used an obstacle. This dissenting opinion is to be classified as a disagreeing opinion that uses the conclusions from four judgements, three doctrines, commentaries, and two supporting aids – laws of another country and the research on the need for modernizing the property law.

Then comes the dissenting opinion by Judges Zagere and Briede on the judgement by the Civil Court Chamber of the Supreme Court of 29 January, 2009 in the claim of N.L. against the Joint-Stock Company “Pro Kapital Latvia” on the recovery of the remuneration for work and the counter-claim by “Pro Kapital Latvia” on declaring the regulations of appendix no.3 to the employment contract ineffective (case no.SK-157/2010, 21 February, 2011). The dissenting judges have indicated that the substantiation by the cassation case claimant has to be considered well-grounded. The substantiation states that the court of the appellation has wrongly qualified the agreed method of remuneration, named the “commission,” as an accomplishment or

<sup>7</sup> Guļāns (2005, p.6), see also Apse D. Dissenting opinions and subsidiary sources of law. (In Latvian.) Delivered on 25 October, 2005 in the congress “Letonika”, further developed into Apse (2007, pp.101-111).

<sup>8</sup> Amendments to the Civil Procedure Law. Latvijas Vēstnesis, 25.02.2009, no. 31(4017)

<sup>9</sup> Jurista Vārds, 28.09.2010., no. 39(634)

piece wages. The appeal court has not attempted to clarify the contents of the notion “work remuneration”. Due to the failure to carry out the judicial analysis of section 59 of the Labour Law, to substantiate the judgement, the appeal instance court has indicated the arguments are not only incompliant with the meaning of the aforementioned norm, but also obviously contradict it. As a consequence, the defendant has been dismissed from fulfilling the obligations envisaged in the employment contract without legal grounds. A doctrine has been used – Balodis K. “Introduction to civil law”.<sup>10</sup> The above-mentioned opinion is classified as a collegial dissenting opinion.

The dissenting opinion by Judge Salenieks is to be appreciated. The senator does not agree with the conclusion of the court judgement stating that the establishment of a legal fact is necessary to determine the status of a politically repressed person. This is to be adjudicated according to the special adjudication procedure envisaged by chapter 37 of the Civil Procedure Law, as such a case on establishing the legal facts have legal significance.<sup>11</sup> In this dissenting opinion, the Judge has used the following sources: four judgements of the administrative department of the Senate, one judgement of the Federal Social Court of Germany for comparison, commentaries to the Civil Procedure Law, commentaries by German law scholar Eyer mann, two judgements of the Constitutional Law (Constitutional Court judgement clarifying the notion of “fair trial” from Articles 92 and 1 of the Constitution, the judgement of the Constitutional Court on the contents of the principle of proportionality), Levits’ doctrine on the above-mentioned principle, Neimanis’ conclusion, and Iljanova’s doctrine. The judge indicates that the results of issuing an administrative act, favourable for establishing the status of a politically repressed person, are subject to the administrative court, rather than the court of general jurisdiction. According to him, the argument that a specific case had to be adjudicated, as the one on issuing a favourable administrative act is not valid. This dissenting opinion could be classified as a partially dissenting opinion.

## Ombudsman’s conclusions

Selective examination of the Ombudsman’s conclusions over the period of the past three years suggests that they have had considerable significance in the provision for effective law. The questions addressed by the Ombudsman indicate the necessity for a complex solution to certain problems, not just for a fair solution in individual situations. For example, following the ombudsman’s conclusion the order for the registration of children for pre-schools will be significantly changed in Riga, as it can

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<sup>10</sup> see Jurista vārds, 5 April, 2011, <http://www.juristavards.lv/index.php?menu=auth&cid=228072> (examined 20.05.2011.)

<sup>11</sup> (SPC-4/2011, 14.03.2011 in civil case no. C33157207 regarding the protest of the Prosecutor General of the Republic of Latvia against the judgement of the Riga District Court of 28 December, 2007 on the V.P. application for establishing a legal fact.) <http://www.at.gov.lv/files/archive/departament1/2011/spc-0004.pdf> (examined 20.05.2011).

be seen from the draft binding regulations; “Order for the registration, admission and dismissing of the pre-school age children in the municipal educational institutions of Riga that implement pre-school education programmes” by forming one queue instead of the four-step one. Besides, the registration applications will no longer have to be systematized by the year of birth, but rather by one objective criterion – the registration date.<sup>12</sup> Thus, the Ombudsman’s recommendations have been followed, suggesting that the admission of children should be reconsidered to avoid the discrimination, by the year of birth, because the provision of a pre-school place for children born in the final months of the year had become problematic in some parts of Riga.

A significant answer has also been provided to the issue of signing of an employment contract by an employer with the help of internal regulations and orders, entitled to limit the possibility of expressing one’s national and religious convictions. Moreover, in specific cases it must be assessed if an employee has violated the regulations on the car design and use, by locating a flag on the company car.<sup>13</sup>

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<sup>12</sup> <http://www.kasjauns.lv/lv/zinas/28034>

<sup>13</sup> The rights for free expression of one’s opinion envisaged by the Constitution of Latvia for the inhabitants of the country are not absolute and upon signing the employment contract the employer is entitled to decrease the possibility of expressing one’s national or religious convictions with the help of the internal regulations and orders, as it was indicated by the Ombudsman’s Office. It has been reported that the company *Latvijas Pasts* has dismissed a driver for keeping a Russian flag in the company car and the decision has been motivated with the breaches of the unified company car design and internal regulations that prohibit the keeping of the belongings not directly related to the work duties in the work place. The legal consultant of the Ombudsman’s Office dealing with the discrimination prevention Gunta Bērziņa explained that when signing the employment contract the employee undertakes to do the agreed work and follow internal regulations that entitles the employer, with the help of internal regulations and orders, to determine both the forms of work that limit the possibilities to express one’s political or legal convictions as well as the company car design and order for using the car for the work purposes. Consequently, if the employee violates internal regulations, in accordance with section 90 of the Labour Law the employer is entitled to remark on this or express a reprimand, however, in the case of a significant violation the employer, in accordance with point 1 part 1 section 101 of the Labour Law, shall be entitled to break the contract. However, Bērziņa stresses that in the case of *Latvijas Pasts* it should still be considered if the employee has violated the regulations regarding the design and use of the company car by locating the flag on the car. It must be admitted that if the dismissed employee had indicated the conditions that could serve as a basis for his direct or indirect discrimination, the employer’s duty would be to prove that the different attitude is based on objective conditions not connected with the forbidden criterion – in this case – the political conviction. As it was reported, the case in *Latvijas Pasts* was found as a result of the campaign by a national radical Latvian youth organization and Internet websites last spring urging to take pictures of the vehicles decorated with Russian symbols – the Russian flag or the so-called George’s ribbon that belong to the persons, in their belief, disloyal to Latvia. In one of the photos published in the Internet there was a *Latvijas Pasts* car with a Russian flag above the instrument panel. Although the campaign took place in spring in connection with the celebration in Latvia of the Victory Day recognized in Russia on 9 May, the passion about the taking of photos of vehicles started anew when in one of the sites the personal data of the photographed car owners appeared. *LETA, 08 February, 2010.*

The Ombudsman has been entrusted to assess not only justice issues, but also the ethical aspects of state actions in the protection of individual rights. For this reason, a much larger publication of the thesis of the Ombudsman's conclusions, in special collections (certainly by protecting the sensitive data) or electronically, would be important (similar to the judicature conclusions of the Supreme Court and Constitutional Court). This concerns not only the issues that have gained wider public resonance<sup>14</sup>, but also the ones that contain conclusions that would facilitate faster socialization of rights (Rehbinder, 2000, p.101). A larger publication on the scale of the Ombudsman's opinions would contribute to the creation of the understanding of law that is not alienated from the people and would diminish legal nihilism<sup>15</sup> as the final report on the year with the review of the most important conclusions is to a certain extent belated. The Ombudsman as expert's conclusions have a consulting, however not always decisive, role in the cases of the Constitutional Court.<sup>16</sup> Thus, the State Revenue Service disregarded the Ombudsman's appeal to discontinue illegal collection of taxes, not envisaged by the law. The author considers that the absence of a reaction hereby is an expression of the lack of legal culture and nihilism on the part of the institution. The Government has indicated that it will not interfere in the conflict as persons have to contest administrative acts to the Director General of the State Revenue Service and afterwards at the court.<sup>17</sup> Before the report of 2010, the Ombudsman presented his vision of the previous period.<sup>18</sup> In the dissenting

<sup>14</sup> [http://www.tiesibsargs.lv/lat/petijumi\\_un\\_viedokli/?doc=278](http://www.tiesibsargs.lv/lat/petijumi_un_viedokli/?doc=278), for more see the conclusion in Gulbis' case as well as the conclusion in the case of journalist Nagla stating that „the freedom of speech comprises journalists' rights not to disclose the source of information. Only the court, by observing the principle of proportionality may require the disclosure of the source of information to protect essential interests of a person or society,” in the conclusion of the Ombudsman's Office. The Ombudsman also indicates that by conducting the search in the residence of journalist Nagla and „substantiating it with the aim among others to find the information on the acquisition and spreading of the XML files of the EDS data base, the claimant by strengthening the evidences and evading the imposing on the journalist the disclosure obligation on the journalist through the court, has accessed the information source identity.” The Ombudsman indicates to the claimants that further on, when adopting decisions, along with the special norms “section 12 of the Criminal Procedure Law must be taken into account providing that the criminal procedure shall be conducted by following the internationally recognized human rights and not admitting unjustified imposing of criminal procedure obligations or impropotional interference in the person's life”, cf. [www.diena.lv](http://www.diena.lv) 4 October, 2010.

<sup>15</sup> see for more: Osipova, Roze (2007, p. 44).

<sup>16</sup> See e.g. case no. 2010-50-03 on the contents of the rights for the expression of religious opinions, <http://www.satv.tiesas.gov.lv/lietas> (examined 20.05.2011).

<sup>17</sup> <http://www.delfi.lv/news> (examined 29.03.2011).

<sup>18</sup> In many cases the Ombudsman's recommendations and conclusions are taken into account, however, in the author's opinion still a long period of time is to pass before the Ombudsman in Latvia becomes as respected official as the institution is in the Nordic countries where it has been acting for several decades or even hundreds of years. Although the recognition of the Ombudsman's institution is increasing slowly, there is also a positive trend, i.e., inhabitants acquire increasingly bigger understanding about the issues with which they can address the Ombudsman for assistance. <http://www.tiesibsargs.lv/lat/publikacijas/runas/?doc+655> (examined 19.05.2011).

opinions and Ombudsman's conclusions the interests of generality, effectiveness of the proceedings, and development of laws, as objective criteria, prevailed over the psychological and subjective ones (legal independence guarantees of the decision adopter and freedom of conscience). This is of particular importance under the conditions of unstable judicial culture.

## Summary

1. The dissenting opinions of judges act as an indicator and initiator of changes in court practice. They serve more as an instructing commentary that adjusts creativeness and law policy.
2. Dissenting opinions of judges leave a trace in the law science and practice, as an integral part of the development of the judge-made law.
3. Consequently, the dissenting opinions of judges may qualify as a self-contained subsidiary source of law that could be listed between the judicature and doctrine.
4. Depending on the significance of the conclusions (if a norm has been created) the dissenting opinions of the judges of the European Court of Human Rights and Constitutional Court, in certain cases, could be included in the subsidiary source group of the self-contained sources of law.
5. Compulsory publication of individual opinions should be introduced, as a normative obligation, in the practice of the Senate of the Supreme Court. It could represent a significant contribution to the development of the judge-made law.
6. By the content of dissenting opinions, they can be divided as follows:
  - 1) Concurring.
  - 2) Individually disagreeing ones (partially dissenting ones and fully dissenting opinions). There is also evidence of collegiality attribute.
7. The Ombudsman's conclusion serve as a preventive tool for the expression of the principle of equality before the law in similar cases of institutional practice.
8. The Ombudsman's conclusion contributes by weighing and sifting values as well as through the significance of their conclusions. As such, depending on the quality and innovation of their conclusion, it becomes a subsidiary source or supporting aid for the orientation of the law.
9. In disclosing the contents of legal notions, the largest significance belongs to the subsidiary sources of law and the supporting aids, which, thanks to their recommendational character, exert the strongest influence on judicial thought and normatively ungoverned or partly governed situations.
10. The Ombudsman's conclusion has both a judicial culture effect as well as an institutional effect on the judicial thought of Latvia. The Ombudsman's conclusion, linked to the personal qualities of the Ombudsmen, serves as a school of weighing the existing law and values.

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## **COMMON TRENDS IN COHABITATION LAW WITHIN THE EUROPEAN UNION**

### **Abstract**

The institute of marriage is recognised and regulated in details at the European level where the applicable national law is determined by the conflict of law to provide aid to ex-spouses in the case of divorce. On the contrary, the institute of cohabitation does not exist in the legislation of every EU country, thus partners from different countries may not experience the same scope of rights and obligations towards each other.

The purpose of the paper is to give a short comparison of the existing models of regulation of cohabitation in Europe. The analysis of the scope of regulation, main characteristics of cohabitation to be legally recognised are provided. In addition, the possible ways of harmonization of regulation and its necessity at the EU level are reviewed.

The research paper employs the analysis method in combination with comparison to identify the scope of regulation. Additionally, the logical method is applied to draw up conclusions. The research is based on both statistical data and scientific literature.

**Keywords:** cohabitation, history of cohabitation, legal regulation of cohabitation

### **Introduction**

Although cohabitation outside marriage is becoming more widespread, the phenomenon itself is quite new in comparison with the institute of marriage. Therefore, this circumstance determines the inadequate response of law in European countries. The institute of cohabitation does not exist in the legislation of all EU countries, thus partners from different countries may not experience the same scope of rights and obligations towards each other. Legal recognition at the national level depends on the moral, cultural, religious traditions, as well as the existing national legal system. It may vary from total ignorance to comprehensive regulation, recognizing cohabitation

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as a union equivalent to marriage, when compared by the scope of rights persons acquire.

Moreover, the high level of mobility in Europe contributes to a large number of international couples, which choose to live without registration of marriage. As a result, partners from different countries may not experience the same scope of rights and obligations towards each other.

All around Europe the number of children who are born during cohabitation varies from 5 to 60 percent (Jarkina V. Unbedahte A., 2009, 40 p.), which additionally stresses the topicality of the phenomenon. For example, in the United Kingdom cohabitation is a choice of 8 percent of couples, about 40 percent of children are born during cohabitation and 80 percent of them have both parents' names in birth certificate (Welstead, M. Edwards, S., 2006, 23 p.). The latest census in April 2007 revealed that 2 million couples lived together and that the prediction was that the number of cohabitating couples to married ones would grow from one in six to one in four by 2031 (Cruz, P. de ,2010, 240 p.). At the same time roughly 20 percent of all couples in Sweden are unmarried, and virtually all Swedish marriages are said to be preceded by a period of cohabitation. Legal marriage rates there dropped significantly in the late 1960s, and by 1986 nearly half (48.4 percent) of all children born in Sweden had unwed mothers, most of whom lived with the child's father (Glendon, M. A., 1996, 273 p.).

Due to the current trend of legal liberalization, cohabitating couples are accepted more widely. However, certain problems are still common. For instance, is it mandatory to register cohabitation as it is done in the case of marriage and are these two forms of relationships equivalent to each other? What is the scope of responsibility to be taken by partners during cohabitation and after separation? What are one partner's legal binds towards the other?

Some level of harmonization must be reached, although the current obstacles include different traditions, religion, culture, history and legal reality.

## 1. Grounds for appearance of the phenomenon

The institute of cohabitation appeared in "old Europe" (e.g. France) as a solution to a spreading trend of cohabitation. The official prohibition of divorce until the 20<sup>th</sup> century caused a common situation of individuals, being officially married, and cohabitating with other individuals. This in turn created a problem of division of assets when ending such relationships, as no legal rules existed. Additionally, children born during cohabitation had no any rights to be financially supported by any of the parents.

As late as the 1960s, informal cohabitation was not considered to be a legal subject. In the 1970s, law experienced some minor amendments, yet no law explicitly and openly dealing with the relationships among *de facto* family members was in

place, Nordic countries were the only exception.<sup>2</sup> It was as though jurists everywhere had agreed to pretend the phenomenon did not exist.<sup>3</sup> At that time, several factors resulting in increased number of cohabitating couples existed. First, the prohibition of divorces promoted growth of cohabitating households: couples, where one of the partners, for instance, had already been married with no possibility to divorce, could not marry legally, and thus formed a cohabitating union. Another reason of increased spread of cohabitation was the prohibition for persons who belonged to different race, subcultures and social groups to use traditional family law. At the same time, there has always been a class of people who assumed marriage as infringement to individual liberty. In this case, the decision to marry was often driven by a pregnancy or a birth of a child because an unwed mother rarely felt safe enough to raise an extramarital child. All of the reasons mentioned above made cohabitation a widespread alternative to marriage.

The legal system has been quite reluctant to address this social phenomenon. For instance, Napoleon's declaration that '*les concubins se passent de la loi, la loi se desinteresse d'eux*'<sup>4</sup> still found an echo in England in the mid-1960s. Lord Devlin reiterated this denial of rights and recognition in the *Enforcement of Morals*: "a man and a woman who live together outside marriage are not prosecuted under the law but they are not protected by it. They are outside law. Their union is not recognised, no legal obligation is implied, and express obligation is not enforced by the law" (Bradley D., 2001, 22 p.). So it was a kind of compromise from the side of legislators – there was no punishment for choosing a legally different model of family relationship, but at the same time zero level of legal security for protecting rights of cohabitating partners, and especially children who were born during this relationship.

But not all European countries were as liberal when it concerned the area of penalty. Criminal sanctions could be applied to cohabitation in Italy until 1968, in parts of Germany until 1970, and in Norway until 1972.<sup>5</sup> There is no confirmation about facts of application of sanctions but in theory cohabitating partners were subject to them.

Later, the French and German Civil Codes dealt exclusively with non-marital children, especially in respect to inheritance rights, but still ignored the necessity of legal regulation of cohabitation. In England, cohabitants were in principle regarded as legal strangers to each other with other claims arising from their relationship (Glendon, M. A., 2006, 253 p.).

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<sup>2</sup> For example, the Cohabitation Act was first adopted in Sweden 1987, regulation of cohabitation in Norway is in force since 1990'.

<sup>3</sup> *Ibid*, 252 p.

<sup>4</sup> law of cohabitation is passed, the law is indifferent to them (author's translation)

<sup>5</sup> The Bavarian Police Code originally allowed forcible separation in extra-marital relationships. The Norwegian Code of 1902 dictated fines or imprisonment for anybody who despite warning by the prosecution, continues to live together with a person of the opposite sex in an indecent relationship which causes public indignation. Marriage nullified a conviction and penalties.

In the second part of the 20<sup>th</sup> century family relationships developed in the way of fulfilment of individual emotional needs. Persons became even more independent from partners and more freely founded unions without legal registration. Any practical situation causes legal consequences so cohabitating partners experienced necessity to regulate areas of their relationships, which were not sufficiently protected before. A conclusion can be made that the legal regulation of cohabitation is still in evolutionary development.

As one of the most progressive approaches to cohabitation regulation, the example of Swedish legislators can be considered. In Sweden, the Cohabitation Act was adopted in 1987 for the first time, and later reviewed in 2003.

## 2. Terminology

In order to bring a fruitful discussion on cohabitation legal content and avoid uncertainties, it is important to define it from the legal perspective. For example, how long should the union last to be officially recognised? What are the objective rights cohabitants acquire while and after such relationship? What is the status of children born during cohabitation?

One of the first researchers who defined cohabitation as “living together in marriage like circumstances but without marriage” was Jan Trost (Trost, J., 1979, 8 p.). Burton’s legal dictionary defines cohabitation as an act of lodging together as husband and wife, occupying the same domicile (Burton, W., 1998, 89 p.). Such definition does not include all the necessary parts; when mentioning them the term becomes exclusive. The Oxford Dictionary of Law states that “cohabitation is unmarried people living together as husband and wife who do not have status of married couple” (Oxford dictionary of law, 2002, 87 p.). In addition to the above-mentioned definitions, Black’s Law Dictionary adds another interpretation of cohabitation “as partners in life with the suggestion of sexual relations” (Garner, B., 2009, 296 p.). At the European Union level the term may be applied only for registered partners equal to family members if the legislation of the host Member State treats registered partnership as equivalent to marriage.<sup>6</sup>

There is a need to strictly divide the concepts of cohabitation and registered partnerships because the latter one is often understood as the union of same sex persons in states where such couples are not allowed to conclude an official marriage. For example, in Germany the Life Partnership Act of 2001 permits a same-sex

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<sup>6</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF> (last seen 22.05.2011.)

couple to enjoy many rights which are enjoyed by married, opposite-sex couples, excluding the right to officially register marriage and adopt children (Cruz, P. de, 2010, 274 p.).

Taking this into consideration, cohabitation in the European legal context may be defined as the union of opposite-sex persons, which assumes strong social connection between them, existence of common household and possibility for the birth of children. Additionally, there are no legal obstacles for persons to be possible to register an official marriage.

### 3. Models of legal regulation according to the legal system

#### 3.1. Common law jurisdictions

There are three main contexts in which the inconsistency of the law regarding cohabitation has been noted: first, during the relationship; second, upon breakdown of the relationship and third, upon the death of a cohabitant.

For example, in the United Kingdom, The Family Law Act of 1996 provides married couples and civil partners with the right to occupy the matrimonial home but this right is not given to cohabitants of either a rented or owner-occupied home.<sup>7</sup> Indeed, an occupation order granting occupation rights to a non-entitled cohabitant who is not an owner or tenant of the family home can be made for a maximum of 12 months, but this is usually an order which will be sought as a result of domestic violence (Cruz, P. de, 2010, 241 p.).

However, the only distinction between the cohabitant father and married father is that the latter one gains automatic parental responsibility according to the Children Act of 1989. Cohabitant fathers therefore cannot take formal decisions relating to his children as giving consent to medical procedures or adoption. He achieves these rights after concluding a special parental responsibility contract with the mother of the child.

Therefore, it may be concluded that cohabitation has received limited attention from the legal perspective. The main reason from the legislator's side may be that cohabitating heterosexual couples already have the possibility to conclude a marriage

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<sup>7</sup> The classical example to be mentioned is *Burns v Burns* case: The plaintiff, Valerie Burns, had been living with the defendant for 19 years, 17 in the house which was the subject of the dispute. She and the defendant, Patrick Burns, had never married, however. The house had been purchased in the name of the defendant, and he paid the purchase price. The plaintiff made no contribution to the purchase price or the mortgage repayments, but had brought up their two children, performed domestic duties and recently contributed from her own earnings towards household expenses. She also bought various fittings, and a washing machine, and redecorated the interior of the house. The plaintiff left the defendant and claimed a beneficial interest in the house. In the absence of a financial contribution which could be related to the acquisition of the property, for example to the mortgage repayments, or a contribution enabling Patrick Burns to pay the mortgage instalments, she was not entitled to a beneficial interest in the house.

and enjoy full rights of spouses and therefore additional protection from law side is not necessary. However, if a person has joined a union like cohabitation, he/she has a right to await the specific legal protection, rather than just being considered as a person cohabitating with him/her as a “legal stranger”.

### 3.2. Continental law jurisdictions

Cohabitation is a widespread phenomenon also in continental law countries if compared to the marriage institute. Nevertheless, the common trend is to extend the legal regulation both to heterosexual and same-sex couples. For example, in 1999 the French Parliament adopted the “Civil Pact of Solidarity” which is a form of registered or civil union between two adults not conditional to sex (Cruz, P. de, 2010, 274 p.).

Sweden has been a pioneer country also in this area and since 1980 has created legislation to regulate cohabitants’ property rights. In 2003 the Cohabitees Act entered into force. Its innovative feature is that if cohabitants live in a property of which one of them is the registered owner or for which he or she holds the site leasehold, they may enter the register that the property is their joint home by applying to the registration authority which is the district court.<sup>8</sup> A note to this effect entered in the register can be a guarantee that the cohabitant who owns the property does not sell or mortgage it without the other cohabitant’s consent.

Similarly, as common law states, paternity must be specially established for a child whose parents are not married. In addition, cohabitants are not allowed to jointly adopt a child.

## 4. Future trends and ways of harmonization at the EU level

Although some time has passed from the moment when cohabitation was first recognised as a legal reality and exclusive regulation adopted, and a certain progress has been achieved, in reality life dictates new changes and new developments and amendments to the legal system are needed. Therefore, there is a necessity to continue adaptation of the legal system to this social phenomenon and to search for its harmonization on the international level.

In many European countries implementation of the legal regulation of cohabitation has promoted the recognition of same-sex couples. That mostly explains the tendency of non-liberal attitudes towards further recognition of legal regulation of cohabitation of heterosexual couples too. Although this issue keeps its actuality as developments in model of society set, it also changes the concept of traditional family law. For instance, English researchers Barlow and James assert, “the way forward is for the law to be reformed to protect the function rather than the form of relationships” (Barlow A. James. G., 2004, 143 p.). In this respect, the volume of rights and the

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<sup>8</sup> The Cohabitees act 2003 of Sweden - <http://www.sweden.gov.se/sb/d/12680/a/155258> (last seen 23.05.2011.)

mechanism of protection of cohabitants gain are more important than a way how they acknowledge their consent to form a legal institute of cohabitation.

There is an obvious trend of keeping different approach to couples where persons hold different citizenship of the European Union countries, which is mostly based on different understanding of history, culture, traditions, religion etc. Mainly two groups of countries may be recognized: (i) the ones which have introduced legal regulation of cohabitation and endow partners with definite scope of rights and (ii) others which ignore the existence of the institute of cohabitation.<sup>9</sup> Such situation complicates the possible harmonization of legal regulation of cohabitation at the European Union level. At this moment no legislation at the EU level has been passed to determine the scope of minimum rights of cohabitation's partners and to set up common standards of legal recognising of such unions. Although in March 2011 the European Commission after public consultations<sup>10</sup> has published a proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships<sup>11</sup> what is the first step towards international recognition of such unions.

Another obstacle which refrains the European Union Member States from closer cooperation in the area of the cohabitation regulation is its cautious attitude towards harmonization of legal systems in such a sensitive area. The possibility of 'opt-out' for some countries also does not promote the development of the institute of cohabitation.<sup>12</sup> Nevertheless, at least minimum measures are necessary to promote common approach. For example, the above-mentioned argument by Barlow and James propose providing better legal information and setting up a civil partnership register (Cruz, P. de, 2010, 282 p.). If fulfilled, this could improve knowledge and awareness among individuals about their rights but could not equalize citizens of the European Union countries in their rights during cohabitation.

<sup>9</sup> Some EU countries despite such ignorance still have introduced some provisions for providing certain equality of partners and officially married spouse. For example, Regulation of the Cabinet of Ministers of Latvia Nr. 243 "Procedures for the Entry into and Residence in the Republic of Latvia of Citizens of European Union Member States, European Economic Area States and the Swiss Confederation, and their Family Members" states that a member of extended family is also a partner with whom a citizen of a Union has had registered relationship or relationship which lasted at least for two years - <http://www.likumi.lv/doc.php?id=228596&from=off> (last seen 2.08.2011.)

<sup>10</sup> Green Paper on conflict of laws in matters concerning matrimonial property regimes. Available [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=LV&DosId=194518](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=LV&DosId=194518) (last seen 1.08.2011.)

<sup>11</sup> Available at [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=200266](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=200266) (last seen 1.08.2011.)

<sup>12</sup> For example, as for Rome III (European Union regulation on jurisdiction and applicable law in matrimonial proceedings) United Kingdom has used the right of opt-out. There are no certain confidence all European countries would be unanimous if a kind of common framework on cohabitation was adopted.

## Conclusions

1. Cohabitation is a relatively new legal phenomenon, and its legal recognition at the national level depends on the moral, cultural, religious traditions as well as the existing national legal system. Different approaches to regulate such kind of relationships exist, ranging from complete ignorance by national legislators to comprehensive regulation acknowledging cohabitation equal to registered marriage. Taking into account individual's contemporary mobility; the framework of cohabitation is particularly significant.
2. Cohabitation in the European legal context may be defined as the union of opposite-sex persons which assumes strong social connection between them, existence of common household and possibility for children's birth. Additionally, there are no legal obstacles for persons to be able to register an official marriage.
3. There are no significant differences in legal regulation of cohabitation when comparison is made according to common and continental law jurisdictions. The scope of rights the cohabitants receive depends on the recognition of such a legal institute and the level of possible regulation in the particular European Union country.
4. The volume of rights and mechanism of protection of cohabitants gain is more important than a way they acknowledge their consent to form a legal institute of cohabitation.
5. The possible actions for future harmonization could be more explicit and better spread in order to gain legal information and set up a civil partnership register. Additionally, the European Commission and the Council of the European Union should facilitate the entry into force of regulation proposal of 2011 .

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Edmunds Broks<sup>1</sup>

## SHARED RESPONSIBILITY IN THE CONTEXT OF EU INTEGRATION

### Abstract

The issue of shared responsibility of states and of states and international organizations has been largely overlooked in public international law. The authoritative work of the International Law Commission may be helpful in a situation where a wrongful act is attributable to the EU itself. However, the ILC is silent on more complicated scenarios where responsibility must be divided between the EU and one or more of the member states. Such a lack of principles for the sharing of responsibility may result in inadequate judgments. It may also have a detrimental effect on cooperation of states in general. The sharing of responsibility at the EU level differs from shared responsibility under general public international law, in that principles for dividing responsibility among several actors are not entirely absent from EU Law. Also at the EU level, it is relatively easier for courts to refer to the common principles of all the member states. Finally some of the jurisdictional difficulties are not as rigid before the European Court of Justice as in other international courts.

**Keywords:** international law, state responsibility, responsibility of international organizations, European Union

### Introduction

This paper briefly looks at an issue which has been largely overlooked in public international law – shared responsibility of states and of states and international organizations.<sup>2</sup> Integration is likely to be brought about by cooperation and European

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<sup>2</sup> Scholars that do address the matter are: Noyes, J. and Smith, B. (1988) “State Responsibility and the Principle of Joint and Several Liability”, 13 YALE J. INT’L L., 225; Brownlie, I. (2008) *Principles of Public International Law*, 8<sup>th</sup> ed., Oxford UP, 457. Faure, M. and Nollkaemper, A. (2007) “International Liability as an Instrument to Prevent and Compensate for Climate Change”, *Stanford Journal of International Law*, Vol. 26A. Ahlborn, C. (2011) *The Rules of International Organizations and the Law of International Responsibility*, *International Organizations Law Review*, forthcoming, Amsterdam Center for International Law Research paper No. 2011-03 (available

integration is no exception. The EU member states and the EU as an international organization have formed an intricate web of legal relations comprising of a multitude of multilateral and bilateral rights and obligations. These relations concern a vast array of subject matters of cooperation, from trade and protection of the environment, to cooperation in defense and foreign policy. Also these relations involve not only rights and duties between member states and the EU and between member states themselves, but also concern third states<sup>3</sup> and other international organizations<sup>4</sup>. However, as beneficial and necessary as cooperation may be, it also has a negative side – a likely possibility that throughout the course of cooperating, international obligations may be breached. If a breach indeed occurs as a result of a collective action, several legal issues become relevant - who will bear responsibility and provide reparation; how is responsibility divided between multiple actors?

In search of answers to these questions, one would naturally turn to the work of the International Law Commission (ILC). The ILC has studied the topic of international responsibility for more than 50 years and has produced its famous *Articles on Responsibility of States for Internationally Wrongful Acts*<sup>5</sup> and is currently contemplating *Articles on Responsibility of International Organizations*<sup>6</sup>. Surprisingly however, one finds very little in these articles to solve a case where responsibility must be divided between multiple wrongdoing states or states and organizations. As discussed later on, the ILC's work may be helpful in a situation where a wrongful act is attributable to the EU itself (for instance, where conduct is performed by an organ or an agent of the EU). However, the ILC is silent on a more complicated scenario where wrongful conduct is attributable to both the EU and a member state (for instance, if a member state as well as the EU itself is in breach of a mixed agreement or in a case where both breach an *erga omnes* obligation, like the obligation to prevent

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at [www.sharesproject.nl](http://www.sharesproject.nl)). Nollkaemper, A. (2011), "Issues of Shared Responsibility before the International Court of Justice", ACIL Research Paper No 2011-01, SHARES Series, (available at [www.sharesproject.nl](http://www.sharesproject.nl)). D'Aspremont, J. (2007), "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *International Organizations Law Review*, Vol. 4, 91. Orakhelashvili, A. (2010), "Division of Reparation Between Responsible Entities" in: Crawford, J., Pellet, A., and Olleson, S., (eds), *The Law of International Responsibility*, Oxford UP 647.

<sup>3</sup> Hirsch, M. (1995), *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles*, Nijhoff.

<sup>4</sup> European Court of Justice, C-459/03, *Commission v. Ireland (Mox Plant case)*, ECR [2006] I-04635.

<sup>5</sup> ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission*, 2001, Volume II, UN Doc A/CN.4/SER.A/2001/Add.1. (hereafter - *Articles on State Responsibility*).

<sup>6</sup> ILC, *Draft Articles on the Responsibility of International Organizations*, Report of the sixty-first session (2009) UN GAOR (A/64/10) chp.IV-C (hereafter - *Articles on the Responsibility of International Organizations*).

genocide).<sup>7</sup> As European integration seems to be ever expanding and thus cooperation becomes ever more widespread, questions of shared international responsibility need to be explored.

To outline these issues, this paper begins with a brief assessment of the law of state responsibility and identifies its inability to address adequately legal consequences of breaches of international law, which have been committed jointly by several states or by states and international organizations. The paper then notes the difficulties that the absence of principles for allocating responsibility between multiple actors creates: inadequate judgments of international courts and tribunals; the generally detrimental effect on cooperation of states; and the impediment of fulfillment of fundamental objectives of the law of international responsibility. The article then turns specifically to issues of integration, suggesting that the process of European integration may lead to several scenarios of shared responsibility, which international responsibility would be unable to resolve adequately. Finally, the paper considers how shared responsibility at the EU level differs from shared responsibility under general public international law.

## 1. The problem of shared responsibility

The core of the problem with allocating responsibility between multiple actors is that international law provides very little guidance on the issue.<sup>8</sup> The work of the ILC has been solely concentrated on the principle of individual (or independent) responsibility which in essence states that each state or international organization is responsible only for its own conduct.<sup>9</sup> The ILC's Articles on State Responsibility directly address collectively performed breaches only in Articles 16-19 which deal with responsibility of a state in connection with an act of another state and in article 47 which deals with plurality of responsible states. Of these – Article 16 (aid or assistance in the commission of an internationally wrongful act) is not really concerned with shared responsibility in a sense that it deals with a conceptually distinct situation. In the case of Article 16 one state incurs responsibility in connection to an internationally wrongful act of another state, i.e., it is not a co-author of the same wrongful act, but rather performs a separate breach.<sup>10</sup> Articles 17 and 18 pronounce

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<sup>7</sup> Dissenting Opinion of Judge Weeramantry in the *East Timor case*, ICJ Rep 139-223, 172. In *Bosnian Genocide case* ICJ found that Serbia was responsible for failing to prevent genocide. Such a proposition seems to imply that any state that fails to prevent genocide is breaching Article 1 of the Genocide convention. If such a proposition is accepted, failing to prevent genocide would arguably result in shared responsibility of all states.

<sup>8</sup> *supra* 2.

<sup>9</sup> ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" in Yearbook of the ILC 2001, Vol. II (A/CN.4/SER.A/2001/Add.1) (Part 2), (hereafter - Commentaries to the Articles on State Responsibility), commentary to Art.47.

<sup>10</sup> ILC, Commentaries to the Articles on State Responsibility, commentary on chapter IV, (5).

that a state which directs and controls another state or coerces another state to perform a breach is responsible for that breach. Similarly, in line with the principle of individual responsibility, Article 47 asserts that where several states are responsible for the same internationally wrongful act, the responsibility of each state may be invoked in relation to that Act. Thus all that ILC's articles say on shared responsibility is to pronounce a principle - several states may be held responsible for the same breach. The ILC does not elaborate on a key practical question – how to allocate responsibility between these states?

The ILC's Articles on Responsibility of International Organizations are based on the same principle of individual responsibility.<sup>11</sup> Articles 13 to 16 are modeled exactly as the above mentioned Articles on State Responsibility. The only nuance being Article 16 of Articles on *Responsibility of International Organizations*, which deals with a situation where international organization adopts a binding decision on a member state to commit an act that would be internationally wrongful if committed by the organization itself (a situation of some importance to breaches performed by the EU member states while giving effect to their EU obligations). Thus also the ILC's latest work provides no guidance on how to actually allocate responsibility between multiple actors.

It seems surprising that the topic of shared responsibility has been similarly ignored also by legal scholars. As a result of this neglect, apart from an Article by Noyes and Smith<sup>12</sup> and a brief analysis by Brownlie<sup>13</sup> the topic up until 2010 was largely unexplored.<sup>14</sup> Though presently it seems to receive its due share of attention.<sup>15</sup>

However, the largely unmapped scholarly field of this topic is but a part of the problem. More importantly, the inadequacy of international law on shared responsibility has also real life consequences. Firstly, an argument can be made that the lack of principles of shared responsibility results in inadequate judgments. The *Behrami* judgment<sup>16</sup> of the European Court of Human Rights (ECtHR) illustrates a situation where only one of the involved actors (namely the UN) bears the whole of responsibility (or in fact no one bears responsibility since the European Convention on Human Rights (ECHR) is not binding on the UN). Arguably part of the responsibility for failing to protect the right to life by demining unexploded bombs

<sup>11</sup> ILC, Text of the Draft Articles on the Responsibility of International Organizations with Commentaries Thereto, Report of the sixty-first session (2009) UN GAOR Supplement No.10 (A/64/10).

<sup>12</sup> Noyes J. and Smith, B. (1988), "State Responsibility and the Principle of Joint and Several Liability", 13 *YALE J. INT'L L.*, 225.

<sup>13</sup> Brownlie, I. (2008), *Principles of Public International Law*, 8<sup>th</sup> edn, Oxford UP, 457.

<sup>14</sup> Another article which analyses the issue is Faure, M. and Nollkaemper, A. (2007), "International Liability as an Instrument to Prevent and Compensate for Climate Change". *Stanford Journal of International Law*, Vol. 26A.

<sup>15</sup> *supra* 2.

<sup>16</sup> European Court of Human Rights, *Behrami v. France* (application no. 71412/01) and *Saramati v. France, Germany and Norway* (no. 78166/01), Grand Chamber, 2 May 2007.

in Kosovo should have been shouldered by France. As French troops were on the ground, they had the actual ability take care of the bombs and thus to protect lives of civilians.<sup>17</sup> Similarly, lack of principles for sharing of responsibility and also legal processes that would facilitate claims involving shared responsibility has impacted a number of International Court of Justice judgments.. This is particularly apparent in the *Certain Phosphate Lands in Nauru*,<sup>18</sup> *Legality of the Use of Force* cases,<sup>19</sup> *East Timor* case<sup>20</sup> and *Oil Platforms* cases.<sup>21</sup>

Secondly, taking a broader look, the shortcomings of international regulations on shared responsibility may also have a detrimental effect on cooperation of states in general. The lack of principles and processes for the sharing of responsibility results in uncertainty as states are left guessing what will be the actual legal implications of collective action. Such uncertainty is likely to motivate states to take a more reserved attitude towards cooperation. Thirdly, absence of principles for allocating responsibility between multiple actors hinders fulfillment of most fundamental objectives of the law of international responsibility – to provide reparation to the injured parties and to protect rule of law.<sup>22</sup>

## 2. Sharing of responsibility between EU and its member states

Integration of the EU as any integration is premised on cooperation.<sup>23</sup> Although this cooperation has extended far beyond classic state to state or state to international organization relationships, at its core the European Union is a project that is advanced

<sup>17</sup> See Bell, A. (2010), “Reassessing Multiple Attribution: The International Law Commission and the *Behrami and Saramati* Decision” N Y U J Int’l L & Pol 42(2), 517. Verdirame, G. (2008), “Breaches of the European Convention on Human Rights Resulting from the Conduct of International Organisations”, European Human Rights Law Review, Vol. 2, 209-213.

<sup>18</sup> International Court of Justice, *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240.

<sup>19</sup> International Court of Justice, *Legality of the Use of Force (Yugoslavia v USA)* (Provisional Measures) [1999] ICJ Rep 916.

<sup>20</sup> International Court of Justice, *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90.

<sup>21</sup> International Court of Justice, *Oil Platforms case (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Rep 324. For a detailed discussion of these cases and their relevance for development of theory of shared responsibility see Nollkaemper, A Issues of Shared Responsibility before the International Court of Justice, ACIL Research Paper No 2011-01, SHARES Series, (available at [www.sharesproject.nl](http://www.sharesproject.nl)).

<sup>22</sup> For a detailed discussion on the twofold objectives of law of international responsibility see Nollkaemper, A. (2009), “Constitutionalization and the Unity of the Law of International Responsibility”, Indiana Journal of Global Legal Studies, Vol. 16, Issue 2, Summer 2009, 535.

<sup>23</sup> For a detailed discussion see Marks, G., Hooghe, L. and Blank, K. (1996), “European Integration from the 1980s: State-Centric v. Multi-level Governance”. Journal of Common Market Studies, Vol. 34 (3), 341.

by member states and by institutions created by member states. An inevitable side effect to any joint conduct is that rules of international law may be breached as a result of cooperation. If that were to happen, the rules on international responsibility are applicable. These rules as discussed earlier are rather clear in cases where breaches are committed by a single state or a single international organization. Such cases present no fundamental issues on who is to bear responsibility. Both the ILC's Articles on State Responsibility and the draft Articles on the Responsibility of International Organizations state that responsibility is incurred by the party to whom the breach is attributable. But what if the same breach is performed jointly by several actors?

In the case of the EU and its member states, several scenarios of shared responsibility are possible. First, it is possible that collective action of member states is attributable to the EU as an international organization. In such a case, the collective action of member states materializes as a conduct of the organization itself. In accordance with the ILC's draft *Articles on the Responsibility of International Organizations*, this would happen for instance if the conduct was actually carried out by organs or agents of the organization. This scenario, although it involves the allocation of responsibility at a collective level, is not really a case of shared responsibility, as responsibility is borne by a single actor – the organization. Thus, such a case does not raise the problematic issue of how to share responsibility among multiple actors. This scenario does, however, raise an issue of member states hiding behind legal personality of the organization.<sup>24</sup>

Secondly, it is possible that collective action is attributable to both the EU and one or more of its member states. An example of such a case would be a situation where the EU directs and controls a member state in performance of conduct which is in breach of the member state's international obligations (and which is unlawful for the EU itself). The ILC's Articles on the Responsibility of International Organizations address this kind of situation in Article 14 (organization exercises direction and control over the commission of an internationally wrongful act) and Article 16 (organization adopts a decision binding on a member state).

Both of these articles overlap to a large extent, as pointed out in the commentary to Article 14: "adoption of a binding decision on the part of an international organization could constitute, under certain circumstances, a form of direction or control in the commission of an internationally wrongful act".<sup>25</sup> However, Article 14 differs from Article 16 in one important way. Under Article 14 an organization incurs responsibility from a wrongful conduct of a state which it had directed and controlled. Thus both, the organization and the state, bear responsibility for the same wrongful act. On the contrary under Article 16 if an organization performs a separate

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<sup>24</sup> An argument can be made that questions the wisdom of strict application of the fundamental principle at the root of Articles on the Responsibility of International Organizations, i.e., that the organization is to bear exclusive responsibility for its conduct, even if the conduct constitutes a breach of obligations of member states. For detailed discussion of this issue see D'Aspremont, J. (2007), "Abuse of the Legal Personality of International Organizations and the Responsibility of Member States", *International Organizations Law Review*, Vol. 4, 91-119.

<sup>25</sup> ILC's commentary on Article 25, *supra* 11.

wrongful act – it adopts a decision, which forces a state to commit a breach. The conceptual difference between these two situations is that Article 16 looks more like a primary obligation (not to direct and control) rather than a secondary obligation like the rest of the ILC's Articles.

Whatever the extent of the overlap, what is clear is that both articles provide for responsibility of the organization. At the same time the conduct of the member state also remains wrongful, as state's membership of an organization does not deprive validity from its other international law obligations.<sup>26</sup> ECtHR has affirmed this principle in such judgments as *Bosphorus*<sup>27</sup> and *Matthews*<sup>28</sup>. Although these two cases endorse the principle that both the EU and its member states may be responsible for one and the same wrongful conduct, they do not constitute a proper case of shared responsibility since the EU is not a party to the ECHR. However, once the EU becomes formally bound by the ECHR, such cases will indeed raise questions of how to divide responsibility between the EU and its member states.

Other situations of shared responsibility could arise under mixed agreements such as United Nations Convention on the Law of the Sea. Likewise shared responsibility of the EU and its member states becomes relevant with regard to the category of *erga omnes* obligations, such as obligation to prevent genocide or to bring to an end serious breaches of peremptory norms.

Sharing of responsibility among EU member states or between member states and the EU itself differs from shared responsibility under general public international law in several ways. First of all, principles for sharing responsibility among several actors are not entirely absent from EU Law.<sup>29</sup> Also on the EU level it is relatively easier for courts to refer to the principles common to all member states and to conclude that such principles like joint or joint and several liability form part of the EU law.<sup>30</sup> Secondly, on the EU level some of the difficulties with jurisdiction of courts (like

<sup>26</sup> In EU Law this principle is embodied in Article 351 of the Treaty on the Functioning of the European Union (hereafter – TFEU), which provides that treaties concluded by a member state prior to its accession to the EU remain valid and prevail over conflicting EU Law obligations. See joined cases C-364/95 and C-365/95 *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas*, ECR [1998] I-01023. The principle is also established in article 18 of the draft Articles on the Responsibility of International Organizations.

<sup>27</sup> European Court of Human Rights, *Bosphorus Hava Yollari Turzim ve Ticaret Anonim Sirketi v. Ireland*, judgment of 30 June 2005, Application Number 45036/98.

<sup>28</sup> European Court of Human Rights, *Matthews v. United Kingdom*, judgment of 18 February 1999, Reports of Judgments and Decisions(1999-I), at 251.

<sup>29</sup> Although not in a state to state or state to EU context, but the ECJ has made use of principles of joint and joint and several liability, see C-384/09 *Prunus SARL, Polonium SA v Directeur des services fiscaux*, OJ C 186 , 25/06/2011, 0004; C-78/10 *Marc Berel and Others v Administration des douanes de Rouen*, C 103 , 02/04/2011, 0009. C-384/04 *Commissioners of Customs & Excise and Attorney General v Federation of Technological Industries and Others*, ECR [2006] I-04191.

<sup>30</sup> C-294/98 P *Metsä-Serla Oyj, UPM-Kymmene Oyj, Tamrock Oy and Kyro Oyj Abp v Commission of the European Communities*, ECR [2000] I-10065; *Commissioners of Customs & Excise and Attorney General v Federation of Technological Industries and Others*, ECR [2006], I-04191.

the principle of consent based jurisdiction and inability of courts to decide questions that concern duties of states that are not party to the proceedings) are not as rigid as in other international courts.<sup>31</sup> Likewise, in disputes involving member states and EU institutions, adjudication is readily available under a number of infringement proceedings, such as Articles 258 and 259 of the Treaty on the Functioning of the European Union (TFEU); similarly any claimant is able to institute action against the EU for its non-contractual liability under Article 340 of the TFEU.

### 3. Conclusion

With the ever increasing scope of EU competences and a corresponding increase in its activities, it is likely that the EU will more often be involved in breaches of international law. The number of collectively performed breaches is likely to increase also because many of the EU's competences are shared with member states and even in areas that are not shared the EU often depends on member states to actually implement any given policy. This trend demands an urgent and comprehensive analysis of principles that would be applicable in cases of collectively performed breaches.

Currently the law of international responsibility is rather lacking in this area. Given the limited number of adjudicated cases on the issue and the fact that existing judgments provide only rudimentary guidelines, the fundamental questions on shared responsibility are likely to be resolved by international courts that will be seized with cases involving collectively performed breaches. These courts are most likely to turn to principles of the domestic legal systems to substantiate the application of joint, joint and several or perhaps proportionate sharing of responsibility. Thus, EU member states will be well positioned to influence the development of shared responsibility principles. This is because already existing similarities between member states (e.g., the Principles of European Tort Law<sup>32</sup>) or the endorsement of these principles by the ECJ, will provide convincing grounds that a certain principle (say, joint and several responsibility) must also be recognized as forming part of the law of international responsibility.

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<sup>32</sup> European Group on Tort Law, *Principles of European Tort Law* (available at [www.egtl.org](http://www.egtl.org)).

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## HORIZONTAL EFFECT OF BASIC HUMAN RIGHTS IN PRIVATE LAW AS A COMMON TREND OF EUROPEAN INTEGRATION

### Abstract

This article analyses the horizontal effect of basic human rights in private legal relationships in the context of the development of this concept within the Law of the European Union and the practice of the European Court of Human Rights. The analysis of the Latvian court practice regarding application of the provisions of basic human rights contained in the Constitution of Latvia gives sufficient grounds to conclude that several basic human rights contained in the Constitution of Latvia are directly applicable in private legal relationships. However, there is no necessity to limit the concept of horizontal effect of basic human rights to either direct or indirect horizontal effect. If the law does not give any direct regulations then the court is obliged to protect the basic human rights of a person by applying them directly or through general clauses contained in ordinary law.

**Keywords:** horizontal effect of basic human rights, *Drittwirkung*, the Constitution of Latvia

### Introduction

Freedom of contract has been one of cornerstones of European legal identity. It is mainly derived from the philosophical concept of free will. However, for the past half century European legal thought has been greatly affected by the general acknowledgment of human rights, which has also had a significant impact on traditional approaches to the freedom of contract and to the private law in general.

There are two common approaches regarding impact of human rights in the private sphere: the theory of direct effect and the theory of indirect effect. The theory of direct effect of human rights in the private sphere insists that constitutional

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provisions containing human rights are directly applicable in private legal relations.<sup>2</sup> The theory of indirect effect provides that basic rights are not directly applicable in private legal relationships; instead they should be taken into account when interpreting the law, in particular, general clauses of law. Though it is often considered that the theory of indirect effect of human rights prevails in most European legal systems, in the practice the difference between those two theories is diminishing. This is a process common in many EU member states driven by the activism of the European Court of Human Rights, various legal instruments of the European Union (in particular, the Charter of Fundamental Rights and many directives referring to fundamental law), and activities of the European Commission (in particular, the program “Fundamental rights and citizenship” established by EU Council decision No. 2007/252/JHA).

In this context it is important to determine general considerations for effect of basic rights<sup>3</sup> in private relationships in Latvia for there have been no publications in Latvia dedicated only to this issue.

## 1. Traditional approaches to the horizontal effect of basic rights in private law

Classical concept of basic rights presumes that basic rights contained in the Constitution of Latvia (hereinafter – the Constitution) regulate legal relationships between the state and private person only. Within this concept the main function of basic rights is to protect individuals against the state. Therefore basic rights are rights of an individual to claim a particular activity (or inactivity) from the state (Levits, 2000, 246.lpp.). Basic rights are binding only upon the state. Hence, for instance, rights to private life protected by Article 96 of the Constitution would mean that the state cannot interfere in the private life. Certain obligations of the state can be derived from basic rights, in particular, to protect basic rights against interference of other individuals (to adopt legal mechanisms for safeguarding property etc.). However, this does not change the presumption that basic rights regulate legal relationships only between the state and the individual.

The classical concept of basic rights has been modified by the concept of horizontal effect of basic rights widely known as the *Drittwirkung*. European legal scholarship traditionally identifies two sub concepts of the *Drittwirkung*, i.e., two ways how basic rights can affect private relationships: direct effect of basic rights (German - unmittelbare drittwirkung) and indirect effect of basic rights (German –

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<sup>2</sup> In this article term „private law/legal relationships” means legal relationships between two private persons; i.e., the article does not analyse the problems related with application of the basic human rights when one of the parties is a public legal entity or other person using prerogatives of public power.

<sup>3</sup> In this article term „basic rights” means rights directly protected in the constitution. The term is also used in the context of rights and freedoms protected by Treaties of the European Union and EU Charter of Fundamental Rights and Freedoms.

mittelbare drittwirkung). The concept of direct effect presumes that all or at least several basic rights contained in the Constitution are directly applicable in private relationships, and parties can refer to basic rights in a civil litigation. For instance, an employee could be entitled to claim annulment of provision of employment agreement stipulating that an employer may check personal belongings of an employee only through reference to Article 96 of the Constitution (protection of private life). The concept of indirect effect presumes that basic rights should be taken into account when applying general clauses (good faith, good morals) contained in civil codes and other provisions regulating private relationships, but basic rights per se do not regulate private relationships (see Ferreira, 2010, p.8-9; Busch, 2011, p.12; Balodis, 2007, 221.-222.lpp.). As a consequence, the employee in the above mentioned example could claim annulment of the said provision of employment agreement with reference to Article 1592 of the Civil Law which prescribes that “no contract which encourages anything illegal, immoral or dishonest shall be binding.” In this case the general clause „immoral encouragement” should be interpreted as prohibiting contractual provisions that unjustifiably limits basic right to private life.

In general the acknowledgment of applicability of fundamental rights in private law in a legal system is affected by the express statements in a constitution<sup>4</sup>, direct protection of fundamental rights in private relationships in law, legal scholarship and court practice. These factors differ from state to state, however, two recently published results of fundamental comparative research projects confirm that most legal systems of EU member states recognizes influence of basic rights in private relationships (see Oliver, 2007; Brüggemeier, 2010). Therefore it is even maintained that “the idea that fundamental rights influence the “horizontal” relationship between private parties has become part of the “acquis commun” shared by the legal systems of EU member states” (Busch, 2011, p.10). While influence of basic rights in private relationships is primarily governed by traditions of the respective legal system, it can be expected that a more unified approach will be promoted through common European legal mechanisms – EU law and judgments of the European Court of Human Rights.

## 2. Judgments of the European Court of Human Rights and EU law as an impulse for a unified concept

European Convention of Human Rights and Fundamental Freedoms (hereinafter – the Convention) does not provide express provisions on its applicability to private relationships. However, the state responsibility doctrine established by the European Court of Human Rights provides that the state has violated fundamental

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<sup>4</sup> For instance, Article 9(3) of the Basic Law of the Federal Republic of Germany expressly states that „The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful.”

rights prescribed by the Convention if state authorities (including courts) have not protected fundamental rights where appropriate (Oliver, 2007, p.432; Arai, 2006, p. 186). The courts of the member states of the Convention are also obliged to interpret instruments of private law (both legal provisions and legal transactions) in accordance with the provisions of the Convention. This has been developed by the European Court of Human Rights in two recent judgments adopted in 2004 and 2009. It may be expected that the judgments will have a considerable impact on the *drittwirkung* theory across the Europe.

In 2004 the European Court of Human Rights delivered a judgment in the case *Pla and Puncernau vs. Andorra*,<sup>5</sup> in which it held that a violation of Article 14 of the Convention taken in conjunction with Article 8 has been committed by the Andorra. The reason to submit the application before the European Court of Human Rights was the fact that the Supreme Court of Andorra did not acknowledge the entitlement of the applicant to receive inheritance for in the will drafted in 1939 the testatrix had included a provision that “the future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage [...]”<sup>6</sup> The European Court of Human Rights established that the Supreme Court of Andorra had misinterpreted the will. The Court acknowledged that it is not “in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.”<sup>7</sup> Judge Lech Garlicki in his dissenting opinion stated that “it seems equally obvious that the level of protection against a private action cannot be the same as the level of protection against State action.[..] In other words, what is prohibited for the State need not necessarily also be prohibited for individuals.”<sup>8</sup> This objection was rejected in a more express form in the case *Khurshid Mustafa and Tarzibachi v. Sweden*.<sup>9</sup>

Applicants in the case *Khurshid Mustafa and Tarzibachi v. Sweden* were immigrants of Iraqi origin in Sweden. They rented a flat in a suburb of Stockholm. The tenancy agreement contained a provision that „the tenant undertakes not to erect, without specific permission, placards, signs, sunblinds, outdoor aerials and such like on the house.”<sup>10</sup> Nonetheless the tenant erected a satellite antenna; therefore the landlord gave a notice of termination of the tenancy agreement. The court in which the respective claim was brought satisfied the appeal of the landlord and cancelled

<sup>5</sup> Judgment of the ECHR in case *Pla and Puncernau v. Andorra* (69498/01), 15.12.2004,

<sup>6</sup> Judgment of the ECHR in case *Pla and Puncernau v. Andorra* (69498/01), 15.12.2004., para.12

<sup>7</sup> Ibid, para.59

<sup>8</sup> Dissenting opinion of judge Garlicki <http://cmiskp.echr.coe.int/>

<sup>9</sup> Judgment of the ECHR in case *Khurshid Mustafa and Tarzibachi v. Sweden*, 23883/06., 16.03.2009.,

<sup>10</sup> Ibid, para.6

the tenancy agreement. The tenants submitted an application before the European Court of Human Rights complaining that Sweden has violated rights of the tenants to information protected by Article 10 of the Convention. The satellite antenna had been the only means to receive information in their native language. European Court of Human Rights found a violation of Article 10, for the provision in the tenancy agreement and eviction of the tenants had not been necessary in a democratic society.

In those cases the European Court of Human Rights has established a violation in activities of the court of the respective state. The courts had not protected rights of person in a civil litigation. However, it must be noted that obligation of a court to interpret instruments of private law in accordance with the Convention clearly determines the content of private relationships. For instance, the ratio of the case *Khurshid Mustafa and Tarzibachi v. Sweden* is that rights of a landlord to terminate tenancy agreement due to a breach of provision prohibiting a tenant to erect satellite antennas must be weight against basic rights of a tenant to receive information.

A significant increase of impact of basic rights in private law can be achieved by instruments of EU law. The Court of Justice of the European Union has concluded that several fundamental freedoms and basic rights of EU law have direct or indirect effect in private relationships: 1) right to equality regardless of nationality, guaranteed by Articles 18 (general prohibition of discrimination), 45 (free movement of workers), 56 and 61 (freedom to provide services) of the Treaty on the Functioning of the European Union (hereinafter – the Treaty); 2) right to equality regardless of sex, guaranteed by Article 157 of the Treaty; 3) freedom of movement of persons, guaranteed by Articles 45, 49 and 56 of the Treaty; 4) right of establishment and freedom to provide services guaranteed by Articles 49. and 56 of the Treaty; 5) freedom of movement of goods and the trademark right, guaranteed by Articles 28 un 36 of the Treaty; 6) Freedom of competition and the right to fair competition, guaranteed by Articles 101 un 102 of the Treaty; 7) freedom of movement of capital, guaranteed by Article 59 of the Treaty (Ferreira, 2010, p.12.-13.). However, the manifestation and scope of the horizontal effect of the above mentioned rights and freedoms is small if compared with rights protected by the Charter of Fundamental Rights of the European Union (hereinafter – the Charter).

It is widely held that EU fundamental rights enshrined in the Charter do not have direct horizontal effect (Busch, 2011, p.5). Article 51, Paragraph 1 of the Charter explicitly states that “the provisions of the Charter are addressed [...] to the Member States only when they are implementing Union law”. Therefore the Charter is not an independent source of basic rights binding a court of a member state when not applying EU law. Consequently, it is applicable in private relationships only when the court in civil litigation must interpret the national law in accordance with the EU law.

In the past years EU institutions have been active in promoting the idea on unified solution on impact of basic rights in private relationships. Within the framework of the program “Fundamental rights and citizenship” established by EU Council decision No. 2007/252/JHA several scientific projects dealing with comparative

analysis of impact of fundamental rights in private law have been completed. Vice-president of the European Commission Viviane Reding has already stated that the Charter must be mainstreamed in the EU legislation and that divergent legal systems in the area of private law in the EU could render difficult a common solution at EU level (Busch, 2011, p.IX). This statement being political in the very nature, clearly shows that attempts to harmonize rights protected by the Charter in private law may come in the agenda of EU politics. In this context it is important to estimate the legal consequences and capabilities towards the impact of fundamental rights in private law in each member state. It is of increasing importance in Latvia, since there have been no specific research made on impact of fundamental rights contained in the Constitution in private legal relationships.

### 3. The effect of basic rights in private relationships in Latvia

It can be held that there is no stable and unified solution for the problem of horizontal effect of the basic rights. Hitherto there is a view that articles 107<sup>11</sup> and 108<sup>12</sup> of the Constitution are directly applicable in private legal relationships for the respective rights are mainly addressed to private persons as participants of the market economy (Levits, 2000, 255.lpp.). Other basic rights cannot be used as a direct source of claim in civil procedure for private autonomy of the individuals created and protected by civil law allows activities based on other value system. Therefore the objective value system prescribed by the basic rights can be used only as far as acknowledged by the private law and not as a superior system that prevails the private law. Values protected by the basic rights can be used when specifying general clauses contained in the Civil Law and other normative acts (Levits, 2000, 256.-257. lpp.). The same, with a reference to the doctrine of indirect effect in Germany, is supported in a book on civil law (chapter dedicated to transactions being contrary to good morals) (Balodis, 2007, 221.lpp.). Nonetheless, the above mentioned in itself does not mean that there is general denial of direct effect of basic rights in private relationships.

Provisions of the basic rights contained in the Constitution provide a person with certain amount of rights. For instance, Article 96 of the Constitution provides subjective rights to inviolability of correspondence. Inviolability of correspondence as well as any other basic right is legally protected benefit (value). This benefit may be infringed not only by the state but also by any other private person who arbitrarily opens a letter addressed to other.<sup>13</sup> Therefore any unjustified interference with the basic

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<sup>11</sup> Article 107 of the Constitution: *Every employed person has the right to receive, for work done, commensurate remuneration which shall not be less than the minimum wage established by the State, and has the right to weekly holidays and a paid annual vacation.*

<sup>12</sup> Article 108 of the Constitution: *Employed persons have the right to a collective labour agreement, and the right to strike. The State shall protect the freedom of trade unions.*

<sup>13</sup> Compare with conclusion of Riga Regional Court: *„Protection of human dignity is provided in Article 95 of the Constitution and person, which has not complied with this requirement not to infringe*

rights contained in the Constitution is an illegal action. However, this conclusion per se does not mean that the Constitution gives legal remedies to the injured party.

Article 89 of the Constitution provides that „the State shall recognize and protect basic rights in accordance with this Constitution, laws and international agreements binding upon Latvia.” The wording of this provision could give grounds for speculations that only state is bound by the provisions of the basic rights. Moreover, *travaux préparatoires* of the Chapter VIII (Basic rights) of the Constitution (minutes of the commission responsible for drafting the Chapter and opinions on the Chapter) clearly shows that no horizontal effect has ever been considered. Again, it does not mean that the basic rights had been intended to provide protection only from the state.

Analysis of the court judgments also does not give sufficient grounds to hold that any stringent concept on influence of the basic rights in private relationships is in use. The Constitutional Court has acknowledged that „as any norm of human rights, the legal norm, incorporated into the third sentence of Article 92 of the Constitution [“Everyone, where his or her rights are violated without basis, has a right to commensurate compensation.”] shall be applied directly and immediately. Besides, the norm does not envisage that a special law is needed to specify it. The fact that such a law does not exist is connected with the possibility of direct application of Article 92 (the third sentence) of the Constitution. It cannot serve as a reason for the court of refusing to accept the claim of an individual to receive compensation.”<sup>14</sup> However, it must be noted that in this case the Constitutional Court did not consider direct application of the basic rights in private relationships, but a provision of law that dealt with compensations for persons being held in imprisonment and later acquitted. The direct applicability of the basic rights acknowledged in the judgment does not mean that the basic rights are applicable in any legal relationships.

In two recent judgments the Civil Department of the Supreme Court has included motives that generally could be considered as acknowledging direct application of the basic rights in private relationships. The first case dealt with justifiability of a termination notice of an employment agreement given by an employer. The employee claimed that reasons of termination were result of psychological terror. The Senate considered that „Article 94 of the Constitution provides that “everyone has the right to liberty and security of person”, which is also applicable to employment relationships. The employee is protected against the psychological terror not only by

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*dignity of another person has committed illegal activity or tort.*” Rīgas apgabaltiesas 23.01.2008. spriedums lietā Nr. CA-0346-08, in force, not published.

<sup>14</sup> “Par likuma “Par izziņas iestādes, prokuratūras vai tiesas nelikumīgas vai nepamatotas rīcības rezultātā nodarīto zaudējumu atlīdzināšanu” 2.panta un Ministru kabineta 1998.gada 31.augusta noteikumu nr.327 “Pieteikumu iesniegšanas un izskatīšanas, lēmumu pieņemšanas, darba garantiju un sociālo garantiju atjaunošanas un zaudējumu atlīdzības izmaksas kārtība” 3.punkta 1.apakšpunkta atbilstību Satversmes 91. un 92.pantam”: Satversmes tiesas 05.12.2001. spriedums lietā Nr. 2001-07-0103. Latvijas Vēstnesis. 2001. 7. decembris, Nr. 178(2565).

the Constitution but also by Labor Law.<sup>15</sup> This motive which has been borrowed from a publication on psychological terror<sup>16</sup> did not have decisive impact in outcome of the case.

The Senate gave rather clear statement on the horizontal effect of the basic rights in a case where a woman claimed compensation against a hospital due to damage caused by improper medical services: „Article 111 of the Constitution prescribes that the State shall protect human health and guarantee a basic level of medical assistance for everyone.[...] The hospital is organized in a form of a private legal entity and its medical activities are also made in the sphere of private law[...]. The very fact that [...] the hospital is subject of private law and nor Sexual and Reproductive Health Law, nor Medical Treatment Law [...] does not contain provisions that the purpose of the legislator was to delegate state powers, cannot be a ground to conclude that the activity of the respondent by not providing medical services, including child bearing services, is not subject to the review of the court with regard to the protection of the basic rights.[...]”<sup>17</sup> The Senate made the following arguments with regard to the fact that at the time of damage the Civil Law did not contain provisions on redress of moral damage: „The conclusion of the Chamber of Civil Cases that there is no legal grounds for redress of moral damage from the [...]hospital is in evident contradiction to the thesis prescribed in the above mentioned judgment of the Constitutional Court on interpretation of Article 92 of the Constitution. If the court had established violation of the claimant’s rights and considered that Article 1635 of the Civil Law [...] is not applicable, it had to apply the respective constitutional provision directly and immediately.”<sup>18</sup>

The assumption that Article 111 of the Constitution binds dentists and other doctors is not correct, for the respective provision directly states that protection of health and securing basic level of medical protection is a duty of state. Nevertheless, argumentation of the Senate regarding direct applicability of Article 92 of the Constitution deserves attention. Despite the fact that the Senate made wrong reference to the judgment of the Constitutional Court (which did not mention anything on horizontal applicability of basic rights) it seems that there are no arguments that could prevent direct applicability of this Article to private relationships. The entitlement to compensation for wrongful actions protected by Article 92 of the Constitution is a self evident legal principle that is applicable in case of any violation of rights and

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<sup>15</sup> Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 20.05.2009. spriedums lietā Nr. SKC-383/2009, not published.

<sup>16</sup> Skat. Neimanis J. Psiholoģiskais terors darba vietā: juridiskie aspekti. *Jurista Vārds*. 2004. 19. oktobris, Nr. 40(345), where it is stated that a person may enforce the rights prescribed by Article 94 of the Constitution „in life directly – without other laws or normative prescriptions [...]. It is exactly inviolability of person that prohibits psychological terror in employment relationships. [...] The employee is protected against the psychological terror not only by the Constitution but also by Labor Law.”

<sup>17</sup> Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 29.04.2009. spriedums lietā Nr. SKC-12/2009, not published.

<sup>18</sup> *Ibid*

against any offender. Particular laws containing preconditions and limits of the use of this right, for instance Law on Reimbursement of Damage Committed by State Authorities,<sup>19</sup> are only concretization or constitutional limitation of the respective principle, and are made in accordance with the Constitution.

Most of the references made to the basic rights in judgments in civil and criminal cases do not have any effect of the outcome of the case. In 2007-2009 courts have made references to the basic rights in more than 10 cases, for instance, in two cases courts have made reference to Article 95 of the Constitution (protecting dignity of a person),<sup>20</sup> in one case to Article 96 (protecting private life),<sup>21</sup> in six cases to Article 100 (freedom to express opinion),<sup>22</sup> in two cases to Article 105 (protecting rights to property).<sup>23</sup> The reference to the basic rights is made as obiter dictum or as a contra-argument of one of parties. A good example is a case where a competition restriction clause was included in an employment agreement and its validity was contested in the court. The Senate held that „the first sentence of Article 106 of the Constitution prescribes that everyone has the right to freely choose their employment and workplace according to their abilities and qualifications. Though the rights provided by this provision are not absolute and may be limited in accordance with Article 116 of the Constitution which states that rights of person prescribed by Article 106 of the Constitution may be subject to restrictions provided by law [..]. This means that restrictions to rights prescribed by Article 106 of the Constitution must be made by law. In the instant case the restriction to the rights of the respondent [employee] are prescribed by Article 84 of the Labor Law. Therefore arguments of the employee regarding Article 106 of the Constitution are not grounded.”<sup>24</sup> The purpose of these motives is to justify that restriction of competition (prohibition to make the same job for other employer) do not violate Article 106 of the Constitution. At the same time these motives confirm that the court cannot confirm validity of legal relationships that are contrary to the basic rights.

<sup>19</sup> Valsts pārvaldes iestāžu nodarīto zaudējumu atlīdzināšanas likums: LV likums. Latvijas Vēstnesis. 2005. 17. jūnijs, Nr. 96 (3254)

<sup>20</sup> Rīgas apgabaltiesas 08.10.2008. spriedums lietā Nr. CA-0657-08, in force, not published; Rīgas apgabaltiesas 23.01.2008. spriedums lietā Nr. CA-0346-08, in force, not published.

<sup>21</sup> Rīgas apgabaltiesas 11.12.2007. spriedums lietā Nr. CA-2131-07, not in force, not published

<sup>22</sup> Rīgas apgabaltiesas 08.10.2008. spriedums lietā Nr. CA-0657-08, in force, not published, Latgales apgabaltiesas 27.03.2008. spriedums lietā Nr. CA-0082-08, in force, not published, Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 30.01.2008. spriedums lietā Nr. SKC-3/2008, not published, Latvijas Republikas Augstākās tiesas Civillietu tiesu palātas 14.11.2007. spriedums lietā Nr. PAC-407/2007, not in force, not published, Zemgales apgabaltiesas 26.04.2007. spriedums lietā Nr. CA-0147-07, in force, not published; Latgales apgabaltiesas 03.04.2007. spriedums lietā Nr. CA-0070-07, in force, not published,

<sup>23</sup> Latgales apgabaltiesas 08.10.2008. spriedums lietā Nr. CA-0180-08, in force, not published; Latvijas Republikas Augstākās tiesas Senāta 21.03.2007. spriedums lietā Nr. SKC-53/2007, not published

<sup>24</sup> Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta 26.11.2008. spriedums lietā Nr. 424/2008, not published

An argument supporting the direct effect of basic rights in private relationships may be also found in Point 5, Article 12 of the Ombudsman Law<sup>25</sup> where it is prescribed that the ombudsman „shall resolve [...] disputes in respect of human rights between private individuals”. Taking into account that the human rights are contained in the Constitution, it can be concluded that the legislator by adopting the Ombudsman Law has accepted the direct effect of basic rights included in Chapter VIII of the Constitution in private relationships (Libiņa, 2006, 148.lpp.).

The above mentioned facts give sufficient grounds to conclude that most basic rights have some effect in private relationships. The premise that every legal provision must be in accordance with the Constitution also provides that all legal relationships, even private legal relationships must be in accordance with the Constitution. However, it should be noted that provisions of Chapter VIII of the Constitution have never been intended and are not suitable to regulate private relationships. In private legal relationships a collision of basic rights of both parties can often be established (for instance, provision of tenancy agreement allowing a landlord to inspect premises at any time is an expression of property rights and simultaneously restricts privacy of a tenant). Article 89 of the Constitution prescribes the competence and obligation of the legislator to develop regulation protecting those conflicting interests in private relationships. The discretion of the legislator is very broad and depends on the respective basic right. One of legal instruments that the legislator may use in protecting the basic rights in private relationships is general clauses.

An excellent example is the modern interpretation of the general clause “good morals” contained in Articles 1415 and 1592 of the Civil Law that legal and ethical principles enshrined in the Constitution can be used in determining the contents of private relationships (Balodis, 2007, 221.lpp.). Articles 1415, 1592 and other provisions containing general clauses should be treated only as technical means for application of basic rights in private relationships. However, it does not mean that any provision of a contract interfering with basic rights should be treated as immoral and therefore void.<sup>26</sup> For instance, a provision in an employment agreement stipulating that an employee shall wear only white suit restricts private autonomy protected by Article 96 of the Constitution, though such obligation is self-evident and necessary for persons being employed in hospitals. In the very case it should be considered whether the respective provision of the employment agreement does not contradict to rights to fair working conditions provided in Article 7, Part 1 of the Labor Law. In determining contents of the general clause “fair working conditions” basic rights of a person must be taken into account, though they are to be weight against basic rights and legal interests of other participants to respective legal relationship. Nevertheless it must be emphasized that there in essence is no difference between phrases “contract is in conformity with good morals” and “contract is in conformity with basic rights”.

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<sup>25</sup> Tiesībsarga likums: LV likums. Latvijas Vēstnesis. 2006. 25. aprīlis, Nr. 65(3433)

<sup>26</sup> Compare: „Provisions of basic rights prescribed in the Satversme cannot be directly applied in considering conformity of the legal transaction with good morals.”: Balodis K. Ievads civiltiesībās. Rīga: Zvaigzne ABC, 2007, 221. lpp.

Assessment of contract in the context of good morals therefore is a concretization or constitutional limitation of basic rights in respective legal relationship.

The principle of freedom of contract is not a superior principle overruling the basic rights. In Latvian legal system principle of freedom of contract is only one expression of basic rights of private autonomy protected by Article 96 of the Constitution. The Constitutional Court has concluded that rights prescribed by Article 96 of the Constitution “means that the individual has the right to its private home, the right to live as he likes, in accordance with his nature and wish to develop and improve the personality, tolerating minimum interference of the state or other persons. The right includes the right of an individual to be different, retain and develop virtues and abilities, which distinguish him from other persons and individualizes him.[..] The right to inviolability of private and family life is guaranteed also in Article 8 of the European Convention on Human Rights. The ECHR has recognized that the right to inviolability of family and private life include the right to establish and develop relations with other persons.”<sup>27</sup> Therefore the principle of freedom of contract is of equal legal value as other basic rights.

Though the whole legal system is based on the acknowledgment of the free will (activities of the person are acknowledged because (and insofar as) they are expression of free will), the state do not acknowledge all statements of free will. In general, the state is entitled not to enforce legal relationships where person has completely or partially waived his/her basic rights. The Constitutional Court in a case where it had to examine whether a person may waive from right to a fair trial by agreeing to arbitration clause expressed that it “does not agree with the statement of the submitter that voluntary restriction of the right cannot be binding on the person. The submitter substantiates the viewpoint only by instances: to his mind an agreement by which the person undertakes limitation of e.g. passive election rights, the right to unite in trade unions as well as the freedom of the religion cannot be in effect. From the above he deduces that “in the same way the agreement by which the person relinquishes his human rights, [..] guaranteed in Article 92 of the Constitution, cannot be in effect”. The above argumentation is not satisfactory as the used examples seem to be essentially different from the issue to be reviewed in the matter. [..] it is not the obligation of the Constitutional Court to elaborate a general theory on the admissibility of voluntary restriction of the fundamental rights[.].<sup>28</sup> This reflection of the Constitutional Court gives reason to hold that validity of voluntary waive of basic rights cannot be ruled by a general theory; instead every particular case must be examined independently.

<sup>27</sup> Par Civillikuma 156.panta otrās daļas vārdu “divu gadu laikā, skaitot no dienas, kad viņi uzzinājuši par apstākļiem, kas izslēdz paternitāti” atbilstību Latvijas Republikas Satversmes 92.un 96.pantam un 1975.gada 15.oktobra Eiropas Konvencijas par to bērnu tiesisko statusu, kuri nav dzimuši laulībā, 4.pantam : Satversmes tiesas 04.06.2009. spriedums lietā Nr. 2008-43-0106, point 11. Latvijas Vēstnesis. 2009. 5. jūnijs, Nr. 88 (4074); skat. līdzīgi Satversmes 105. panta kontekstā: Par Civilprocesa likuma 132. panta pirmās daļas 3. punkta un 223. panta 6. punkta atbilstību Latvijas Republikas Satversmes 92. pantam: Satversmes tiesas 17.01.2005. spriedums lietā Nr. 2004-10-01, point 8.1. Latvijas Vēstnesis. 2005. 18. janvāris, Nr. 9 (3167)

<sup>28</sup> Ibid, see point 7.2.

Admittedly, there are basic rights that are addressed mainly to the state, for instance, election rights (Articles 8 un 9 of the Constitution), right to know one's rights (Article 90), rights to petition (Article 104), rights to social security, healthcare, education etc. Article 91 of the Constitution stating that "all human beings in Latvia shall be equal before the law and the courts. Human rights shall be realized without discrimination of any kind" is not applicable in private relationships. This Article requires the state to act equally against persons and does not provide a general requirement to act equally within private relationships (compare with Levits, 2003, point A4). Provisions prohibiting discrimination in Labor Law, Consumer Protection Law etc. are expression of social policy and EU law, and not legal consequences of Article 91 of the Constitution.

The above mentioned considerations on effect of the basic rights in private relationships indicates that legal regime in this issue cannot be attributed to only one of traditional concepts of horizontal effect of the basic rights.<sup>29</sup> In Latvia the basic rights are applicable directly in private relationships if there are no particular legal instruments provided by ordinary law. In any case the courts in considering disputes between private persons are obliged to protect the basic rights of the persons (Article 89 of the Constitution).

## Summary

In Latvian legal system the basic rights prescribed in the Constitution have impact in private relationships. Article 89 of the Constitution obliges the state to adequately protect the basic rights in private relationships. If the law does not give any direct regulations then the court is obliged to protect the basic rights of a person by applying them directly or through general clauses contained in ordinary law. This effect of the basic rights in private relationships is similar to regulation in many other European countries, therefore a unified concept of horizontal effect of EU basic rights and freedoms would not make any complications in Latvian legal system.

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<sup>29</sup> Critics regarding this distinction see. Beckmann P., Colombi Ciacchi A., Ferreira N., Moulin-Doos C etc. Germany: Grām.: *Fundamental Rights and Private Law in The European Union. I. A Comparative Overview*. Ed. by Brüggemeier G., Colombi Ciacchi A., Comandè G. Cambridge: Cambridge University Press, 2010, p.272-275

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**Simona Innus-Pavelškopa<sup>1</sup>**

## **THE NATURE AND UNDERSTANDING OF THE INSTITUTE OF ADOPTION IN THE LATVIAN SSR**

### **Abstract**

The lecture will focus on family law, in particular emphasizing the institute of adoption, and particularly the nature and understanding at the time when Latvia was part of the Union of Soviet Socialist Republics (USSR). A child needs special care and a part of child's valuable life is a family, where the child is cared for by its parents. The child in this situation should be provided with alternative care, and one of these alternative types of care is adoption. Adoption involves the bringing up of children without their parents, but still within the circumstances of the family, providing a stable and harmonious home. <sup>2</sup>

**Keywords:** adoption, family law, institute of marriage, children's and parents' relationship, Latvian Soviet Socialist Republic

### **Introduction**

The author's doctoral thesis topic is "Legislation and Practical Arrangements of the Adoption institute in the 20th Century in the Territory of Latvia". This time for the Conference *European Integration and Baltic Sea Region: Diversity and Perspectives*, on the theme of the Legal and Historical Aspects of European Integration, the lecture will focus on family law, in particular emphasizing the institute of adoption, and particularly the nature and understanding at the time when Latvia was part of the Union of Soviet Socialist Republics (USSR).

The institute of adoption will be analyzed in studying family law, the institute of marriage, and the child and parent relations framework. It will be done through the direct study of Soviet era law. The author has chosen to study the Soviet law, as Soviet law in the territory of Latvia was in force for a substantial period of time, almost 50 years.

In June 1940, Latvia was occupied by the USSR, which did not recognize local rights. The notice of November 25, 1940 by the Council of Commissars of People of

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the Latvian Soviet Socialist Republic (LSSR) stated that on November 26, the LSSR shall enter into force the codifications of the Russian Soviet Federal Socialist Republic (RSFSR) in the principal areas of law (Lazdiņš, 2003, 102.lpp.).

It is not possible to analyze the legal framework of adoption and practical arrangements in the territory of Latvia in the 20th century without analyzing the law and rights of the Soviet times as Soviet law in the territory of Latvia was in force for a substantial period of time, almost 50 years.

A child needs special care and a part of child's valuable life is a family, where the child is cared for by its parents. However, life tends to be cruel, sometimes keeping the child from growing in his family. The reasons may be different – fatal accident or carelessness, or reluctance by parents to be responsible for the consequences of their actions – but no matter what the victim of this situation is a child. A child temporarily or permanently deprived of its family environment should not remain in such environment, and is entitled to special protection and assistance.<sup>3</sup> The child in this situation should be provided with alternative care, and one of these alternative types of care is adoption. Adoption involves the bringing up of children without their parents, but still within the circumstances of the family, providing a stable and harmonious home.<sup>4</sup>

In order to fully talk about the adoption institute, it must be analyzed on the basis of family law, the institute of marriage, and the children's and parents' relationship, as all these institutes are tied.

This lecture will shed some light into the wording of the Institute of Adoption, reflecting the Soviet legal framework.

## 1. Soviet law

In June 1940, the Latvian state was occupied by the USSR. Contrary to earlier centuries' experiences, this time local law was not recognized, and the Latvian SSR People's Board of Commissioners (PBC) stated that on November 26, the Latvian SSR would enter into force the Russia SFSR law codification in the major fields of law.<sup>5</sup> After World War II, during the period from 1945 to 1991, the Latvian state was fully incorporated into the Soviet legal system. Although the formal features of Soviet law were related to the continental European legal family, for Latvia the new laws were strange. In particular, these new laws related to public and civil law (for example, religious marriage ceremony was deprived by law), as well as the judicial system (Lazdiņš, 2003, 102.lpp).

<sup>3</sup> *Konvencija par bērnu tiesībām*. ANO Ģenerālā Asambleja, 1989. 20.novembris., 20.panta 1.daļa.

<sup>4</sup> *Noteikumi par adopcijas kārtību*: MK noteikumi nr.111. Latvijas Republikas Saeimas un Ministru kabineta Ziņotājs, 2003. 12. jūnijs, nr.11.

<sup>5</sup> Hronoloģiskais likumkrājums :Latvijas PSR likumu, Latvijas PSR Augstākās Padomes Prezidija dekrētu un Latvijas PSR valdības lēmumu hronoloģiskais krājums : 1940.-1959. Rīga: Latvijas PSR Ministru Padomes Juridiskā komisija, 1960., 22.lpp.

By November 26, 1940, the basic source of Latvian civil law became the RSFSR Civil Code. Civil law regulated the property and related personal moral relations between socialist organizations, citizens and socialist organizations, and between citizens (Latvijas PSR valsts un tiesību vēsture (1917-1970), 1970, 124.lpp.). It should be noted that the RSFSR Civil Code, did not regulate family law.

Soviet civil law consisted mainly of private and corporate property relations. Family law, employment law, land rights were considered as separate fields of law, which should be separated from the civil law, because they either are more than property relations as family law or labor law, or governs persons' relationship to such a special thing as land on which exclusive property rights has the state (Latvijas tiesību vēsture (1914-2000), 2000, 329.lpp.).

Family law in Soviet Latvia during 1940-1941 as it was preached "got rid of the material calculated and religious influence which was specific to bourgeois apparatus" (Latvijas PSR valsts un tiesību vēsture (1917-1970), 1970, 127.lpp.). Family law in the Latvian SSR starting on November 26, 1940 was regulated by the RSFSR Marriage, Family and Custody Law Code,<sup>6</sup> as well as by several other laws of the Soviet Union and the laws of the Latvian SSR (Latvijas tiesību vēsture (1914-2000), 2000, 335.lpp.).

On the basis of the RSFSR Code on April 4, 1941 the Latvian SSR SPC approved the Regulation "On the Guardianship Organs." Since the Orphans' Courts were eliminated, the guardianship case sorting was assigned to Temporary local executive committees. Their jurisdiction was transferred to the adoption proceedings, which previously in the Latvian Republic were assigned to the District Courts (Latvijas tiesību vēsture (1914-2000), 2000, 336.lpp.).

In family law during World War II were made several significant changes, which, with minor editorial changes were in force until the Soviet Union Marriage and Family Law Basics were developed.

A new stage in Soviet marriage and family law marked the on July 27 1968, when USSR HR approved the USSR and the United Republic Marriage and Family Law Basics. In strict accordance with the foundations, Latvian SSR HR adopted on April 18, 1969 Latvian SSR Marriage and Family Code (hereinafter referred to LMFC), which entered into force on October 1, 1969. Codifying it were formulated main tasks, principles and scope of regulated relations of marriage and family law (Latvijas tiesību vēsture (1914-2000), 2000, 390.lpp.).

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<sup>6</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar pārgrozījumiem līdz 1940.gada 1.decembrim. Rīga: Sabiedriski ekonomisko rakstu apgādniecība, 1941

## 2. Regulation of the Institute of the Adoption in the Latvian SSR after the RSFSR Marriage, Family and Custody Law Code of December 1941

According to the RSFSR Marriage, Family and Custody Law Code, Section 3 on the adoption there is set that it was only allowed to adopt a juvenile and minor children and the adoption was permitted only in the interests of children.<sup>7</sup> Given the fact that the adoption was restricted to the child's interests, it appears that the Soviet-era law recognized the interests of children and recognizes the family as a value, the best solution for the child's full development.

Code intended a ban on persons deprived of their right to be a guardian to adopt in case if the person has been deprived of their right to vote, because the court has deprived of parental rights because of personal interests are contrary to the guardianship or trusteeship be subject to interest, as well as if a person has hostile relations. Also a minor was unable to adopt. Therefore, it can be concluded that the adoption by national implementation of existing restrictions imposed in order to protect the child's interests, as well as the age limit-majority was determined, in order to become adoptive parents, but there was no difference in age, what should be between the adoptee and the adoptive parents and the defined upper age limit was not defined.

Adoption was made by the guardianship and trusteeship organ's decision, and it was registered with the general procedures of civil status registration organs. In cases where the foreign nationals who lived in the Soviet Union wanted to adopt children, they had to receive in addition a special permit from the province, district, or the appropriate Executive Committee of the Presidium.<sup>8</sup>

When adopting the adoptee could be granted the adopter name as well, with the consent of the adoptee, adopter's patronymic.

If the adoptable had parents, or if he was in custody or guardianship, for adoption it was necessary to have consent of parents, who had their parental rights or guardians.<sup>9</sup> Parental consent was not required in cases where the documents had shown that the court had deprived parents of parental rights, or it was not known where the parents are located in more than one year, or if their parents were under the auspices of mental illness.

Adopting children who were in maternal and infant health or national department of education institutions and whose parents' place of residence was unknown, and over one year was not made themselves known, adoption could be done without parental consent. Consent in these cases was given by the administration of the institution where the child was. However, if the institution had any indication of parents' home,

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<sup>7</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar pārgrozījumiem līdz 1940.gada 1.decembrim. Rīga: Sabiedriski ekonomisko rakstu apgādniecība, 1941, 57.pants

<sup>8</sup> Turpat, 58., 77. un 59.pants

<sup>9</sup> Turpat, 60.un 61.pants

then in the beginning it had to do everything to look up the parents and only if the search was unsuccessful, parents might be considered as missing absent.<sup>10</sup>

If one parent had given consent to the adoption, as well as in writing announced and with the witnesses and viewing materials showed that the other parent lived alone and did not participate in child rearing and maintenance, the other parent's consent was not required.<sup>11</sup>

If the child was adopted by married person, consent of the spouse was necessary. When adopting a child who had reached the age of ten, child's own consent was also needed.

Adoptees and their offspring in relation to the adoptive parents and adoptive parents in relation to adopted children and their descendants in personal and property rights and obligations were been likened to relatives after the birth.<sup>12</sup>

Adopted children were treated as children at birth.<sup>13</sup> Interesting, that in cases where the facts showed that the relationship between a person who has taken the upbringing of children, foster children, in fact are subject to the adoption of the material respects of law, the court had right, on the basis of the Civil Procedure Code, Article 4, to apply these things to the law on adoption with all ensuing rights and obligations (KPFSR Augst. Tiesas pask. Krāj. 1935.g.izd., 136.lpp.).

Similarly, a remarkable fact is that the Civil Code Article 418 did not restrict the rights of adoptees to inherit property what is left after the deceased parents (KPFSR Augst. Tiesas CK lēm.- „Сов. юст.” 1937.g. 4.num., 58.lpp.).<sup>14</sup>

The guardianship organs could revoke adoption, which was made while the parents were absent or without their consent, after the parents' request, if it was the child's best interest. If the child had reached the age of ten, it was necessary for his consent.

Any person or institution could initiate an action for annulment of adoption, if the child's interests required it.

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<sup>10</sup> Materiāli pie kodeksa atsevišķiem pantiem. KPFSR Lauības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 41.lpp

<sup>11</sup> Materiāli pie kodeksa atsevišķiem pantiem. KPFSR Lauības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 41.lpp

<sup>12</sup> KPFSR Lauības, ģimenes un aizbildnības likumu kodekss. Ar pārnozīmumiem līdz 1940.gada 1.decembrim. Rīga: Sabiedriski ekonomisko rakstu apgādniecība, 1941, 62., 63. un 64.pants

<sup>13</sup> Turpat, 42.pants

<sup>14</sup> Materiāli pie kodeksa atsevišķiem pantiem. KPFSR Lauības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 42.lpp

If the adoption was cancelled, the court gave its decision on the child's deprivation of his adopter and the transfer to guardianship and trusteeship organ's care, and the court could also order the adoptive parent to take care of baby food.<sup>15</sup>

### 3. Regulation of the Institute of the Adoption in the Latvian SSR after the RSFSR Marriage, Family and Custody Law Code of January 1949

Analyzing RSFSR Marriage, Family and Custody Law Code version of January 1949,<sup>16</sup> concludes, that the regulation of the adoption fundamentally remained the same, except for some additions. Section 3 of the Code governed adoption matters and the conditions of the adoption were set out in the Code also from the Article 57 to Article 67. In addition to the earlier highlighted version of the Code, there was added a supplement to the explanation of Article 59, setting up procedures for establishing the fact of adoption after the adopter's or the adoptee's death or disappearances missing in front if while being alive, adoption has not been reported.<sup>17</sup> Explanation for this supplement is the fact that the Second World War took place, which brought with it the need for the regulation of new living situation, making appropriate amendments to the legislation.

The code's Article 60 was added with a supplement, providing that the adoptive parents, at their request, could be recorded in the birth civil status registration books as the adoptee's parents (Latv. PSR APP 1944. g. 7. dec. Dekr. I).<sup>18</sup>

The Code was also accompanied by a number of additions, of which Appendix IX was the Latvian SSR Education, Health and Justice People Commissioner's April 30, 1945 Instruction "Patronage, adoption and guardianship of the children who had lost their parents."<sup>19</sup> The instruction anticipates practically the same framework, which is included in Chapter 3 of the Code. The Instruction gives the regulation of the adoption from Paragraph 13 to Paragraph 23, like the Code Article to Article 56. Therefore, it can be concluded that the regulation of the adoption given in the instruction duplicates the regulation of the adoption given in the Code.

<sup>15</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar pārgrozījumiem līdz 1940.gada 1.decembrim. Rīga: Sabiedriski ekonomisko rakstu apgādniecība, 1941, 65., 66.un 67.pants

<sup>16</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 3.nodaļa

<sup>17</sup> Turpat, 45.pants

<sup>18</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 60.pants

<sup>19</sup> Latvijas PSR Izglītības, Veselības aizsardzības un Tieslietu tautas komisariātu 1945.gada 30.aprīļa instrukcija „Vecāku zaudējušo bērnu patronēšana, adopcija un aizbildnība”. Materiāli pie kodeksa atsevišķiem pantiem. KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 134.lpp

Taking into account all the above mentioned, it follows that the RSFSR Marriage, Family and Custody Law Code version of January 1949, compared to the RSFSR Marriage, Family and Custody Law Code, December 1941 version, retains the previous framework, only in few places little changes in language usage and providing two new reservations, the procedure for establishing the fact of adoption after the adopter's or the adoptee's death or disappearances missing in front if while being alive, adoption has not been reported and the possibility for the adoptive parents, at their request, to be recorded in the birth civil status registration books as the adoptee's parents.

## Conclusions

1. By November 26, 1940, the basic source of Latvian civil law became RSFSR Civil Code. Civil law regulated the property and related personal moral relations between socialist organizations, citizens and socialist organizations, and between citizens (Latvijas PSR valsts un tiesību vēsture (1917-1970), 1970, 124.lpp.). It should be noted that the RSFSR Civil Code, did not regulate family law. Soviet civil law consisted mainly of private and corporate property relations. Family law, employment law, land rights were considered as separate fields of law, which should be separated from the civil law, because they either are more than property relations as family law or labour law, or governs persons' relationship to such a special thing as land on which exclusive property rights has the state ((Latvijas tiesību vēsture (1914-2000), 2000, 329.lpp.). Family law in Soviet Latvia during 1940-1941 as it was preached "got rid of the material calculated and religious influence which was specific to bourgeois apparatus" (Latvijas PSR valsts un tiesību vēsture (1917-1970), 1970, 127.lpp.). Family law in the Latvian SSR starting on November 26, 1940 was regulated by the RSFSR Marriage, Family and Custody Law Code, as well as by several other laws of the Soviet Union and the laws of the Latvian SSR (Latvijas tiesību vēsture (1914-2000), 2000, 335.lpp.).
2. Given the fact that the adoption was restricted to the child's interests, it appears that the Soviet-era law recognized the interests of children and recognizes the family as a value, the best solution for the child's full development.
3. Code intended a ban on persons deprived of their right to be a guardian to adopt in case if the person has been deprived of their right to vote, because the court has deprived of parental rights because of personal interests are contrary to the guardianship or trusteeship be subject to interest, as well as if a person has hostile relations.<sup>20</sup> Also a minor was unable to adopt. Therefore, it can be concluded that the adoption by national implementation of existing restrictions imposed in order to protect the child's interests, as well as the age limit-majority was determined,

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<sup>20</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar pārgrozījumiem līdz 1940.gada 1.decembrim. Rīga: Sabiedriski ekonomisko rakstu apgādniecība, 1941, 58. un 77.pants

in order to become adoptive parents, but there was no difference in age, what should be between the adoptee and the adoptive parents and the defined upper age limit was not defined.

4. Analyzing RSFSR Marriage, Family and Custody Law Code version of January 1949,<sup>21</sup> concludes, that the regulation of the adoption fundamentally remained the same, except for some additions. Section 3 of the Code governed adoption matters and the conditions of the adoption were set out in the Code also from the Article 57 to Article 67. In addition to the earlier highlighted version of the Code, there was added a supplement to the explanation of Article 59, setting up procedures for establishing the fact of adoption after the adopter's or the adoptee's death or disappearances missing in front if while being alive, adoption has not been reported.<sup>22</sup> Explanation for this supplement is the fact that the Second World War took place, which brought with it the need for the regulation of new living situation, making appropriate amendments to the legislation.
5. The Code was also accompanied by a number of additions, of which Appendix IX was the Latvian SSR Education, Health and Justice People Commissioner's April 30, 1945 Instruction "Patronage, adoption and guardianship of the children who had lost their parents."<sup>23</sup> The instruction anticipates practically the same framework, which is included in Chapter 3 of the Code. The Instruction gives the regulation of the adoption from Paragraph 13 to Paragraph 23, like the Code Article to Article 56. Therefore, it can be concluded that the regulation of the adoption given in the instruction duplicates the regulation of the adoption given in the Code.
6. Taking into account all the above mentioned, it follows that the RSFSR Marriage, Family and Custody Law Code version of January 1949, compared to the RSFSR Marriage, Family and Custody Law Code, December 1941 version, retains the previous framework, only in few places little changes in language usage and providing two new reservations, the procedure for establishing the fact of adoption after the adopter's or the adoptee's death or disappearances missing in front if while being alive, adoption has not been reported and the possibility for the adoptive parents, at their request, to be recorded in the birth civil status registration books as the adoptee's parents.

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<sup>21</sup> KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 3.nodaļa

<sup>22</sup> Turpat, 75.lpp

<sup>23</sup> Latvijas PSR Izglītības, Veselības aizsardzības un Tieslietu tautas komisariātu 1945.gada 30.aprīļa instrukcija „Vecāku zaudējušo bērnu patronēšana, adopcija un aizbildnība”. Materiāli pie kodeksa atsevišķiem pantiem. KPFSR Laulības, ģimenes un aizbildnības likumu kodekss. Ar grozījumiem līdz 1948.gada 31.decembrim. Rīga: Latvijas valsts izdevniecība, 1949, 134.lpp

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**Irena Kucina<sup>1</sup>**

## **IS THE EUROPEAN UNION REGULATION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION EFFICIENT?**

### **Abstract**

The paper is devoted to the issue of international child abduction in the area of civil aspects with the aim to discuss the EU Regulation on the matter. At the end of the study the author provides conclusions and suggestions.

**Keywords:** child abduction, Brussels IIbis Regulation, exequatur procedure, issue of certificate

### **Introduction**

The issue of international child abduction in the field of civil aspects has reached new heights by the end of the 20th century, considering society's rapid law and technology development. In order to protect children from inimical influence caused by their abduction, to protect the rights of those persons under whose custody or guardianship the child is and to ensure prompt return of the child within the framework of the Hague Conference on Private International Law, on 25th October, 1980 the Hague Convention on the Civil Aspects of International Child Abduction<sup>2</sup> (hereinafter – the Hague Convention) was concluded. Recognizing the topicality of the children's abduction problems, The Hague Convention is also widely recognized by more than 80 different countries<sup>3</sup> as the legal act which provides the appropriate civil law solution in the child abduction cases.

As regards Latvia, Estonia and Lithuania the appropriate and effective application of the Hague Convention is essential not only from the point of view of the fulfilment of the obligations, which arise from the participation of Latvia, Estonia and Lithuania

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<sup>2</sup> Hague Convention on the Civil Aspects of International Child Abduction. Hague Conference on Private International Law. Available: [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.net/index_en.php?act=conventions.text&cid=24) [cited 03-08-2011].

<sup>3</sup> Hague Conference on Private International Law. Available: [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) [cited 03-08-2011].

at Hague Conference on Private International Law and the fact that the Hague Convention is in force in Latvia since 1st February 2002, in Estonia since 1st July, 2001 and in Lithuania since 1st September, 2002<sup>4</sup>. The Convention's application is essential also within the context of the European Union (hereinafter – the EU), considering the Council Regulation (EC) No.2201/2003 of 27th November, 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No.1374/2000<sup>5</sup> (hereinafter – the Brussels IIbis Regulation).

The goal of the Brussels IIbis Regulation is to provide strict obligations to assure the prompt return of a child. However, this goal suffers from a number of shortcomings. The aim of this paper is to draw attention to some of these weaknesses as regards to enforcement procedure.

European legislators have created the Regulation trusting that competent authorities of the EU Member States shall apply this Regulation efficiently and correctly. But the European legislators have not allowed deviations in this Regulation if it is not the case. Therefore, the question is what happens if the State where a child was abducted questions the validity of the certificate issued pursuant to Article 42(2) of Brussels IIbis Regulation. Can the issue of the certificate be appealed? Can the recognition of the certificate be opposed?

## **Brussels IIbis Regulation on child abduction matters**

The Brussels IIbis Regulation has been in effect since 1st March, 2005 and the provisions of the Regulation are binding additionally to the Hague Convention. Therefore, in the issues of the civil aspects of the child abduction among the EU Member States besides the Hague Convention also the Brussels IIbis Regulation is applied.

The Brussels IIbis Regulation is one of the most essential instruments of the judicial cooperation in the area of cross - border family rights. The Regulation relates to three essential cross - border family rights' aspects: matrimonial matters – cross-border divorces, marriage legal separation or marriage non-existence matters; the matters regarding the parental responsibility – cross - border custody or guardianship and access rights matter; the children's unlawful cross - border removal or retention.

The mechanism envisaged by the Brussels IIbis Regulation in the issues of the civil aspects of the children abduction requests the Member State courts to have mutual trust in the deciding the issues of the children's abduction cases, and is directed to the diminishing of the children's cross - border abduction in the EU.

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<sup>4</sup> Ibid.

<sup>5</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (OJ L 338, 23.12.2003, p. 1–29).

In accordance with the Brussels IIbis Regulation, the final word to decide about the custody and guardianship rights over the child, including his return, after the decision about the child's non-return is taken in a Member State where child was abducted, always goes to the court of a Member State where was the child's habitual residence just before the abduction<sup>6</sup>. After the court of a Member State of a child's habitual residence requires the return of the child, and regarding whom a certificate foreseen by the Regulation had been issued it should be enforced automatically, without the possibility for this judgement's appeal, recognition and enforcement in a Member State where a child was abducted.

## The importance of a certificate upon the return of a child

The system of a certificate on return of a child is provided only within the Brussels IIbis Regulation and the Hague Convention does not provide for a such regulation. In accordance with the conditions of the Hague Convention, if the court of the country where the child was abducted to makes the judgment on non-return of the child, the court of the country of the child's habitual residence prior to the abduction has no authority to decide on return or non-return of the child. It means that if the court of the Contracting State of the Hague Convention, that is not a Member State of the EU, decides not to return the child, the child shall stay in the country where the child was abducted to, and the court of the country, where the child was abducted to, shall further decide on the custody rights. This regulation is required within the EU, as it was recognised that the courts of Member States, where the child was abducted, often interpret the bases for non-return of the child under the Hague Convention too widely and superficially. Therefore the control mechanism for repeated assessment was deemed necessary as regards the issues of non-return of the child.

In order to issue such a certificate, the conditions provided in Article 42(2) of Brussels IIbis Regulation, for the issue of a certificate must be applied. Thus if:

- a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
- b) the parties were given an opportunity to be heard; and
- c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

This means that the court of the Member State of the child's habitual residence that was the child's habitual residence prior to abduction must comply with certain procedural conditions set forth in Article 42(2) of Brussels IIbis Regulation when considering the case. Only conformity and observance of these conditions allows for the issuing of such certificate.<sup>7</sup>

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<sup>6</sup> Article 11(8) of Brussels IIbis Regulation

<sup>7</sup> Practice Guide for application of the Council Regulation (EC) No 2201/2003, p. 37. The text is available in European Judicial Network in Civil and Commercial Matters at: [http://ec.europa.eu/civiljustice/parental\\_resp/parental\\_resp\\_ec\\_vdm\\_lv.pdf](http://ec.europa.eu/civiljustice/parental_resp/parental_resp_ec_vdm_lv.pdf) (examined on May 7, 2011).

Consequently the certificate issued in the Member State of the child's habitual has power of enforcement based on which the enforcement in other state should be started.<sup>8</sup> That ensures as quick and effective return of the child as possible. In accordance with Brussels IIbis Regulation, it is not possible to appeal the issue of the certificate in the Member State of the child's habitual residence. Similarly, in accordance with Brussels IIbis Regulation, it is not possible to use the recognition procedure of the judgment on the child's custody rights, including the return or non-return of the child, in the Member State from where the child was abducted.<sup>9</sup> It means that an irreversible mechanism is initiated to return the child upon the issue of the certificate. But the question still remains open, namely, what happens if the State where a child was abducted questions the validity of the certificate issued pursuant to Article 42(2) of Brussels IIbis Regulation? Can the issue of the certificate be appealed? Can the recognition of the certificate be opposed? Can it be deemed that the issued certificate is not valid and the judgment on return of the child may not be enforced? The answers to the question on a validity of a certificate could be found in the judgment of the European Court of Justice (hereinafter – the Court) of 22 December 2010 in the case C-491/10 PPU (*Joseba Andoni Aguirre Zarraga v Simone Pelz*)<sup>10</sup>.

### *Zarraga* case analysis

In the above-mentioned *Zarraga* case, the Court stated that the court of the Member State of enforcement does not enjoy a power of review of a judgment certified pursuant to Article 42 of Brussels IIbis Regulation<sup>11</sup>, even if it contains a serious infringement of fundamental rights<sup>12</sup>. That means, that the Court in this case considered that it is within the legal system of the Member State of origin that the parties concerned must pursue legal remedies which allow the lawfulness of a judgment certified pursuant to Article 42 of Brussels IIbis Regulation to be challenged.

The conclusion of the Court in the above-mentioned *Zarraga* case, that legal remedies should be sought in the Member State of origin, does not oblige Member

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<sup>8</sup> Article 42(1) and Recital 17 of Preamble of Brussels IIbis Regulation.

<sup>9</sup> Recitals 17 and 24 of Preamble of Brussels IIbis Regulation.

<sup>10</sup> Judgment of the European Court of Justice of 22 December 2010 in the case C-491/10 *Joseba Andoni Aguirre Zarraga v Simone Pelz*. The text is available in EurLex data base on the internet at: <http://eur-lex.europa.eu/lv/index.htm>.

<sup>11</sup> Article 11(8) of Brussels IIbis Regulation provides that „notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.”

<sup>12</sup> Judgment of the European Court of Justice of 22 December 2010 in the case C-491/10 *Joseba Andoni Aguirre Zarraga v Simone Pelz*, para.71. The text is available in EurLex data base on the internet at: <http://eur-lex.europa.eu/lv/index.htm>.

States to ensure such kind of legal remedies if a judgment certified pursuant to Article 42 of Brussels IIbis Regulation contains a serious infringement of fundamental rights.

Of course, if the national law of the Member State of the child's habitual residence allows it, the judgment whereof the certificate is issued can be contested. It could be assumed that the court of appeal may make a judgment that opposes the judgment of the court of first instance, which is, it may disagree on the judgment of the first instance about return of the child and issue of the certificate. It should be unambiguously appreciated if the instance of appeal assesses, verifies, analyzes the conditions of issue of the certificate and makes the appropriate judgment, as the main objective is to achieve the issue of the certificate in compliance with the conditions set forth in Brussels IIbis Regulation. Similar approach is accepted by the Court in *Zarraga* case.

However to establish legal remedies if a judgment certified pursuant to Article 42 of Brussels IIbis Regulation contains a serious infringement of fundamental rights is not an obligation for Member States. Besides, Article 42 of Brussels IIbis Regulation contains other provisions which should be considered by the court of the Member State of origin by issuing a certificate. These provisions are not considered by the Court as the current case was concerned only with infringement of fundamental rights of a child.

## **The principle of mutual trust provided in Brussels IIbis Regulation is in dangerous - possible reforms**

According to the author the principle of mutual trust is not unlimited. It should be balanced with evaluation of rights and interests of a child and a person. If a judgment given in one Member State could be automatically enforced in another Member State and in the Member State of enforcement there does not exist the possibility to oppose or to abolish it, then the Member State of origin should provide an appropriate protection of child's and person's rights and interests, in order to justify an automatic enforcement of judgments, which results from the principal of mutual trust. The protection of a child's and a person's rights and interests is not a question of discretion of each Member State; it should be a question of an obligation of each Member State. Automatic enforcement of judgments and the principal of mutual trust should be balanced with evaluation of rights and interests of a child and a person.

Within the EU there exist other legal instruments which allow recognising and enforcing of a judgment in another Member State without the need for a declaration of enforceability. For example, a judgment on an uncontested claim which is certified as a European enforcement order<sup>13</sup>, a judgment given in a Member State in the

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<sup>13</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*OJ L 143, 30.4.2004, p. 15–39*). Article 20 (1).

European Small Claims Procedure<sup>14</sup> and European order for payment procedure<sup>15</sup> are automatically enforced in another Member State. However, it is essentially to point out that all these legal instruments obligate Member States to establish a mechanism of review of a judgment in situations where the defendant was not able to contest the claim. If the Member State of origin doesn't provide a mechanism for review, a judgment can't be certified.<sup>16</sup> As a result a review of a judgment is substantial mean for a defendant in order to protect his or her rights. This mechanism guarantees that defendant could ask for review of a judgment even when it is in force and appeal in general proceeding is not possible and perhaps the enforcement of judgment is already initiated in other Member State.

According to the author the similar approach should be established in cases of child abduction in Brussels IIbis Regulation in order to provide substantial protection of a child's and person's rights and interests as it is provided in other EU legal instruments discussed above.

The conditions of issuing a certificate are linked with compliance of procedural law, which is closely linked with fundamental rights. Therefore the author proposes the Brussels IIbis Regulation to provide minimum standards for review of a judgment certified pursuant to Article 42(2) of Brussels IIbis Regulation. Another option to make a balance with evaluation of rights and interests of a child and a person is, for example, to provide possibility of withdrawal of certificate. Such possibility already exists in Article 10 of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.<sup>17</sup>

There are no reasons to say that, if Brussels IIbis Regulation would provide for a mechanism for review of a judgment or mechanism for withdrawal of certificate, it would considerably delayed the return of the child that is one of the objectives of the Regulation in these matters, and therefore the system set forth in the Regulation with regard to matters on return of the child would lose its significance. According to the author the objective of the Brussels IIbis Regulation should be in dual nature, namely, to provide substantial protection of a child's and person's rights and interests and to provide prompt return of a child. Only when this combination works together, the Brussels IIbis Regulation would operate in a proper way. The protection of a child's and a person's rights and interests should be at the same level as a protection of financial interests, even in a higher level. If at the EU level there exists proper

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<sup>14</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*OJ L 199, 31.7.2007, p. 1–22*). Article 20(1).

<sup>15</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*OJ L 399, 30.12.2006, p. 1–32*). Article 19.

<sup>16</sup> Article 18 of Regulation No 805/2004, Article 18 of Regulation No 861/2007, Article 20 of Regulation No 1896/2006.

<sup>17</sup> Withdrawal of the European Enforcement Order certificate is possible where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation.

protection of financial interests providing for a mechanism for review of a judgment or mechanism for withdrawal of certificate, there is a need for a similar protection of a family law. Such protection is desirable, even compulsory in order to justify a principle of mutual trust.

## Conclusions

This EU regulation could be efficient if it contained the conditions founded on the principle of mutual trust and replied to the question how to act in case there are concerns about their violation or prevented the concerns at all, providing clear, efficient regulation with extended procedural guarantees.

The regulation should be made more clear. This can be achieved by amendments to Brussels IIbis Regulation, as bringing the case to the European Court of Justice is not always the most efficient way to solve the issue. Mainly due to the fact that the European Court of Justice should be the very last means to solve issues, if the issues can be solved by clear and obvious regulation. Amendments to Brussels IIbis Regulation are surely required.

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Rada Matjusina<sup>1</sup>

## JUDICIAL INDEPENDENCE AND IMPARTIALITY AS THE LEGAL VALUE AND ITS GENESIS IN EUROPE

### Abstract

General human rights instruments guarantee the right to a fair trial before an independent and impartial court. The Human Right Committee in already recalled that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. The doctrine says that judge independence makes the responsibility to apply the law impartially.

The author analyses whether a society should have any criteria of judicial impartiality, whether the judicial impartiality and judicial independence is ensured in the democratic society. The article shows the need of the obligatory international legal acts on the question of ensuring the judicial impartiality and independence, and shows the role of the court judgement in the developing of the judicial impartiality and independence as the value.

**Keywords:** judge, judicial independence, judicial impartiality, values

### Introduction

All the human rights remedies and the instruments shall be guaranteed by judicial independence and judicial impartiality. The research of legal values and the genesis of subjective categories of judicial independence and judicial impartiality has the theoretical and practical importance. In theory the study of subjective categories make it possible to make evidential considerations as to whether these categories have to be defined as written legal rule or as a society's value.

The object of the research is the subjective category of judicial impartiality and judicial independence and its development.

The lack of trust in the judicial system appears to be not because judges are less professional or biased, but because society has become more democratic, expresses its view more freely and understands its basic rights. The research shows the tendency of

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groundless exaggeration of judicial bias that is based on society's attempt to define the category of judicial impartiality too widely. Moreover, the research shows that there is a tendency to narrow the concept of judicial independence by setting its possible variations and strict criteria. This shows that the problem of research of the concept of judicial impartiality and judicial independence takes one of the main role in the legal theory. Mentioned problems are not questioned in the legal doctrine before.

The aim of the research is to analyse the category of judicial impartiality and judicial independence. The most important requirements for 'judicial impartiality' and 'judicial independence' will be discussed researching basically main international legal acts and court decisions of democratic developed countries of Europe and Latvia, and basically by using the case law of the European Court of Human Rights. The aim of the research is to answer whether judicial impartiality and judicial independence is becoming as a society's value.

With the analytic method the concept of judicial impartiality is research in the historical sources and other legal sources. The comparison and evaluation of both values is the basis of the analysis. The comparison method is used to establish the base of development of judicial impartiality. With the comparison method the concept of judicial impartiality and judicial independence is evaluated.

## The development of judicial impartiality and independence as a legal rule

The judicial impartiality as the important element of the society originates in ancients, for example in the Old Testament we can see the defined principles on the judicial impartiality: *Thou shalt not follow a multitude to do evil; neither shalt thou speak in a cause to decline after many to wrest judgment: Neither shalt thou countenance a poor man in his cause. Thou shalt not wrest the judgment of thy poor in his cause. Keep thee far from a false matter; and the innocent and righteous slay thou not: for I will not justify the wicked. And thou shalt take no gift: for the gift blindeth the wise, and perverteth the words of the righteous* (Ex. 23:2-8).

The society and political process require not only fairness judgment but it require fairness judgment for the society; the society require its own fairness and therefore the society each time examine the court decision whether the principles of fair trial are ensured.

Public lack of trust (e.g., Boston Evening Transcript, 1913, p.4) in the court system becomes higher in the very beginning of XX century, and therefore it becomes necessary to develop legal acts to define such important principles as judicial impartiality and independence. The lack of trust appear not because the judges become less professional or bias, but because the society become more democratic, express its view, understands its basic rights. The society lack of trust contributed to a number of international acts, as well as to the court's duty to be impartial and independent. Berlin Professor Christian Tomuschat (2008) says that after the horrors of Second World War, a broad consensus emerged at the worldwide level demanding

that the individual human being be placed under the protection of the international community. For example, a few German local courts (of severely restricted jurisdiction) had been opened in the summer of 1945. Kostal (2011) writes that, “in October 1945, it was proclaimed the main task to establish a new democratic judicial system in Germany, one founded on the independence of judges from executive control”.

By the time the international laws emphasizes the need of judicial impartiality and independence. The Universal Declaration of Human Rights has been adopted by the United Nations General Assembly on December 10, 1948. The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are inherently entitled.

On November 1, 1998 the European Convention on Human Right came into force. Article 6 provides a detailed description of right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time. One of the first judgments that define the concept of judicial impartiality and the possible violation of the Article 6 was made in 1982, in *Piersack v. Belgium* the European Convention on Human Right says that “impartiality” normally denotes absence of prejudice or bias.

As to judicial independence, the European Court of Human Rights made several decision strictly defining the meaning: in *Bryan v United Kingdom* the court set out several principles to be taken into account in establishing the independence of the judiciary, including the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures, and whether the body presents the appearance of independence.<sup>2</sup> This decision shows that court tries to define mentioned principle by the defining the criteria. No doubts, the mentioned criteria reveal the meaning of the judicial independence but these criteria can't be exclusive, and judicial independence shall be analysed each time under the concrete circumstances of the case.

According to the judgments made by the European Court of Human Rights the society can define the list of the indication that determines the judicial impartiality and independence. But it shall be noted that such list can't bound the authorities and the society to continue to develop these concepts and interpret these principles more widely.

Latvian judicial system also had been questioned on the judicial impartiality. Latvian courts defined the main judicial impartiality problem by interpreting the Article 6 of the European Convention on Human Rights, and questioned whether there should be any doubt on court bias if the judges, who made the pre-trial decision, can hear the same case later and make a judgement. The decision on this matter the Supreme Court of Republic of Latvia made on July 11, 2011 (SKA-112/2011) and

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<sup>2</sup> Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, Hampshire: Hobbs the Printers Limited, 2003: *Reference to: Bryan v United Kingdom* (1995) 21 EHRR 272, paragraph 37; *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHHR 1, paragraphs 55 and 57; *Piersack v Belgium* (1983) 5 EHRR 169, paragraph 27; *Delcourt v. Belgium* (1970) 1 EHRR 355, paragraph 31.

held that there is no reason to limit the judge's right to hear the case when this judge already had made a pre-trial decision at the same case. If the judge doesn't get to the situation when he has to re-examine or criticise his own work and his impartiality could be questioned, then there is no reason to reset the judge form this case.

The same argumentation could be found in the various decision of the European Court of Human Rights (e.g. *Fey v. Austria* (1993), *Saraiva de Carvalho v. Portugal* (1994)). The mere fact that a judge had already taken decisions before the trial could not in itself be regarded as justifying anxieties about his impartiality. What mattered was the scope and nature of the measures taken by the judge before the trial. Even in 1972 the European Court of Human Rights '*Ringeisen v. Austria* (1972)' says that cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority. During the years the interpretation on this matter doesn't changes, i.e., in the decision *Nortier v. The Netherlands* (1991) the European Court of Human Rights stated that the mere fact that the juvenile judge also made pre-trial decisions, including decisions on detention on remand, cannot be taken as in itself justifying fears as to his impartiality. What matters is the scope and nature of these decisions.

Therefore it can be concluded that the individuals exaggerate the meaning of the principles (judicial impartiality and independence) and the legal authority repeatedly state that the judge task must be to determine whether the reasonable bystander - a fully informed layman who has no axe to grind - would on objective grounds fear that the court or judge lacks independence and impartiality.

That means that the state provides the society the real instrument of determining the fair trial, and at the same time the state prevents the exaggeration of the principles of judicial impartiality and independence by interpreting the meaning of these principles.

## The further development of the principles as a value

The concept of judicial impartiality and independence, as today we understand it, is defined in most international and national laws and these laws emphasizes the principle of judicial impartiality and independence as each person's guaranteed minimum rights. For example The International Covenant on Civil and Political Rights Article 14 defines that all persons shall be equal before the courts and tribunals, furthermore in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Human Rights Committee (Human Rights in the Administration of Justice, 2003, p.118) has unambiguously held that the right to be tried by an independent and impartial tribunal is an "absolute right that may suffer no exception". Therefore there are the rights that shall be applied in any circumstances and in any court.

The judicial independence is very closely linked to the judicial impartiality, because only the judge, who is independent of any outside influence, can make decision impartially. Professor George D. Brown (2007, p.39) makes us understand the very close link between the impartiality and independence. He says: exposure to legitimizing judicial symbols reinforces the process of distinguishing courts from other political institutions. The message of these powerful symbols is that “courts are different,” and owing to these differences, courts are worthy of more respect, deference, and obedience – in short, legitimacy.

The separation of powers is the most important instrument to ensure the judicial independence and impartiality. And to ensure that this system in reality works, the judges has to have very high status in the society, the status providing independent and impartial review of cases, that protects judges from any interference or pressure from outside. And such kind of status is guaranteed by the judges in all known democracies states. For example, the concept of judicial independence and the procedure ensuring laid down in the legislation of such European countries as Germany<sup>3</sup>, France<sup>4</sup>. Also the Universal charter of the judge article 1 says that *judges shall in all their work ensure the rights of everyone to a fair trial. [...] The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.*

During the historical process it is obvious that the society's need to have the impartial and independent judicial system had been realized. Large numbers of different international and national legal were adopted and court cases were made, the real functional judicial system started to work. But still today the society emphasise the judicial bias.

According to the society view<sup>5</sup> there are no claims against the developed system, but today the society doubt the real fulfilment of the developed system and the real ensuring of the judicial impartiality and independence. The system is ensuring the existence of the main procedural values but the system is not perfect to provide its implementation in the society.

That means that there are the instruments that can ensure fair trial and these instruments are provided by legal obligatory rules. But these rules do not develop the real values in the society, because only the society by the acceptance and implementation can provide that the principles set in the legal rules become a value.

Therefore since the very beginning of XXI century the Europe starts to develop new models of how to ensure directly judge impartiality and judge independence. For example, during the Latvian pre-accession preparation phase into EU on May 12, 2000

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<sup>3</sup> Grundgesetz für die Bundesrepublik Deutschland, approved on 8 May 1949, available: <https://www.btg-bestellservice.de/pdf/80201000.pdf> (Official Translation)

<sup>4</sup> Constitution de la République Française, adopted on 4 October 1958, available: <http://www.assemblee-nationale.fr/english/8ab.asp> (Official Translation)

<sup>5</sup> Guļāns, A. (2008), „Ceru, ka ir sācies nopietns darbs, kura mērķis ir tiesu sistēmas darba pilnveidošana”, referāts Latvijas tiesnešu konferencē 2002.gada 8.martā, available: <http://www.at.gov.lv/lv/about/chairman/speeches/2008/20080401-copy/?print=1>

in a small seminar the judges called upon to formulate requirements putting forward to judge candidates. The judges acknowledged that the judge's behaviour model has an obligation not to provide any guidance on the process of possible outcomes. At the same time the judge must be able to keep the conversation open, collegial, with understanding, structuring arguments, should be able to use its authority flexibly (Geislers, 2011, p.216).

Thus the judicial impartiality and judicial independence as a category have been interpreted not only on the ground of the formal developed rules under the covenant, convention and other international legal acts, but mostly of the real implementation of these rules by the judge.

Today the modern society does not emphasize the needs of the legal regulation because the large numbers of existed national and international acts give to the democratic society stable ground to ensure fair trial. The next step is to ensure the implementation of these rules into the real court procedure – to show the society that these rules are working and the society needs are contented. That is why the problem of the judicial impartiality and judicial independence stress the representatives of judicial system; the judges develop the ethical principles and guidance that shall make the society able to trust the court.

Professor Patricia Noonan (2003, p.10) in a comparative report on judicial selection, appointment and promotion criteria in Latvia indicates that the following characteristics of judge's qualifications must be observed - patience and tolerance, ability to listen and hear, courtesy, sympathy, while the ability to be fair and reasonably attentive.

These are the first modern steps on the democratic understanding of judicial impartiality and judicial independence. That combines the understanding of the legal ruling on the basic described values and the practical implementation of these prescripts into the judge daily work with the direct effect to the society – to ensure the society to feel that the judicial impartiality and judicial independence exists, to ensure that it become a reputed value.

## Conclusion

1. The judicial impartiality and judicial independence are the values of the democratic society, thus these are the categories that shall be ensured not only by strict procedural rules, but also and primary by the personal quality of the judges. The judge has to have personal and emotional intelligence, the judge has to have patience and tolerance, ability to listen and hear, courtesy, sympathy, while the ability to be fair and reasonably attentive.
2. The judicial impartiality and judicial independence as the democratic society value further have to be developed and improved not only on the ground of the formal developed rules under the covenant, convention and other international legal acts, but mostly by the real implementation of these rules by the judge.

3. The implementation and genesis of judicial impartiality and independence shall be analysed not by the adopted legal compulsory rules, but by the sequentially judge decisions.
4. The judicial impartiality and independence as a value can appear only in the society's consciousness, and only by this way the compulsory rules become a value.
5. There is a base to conclude that today judicial impartiality and judicial independence are implemented into judicial system as a legal compulsory rule, but not as a society's reputed value.

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**Paulius Miliauskas<sup>1</sup>**

## **THE RESTRUCTURING PROCEDURE IN THE REPUBLIC OF LITHUANIA AND ITS LEGAL IMPLICATIONS**

### **Abstract**

In order to achieve a high level of legal integration in the European Union certain fields of law have to be amended and regulated by the Member States. These amendments are undertaken by following general policies, recommendations, traditions, and the quality of legal system of the EU. One of the fields that the European Commission promotes, that have wide reaching social and economic consequences, is the restructuring of legal entities. This paper considers legal issues which may arise in applying the Law on Restructuring of Enterprises of the Republic of Lithuania. Basic principles under the law are discussed. Legal problems that have been encountered by the courts in applying the old wording of the law are also addressed. Furthermore, certain provisions of the new wording that might cause legal uncertainty and hinder the successful restructuring procedure are identified. Finally, the paper draws some conclusions about what can be learned from the mistakes of the Lithuanian legislator.

**Keywords:** company law, restructuring, bankruptcy

### **Introduction**

Companies play a crucial role in the economy of every state. In order to keep companies operating is a going concern as well as to avoid liquidation, corporate rescue laws are enacted. It has long been recognized, both on national and supranational level, that legal systems should provide companies the option to restructure. For example, it is stated by the European Commission that the availability of statutory rescue and restructuring procedures is crucial (European Commission, 2003, p. 7). The European Commission has long been active in the field of reducing and minimizing negative consequences to social welfare and employment caused by the restructuring of legal

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entities<sup>2</sup>. Although there are no mandatory EU legal acts regarding the restructuring procedure, the European Commission clearly recognizes the crucial role of statutory rescue and encourages legal systems to provide an option to restructure. Member States should try to not only adopt laws according to the legislation of EU but also to contribute to the recommendations, traditions, and quality of the EU's legal system. In order to achieve a high level of legal integration within the EU, high legal standard restructuring procedures should be introduced in the Member States.

On the academic level it has been recognized that corporate rescue laws are a necessary alternative to liquidation and bankruptcy proceedings because they preserve a company's value (Parry, 2006, p. 2). The value of a company may be a lot more than if the assets of the company would be sold, as a consequence of liquidation, the corporate rescue laws are enacted in order to keep the businesses alive (McCormack, 2008, p. 5–6). In the context of bankruptcy, introduction of restructuring procedure allows the preservation of businesses. Therefore, it becomes possible for the company to repay debts to the creditors (at least more than they would get in case of liquidation), to keep employees employed, and to continue paying taxes to the state. Thus, restructuring procedure is not only beneficial for individual companies but for the whole economy of the state as well.

In the Republic of Lithuania, the possibility to rescue companies in distress was first introduced in 2001 with the enactment of the Law on Restructuring of Enterprises (also referred to as the Law). Since the enactment of the Law, up until the end of 2008 there have been only 41 restructuring cases (Department of enterprise bankruptcy management, 2008, p. 12–13). However, due to a change in the economic situation both in the Republic of Lithuania and in the rest of the world, there has been a drastic increase in restructuring proceedings with a total number of 121 restructuring cases (Department of enterprise bankruptcy management, 2011, p. 9–10). The above statistical data suggests that during 2009–2010 there had been three times more restructuring cases of legal entities than in all previous years combined. The Lithuanian legislator has reacted accordingly and in 2010 introduced new wording to the Law. Despite the increase in the number of restructurings and the entrance into force of the new wording, so far only 5 restructuring proceedings have been successfully completed. On one hand, it can be explained that the restructuring of a legal entity is a lengthy procedure that takes around 4 years. Thus, there are on-going restructuring procedures that are still yet to be completed. On the other hand, statistical data also poses a legal concern that the laws regarding the restructuring of legal entities in the Republic of Lithuania are far from perfect.

This paper is based on qualitative academic legal research. The main analysis methods are: linguistic (texts of Lithuanian laws are analysed), systematic (the

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<sup>2</sup> European Restructuring Toolbox has been developed in order to help companies limit negative effects of restructuring process. Since 2005 the European Commission Task Force on Restructuring has regularly organised forums dedicated to restructuring on various themes. More information is available online at: <<http://ec.europa.eu/social/main.jsp?catId=782&langId=en>>.

author approaches and interprets legal regulations systematically), logical (various inconsistencies in legal regulations are discussed) and teleological (the purpose of the legal acts is determined). Also, a case study method is used while analysing different cases solved by Lithuanian courts. The aim of the paper is to contribute to the analysis of corporate rescue laws around the EU by analysing the legal acts of the Republic of Lithuania.

The paper is structured as follows. In the second section restructuring concept and basic restructuring principles are introduced. The third section deals with the restructuring procedure in the Republic of Lithuania. The paper also addresses legal problems that have been encountered by the courts in applying the old wording of the Law. Furthermore, certain provisions of the new wording of the Law that might cause legal uncertainty and hinder the successful restructuring procedure are identified. Finally, the paper draws some conclusions about what can be learned from mistakes of the Lithuanian legislator.

## 1. What is restructuring?

Before analysing the topic in detail the concept of restructuring of legal entities (sometimes also called reorganisation or corporate rescue) has to be examined. A broad and a narrow concept of restructuring of legal entities can be distinguished. A broad definition encompasses not only formal restructuring procedure of financially distressed companies but also company reorganisation, closures, mergers and acquisitions, downsizing, outsourcing, relocation, etc. (European Commission, 2010, p. 12–13). As is clearly seen, the broad definition of restructuring goes well beyond the bankruptcy regulation and is related to any change in the structure of a company or its activities. Some legal scholars define restructuring (or corporate rescue) as a major intervention necessary to avert eventual failure of the company (Finch, 2009, p. 243). However, this definition (although it deals only with bankruptcy procedure) captures both formal and informal rescue strategies, and therefore, does not fit the goals of this paper. For the purposes of this paper restructuring of legal entities is understood narrowly as a formal procedure controlled by the courts. The aims of such procedure are to maintain and develop the activities of a legal entity, settle its debts, and avert bankruptcy. The aforementioned goals are achieved by securing assistance from the creditors and applying legal, economic, technical, organisational, and other measures.

In order to better understand the aims and functions of restructuring procedure different legal systems should be distinguished at this point. Restructuring as it was defined above is a legal institute of bankruptcy regulation. Therefore, it can occur inside or outside of bankruptcy proceedings. This depends on whether restructuring of a legal entity is initiated as a part of bankruptcy or if it is a separate and partly independent legal procedure. Also, depending on the goals of bankruptcy regulation soft and hard legal bankruptcy regimes can be identified (Wood, 2007, p. 4 – 9). First, the issue of creditor (hard) and debtor (soft) oriented bankruptcy regimes will be addressed. A bankruptcy regime is characterized as creditor oriented, if it replaces

management with a court appointed trustee, does not provide for a complete stay of the creditors' enforcement rights and applies the absolute priority rule while distributing assets of the business (Franken, 2004, p. 650). On the other hand, bankruptcy regime is considered to be debtor friendly if it leaves the incumbent management in control of a legal entity, completely stays within the enforcement rights of the creditors, and applies the distributive rule, which allows loss sharing between shareholders and creditors. Most of the debtor friendly regimes provide for a corporate rescue procedure (restructuring) and allow a better chance to save the business. It has been identified in the legal literature that France has the most debtor oriented legal bankruptcy regime, while UK is mostly creditor oriented (Kammel, 2008, p. 64–67).

As was mentioned above, restructuring proceedings can occur inside and outside of bankruptcy proceedings. Restructuring procedure is usually initiated inside bankruptcy proceedings when the laws of the state allow for the entering into restructuring or bankruptcy through a single procedure. In other words, there are no separate procedures to initiate bankruptcy and restructuring proceedings. For example, the Czech Republic and Denmark have unitary entry into insolvency proceedings which can turn into final bankruptcy or reorganization (Wood, 2007, p. 149 – 150). Restructuring outside bankruptcy occurs when restructuring proceedings may be initiated separately from bankruptcy proceedings. In this case, bankruptcy and restructuring are two separate court proceedings. Usually these proceedings are interconnected, for example, as long as restructuring proceedings are not terminated bankruptcy proceedings cannot be initiated. Bankruptcy and restructuring proceedings are separate in countries like Poland, Hungary and Slovakia (Wood, 2007, p. 159, 165–167; Zdzienicki and Cieminski, 2006, p. 281–299; Csoke, 2006, p. 215–240).

## 2. Restructuring procedure in the Republic of Lithuania

Restructuring in Lithuania is regulated only as a formal procedure. Therefore, it is understood in a narrow sense. It has to be noted, that there are no restrictions imposed by law for creditors and financially distressed companies to use contractual measures. Thus, they can agree to save the business outside the formal restructuring proceedings as well. The Law stipulates that when restructuring proceedings are initiated the incumbent management remains in control of the legal entity (however, they are supervised by the restructuring administrator appointed by the court) (Law on Restructuring of Enterprises, 2010, Article 9, paragraph 1), the claims of the creditors are completely stated, including writs of execution and set off rights (Law on Restructuring of Enterprises, 2010, Article 8, paragraphs 1 and 3), and loss sharing between creditors and shareholders is allowed, i. e., the calculation of default interest and interest for all the liabilities are suspended, creditors are allowed to discharge from liabilities (Law on Restructuring of Enterprises, 2010, Article 8, paragraph 2 and Article 12, paragraph 1, subparagraph 4). Due to these reasons, the Lithuanian bankruptcy regime (when restructuring proceedings are initiated) can be classified as debtor friendly or soft. It also has to be noted that the restructuring procedure in the

Republic of Lithuania occurs outside the bankruptcy proceedings and is regarded as a separate legal proceeding. This does not mean that bankruptcy and restructuring do not influence one another. On the contrary, these two proceedings are interrelated. When courts receive a petition for restructuring while the investigation of the petition for bankruptcy is under way and there is no decision to start bankruptcy proceedings yet, the investigation of the petition for bankruptcy has to be postponed until the court order to initiate or to refuse the restructuring proceedings (Law on Enterprise Bankruptcy, 2001, Article 9 paragraph 4). Under this rule, the Lithuanian legislator clearly supports restructuring over bankruptcy. Therefore, bankruptcy proceedings cannot be started if there is a chance to rescue the legal entity in distress. However, when the restructuring proceedings are terminated by the order of the court, due to the failure to present the restructuring plan or to properly implement it, there is an obligation for the management of the legal entity to initiate bankruptcy proceedings (Law on Restructuring of Enterprises, 2010, Article 28, paragraph 2).

According to Article 5 of the new wording of the Law, restructuring proceedings can be initiated only by the approval of the shareholders of the legal entity under financial distress after the management body has prepared the guidelines of the restructuring plan and these guidelines have been approved by the meeting of the shareholders. Also, there are legal requirements and restrictions for the initiation of the restructuring procedure (restructuring tests):

- 1) an enterprise has to be in financial difficulties or there has to be a real possibility that it will be in financial difficulties within the next three months. This means that the legal entity is unable to discharge its obligations and reduce losses which, without assistance rendered by creditors, would force it to terminate its activities and go bankrupt. Assistance of the creditors is essential and it has been established by the courts that restructuring procedure is feasible only if creditors agree to assist in the corporate rescue (Court of Appeal, case No 2-1062/2011);
- 2) an enterprise has not discontinued its activities. Continued activities mean that the enterprise is seeking to be a part of commercial legal relationships and has entered into new contracts or is performing its duties under earlier agreements. If it is established that a company is no longer pursuing any of the activities stipulated in its articles of association restructuring proceedings cannot be initiated;
- 3) an enterprise has not entered bankruptcy proceedings or has not gone bankrupt. A legal entity is considered to be insolvent when it fails to settle its debts with the creditors after the lapse of three months from the due date and the overdue liabilities are in excess of over a half of the value of the assets on the legal entity's balance sheet. If the court after analysing the enterprise's balance sheet states that the company is insolvent, restructuring procedure cannot be initiated (Court of Appeal, case No 2-1390/2011);
- 4) an enterprise was established at least three years before the date of filing of a petition to initiate enterprise restructuring proceedings. This is a new requirement compared to the old wording of the Law. It has been included

following the recommendations put forward by the European Commission (Communication from the Commission, 2004, paragraph 12)<sup>3</sup>;

- 5) at least five years have passed from the coming into effect of the court decision to close the restructuring proceedings or the court ruling to terminate the proceedings. This is also a new provision which ensures that financially distressed companies will not abuse the possibility to restructure and will not initiate restructuring procedures one after the other in order to prolong their bankruptcy and liquidation (Regional Court of Klaipėda, case No B2-1278-159/2011).

Restructuring procedure can only be initiated by the shareholders of the legal entity after they have approved the guidelines of the restructuring plan prepared by management and have selected a restructuring administrator. The restructuring administrator informs all the creditors of the legal entity about the decision of the shareholders to start restructuring procedure and files a petition with the court to initiate restructuring proceedings (Law on Restructuring of Enterprises, 2010, article 6, paragraph 2). After receiving a petition, the court adopts a ruling regarding the receipt of the petition to initiate restructuring proceedings and informs creditors of the legal entity. Only after analysing the restructuring case the court adopts a ruling to initiate restructuring proceedings or to refuse to initiate legal proceedings. This ruling must be adopted no later than within a month after receipt of the petition. From the coming into effect of the court ruling, the legal entity acquires the status of enterprise under restructuring. The ruling is executed without delay, which means that appealing against the ruling does not suspend the restructuring procedure (Law on Restructuring of Enterprises, 2010, article 7).

From the date of coming into effect of the court ruling to initiate the restructuring proceedings to the date of adoption of the court ruling to approve the restructuring plan it is prohibited to discharge all the pecuniary obligations, to apply judicial pledge, servitudes, usufruct, to offset claims, to pledge, sell or otherwise transfer the assets of the legal entity, which are necessary for continuation of its activities. It also has to be mentioned that the calculation of default interest, interest for all the liabilities, recovery under the writs of execution and set-off of claims are suspended (Law on Restructuring of Enterprises, 2010, article 8).

After the initiation of the restructuring proceedings, management of the enterprise prepares a draft restructuring plan which has to be approved by the meeting of the shareholders of the legal entity. Only at this point in time creditors come into play and have the right to express their will regarding the restructuring of the legal entity. The meeting of the creditors approves the draft restructuring plan if the creditors, whose amount of claims, in terms of value, account for at least two-thirds of the amount of all the creditors' claims confirmed by the court, vote in favour of the draft restructuring plan. There are no separate voting procedures according to creditor classes. After the creditors have approved the draft restructuring plan it is submitted

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<sup>3</sup> Paragraph 12 states that a newly created firm should not be eligible for rescue or restructuring aid even if its initial financial position is insecure.

to the court, which adopts a ruling to approve the restructuring plan. This ruling is final and is not subject to appeal. If creditors do not approve the draft restructuring plan there is a possibility to return it to the management body of the legal entity for revision (Law on Restructuring of Enterprises, 2010, article 23).

The restructuring of a legal entity cannot last more than four years with a possibility to extend such period for an additional year if the approval of the court has been received. After the restructuring plan of the legal entity has been implemented, the court closes the restructuring proceedings and the enterprise loses the status of a legal entity under restructuring (Law on Restructuring of Enterprises, 2010, article 28). Thus, the restructuring proceedings end.

### 3. Legal issues identified by the courts

First, the courts in the Republic of Lithuania have stated that creditors cannot be parties to the legal proceedings in a restructuring case until their claims have been approved by the court handling the restructuring case (Court of Appeal, case No 2-1449-1/2009). From a legal perspective this means that before the approval of their claims, by the court creditors, they are barred from entering and participating in the hearings of the court regarding the restructuring procedure. More importantly, creditors cannot appeal if they think that the restructuring procedure is initiated against the requirements of the laws. The problem in this regard is that claims can only be approved after the decision of the court to initiate restructuring proceedings has come into effect. And if the creditors are not allowed to participate in the hearings of the court they cannot dispute these proceedings. In other words, the initiation of the restructuring cannot be disputed by the creditors. The new wording of the law does not address this problem. However, there are some judgements of the higher courts that have identified the problem and are trying to shift legal practice towards allowing creditors to appeal, even before their claims have been approved (Supreme Court, case No 3K-3-179/2011). The restriction for the creditors to participate in the restructuring proceedings is unjustified and limits the rights of the parties to the restructuring procedure more than it is necessary.

Another legal issue is regarding the related creditor participation and their rights in the restructuring procedure<sup>4</sup>. Related creditors are understood as creditors that are closely related to the enterprise that is being restructured (parent company, subsidiaries, shareholders, etc.). Though the new wording of the Law subordinates the rights of the shareholders to satisfy their claims against the company to the claims of other creditors, this does not limit the rights of the shareholders (and other related creditors as the case may be) to participate in the restructuring proceedings as creditors, i. e. to vote in the meeting of the creditors. However, the courts have partially identified this issue and limited the extent of participation of the related

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<sup>4</sup> Related creditor participation and the concept of controlled restructuring procedure in the Republic of Lithuania has been analysed in detail (Miliauskas, 2010, p. 104 – 108).

creditors in the restructuring proceedings. For example, a creditor (legal entity) cannot vote in full capacity while deciding whether to approve the restructuring of a company in the meeting of the creditors, if its managing body is the same as the one of the legal entity that is being restructured. Voting powers can also be restricted if the managing body of the creditor can be influenced by the shareholders of the legal entity under restructuring (Court of Appeal, case No 2-510/2008). The new wording of the Law does not address this issue which is left for the courts to decide upon in future cases. It should be noted that related creditors may abuse the restructuring procedure and cause damages to the legal entity and to other creditors as well. This may happen as they represent the interests of the entity that is being restructured and not the interests of the creditors as a group. Due to this reason the view to limit related creditors' voting rights in the meeting of the creditors should be supported.

The courts have also identified legal issues regarding the guidelines of the restructuring plan. A lot of disputes arose because the old wording of the Law did not address what should be included in the guidelines. It was interpreted differently by the parties in the restructuring proceedings as to what the guidelines of the restructuring plan should include (sometimes they did not even include how the restructuring of the legal entity is to be carried out or there was no future business plan (Court of Appeal, case No 2-705/2009)). However, after the adoption of more coherent and consistent provisions in the new wording of the Law, these issues should not cause legal concerns as the interpretations of what the guidelines of the restructuring plan should look like are limited by the specific provisions of the Law. It is currently clearly defined what the guidelines of the restructuring plan should include before submitting them to court for approval. Also, it is clearly stipulated that the guidelines have to be approved by two-thirds of votes of the shareholders of the legal entity present at the meeting before submitting them to court (Law on Restructuring of Enterprises, 2010, article 5).

Legal issues presented above show that the distribution of power between different parties in the restructuring proceedings has to be balanced, but this is not always possible to do by the Member State itself.

#### **4. Legal issues arising from the new wording of Restructuring Law**

According to the explanatory notes of the Law the purpose of the new wording is to provide better regulation of the restructuring procedure, in order to allow for financially distressed legal entities to restructure more successfully and to continue their activities (Explanatory note, 2010, p. 1). The Law is particularly aimed at a better protection of creditors' rights. However, the rights of the creditors of financially distressed legal entities have been reduced compared to the previous wording of the Law.

As it was mentioned earlier, the restructuring proceedings can only be initiated by the shareholders of the company after the management body has prepared guidelines

of the restructuring plan. This means that creditors are no longer entitled to initiate restructuring proceedings (such a right was conferred to them in the old wording of the Law). The only explanation provided by the Lithuanian legislator as to why the right of the creditors to initiate the restructuring proceedings has been removed is that creditors rarely use their right to initiate the restructuring procedure (Explanatory note, 2010, p. 3). However, these motives are not convincing and the reduction of the creditors' rights seems to be unjustified. The right of the creditors to initiate the restructuring procedure served as a balancing provision between the rights of the shareholders and creditors. It allowed creditors that were interested in preserving business relations with the financially distressed legal entity to start the restructuring procedure on their own and try to satisfy more of their claims than in the case of liquidation. Alternatively, it can be also argued that shareholders of the legal entity, knowing that the restructuring procedure could be initiated by the creditors, had more pressure and were more prone to start the procedure themselves. It has to be noted that the right of the creditors to initiate the restructuring procedure did not constitute a barrier for the whole restructuring procedure and did not contribute to the prolongation of the proceedings. Thus, it is likely that this right has been removed without legitimate and objective reason.

The new wording of the Law has deprived creditors of a right to sanction the guidelines of the restructuring plan. In other words, the initiation and all the restructuring proceedings up until the approval of the draft restructuring plan have been given into the hands of the management body and shareholders of the legal entity. This might cause certain legal problems as the restructuring procedure can be used in order to avoid performance of the obligations. Creditors enter the restructuring procedure quite late and are not in a position to prevent such abuse.

According to the time frame set by the Law to initiate the restructuring procedure, (Law on Restructuring of Enterprises, 2010, article 14, paragraph 5) creditors can influence the restructuring of the legal entity only after about 7 months after the initiation of the restructuring proceedings. Only at this point in time, do they have the right to approve the draft restructuring plan. Thus, the subsequent continuation of restructuring depends on their decision. However, during the first 7 months creditors are not in a position to influence the whole restructuring proceedings and do not have any vote, as to whether such procedure is justified or if they assent to it. Despite all of this, there are certain legal consequences that can negatively affect the creditors during this waiting period. For instance, during the period starting from the date of coming into effect of the court ruling to initiate the restructuring proceedings to the date of adoption of the court ruling to approve the restructuring plan, the discharge of all pecuniary obligations is prohibited and the calculation of default interest and interest for all the liabilities is suspended. Creditors are also not allowed to recover their claims under the writs of execution or by the way of set-off. The above mentioned consequences, caused solely by the decision and will of the shareholders, raise some legal concerns, especially when taking into account the view of the courts and the legislator that the restructuring proceedings are viable only when the creditors assent to the restructuring of legal entity in financial distress.

The legislator explains that if the creditors do not approve the draft restructuring plan the consequences for the legal entity would be very severe (Explanatory note, 2010, p. 3). In this case all the assistance from the creditors would be cancelled, all the suspended obligations would become due, and the calculation of default interest and interest of all the liabilities would continue from the date of their suspension. But do these regulations really punish the legal entity? As the case might be, creditors are mainly interested in retrieving their claims in the shortest possible timeframe. They are not interested in taking unnecessary risks and waiting for the debts to accumulate additional interest<sup>5</sup>. Also, as the legal entity is in financial distress it is more likely that the financial situation will only worsen with the passage of time, particularly if the creditors think that restructuring is not a viable option. The chance of successfully retrieving claims from the debtor diminishes greatly after the restructuring proceedings have continued for around 7 to 9 months and the debts of the legal entity in distress have accumulated even higher. This allows a presumption that it would be even harder for the creditors to retrieve their claims if the restructuring plan is not approved. In other words, the longer they wait, the more assets of the debtor are wasted. Also, it can be assumed that shareholders of the legal entity can abuse the restructuring procedure in order to prolong liquidation. As it was mentioned earlier the initiation of the restructuring proceedings postpones the investigation of bankruptcy petition until the restructuring petition has been fully adjudicated. If this happens, the delay in bankruptcy would depend solely on the decision of the shareholders of the legal entity in distress.

Another problem regarding the new wording of the Law might arise in satisfying creditor claims, according to the sequence and procedure established by the Law (Law on Restructuring of Enterprises, 2010, article 13). As it was in the old wording, the claims of a secured creditor are satisfied first from the proceeds of the sale of the company's pledged assets. The claims of the other creditors are satisfied in two stages according to the sequence established by the Law. During the first stage, claims without the calculated interest and default interest are satisfied. In the second stage – the remaining creditors' claims interest and default interest are satisfied. In each stage, there is an established sequence according to which certain groups of creditors have the priority to satisfy their claims. First in line to satisfy their claims are the employees of the legal entity and persons who have suffered damages due to an accident at work. Second in line are the claims of all the rest creditors. A new provision has been added in the new wording of the Law. It states that claims of the shareholders of the legal entity are satisfied last, i. e. after the claims of first and second line creditors have been satisfied. Though the purpose of the legislator to subordinate shareholders' claims against the claims of other creditors is a huge step towards a more transparent restructuring procedure, as shareholders will not be able to satisfy their claims according to the restructuring plan before the claims of other creditors are satisfied.

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<sup>5</sup> From the bankruptcy regulation point of view, restructuring is only feasible when legal entity under financial difficulties is worth more as a going concern than if it would be if its assets would be separately sold to satisfy creditor claims (Baird and Rasmussen, 2002, p. 758).

In this regard, the transfer of the claim to another person or creditor does not change the sequence of satisfaction of such a claim, (Law on Restructuring of Enterprises, 2010, article 23, paragraph 4) it has to be noted that the provision itself is very unclear, complicated, and might cause problems when being applying in court.

The Lithuanian legislator in determining the satisfaction of shareholders' claims stipulates that:

*“Third in line for satisfaction shall stand claims of participants of the enterprise under restructuring who became creditors of the enterprise prior to initiation of the restructuring proceedings and who alone or together with other participants control the enterprise under restructuring (who became creditors of the enterprise both directly and indirectly through parent enterprises or subsidiaries or through legal persons of other legal forms, on the adoption of decisions of the meeting of participants whereof they may have an influence (hereinafter referred to as “parent enterprises or subsidiaries”) not relating to employment relations”.*

The first part of this paragraph clearly states that the legislator intended to subordinate the satisfaction of the shareholders claims, who control the legal entity under restructuring. Nonetheless, it is not quite clear from the wording whether the subordination affects only the controlling shareholders or all shareholders of the legal entity. Keeping in mind the fact that there are various legal mechanisms to control legal entities (pyramid structures, multiple voting rights shares, shareholders' agreements, etc. (European Commission, 2007, p. 7 – 8)) it should be considered that the subordination of shareholders' claims provision affects all the shareholders despite the size of their shares in the legal entity. However, it should be demonstrated that they have influence in adopting the decisions of the general meeting of shareholders of the legal entity under restructuring. The second part of this provision is much more unclear and complicated. It is stated that third in the line are the claims of the shareholders' who became creditors directly and indirectly through parent companies and subsidiaries. The notion of 'indirect creditor' is not known in Lithuanian law, nor is it used in legal academic literature. Taking into account the fundamental principal of separate legal personality, it should be stated that shareholders cannot become indirect creditors through other controlled companies. In this case the parent company or subsidiary becomes the creditor of the legal entity under restructuring but not the shareholders of these companies. In light of these considerations, it should be understood that the Lithuanian legislator wanted to subordinate not only the claims of shareholders of the legal entity but also the claims of other companies directly or indirectly controlled by the same shareholders. It should also be noted that there are some legal legislative technique mistakes, for example, in the above mentioned provision parent companies and subsidiaries are equated to legal forms of legal entities. However, this is not the case. Defining a company as a parent or a subsidiary only reveals the legal ties and relationships between two companies (parent company controls the subsidiary) but it does not indicate what is the legal form (is it a partnership, sole proprietorship or a company limited by shares). Due to the above

mentioned reasons the provision regarding the satisfaction of shareholders' claims is complicated and unclear. Therefore, it might cause a lot of dispute in the courts.

There is another legal issue regarding the procedural term limits under which the restructuring proceedings have to be concluded. The Lithuanian legislator has set quite short terms in order to avoid prolonging restructuring proceedings (Supreme Court, case No 3K-3-263/2010). However, some of the term limits are very short and cannot be objectively complied with. For example, a separate appeal against the ruling to initiate or to refuse to initiate the enterprise restructuring proceedings must be examined in the Court of Appeal of Lithuania, no later than 14 working days from the date of its receipt. Statements in response to separate appeals may be filed within 10 working days from the date of dispatch of a copy of the separate appeal to the parties involved in the proceedings. It is clearly seen that responses to the appeal will be received almost at the same date when the judgement has to be passed and the court will not be able to properly adjudicate the case in one day.

## 5. Conclusions

Though restructuring of legal entities is not yet directly regulated on the level of European legislation, the European Commission promotes the rescue of distressed companies. There have been recommendations (including European Restructuring Toolbox) and forums organised by the Task Force on Restructuring on various problems arising during the restructuring of legal entities. However, the evidences from the Lithuanian perspective have shown that more stringent measures from the European Union are required in order to deal with the problems arising during the restructuring of legal entities. The legislators of the Member States might not be able to cope with these problems alone.

Despite the fact that the new wording of the Law is definitely a step forward towards a better regulation of restructuring procedure in the Republic of Lithuania (as it solves a lot of interpretation and application problems created by the old wording of the Law), it is far from perfect. As it was shown in the article, the purpose of the restructuring procedure should not be focused on the rights of only one party of legal relations. Instead, the rights and obligations of different parties in the procedure of restructuring should be balanced, so as not to infringe on their interests more than is necessary to achieve the goals of the restructuring procedure. Lithuania, in this regard, presents a clear case of problems that arise due to the imbalance of powers during the restructuring of legal entities.

The diluted role of creditors, the over empowerment of shareholders, unclear provisions and impossible to comply with timeframe of the restructuring procedure – these are the problems that exist in Lithuania. These legal issues are caused by a lack of successful restructuring proceedings and an increasing amount of failures and liquidations of legal entities. The negative consequences from the failure of businesses affect not only the economy of Lithuania but of the whole of Europe.

Taking into account the case of Lithuania and other academic research from other Member States, it can be concluded that the restructuring proceedings differ substantially in different Member States. Each of them faces their own perils of regulating corporate rescue procedures. Due to these reasons, further research in the field of restructuring should focus on the question of whether restructuring of legal entities should be harmonised at the European level and what are advantages of a single and well balanced restructuring procedure in all of the Member States.

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## THE ROLE OF A JUDGE IN EUROPEAN INTEGRATION

### Abstract

It can be best to view European integration as work in progress. Since the 1950s, there has been a considerable legal and political impact of the integration process on the legal systems of the Member States of the European Union. The Treaty of Lisbon has further strengthened the position of the European Union vis-à-vis its Member States.

The process of Europeanization differs from one Member State to another.

This article aims at presenting a juridical and political analysis of the role of a judge in Latvia, paying particular attention to the role in terms of the integration of the legal framework of the Community. It is argued that during case trials a judge seeks to develop and maintain certain values, in particular, those pertaining to the Community legal system.

The article covers the following topics:

- the purposes of the application of law;
- the judge as an identifier of the European Union values;
- further development of the common values in courts, particularly, Latvian courts.

**Keywords:** application of the law, common values, integration, judge

### Introduction

If you google the phrase *'the role of the judge'*, you will get an outline on what a judge does in the courtroom and why a judge should be independent and impartial. The author of this article would like to take a different view on the role of the judge, which might not be obvious in everyday trials.

The primary function of a judge is to resolve a legal dispute. A judge seeks a response to the submissions of the parties in the entire legal framework, finds the appropriate interpretation and applies it to the case in question.

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That would be the way to look at the court functions under a classical legal approach.

Yet a judge also takes part in the making of the law. Here a question arises: how can a trial judge possibly make the law? To support an unfavourable response to the above question, we could refer, *firstly*, to Article 83 of the Satversme (the Constitution of the Republic of Latvia) providing for a judge to be subject solely to the law. *Secondly*, we could also refer to the institutional position of the particular court and its sociological assessment, which leaves little chance to argue that the decision made by a trial judge would be enforced. In view of the above, what would be the grounds to argue that any judge irrespective of the type of court he (she) represents, makes the law?

The grounds for a favourable response to the above question can be sought in the premises inferred from the general purpose of the application of the law (Zipeliuss, p. 6). It is possible to look at the application of the law by reference to an individual case. Conversely, if one looks at the application of the law from the perspective of the practical formation of a judicial state, it is obvious that the activities of a judge extend beyond the limits of an individual case (Neimanis, p.164).

The European Court of Justice is often referred to as the 'engine' of European integration (Schulze, Seif, p.5). There is no doubt that the European Court of Justice takes a unique role and place among the European institutions. The decisions adopted by the European Court of Justice have been a source of both joy and anger to the Member States, and the decisions have also shaken the foundations of the legal science.

The author hereby puts forward an argument that the national courts can also be and are the engines of European integration. This is possible, if one views the application of the law from a functional rather than a formal perspective. The German legal dogmatics has long since differentiated between the two notions – the law (legal provisions) (*Rechtsnorm*) and the legal clause (sentence) (*Rechtsatz*) (Starck, p.180). It is based on the concept that the law reaches the reader (the public) in the form of legal clauses (sentences). When we read a legal act in an official newspaper, we read legal clauses (sentences). It is similar to reading 'Indrani' by Latvian writer Blaumanis or 'Harry Potter' by Rowling. The truth is, however, that the legal provision is hidden behind a legal clause (sentence) and it is the task of a person applying the law to fully uncover it.

The above task is not an easy one, and any mistakes made while performing it might have a dramatic effect. The above can be exemplified by using as a comparison the decline of the Weimar Republic and Hitler's rise to power. Under Article 102 of the Constitution of the Weimar Republic a judge was subject to the law.<sup>2</sup> Unfortunately, the Constitution of the Weimar Republic was in force at the time when the narrow understanding of a judicial state prevailed. As a matter of fact, the Weimar Republic was a 'formal judicial state' at the time. Since the 19th century and during the time

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<sup>2</sup> <http://www.documentarchiv.de/wr/wrv.html>

of the Weimar Republic the idea of legal positivism flourished in the Western Europe. As it may be known, the supporters of legal positivism at the time (Karl Bergbom, Gustav Radbruch before the national socialist era) held the view that the law is merely a total of the acts issued by the national lawmaker (Koller, p.141). It derived from the premise that a judge should be subject to the law and solely to the law.

Legal positivism entailed that a judge had no right to repeal acts, it had to follow them strictly even if they contradicted the constitution. The above approach resulted in transforming of a judicial state into a formal judicial state which manifested itself as:

- 1) the separation of the notion of a judicial state from the theory of judicious rights and justice;
- 2) releasing of the lawmaker from the binding power of the fundamental rights;
- 3) partial degeneration thereof to simple programmatic slogans;
- 4) the central position of the governance (executive system) legitimacy principle;
- 5) the subjecting of the binding power of the fundamental rights to executive and judicial system, through a wider interpretation of the provisions (covenants) of the law (Dreier, p.354).

The interpretation which was based on a subjective understanding as well as the transformation process led to a situation where while all the criteria of a judicial state were fulfilled, in substance the judicial state was impaired, which in turn rendered the Weimar Republic an injudicial state within a matter of months in 1933.

After the Second World War as a result of the terrifying exaggerations of the notion based law the value based law got the upper hand. The core idea of the value based law lies in an assertion that the goal of the application of the law is to achieve the values contained in the legal provisions (Meyer, 1984). Moreover, such values are aligned with the core values of democracy.

Looking at the activities of the judge during case trials from today's perspective, it can be argued that the practical achievement of the legal values during case trials is the task of both the first instance courts judges and the cassation instance judges.

To ensure that a real legal value is also achieved as a result of an individual trial, an appropriate methodology and consciousness of the role of a judge are key. Based on the appropriate dogmatics<sup>3</sup>, a Latvian judge applies the Western law methodology in his work. It is thereby ensured that during the process of the application of the law the judge is logically and sequentially guided to the result. It is, however, possible to argue that the post-soviet formally logical and positively charged approach has impacted the practical application of the law. There have been many cases that can be used to demonstrate that the judge selected a formally logical approach without even

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<sup>3</sup> Juridiskās metodes pamati: 11 solī tiesību normu piemērošanā. Aut.kol.E.Meļķiņa z.red. Rīga: Ratio iuris, 2003

reviewing the achieved result in terms of its adequacy and consistency with the value which the applied provision or a body of provisions aimed to achieve.

Thus, for example, in the case relating to the suspension from the duty of the head of the KNAB (the Corruption Prevention and Combating Bureau), the court held that the executive could be suspended from the duty based on the provisions of the employment law on account that the Law On Corruption Prevention and Combating Bureau lacked similar provisions. It however failed to attract the attention of the court that the 'silence' (lack of the provision) in the Law On Corruption Prevention and Combating Bureau was aimed at ensuring independence which would otherwise be impaired should such suspension occurred.<sup>4</sup>

The above mentioned example supports the importance of securing that the purpose of the application of the law is not merely a closure of a formally logical process, but rather the recognising of the values and substance contained in the legal provisions.

## Judge as an identifier of the European values

The functioning of the European Union is based on common values such as the respect for human dignity, fundamental rights, including the rights of communities and families, freedom, democracy, equality, and the rule of law. The communities of the Member States - in which pluralism, non-discrimination, tolerance, justice, solidarity, responsibility and gender equality prevail - share the above values, as confirmed in the preamble of the European European Charter of Fundamental Rights.

It can be argued that whenever a case is tried, the judge applies some of the European core values. It is a fact. For the purposes of European integration, however, such cases bear greater significance in which the judge uncovers the value, names it and clearly points out that the said value, not just the wording of a particular act has been decisive in judging the case. For it is then that the public can see the true meaning of the common European values.

For example, the general legal values identified by the Senate include: the proportionate effects of legal consequences (in particular, relating to tax penalties), the predictability of legal effects, gender equality, human dignity and the importance of its protection, the value of privacy, good corporate governance, as well as economic values such as fair competition, freedom of movement, etc.

In view of the above the Senate has pointed out to the need of the specification of legal effects (in particular, relating to tax penalties), the application of teleological reduction (by narrowing the reach of the provision and by applying general value), derogation from a wrong national legal provision and compliance with a general value.

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<sup>4</sup> Senate's judgement of 26 August 2011 in case No.SKA-327/2011 (not published)

### *Specification of legal effects*

The specification of legal effects for the purposes of achieving an adequate proportionality principle has been a topical issue in many cases. In this regard the Senate made material changes in the national tax administration practice under which taxpayers used to be subject to penalties in all cases, without having considered the usefulness and proportionality of the penalties. At the moment the Senate is hearing more complicated cases. For example, it has pointed out that although the availability of personal data should be viewed from the perspective of privacy protection, the *adequacy (proportionality)* of such protection should be considered.<sup>5</sup> The rights of the public to get access to the documents of institutions and the adequacy of the restrictions pertaining to the use of these rights have been highlighted.<sup>6</sup>

### *Reduction*

In the judgement of the case No.SKA-480/2010 of 15 October 2010, for example, the Senate found that if a person loses employment after a maternity (parental) leave and the maternity leave coincides with the period which is taken into account for the purposes of calculating the unemployment benefit, the person's in question unemployment benefit is calculated by reference to the minimal national insurance contributions for unemployment (starting from Ls 50 a month). Thus the amount of the unemployment benefit is set at its minimal amount rather than on the actual employment salary before maternity leave based on which the national insurance contributions were made. Thus the social guarantees in the event of unemployment after the expiration of the maternity leave period worsen for persons who are on maternity leave and get child care benefit. On account that the maternity leave and child care benefit are mainly benefited for by women, the legal provisions as a result of which the persons who have taken maternity leave find themselves in an unfavourable situation, in terms of the amount of the unemployment benefit, can be construed as indirectly discriminatory based on gender.

The Senate pointed out that in such a case, by using a teleological reduction approach, the wording of Part 1 Article 8 of the Law "On Unemployment Insurance" had to be narrowed, and the above legal provision, being indirectly discriminatory, was not applicable to the above mentioned persons. Thus a legal gap had arose which had to be closed. In the view of the Senate for the above purposes the principles and provisions contained in the legal framework pertaining to other types of social insurance should be used, i.e. if, when calculating the average insurance contributions salary, during the six calendar month a person due to grounded reasons, e.g. pregnancy, child birth leave, child care benefit, temporary sickness leave, did not receive any salary, the salary for the purposes of calculating the benefit had to be determined by reference to the six calendar month period before the afore mentioned period commencing not earlier than 32 months before the month in which the insurance event occurred (refer

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<sup>5</sup> Senate's judgement of 6 May 2010 in the case SKA-193/2010 (not published)

<sup>6</sup> Senate's judgement of 21 March 2011 in the case No. SKA-254/2011 (not published)

to Paragraph 4 of Article 12 of the Law “On Compulsory Social Insurance Against Industrial Accidents and Occupational Diseases” and Sub-paragraph 2 of Paragraph 2 of Article 31 of the Law “On Maternity and Sickness Insurance”, valid at the time of the calculation of the unemployment benefit of the applicant).

### *Derogation from the application of a provision*

The Senate has pointed out that where a national provision directly contradicts a European value, it is not applicable. In the case No.SKA-175/2009 the Senate found that the freedom of provision of services including the right to travel freely, was not achieved by the requirement of the Cabinet Regulation under which passports could be issued to children for a term of one year, although the respective term under the European Union rules was at least five years.<sup>7</sup> In addition, it was inadmissible to put forward further disclaimers or preconditions, e.g. the need of the travel disclaimer or the length of the travel precondition. The Senate therefore concluded that the state had failed to adequately implement Paragraph 3 of Article 2 of the European Community Directive No.73/148 in its national law. As the term by which the implementation of the directive had to be completed had expired at the time the applicant filed an application for issuing passports for her children, the state was required to apply Paragraph 3 of Article 2 of the European Community Directive No.73/148 directly. As the state had a duty to issue the passports to the children of the applicant for a term of five years in line with the requirements of the Paragraph 3 of Article 2 of the European Community Directive No.73/148, it was of no importance that the applicant had requested the passports to be issued for a term of one year.

Interestingly, the state supported the rightness of its position in the case using the argument of the security interests of children. The Senate dismissed the above argument as being ostensible on grounds that a child under the age of five years can only use its passport for travelling due to the child’s legal capacity limitations. Before adopting of the provisions of the respective directives on the minimum term of the passport, the European Communities Council had already considered the question of the security interests of children, given that the provisions of the directives were directly aimed at the travellers and their family members, including children. Child safety, protecting it from unauthorized removal from the state, can be achieved by other means.

## **Further development of common values**

The European Union has always been more than merely an economic union. The main goal of European integration is to remove the traditional power politics, based on the national interests of the Member States, through the building of a new European order, based on a common framework of the European law, common

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<sup>7</sup> Senate’s judgement of 5 March 2009 in the case No. SKA-175/2009 (not published)

institutions and procedures, and an independent European judiciary. Therefore, the European Union is, first of all, a community of values.

The author puts forward an argument that a national judge is not merely a person applying the European Union law and identifying the common values of Europe. A judge of a particular Member State is encouraged to introduce the assessment of new aspects, the identification of new legal values, clarification and further elaboration thereof. The above rights for the judge of a national Member State are provided for by Article 267 of the Treaty of the Functioning of the European Union. The interpretation of contracts lies within the exclusive competence of the European Court of Justice, however, case trials in the first instance are placed in the hands of national judges. This serves as a unique opportunity for enhancing and strengthening of the understanding of common values.

The preliminary ruling procedure has been of critical importance for the role of the European Court of Justice in the development of the Community's legal order. It was through this procedure that the European Court of Justice developed the so called fundamental principles of Community law: the direct effect and supremacy of the European Community law. Aiming to circumvent the limitations of the doctrine of horizontal direct effect, the European Court of Justice has also created the doctrine of indirect effect (*Von Kolson*) as well as the doctrine of state liability (*Francovich*).

In Case C 144/04 *Mangold* and in Case C 555/07, *Seda Küçükdeveci v Swedex GmbH & Co. KG* the European Court of Justice has given a direct effect to the corresponding general principle of law, the principle of non-discrimination on grounds of age, however there was no horizontal direct effect of the respective directive.

And it happens notwithstanding numerous objections.<sup>8</sup>

The European Court of Justice, however, cannot directly resolve a case which lies in the jurisdiction of a national judge. That is why the judge of the national Member State is the actual 'engine' of the integration of the European law.

In the case *Seda Küçükdeveci* the European Court of Justice pointed out that under national law, the national courts may not set aside an enforceable (valid) national provision unless it has been declared unconstitutional by the Federal Constitutional Court. However, it has stated "*By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied.*" The Court ruled, therefore, that "*It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, (...), to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.*"<sup>9</sup>

<sup>8</sup> Herzog R., Gerken L. Stop the European Court of Justice. See: [http://www.cep.eu/fileadmin/user\\_upload/Pressemappe/CEP\\_in\\_den\\_Medien/Herzog-EuGH-Webseite\\_eng.pdf](http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite_eng.pdf)

<sup>9</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0555:EN:HTML>

In Case *Seda Küçükdeveci* the European Court of Justice has recognized in its case law that the fundamental rights form a part of the general principles of the European Union law. In fact, Article 6 of the Treaty of the Functioning of the European Union expressly states this.

Moreover, the national court of a particular Member State may develop and clarify the legal values of the Member State to ensure that the national legal framework aligns with that of other democracies. In most cases this can be achieved through the adoption of the general democratic values.

Here, the Senate decision concerning the boy's name *Otto* is relevant.<sup>10</sup> In the above judgement the Senate developed a new criterion of human rights restriction: a need in a democratic society. The Senate pointed out that under Article 116 of the Satversme (the Constitution) the rights of the persons provided for inter alia in Article 96 thereof, can be restricted if stipulated by the law to protect the rights of other people, democratic state, public safety, welfare and morals.

The Senate found that such a criterion is not expressly referred to in the Satversme (the Constitution) and also distinguished that the criterion ensues from Article 8 of the European Convention on Human Rights and Article 89 of the Satversme (the Constitution) under which the state shall recognize and protect human rights in line with the requirements of the international agreements binding upon Latvia. In addition, the existence of such a criterion is also based in the human dogmatics of Western democracies.

## Conclusions

1. The national courts can be and are the 'engines' of European integration. This is possible if the application of the law is viewed from a functional rather than a formal perspective.
2. The practical achieving of legal values during case trials is the task of both the first instance courts judge and the cassation instance judge.
3. To ensure that an individual trial also results in a legal value being achieved, an appropriate methodology and consciousness of the role of a judge are key. It is important that the purpose of the application of the law would not be aimed only at the closure of a formally logical process but also at the achieving of the values contained in the legal provisions.
4. It can be argued that whenever a case is tried, the judge applies some of the European core values. That is a fact. For the purposes of European integration, however, such cases bear greater significance in which the judge uncovers the value and substance, names it and clearly points out that the said value, not just the text of an act, has been decisive in judging the case. For it is then that the public can see the true meaning of the common European values.

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<sup>10</sup> Senate's judgement of 17 November 2010 in the case No. SKA-890/2010 (not published)

5. To achieve legal values, the Senate has resorted to the specification of legal effects (consequences), the application of teleological reduction as well as the derogation from a wrong national provision and compliance with a common value.
6. A national judge is not merely a person applying the European Union law and identifying the common European values. A judge of a particular Member State is encouraged to introduce the assessment of new aspects, the identification of new legal values, clarification and further elaboration thereof. The European Court of Justice cannot directly resolve a case which lies in the jurisdiction of a national judge. This is why the judge of the national Member State is the actual 'engine' of the integration of the European law.
7. Moreover, the national court of a particular Member State may develop and clarify the legal values of the Member State to ensure that the national legal framework aligns with that of other democracies. In most cases this can be achieved through the adoption of the general democratic values.

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## THE ROLE OF THE DEFENSE COUNSEL IN ENSURING THE RIGHTS NOT TO CONFESS GUILT IN LATVIAN CRIMINAL PROCEDURE

### Abstract

The article explores to what extent the defense counsel should comply with the defense position of the defendant. It examines which actions fall within the competence of the defendant and which ones within the competence of the defense counsel. The author describes basic action guidelines of the defense counsel depending on the defense position chosen by the defendant in order to ensure the right of the defendant not to confess guilt.

The right not to confess guilt emerges from the general right to a fair trial. The issue of confession of guilt is the cornerstone of defense, because the confession of guilt as important evidence is critical to outcome of the case. The significance of confession of guilt is growing because of the prevailing trend in Latvia and other European countries to introduce simplified forms of criminal procedure where the confession of guilt is a prerequisite.

The defense counsel has an important role in ensuring the right not to confess guilt. Contrary to situations in Estonia and Lithuania, in Latvia neither the Criminal Procedure Law nor the norms of professional ethics regulate in relations between defense counsel and defendant to what extent defense counsel should comply with defendant's position.

The author concludes that the defense counsel should comply with the defendant's subjective view in the expressing his or her attitude towards the accusations or prosecution. However, the questions of strategy and tactics should remain within the sole competence of the defense counsel, complying with certain rules. The article contains proposals for amendments of the Criminal Procedure Law and the Code of Conduct of the Latvian Sworn Advocates.

**Keywords:** defense, defense counsel, defense position, confession of guilt, professional ethics

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## Introduction

The right not to confess guilt emerges from the privilege against self-incrimination, which is a constituent element or specific aspect of the fair trial guarantee.<sup>2</sup> The privilege against self-incrimination is defined in paragraph 3 (g) of Article 14 of the International Covenant on Civil and Political rights: “[i]n the determination of any criminal charge against him, everybody shall be entitled [...] not to be compelled to testify against himself or to confess guilt”. The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not include the privilege against self-incrimination, however the European Court of Justice has stated: “[a]lthough not specifically mentioned in Article 6 [...] of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 [...]. By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”<sup>3</sup> The right forms part of the general fair trial guarantee.<sup>4</sup>

The confession of guilt as important evidence is critical to outcome of the case. The significance of confession of guilt is growing because of the prevailing trend in Latvia and other European countries to introduce simplified forms of criminal procedure. The right to a fair trial is not fully ensured in the application of the simplified forms of criminal procedure, which do not include adjudication of a case in a court or direct and oral examination of evidence. Person that agrees to apply them refuses from part of the rights, which result from the general principle of a fair trial, therefore it is important to ensure, that taking decisions regarding the application of the simplified forms of criminal procedure, the attitude of the person is taken into account, which can manifest itself as consent to application or confession of guilt. In order not to penalize innocent people, it is important to ensure that a person confesses guilt knowingly and freely.

The defense counsel has an important role in ensuring the right not to confess guilt. On one hand, the defense counsel has a duty to supervise a person directing the proceedings to ensure that he or she does not use illegal methods to achieve admission of guilt. On the other hand, the defense counsel has a duty to help the defendant to make a decision – to explain the rights of a defendant, to choose the defense position, and not to co-operate with an official authorized to perform criminal proceedings, the essence and legal consequences of confession of guilt.

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<sup>2</sup> Reid K. A Practitioner’s guide to the European Convention on Human Rights. Third edition, London: Sweet& Maxwell Ltd, 2008., p.65

<sup>3</sup> *John Murray v United Kingdom*, Judgement of the European Court of Human Rights No. 18731/91, par.45., *Saunders v. United Kingdom*, Judgement of the European Court of Human Rights No. 19187/91, par. 68.

<sup>4</sup> Trechsel S. Human rights in criminal proceedings. Oxford: Oxford University Press, 2005. p.34.

In order to ensure efficient defense the defense counsel must have a clear defense position. Here the essential question is which of the two – defense counsel or defendant – can best determine, what is in the best interests of defendant: should the defense counsel comply with the defense position of the defendant, or should he act independently. Contrary to situation in Estonia and Lithuania, in Latvia neither the Criminal Procedure Law (CPL) nor the norms of professional ethics regulate in relations between defense counsel and defendant to what extent defense counsel should comply with defendant's position.

The article analyzes to what extent the defense counsel should comply with the defense position of the defendant. It examines which actions fall within the competence of the defendant and which ones within the competence of the defense counsel. The author describes basic action guidelines of the defense counsel depending on the defense position chosen by the defendant in order to ensure the rights of the defendant not to confess guilt.

The limited scope of the article does not allow the author to research following question: whether and to what extent the defense counsel's duty to comply with the defense position of the defendant is different in case a defendant is a person who has limited possibility to realize his or her own defense and if defendant's representative participates in criminal proceedings.

This article examines the international norms which regulate the professional ethics of lawyers, as well as compares regulation in different countries – Latvia and its neighboring countries - Estonia and Lithuania, as well as Russia and United States, taking into account that in the last ones the ethical aspects of the lawyers are discussed in more detail.

## 1. The separation of the defense counsel's and defendant's competence

The legal relations between defense counsel and defendant are based on the duty of the defense counsel to act in the interests of the client. The word "lawyer" is derived from the Latin word „*advocatus*”, which means “*call for help*”.<sup>5</sup> Latvian attorney at law Joseph Minsker (*Josifs Minskera*) once said: “*[f]irst of all – do not harm a client*”.<sup>6</sup> The essence of the defense counsel actions is to help the defendant.

The defense counsel's duty to act in the interests of the client regulates the rules of professional conduct. Article 13 b) of the Basic Principles on the Role of Lawyers provides, that the duties of lawyers towards their clients shall include assisting clients

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<sup>5</sup> Svešvārdu vārdnīca. 2.izd., red. Blūma R., Rīga: Liesma, 1978. ,18.lpp.

<sup>6</sup> Zvērināts advokāts Josifs Minskera. [Sworn advocate Josif Minsker]. The home page of Latvian Criminal Bar Association. Accessible at: [http://www.lkab.lv/lv/musu\\_lepnums/article.php?id=2872](http://www.lkab.lv/lv/musu_lepnums/article.php?id=2872) (last visited 04.04.2011)

in every appropriate way, and taking legal action to protect their interests.<sup>7</sup> Also Article 2.1. of the Code of Ethics of the Latvian Sworn Advocates (The Code of Ethics) provides: „[w]hen defending or representing in a case, an advocate shall not, through his/ her actions or lack thereof, harm the interests of the client hel she is defending or representing.”

In order to ensure efficient defense the defense counsel must have a clear defense position. “Every lawyer who takes a case, has to be clearly aware of the objectives and tasks that he or she sets for him or herself as well as ways to realize these objectives.”<sup>8</sup> Which of the persons who perform defense – defense counsel or defendant – can best determine, what is in the best interests of defendant? Should the defense counsel should comply with the defense position of the defendant, or he or she can act independently?

In criminal theory the question to what extent the defense counsel should comply with the defense position of the defendant historically was not dealt with explicitly, and today it is the topic of scientific discussion.

One view is that the defense counsel has a duty to assist the person directing the proceedings to reveal the truth, or to cooperate with the person directing the proceedings. The proponents of the opinion regard, that the defense counsel’s position in criminal proceedings are independent. It can be completely independent of the defendant’s will.<sup>9</sup> The statement of Russian scientist M.V Chelcov (М. В. Чельцов) in 1954 vividly reflects the position of the autonomy of the defense counsel’s activities: “1) the defense counsel may accept the facts that are denied by the defendant; 2) defense counsel may accept the prosecution evidence which is not accepted by the defendant, 3) defense counsel may acknowledge a perjury of the defendant.”<sup>1</sup> From today’s point of view these approaches are clearly contrary to the principle of separation of procedural functions according to which the defense is distinct from the prosecution and defense counsel should not take a place of prosecutor in criminal proceedings.

The second view is that defense counsel must act as a representative of the defendant. The point of view is based on the idea that the rights of the defendant to realize his or her own defense are absolute and must be ensured also by the defense counsel. The proponents of this view believe that the defense counsel’s actions are entirely dependent on the defendants will, i.e., the defense position of the defendant.<sup>2</sup> This view can be criticized, taking into account that the participation of the defense counsel in the process does not deprive a defendant to realize his or her own defense. For example, a defendant can call the witness, even if the defense counsel, believing that the person is lying, refuses to call him or her. Contrary to the views expressed, the first sentence of part 3 of Article 85 of CPL provides “A defense counsel shall not replace a defendant, but shall operate in the interest thereof.” This provision ensures that the defense counsel is not identified with a defendant, but act as a neutral person.

<sup>7</sup> Basic Principles on the Role of Lawyers. Accessible at: <http://www2.obchr.org/english/law/lawyers.htm> (last visited 04.04.2011)

<sup>8</sup> Адвокат: навыки профессионального мастерства. Л.А. Воскобитовой, И.Н. Лукьяновой, Л.П. Михайловойю (Под. ред.): Москва: Волтерс Клувер, 2008.с.183.

<sup>9</sup> Liede. A. Latvijas PSR kriminālprocess. Rīga: Zvaigzne, 1980., 134. lpp.

Consequently, the defense counsel may avoid expressing his or her subjective opinion. This in turn facilitates the defense counsel's obligation to operate in the interests of the client, if he considers defendant guilty of committing the crime. This shows that the defense counsel's action should not be fully dependant on the defendant's position. \_

Today, in the theory of criminal procedure the prevailing is a third view, which is located in between the above two extreme opposite views, namely that the defense counsel's action is partly dependent on the defendant's position. Both legislation and law scholars distinguish between activities that are in the competence of defense counsel and the actions that are in the competence of defendant. Under certain conditions, it is recognized that the defense counsel may decide the strategic or tactical issues, while issues relating to the expression of defendants attitude toward the suspicions or prosecution, defendant's view prevail.

Taking into account that a defense counsel in criminal proceedings may be only the person with the appropriate legal knowledge and skills, he better than a defendant can decide what strategic or tactical means and techniques should be applied to realize the defense position. Defense counsel as a professional is in the best position to assess what evidence is needed, for example, which witnesses to invite. In addition, a defense counsel has a duty to use his or her professional knowledge and experience, as well as all the means and techniques of defense indicated in the Law, in order to ascertain what the justifying and mitigating circumstances are for a person who has the right to defense, and to provide such person with the necessary legal assistance (part 5 of Article 86 of CPL).

Swiss criminal law scholar Stefan Trechsel states: "*[i]n a situation where the opinion of the accused runs contrary to that of counsel, the accused's will must prevail. This, however, does not impose a duty on a lawyer to act in a manner which is contrary to his or her professional opinion*".<sup>10</sup> Also in the decision *X v. Switzerland* the European Convention of Human Rights held that ECHR did not "*entitle the accused to require his lawyer to adopt a particular defence strategy*" which the latest regarded as impossible to maintain, especially if the accused had been given the opportunity to address the court himself, as was the case here.<sup>11</sup>

Second sentence of Article 4-5.2.(a) of the American Bar Association (ABA) Defense Function Standard provides, that the decisions which are to be made ultimately by the accused after full consultation with the counsel include what pleas to enter; whether to accept a plea agreement, whether to waive jury trial, whether to testify in his or her own behalf and whether to appeal. Article 4-5.2.(a) of the ABA Defense Function Standard provides, that strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to

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<sup>10</sup> Trechsel S. Human rights in criminal proceedings. Oxford: Oxford University Press, 2005. p.251.

<sup>11</sup> Ibid, p.252

conduct cross-examination, what jurors to accept or strike, what trial motions should be made and what evidence should be introduced.<sup>12</sup>

CPL does not state whether the strategic or tactical issues are in the competence of defense counsel. Only in one case, defense counsel has the right to choose the means of defense by him or her self - part 3 of Article 82 of CPL provides that a defense counsel in ensuring defense in an individual procedural action has the right, after the completion of an operation and independent of the defendant, to use the rights specified for a defense counsel in the submission of a complaint regarding the actions of officials, and in the submission of a request, if such use arises directly from the performed operation and complies with the co-ordinated defense position of the defendants. Part 6 of Article 86 of CPL, which regulate the rights and duties of a defense counsel in whole proceedings, provides, that in appealing the adjudication of a public prosecutor regarding the completion of proceedings, a defense counsel shall inform the defendant. From the norms of CPL the duty of the defense counsel to respect the view of the accused indirectly result also in other occasions. For example, part 1 (7) of Article 70 of CPL provides that an accused in pre-trial proceedings has the rights to revoke the complaints of counsel. Part 3 of Article 340 of CPL provides that a complaint submitted in the interests of an accused or victim may be revoked only with his or her consent. At the same time CPL does not provide such rights for other persons who have the right to defense. Therefore CPL should provide the rights of defense counsel to choose the means and techniques of defense independently. However, the mentioned rights are not absolute.

Although the defense counsel has the right to choose the means and techniques of defense independently at the same time there are several limitations or conditions that he or she is bound with.

First, the most important condition is that the defense counsel is obliged to choose only such means and techniques of defense that are legal. A lawyer is a person belonging to the court system; therefore, defending the interests of the client, he acts also in the public interest and his duty to act lawfully. Article 3 of the Advocacy Law of the Republic of Latvia provides that an advocate provides legal assistance in defending and representing the lawful interests of person. Also part 2 of Article 122 of CPL provides that unlawful activity by a representative or advocate performed in the interests of a client in providing legal assistance of any form, as well as an activity for the promotion of an unlawful offence of a client, shall not be recognized as a provision of legal assistance. The basic provision of the defense counsel's action is that defendant's interests have to be defended by legal means and methods. The defense counsel's behavior has to indicate clearly that he or she is ready to protect solely defendant's legal interests.

Second, defense counsel in deciding which means and methods will be appropriate, has to ascertain the view of the defendant, taking into account that the

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<sup>12</sup> Crystal N.M. Professional responsibility: Problems of practice and the profession. New York : Aspen Law and Business, 1996. p.114.

defendant may know the best the circumstances of the case and the evidence, which need to file in the case.

Third, the defense counsel must take into account the defendant's view, deciding the issues that may significantly affect the defendant's rights and directly influence the outcome of the case: whether to appeal the prosecutor's decision on the termination (including the injunction of a public prosecutor regarding a punishment), whether to submitted an appellate complaint and a cassation complaint. Article 4-5.2. (A) of ABA Defense Function Standard and the part 3 of Article 13 of the Russian Code of Professional Ethics for Lawyers states that the question of the appeal falls within the competence of the defendant.<sup>11</sup> In Latvia defendant only has the right to withdraw an appellate complaint and cassation complaint of his or her defense counsel, as well as to oppose the withdrawal (Article 556. and Article 580. of CPL). Part 6 of Article 86 of the CPL has to be amended in order to oblige the defense counsel to take into account the defendant's view, when deciding whether to appeal the prosecutor's decision on the termination (including the injunction of a public prosecutor regarding a punishment) and whether to submit an appellate complaint or a cassation complaint.

Fourth, defense counsel, deciding which means and methods of defense will be appropriate, are bound by the defendant's subjective view toward the suspicions or prosecution.

## 2. The basic action guidelines of the defense counsel depending on the defense position chosen by the defendant

CPL regulates questions which defense counsel cannot decide in the name of defendant and which falls within the competence of the defendant. Second sentence of part 2 of Article 86 states: "*[o]nly a defendant shall be represented by him or herself in the procedural actions wherein his or her subjective view is expressed, and, in particular: 1) in establishment he expression of his or her attitude toward the suspicions or prosecution; 2) in the provision of testimony; 2<sup>1</sup>) in the selection of simpler proceedings; 3) in the last word.*"

The most important condition established by the mentioned rule is the defendant's right to express his or her attitude toward the suspicions or prosecution. The issue of guilt is the cornerstone of the defense position. As regards the defendant's attitude toward the suspicions or prosecution, it is possible to separate four positions of defense: 1) a person admits his or her guilt, 2) a person admits his or her guilt partly, 3) a person does not admit his or her guilt; 3) a person refuses to express his or her attitude towards the suspicions and prosecution. A defendant's right to choose defense position ensures the right not to confess guilt, which emerges from the privilege against self - incrimination.

An important question is how should the defense counsel act, depending on the defense position chosen by the defendant.

If the defendant denies his or her guilt in the proceeding, defense counsel cannot choose another defense position, even though it would conflict with the defense counsel's professional opinion. Article 2.10 of the Rules of Ethics of Advocates of the International Lawyers Union (Commonwealth) of Russian Federation states: *[a]dvocates have a duty to support and justify the position of the accused. He has no right to take another position. Admission of guilt by the accused in these circumstances is a rude violation of the rights of defense.*<sup>12</sup> Similarly, first sentence of part 3 of Article 19 of the Code of Conduct of the Estonian Bar Association states: *"[i]f the client denies the accusations made against him the position of the client shall be binding upon the advocate."*<sup>13</sup> At the same time, Article 26 of Lithuanian Code of Professional Ethics for Lawyers does not give an unequivocal answer: *"[i]n cases when the defendant denies his fault, and the lawyer having familiarized himself with the case draws the conclusion that there is enough evidence to substantiate the guilt of the defendant, the lawyer does not have to persuade the defendant to admit his guilt. It is court that determines the guilt or innocence, not the counsel for defense. The lawyer may choose another position of defense, but must consider it with the defendant. If the defendant does not agree with the position of defense chosen by the lawyer, he may refuse that counsel for defence."*<sup>14</sup> This provision includes the very important duty of the lawyer – not to persuade the defendant to choose another defense position, regardless of his or her professional point of view. At the same time it authorizes the defense counsel to take a different defense position. The rule is not legitimate, taking into account that a different defense counsel's defense position can harm the defendant's interests, rather than help them.

In case the defendant denies his or her guilt, while the defense counsel, evaluating the evidence, finds a defendant guilty, or the defendant has previously admitted his guilt to the defense counsel, the defense counsel may take a neutral position, without ruling on the subjective views of defendant's guilt, but analyzing objectively the facts of the case, and calling attention to any evidence that may benefit the defendant and making valid conclusions. In conclusion, if the defendant denies his or her guilt, the defense counsel may not "hold" position, that defendant is guilty or partly guilty of the offense.

The defense position of the defense counsel may differ from the position of the defendant if he or she admits guilt fully or partly or refuses to express an attitude towards charge. Second sentence of part 3 of Article 19 The Code of Conduct of the Estonian Bar Association states: *"[t]he advocate shall not be bound by the position of his client when rendering a legal opinion on the accusations made against his client, however, he shall inform the client about the defense position."* Article 24 of Lithuanian Code of Professional Ethics for Lawyers provides: *"[i]f the defendant admits his guilt, and the lawyer having evaluated all the evidence available in the case draws the same conclusion regarding the guilt of the defendant, then the counsel for defense in his pleading shall analyze all the circumstances which may reduce the liability of the defendant."* Further article 25 states: *"[i]n cases when the defendant admits his guilt, and the lawyer having studied all the evidence available in the case draws the conclusion that the guilt of the defendant has not been proved or causes doubts, then the counsel for defense must maintain the independent position, not dependent from the defendant."* Article 2.12. of the Rules of

Ethics of Advocates of the International Lawyers Union (Commonwealth) of Russian Federation provides, that the lawyer in that case has to taken a neutral position: “[s]ince in accordance with the law an accused’s confession of guilt may be based on allegations only if approved by the body of evidence, in case if the accused admits his guilt, without such a body of evidence, counsel, coordinating a defensible position, may take a neutral position and argument on the fact that the accusation is not proven. “

Although the defense counsel has the right to take a different position in case the defendant confesses guilt, he has a duty to co-ordinate defense position with the defendant. This rule emerges not only from the rights of defendant to choose the defense position, but also from the requirement of the defense counsel to comply with the principle of confidentiality (part 7 of Article 86 of CPL). For example, if the defendant confesses guilt in a place of another person, but the defense counsel has found that the offense is committed by another person, defense counsel shall not disclose information entrusted without the consent of the defendant, but he has to use other means permitted by law, to protect the defendant’s interests, for example, stating that the existing evidence is not sufficient or reliable.<sup>15</sup> It can be concluded that although the defense counsel’s position may differ from the defendant’s position, the defense counsel can realize it only after co-ordination with the defendant.

Article 86 of the Criminal Procedure Law has to be supplemented by part 8, providing a general condition that the defense counsel has right to choose means and techniques of the defense that comply with the co-ordinated defense position of the defendant.

In addition the defense counsel’s actions depending on the defendant’s position as one of the norms of the advocate’s professional ethics should regulate the Code of Ethics, including the following guidelines: 1) if the defendant denies his or her guilt, the defense counsel is bound by the defendant’s defense position 2) counsel can not convince people to confess guilt; 3) if a defendant confess guilt fully or partly or does not express his or her attitude towards the suspicions or prosecution, the defense counsel by coordinating his or her positions with defendant can take a different defense position, in order to indicate the justifying and mitigating circumstances for a person by using all the means and techniques of defense.

## Conclusions

In order to ensure efficient defense and at the same time the defendant’s right not to confess guilt, the defense counsel’s action is partly dependent on the defendant’s position. The questions of strategy and tactics should remain within the sole competence of the defense counsel, providing the rights to choose the means and techniques of defense independently, but complying with certain rules:

1. defense counsel has a duty to choose only such means and techniques of defense that are legal;
2. defense counsel has to clarify and ascertain the view of the defendant;

3. defense counsel is bound by the defendant's view in the issues that may significantly affect the defendant's rights and directly influence the outcome of the case. Part 6 of Article 86 of the CPL has to be amended in order to oblige the defense counsel to take into account the defendant's view, when deciding whether to appeal the prosecutor's decision on the termination and whether to submit an appellate complaint or a cassation complaint.
4. defense counsel is bound by the defendant's subjective view toward the suspicions or prosecution (accusation). Article 86 of the CPL has to be supplemented by part 9, providing, that the defense counsel has right to choose the means and techniques of defense that comply with the co-ordinated defense position of the defendant. Dependence of the defense counsel's actions on the defendant's position as one of the norms of the advocate's professional ethics should be regulated by the Code of Ethics of the Latvian Sworn Advocates, including the following guidelines: 1) if the defendant denies his or her guilt, the defense counsel is bound by the defendant's defense position; 2) counsel can not convince people to confess guilt; 3) if a defendant confess guilt fully or partly or does not express his or her attitude towards the suspicions or prosecution, the defense counsel by coordinating his or her positions with defendant can take a different defense position, in order to indicate the justifying and mitigating circumstances for a person by using all the means and techniques of defense.

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Vita Nemenova<sup>1</sup>

## LEGAL REGULATION OF CESSION IN LATVIA – THE DIRECTIONS FOR THE DEVELOPMENT OF NATIONAL LAW

### Abstract

In conditions of entrepreneurship development in Latvia, a claim transfer from one creditor to another (a cession) becomes even more significant. In the time period from 1992 to 1993, the activity of the Latvian Civil Law adopted on January 28th, 1937, was renewed. Unfortunately, the Civil Law of 1937 is not a corpus of new legal norms, but only a collection of legal considerations made in previous years. Amendments made to the Latvian Civil Law in the time period from 1992 until today do not apply to legal norms regulating cession of claim rights. Usually a cession presupposes that an assignee has some speculative purposes. Latvian civil law does not oblige anyone to inform the debtor about the concluded cession agreement, as well as does not determine the time period when the assignee should inform the debtor about the cession of claim rights. Legal norms differentiating transferrable and non-transferrable claims have not been worked out adequately. The author of the report pays attention to the problem, which occurred as a result of the defects of the legal regulation of cession in Latvia, analyzes this situation, makes proposals to the amendments of the Civil law.

**Keywords:** cession, creditor, debtor, grantor, grantee

### Introduction

There were different approaches towards the transfer of obligations during different stages of civil law development. In some judicial systems, any civil law obligations were related to the party's identity and it was believed that the rights and obligations could not be passed, while the change of the party was allowed only in extraordinary circumstances. Finally, the development of commercial intercourse, as well as practical needs, have resulted in a situation where the transfer of people's obligations has become a usual phenomenon with some significant economical

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meaning. The transfer of obligations in legal relationship in any given case has its own personal motivation<sup>2</sup>.

In the early nineties, Latvia had renewed its independence and started the transfer from command economy to modern market economy. The renewal of independence of Latvia came along with some great changes in the legislation field. During the time period from 1992 until 1993, the activity of Latvian Civil Law adopted on January 28th, 1937, was renewed. Unfortunately, the Civil Law of 1937 was not a collection of new legal norms, but only a collection of legal views of previous centuries, since Civil Law was based on Roman law, the Napoleonic Code, as well as some older normative acts.

The subject matter and scientific novelty of the research is based on the fact that amendments made to the Latvian Civil Law in the time period from 1992 until today do not apply to the legal norms regulating cession of claim rights, and heretofore, there has been no fundamental research done on the present issue in Latvian legal theory. In her research, the author analyses the current situation in the field of legal regulations concerning cessions, looks for the shortcomings of the Latvian Civil Law and makes suggestions based on these observations.

Cession is a claim transfer from one creditor to another as a result of legal operation, law application or a court decision. A creditor whose claim is being assigned to a new creditor is called an assignor and the new creditor is called an assignee<sup>3</sup>.

## Place of cession in the law of obligation

In their works, V.Kalniņš and I.Novitsky express the opinion that the antecedents of cession were present in the Roman Law already, with only one difference: the obligations had some clear personal nature and Roman Law did not allow to segregate the claim from a person. In fact, in Roman Law the cession was a procedural instrument having the notion of procedural implementation of claim rights. Initially, Roman Law recognized the creditor's ability to authorize another person to represent his interests in court (at the praetor's). Such a representation was formalized by a contract of agency called *mandatum agendy*, where a *cedere actionem* was determined. Lately, a notion of *cessio actionem* has appeared, which, in fact, denoted the procedural implementation of claim rights without any creditor change. The aforementioned construction was not safe in terms or the realization of parties' will. The assignor could revoke the contract of agency, and the given contract of agency terminated after the assignor's death<sup>4</sup>.

<sup>2</sup> Коллектив авторов (2004), Гражданское и торговое право зарубежных государств. Москва, «Международные отношения», с.442

<sup>3</sup> Torgāns K.,(2006), Saistību tiesības 1.daļa. Rīga, 155.lpp.

<sup>4</sup> Новицкий И.Б.,(1994), Римское право. Москва, с.143

The first cession was included into German Civil Law in 1896; then into the Swiss Civil Law in 1912<sup>5</sup>. Nowadays legal norms that regulate cession issues are included into the civil laws of almost all states. Legal regulations of cessions in the Republic of Lithuania were included in the 2000 Civil Code<sup>6</sup>, and legal regulations of cessions in the Republic of Estonia were included in the Law about Obligations adopted in 2000<sup>7</sup>. In the Russian Federation, the cession was included in the first part of the Civil Code of the Russian Federation adopted in 1995. The legal regulations of cessions in the Republic of Latvia are reflected in the Civil Law Obligations' division part nine: "Claim rights cession".

In most foreign countries' legislation acts (civil laws, civil codes) cession has traditionally been examined in the general parts of laws concerning obligations. As an exclusion, the French Civil Code can be mentioned, where the legal norms concerning cession are included in relation with purchase contracts.

Therefore, until now one issue is under discussion: whether the cession contract is a separate contract or an element of various contracts which can be discussed in the general parts of laws concerning obligations.

K.D.Gasnikov reflects the opinion of the most part of the scientists: "One can tell that a cession is a legal construction of general nature, which, as a separate element, is reflected in various civil contracts presupposing the transfer of rights of property."<sup>8</sup>. Alternately, C.V.Teterin believes that there exists a special cession contract: „a transfer of claim rights in based on a united deal which determines both legal foundation and the moment of transfer of rights without any necessity to single out a separate deal for the substantiation of transfer of claim rights"<sup>9</sup>. The tradition of substantiation of transfer of claim rights has deeper roots than the tradition where a cession is considered as an independent contract. It was discussed even by pre-revolutionary Russian lawyers, namely, I.N.Trepictsyn, K.P. Pobedonostsev, D.I. Meyer, G.F. Shershnevich<sup>10</sup>

## The notion of cession in the civil law circulation

Any kind of obligations entitle to demand from the other party to perform certain actions. In this respect, the obligations entitle to demand from the debtor

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<sup>5</sup> Годэмэ Е., (1948), *Общая теория обязательств*. Перевод с французского И.Б.Новицкого. Москва:Юриздат, с. 459

<sup>6</sup> Civil Code of the republic Lithuania (2000), <http://www.scribd.com/doc/238911/Civil-Code-of-the-Republic-of-Lithuania>

<sup>7</sup> Estonia. Law of Obligations Act. (2000), <http://www.legaltext.ee/text/en/X60032K1.htm>

<sup>8</sup> Гасников К.Д.,(2005), *Договор финансирования под уступку денежного требования (факторинг) по праву России и Англии*. Москва, с.55

<sup>9</sup> Тетерин С.В.,(2004), *Проблемы допустимости уступки требования*. Автореферат диссертации на соискание ученой степени кандидата юридических наук. Иркутск, с.11

<sup>10</sup> Пушкина А.В.,(2007), *Спорные вопросы цессии*. Государство и право №3, с.96

to behave in a certain way. So one can tell that the creditor influences the other party – the debtor – in a certain way. That is why it naturally seems that the nature of obligations is utterly personal and they can not be assigned. Modern law regards the obligations as a kind of property. Just as the property turns over, modern law allows the obligations to turn over, too<sup>11</sup>. Cession serves the purpose of circulation and further transfer of obligations.

V.Sinaysky has mentioned that almost all obligations prior to their fulfilment come to a circulation with economical values, thus multiplying the social means of circulation. That is why the cession is valuable from the socially-economical point of view<sup>12</sup>.

From day to day, a man has to confront his future, which nowadays is much more open than before - both for success and opportunities, as well as for threats and fears it brings. One can often hear that it is rather possible future than past that threatens men more. Nowadays, human security is not only about securing life and health of a person. It is closely related to the basic personal rights - rights to receive information and property rights. One of the components or virtues of human security is economical security, as well as security over the preservation of one's property and material welfare.

Property cannot be used contrary to the social interests. Property rights can be limited only in accordance with law. Compulsory expropriation of property for social needs is allowed only as an exception, on the grounds of a special law and for a due remuneration<sup>13</sup>

Debtor's obligations towards creditor have some certain economical value. A creditor is entitled to demand to fulfil the obligations thus deriving from it some benefit. Until the moment of its implementation the creditor's hope for the fulfilment of obligations exists as a commodity, namely, claim<sup>14</sup>.

A person entitled to demand to fulfil the obligations is a creditor. The term has derived from Latin words *credere, credo* – to believe, to entrust; when entering the deal, a creditor believes that the task will be fulfilled in due order. A person having to carry out his/her obligations is a debtor. The most part of obligations in the frame of various contracts are compensation obligations<sup>15</sup>.

In conditions of entrepreneurship development in Latvia, a claim transfer from one creditor to another (a cession) becomes even more significant. In many cases the conclusion of cession contract becomes economically reasoned.

During the last decade a new type of business – debt collection – has been formed and functions in Latvia. A number of firms working in this type of business

<sup>11</sup> Čakste K.,(1937), *Civiltiesības*, Rīga, 30.lpp.

<sup>12</sup> Sinaiskis V.,(1940), *Saistību tiesības*.- Rīga, 34.lpp.

<sup>13</sup> Latvijas Republikas Satversme "Latvijas Vēstnesis", 43, 01.07.1993. [stājas spēkā 07.11.1922.] 105.p.

<sup>14</sup> Torgāns K., (1994), *Komentāri saistību tiesībām Civillikumā*. Rīga, 100 lpp.

<sup>15</sup> Torgāns K., (2006), *Saistību tiesības 1.daļa*. Rīga, 17.lpp.

in Latvia becomes more and more significant. According to several sources, there are 23 debt collection companies working nowadays in Latvia ([www.1188.lv](http://www.1188.lv)), according to other sources, there are 26 debt collection companies ([www.1189.lv](http://www.1189.lv)). The most prominent companies are SIA "Creditreform Latvia", SIA "Lindorf", SIA "Julianus inkasso", SIA "Paus Konsults". Any person – both physical and legal – can act as a debt collector. The collection of debts is a service for the performance of which the creditor concludes an contract with the debt collector.

By its legal nature, any contract is a deal that binds the compliance of will expressed by two or more contracting parties<sup>16</sup>. Usually this contract can be qualified as a contract of engagement (a contract for the performance of a certain paid task), but cession contracts concerning the transfer of claim rights from a previous creditor (an assignor; in most cases - a credit institution) and a new creditor (an assignee – a debt collector) are also very popular.

## Cession foundation

The Civil Law of the Republic of Latvia defines the following cession foundations:

- 1) in compliance with law, without the prior expression of creditor's will;
- 2) in compliance to the court decision;
- 3) according to the legal deal, regardless of whether the creditor had concluded it pursuant to the law or voluntarily<sup>17</sup>.

In practice, in most cases claim rights cessions on the basis of legal deals are used, but one should not underestimate such foundations of claim rights cessions as law and court decision. There are always three persons involved in any cession: the debtor, the former creditor (cedent) and the new creditor (assignee).

A legal deal is a legal act, therefore, its implementation results in appearance, modification or termination of legal relationships in the field of private law. The most prominent feature is that a deal is considered to be legal only in cases when it was made legislatively. The legal order, in its turn, should favour the most possible conformity of legal relationships to the general interests of the society directed at the achievement of socially useful aims. Article 1402 of the Civil Law says that the obligation rights result either from a legal deal or from an unauthorized action or pursuant to a law, while Article 1403 of the Civil Law says that a legal deal is an authorized action with the scope of the formation, modification or termination of legal relationships. The Civil Law defines the preconditions of the possibility of parties to conclude a deal. The parties of an eventual deal, knowing the regulations of the Civil Law, forecast the

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<sup>16</sup> Зенин И.А. (2009), Гражданское и торговое право зарубежных стран. Москва, Юрайт. Высшее образование, с.94

<sup>17</sup> Civillikums.Ceturtdā daļa. Saistību tiesības (1937) Latvijas Vēstnesis,Ziņotājs, 1, 14.01.1993. Stājās spēkā ar 01.03.1993., 1793.p.

course in which the deal can be concluded<sup>18</sup>. There is no definitions of such contracts in the Latvian Civil Law. Though, the essence of the contract is expressed in Article 1412 of the civil Law: „a subject of a legal deal can also be an action, as well as its cancellation, or an action with the aim of formation or transfer of some rights, as well as the actions with any other aims”.

By its legal nature, any contract is a deal that binds the compliance of will expressed by two or more contracting parties<sup>19</sup>.

## Cession limitations in the scope of freedom of contracts

While examining the general conditions of contracts, the order of their conclusion, implementation, termination and invalidation, the Western authors mention the principle of contract freedom, that is, the freedom of its conclusion and content development at its parties' discretion.

Though, in literary sources one can often find stipulations concerning remarkable limitations of such a freedom. Thus, according to the Japanese authors, contract freedom can be considered as the main principle of the new age law, which has not lost its significance even nowadays, although in the modern times there are some certain limitations related to the principle of contract freedom. These limitations apply both to the conclusion of an contract (obligation of acceptance and offer) and to its content. In this respect, the acts applying to the control of various goods, land lease, rent and credit interest are mentioned. The aforementioned measures are treated as the lawmakers' willingness “in the first place, to ensure every human being with human living conditions”, „and only after that – with maximal allowed personal freedom”<sup>20</sup>.

The principle of contract freedom is the most important feature of private autonomy. The contract freedom means that the parties can form contractual relationships and define the content of the contract on the grounds of mutual understanding and free choice.

USA Law about obligations is based on the principle expressed in Part 10, Article 1 of the Constitution, according to which, the state shall not pass any law impairing the freedom of contracts. But in practice, the USA, as well as in any other country, the freedom of contract rights is limited by the law. In USA law, the issues of obligations are included into the Uniform Commercial Code<sup>21</sup>.

In the laws, one can find certain cases when cession is not allowed, for instance, when its possibility was precluded in accordance with an agreement concluded by the former creditor and the debtor, when the obligations towards the new creditor

<sup>18</sup> Neimanis J.,(2004), Ievads tiesībās, tipogrāfija „Renovata”, 24.lpp.

<sup>19</sup> Зенин И.А., (2009), Гражданское и торговое право зарубежных стран. Москва, Юрайт. Высшее образование, с.94

<sup>20</sup> Зенин И.А., (2009), Гражданское и торговое право зарубежных стран. Москва, Юрайт. Высшее образование, с.95

<sup>21</sup> Bojārs J., (1998), Starptautiskās privāttiesības, Apgāds Zvaigzne ABC, 134.lpp.

can not be made without the contract amendment, if non-assignable obligations are related to the payment of court-inflicted penalty etc.<sup>22</sup>.

USA court practice and law have significantly simplified the implementation of claim cession by rejecting the medieval norms that so far had an effect upon the English law. The Uniform Commercial Code of the USA followed the acknowledgement of cessions as it is implicated in the laws of continental European states. In Article 2-210 it is stated that all seller or buyer's rights can be assigned, except the cases when such a transfer can result in significant changes in obligations of one of the parties or a significant increase of burden or risk<sup>23</sup>.

Latvian Civil Law determines exceptions for claims that can not become cession subjects, namely:

- 1) all claims, whereof the implementation, either as a result of parties' agreement, or pursuant to a law, is related to the creditor;
- 2) claims, the content of which would significantly change in case of their transfer to any other person apart from the real creditor<sup>24</sup>.

Item 1, Article 1799 of the Civil Law says that non-assignable are claims which, according to the parties' agreement, are part and parcel of the creditor. Already in 1914, Bukovsky wrote: „doctrinally disputable question, whether the parties can, by mutual agreement, exclude from legal circulation claims that one contracting party has towards the other, is being solved by law positively, since a debtor can be strongly interested in low probability of claim cession to other persons<sup>25</sup>. Such debtor's preference can be substantiated by the fact that usually a cession pursues for the assignee's speculative aims, since, by purchasing the claim for a price that is lower than nominal, he hopes to recover from the debtor a greater sum<sup>26</sup>.

Claims that are part and parcel of the creditor and, therefore, cannot be assigned, include, for example, parental rights to demand maintenance from their children: The aforementioned parental claim right can not be assigned even if there is children's consent to such a cession<sup>27</sup>. A.Grūtups points that one should accept this opinion and to include into the list of non-assignable claims children and parents' (grandparents')

<sup>22</sup> Коллектив авторов, (2004), Гражданское и торговое право зарубежных государств. Москва, «Международные отношения», с. 444

<sup>23</sup> Коллектив авторов, (2004), Гражданское и торговое право зарубежных государств. Москва, «Международные отношения», с. 446

<sup>24</sup> Civillikums.Ceturta daļa. Saistību tiesības (1937), Latvijas Vēstnesis,Ziņotājs, 1, 14.01.1993. Stājās spēkā ar 01.03.1993., 1799.pants

<sup>25</sup> Буковский В, (1914), Сводъ гражданских узаконений губерний Прибалтийских т.2. Рига, с.1422

<sup>26</sup> Жюллио Л. Де ла Морандьер, (1960), Гражданское право Франции. Москва, т .2, с.565

<sup>27</sup> Буковский В, (1914), Сводъ гражданских узаконений губерний Прибалтийских т.2. Рига, с.1422

mutual maintenance claims, as well as former spouses' mutual maintenance recovery claims<sup>28</sup>.

In Article 383 of the Civil Code of the Russian Federation, unlike Latvian Civil Law, it is clearly defined that it is unacceptable to assign to another person rights that are part and parcel of a creditor, for instance, maintenance rights and reparation of life or health damages<sup>29</sup>.

Article 2245 of the Civil Law says that the claim rights of one member towards another granted by the society contractual relationships, are non-assignable. Non-assignable as well are rights of redemption, since the holder of rights of redemption can not pass this right to anyone else and, if an opponent asks so, he/she has to put his/her signature to confirm that the redemption if being made only for his/her sake<sup>30</sup>. The author believes that two aforementioned cases of cession limitations have become obsolete and do not correspond to the modern needs, since, as Čakste said in 1937, modern law considers the obligations as a property<sup>31</sup> and nowadays limits, most of all, private autonomy and property disposal rights of any given person.

## Important features of a cession

Cession has various important features -

- 1) the consent of a debtor is not necessary for cession;
- 2) the assignee does not become a member of concluded obligation, only a claim right is being passed to him. V Sinaysky mentions that the assignee does not receive the status of creditor, but only that of petitioner<sup>32</sup>;
- 3) in case of a contractual cession it is not necessary to indicate the legal basis of cession.

From the moment of its conclusion, cession comes into legal force for all persons; in relation to the debtor, it (in full volume) comes into legal force only when the debtor is being informed about it<sup>33</sup>.

Till the report, the debtor has two creditors and the right to choose, to whom of these two creditors to pay the debt; moreover, the debtor is entitled (till the receipt of the report) to conclude contracts about the cancellation of obligations with any of them. Here, the relationships are similar to solidarity obligations, in accordance

<sup>28</sup> Autoru kolektīvs, (2000), Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Rīga: Mans Īpašums, 292.lpp

<sup>29</sup> Гражданский кодекс Российской Федерации (1995), Москва. 1995, ст.383, [www.interlaw.ru/law/docs/10064072/10064072-001.htm](http://www.interlaw.ru/law/docs/10064072/10064072-001.htm).

<sup>30</sup> Autoru kolektīvs, (2000), Latvijas Republikas Civillikuma komentāri: Ceturtā daļa. Saistību tiesības. Rīga: Mans Īpašums, 293. lpp.

<sup>31</sup> Čakste K., (1937), Civiltiesības, Rīga, 30.lpp.

<sup>32</sup> Sinaiskis V., (1940), Saistību tiesības.- Rīga, 33.lpp.

<sup>33</sup> Буковский В., (1914), Сводъ гражданских узаконений губерний Прибалтийских т.2. Рига, с.1432

with which, a debtor can choose a creditor to pay him<sup>34</sup>. As a matter of fact, the debtor's rights of choice are based on the fact that he did not take part in the cession agreement that is why he should not be deprived from the right to believe that a creditor is a person with which he has concluded an agreement.

The former creditor, in spite of cession, is still considered to be a creditor until the assignee receives from the debtor satisfaction, files an appropriate action or informs about cession in due order. Until that, the debt can be paid to the cedent, as well as reconciliation can be concluded, and the claim right remains at his disposal, too<sup>35</sup>.

On October 23<sup>rd</sup>, 2006, „Baltic – American Enterprise Fund”, USA non-profit institution, and solidarity borrowers L.K. and O.K. have concluded a contract of debt with 360-months mortgage and principal amount of EUR 20.000. The borrowers' obligations towards the mutuant are being ensured by the primary mortgage of immovable property belonging to L.K. The borrowers have undertaken to repay the lender, the interest and other sums till the first day of the following month. In March 2009, the borrowers had lent repayment difficulties, and the ordinary payment was made only partially. In order to resolve the issue and to come to an agreement about the lend repayment, L.K. and O.K. have tried to contact the staff of Baltic—American Enterprise Fund Daugavpils affiliate, but without result, since Baltic – American Enterprise Fund has ended its activity in Daugavpils. At the end of September 2009, solidarity borrowers L.K. and O.K. have received Daugavpils Court decision No. 3-12/3220 taken on September 21<sup>st</sup>, 2009, concerning the voluntary judicial public sale of L.K.'s immovable property. In the decision, it was mentioned that on September 14<sup>th</sup> 2009, the joint-stock company “SEB Banka” has submitted a claim against L.K. and O.K. concerning the voluntary judicial public sale of immovable property, having indicated that the USA non-profit organization Baltic – American Enterprise Fund has concluded a contract of debt with the debtors L.K. and O.K. The claim of the joint-stock company “SEB Banka” was based on the fact that on January 25<sup>th</sup>, 2007, Baltic – American Enterprise Fund and “SEB Banka” have concluded a claim cession contract, according to which, any claims of Baltic – American Enterprise Fund should be passed to the applicant<sup>36</sup>. From January 25<sup>th</sup>, 2007, till March 2009, neither the assignor - USA non-profit organization “Baltic – American Enterprise Fund” – nor the assignee – joint-stock company “SEB Banka” – did not consider necessary to inform the debtors about the concluded contract of cession. It resulted in adverse consequences for the debtors.

Bukovsky points out that neither the assignor nor the assignee is obliged to inform the debtor about cession. If both of them decide not to inform anyone about

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<sup>34</sup> Буковский В., (1914), Сводъ гражданских узаконений губерний Прибалтийских т.2. Рига, с.1431

<sup>35</sup> Civillikums.Ceturtdā daļa. Saistību tiesības (1937), Latvijas Vēstnesis,Ziņotājs, 1, 14.01.1993. Stājās spēkā ar 01.03.1993., 1804.pants

<sup>36</sup> Daugavpils tiesas 2009.gada 21.septembra lēmums lietā Nr.3-12/3220 2009.g.

cession and if a claim is being filed in the name of the assignor by mutual agreement of both contractual parties, the wrongness of such a demand is out of the question<sup>37</sup>.

Usually a cession pursues for the assignee's speculative aims, since, by purchasing the claim for a price that is lower than nominal, he hopes to recover from the debtor a greater sum<sup>38</sup>.

Latvian civil law does not oblige anyone to inform the debtor about the concluded cession agreement, as well as does not determine the time period when the assignee should inform the debtor about the cession of claim rights.

A cession does not give to an assignee any greater rights than an assignor had, but the claim itself passes to the assignee with all accompanying and existing by the moment of cession rights, even in cases when they are based on a personal benevolence towards the assignor, if there are no exceptions from this regulation applicable to them. Still unpaid claim interest, if not applied directly, are being transferred to the assignee, too. The assignor should pass to the assignee anything that can become an argument for a claim or can favour its recovery, as well as anything he received from the debtor after the cession<sup>39</sup>.

Since, according to Article 1806 of the Civil Law, a claim is being passed to the assignee with all accompanying rights, if there are no exceptions from this regulation applicable to them, at the moment of conclusion of a contract of cession, the assignor can mark various exceptions, in accordance with which, the assignee will have only some certain rights that accompany a claim. Therefore, if a contract of cession makes no provision of such exceptions, we can believe that a claim can be passed with all accompanying rights<sup>40</sup>.

The debtor's status should not become worse after a cession, and the assignee can not apply any of the advantages that he may have over the debtor<sup>41</sup>. Greater sums recovered from the debtor are often related with penalty calculation and too late assignee's report about the transfer of claim rights.

Penalties are often used in Latvian contracts and penalty recovery disputes are often considered in courts. Sometimes court-conferred penalty sums are too big, much more substantial than a debt itself. Penalty volume, especially when expressed in percents per each day of arrears, can prove to be so big that its payment can ruin the debtor economically<sup>42</sup>.

<sup>37</sup> Буковский В, (1914), Сводъ гражданских узаконений губерний Прибалтийских т.2. Рига, с.1433

<sup>38</sup> Жюллио Л. Де ла Морандьер, (1960), Гражданское право Франции. Москва, т .2, с.565

<sup>39</sup> Civillikums.Ceturta daļa. Saistību tiesības (1937), Latvijas Vēstnesis,Ziņotājs, 1, 14.01.1993. Stājās spēkā ar 01.03.1993., 1806.pants

<sup>40</sup> Autoru kolektīvs,(2000), Latvijas Republikas Civillikuma komentāri: Ceturta daļa. Saistību tiesības. Rīga: Mans Īpašums, 306.lpp.

<sup>41</sup> Civillikums.Ceturta daļa. Saistību tiesības (1937), Latvijas Vēstnesis,Ziņotājs, 1, 14.01.1993. Stājās spēkā ar 01.03.1993., 1807.pants

<sup>42</sup> Torgāns K, (2006), Saistību tiesības 1.daļa. Rīga, 116.lpp.

## Conclusions

The author concludes that it is necessary to analyze Latvian and other countries' legal acts, court practice and scientists' works in the field of cession regulation, to develop some suggestions for the amelioration of Civil Law norms and, first of all, to oblige assignees to timely inform debtors about concluded contracts of cession. The author believes that it is necessary to concretize non-assignable claim, thus widening a range of assignable claims, as well as to limit the penalties recovered from debtors on the grounds of contracts of cession by the volume of the original penalty, since it will give the opportunity to save the debtor and exclude the probability of assignee's profit.

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## COMPETITION LAW BOUNDARIES ON RESEARCH AND DEVELOPMENT (R&D) AGREEMENTS

### Abstract

Article 101 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) prohibits agreements restricting competition. Article 101(3) provides for certain exceptions to this prohibition. All three Baltic States are bound by the TFEU and the exemption.

On January 1, 2011, European Commission Regulation No 1217/2010 (hereinafter – Regulation 1217) entered into the force; this regulation elaborates the exceptions provided in Article 101(3). Article 101(3) applies when agreements restricting competition meet four requirements.

Some of the requirements in Regulation 1217 are currently too loose and easily abused. Other requirements, however, are too restrictive and could be loosened.

So far Baltic research companies have contributed little to the economic growth and prosperity of Baltic States. Laser engineering industry in Lithuania, for example, is an exception. Still, Baltic research companies have the potential to become serious competitors in the European market.

**Keywords:** competition, boundaries, undertakings, research and development, agreements

### Research and development agreements

Article 101(1) of the TFEU prohibits all agreements and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Essentially, Article 101(1) prohibits all anti-competitive agreements.

Yet, Article 101(3) provides certain exceptions to the general prohibition, including exceptions for research and development (hereinafter – R&D) agreements. The rationale for the exception to R&D agreements is to balance the competition protection with R&D facilitation.

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Although not found among exceptions of Article 101(3), *de minimis* doctrine is accepted as another exception to the prohibition of restrictive agreements which applies when two conditions are met. First, Article 101(3) should be inapplicable. Second, the agreement that restricts competition must not impose hardcore restrictions and its restrictive impact should be insignificant.

R&D agreement will not be considered prohibitive merely because it has a negative impact on competition; instead, an agreement must be evaluated for its positive or potentially beneficial effect on research and development. The EU Commission's Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011, paragraph 50) indicate that these exemptions could "substantial efficiencies in R&D and specialization agreements".

The purpose of R&D agreements is to promote collaboration. As long as they comply with laws, they should be free to stipulate their own rules. Regulation 1217 defines "R&D agreement," as an agreement between two or more, which stipulates conditions under which those parties pursue:

- joint R&D of contract products or contract technologies and joint exploitation of the results of that R&D;
- joint exploitation of the results of R&D of contract products or contract technologies jointly carried out pursuant to a prior agreement between the same parties;
- joint R&D of contract products or contract technologies excluding joint exploitation of the results;
- paid-for R&D of contract products or contract technologies and joint exploitation of the results;
- joint exploitation of the results of paid-for R&D of contract products or contract technologies pursuant to a prior agreement between the same parties; and
- paid-for R&D of contract products or contract technologies excluding joint exploitation of the results.

The difference between R&D agreements and other agreements is in the sort and purposefulness of the activity. As the Commission's Guidelines (2011, para. 111) indicate, "R&D agreements vary in form and scope. They range from outsourcing certain R&D activities to the joint improvement of existing technologies and co-operation concerning the research, development, and marketing of completely new products. They may take the form of a co-operation agreement or of a jointly controlled company".

The subjects of the R&D agreements are all subjects whose activity fulfills the Article 1(c) of Regulation 1217: "acquisition of know-how relating to products, technologies or processes and the carrying out of theoretical analysis, systematic study or experimentation, including experimental production, technical testing of products or processes, the establishment of the necessary facilities and the obtaining of intellectual property rights for the results".

Accordingly, subjects of R&D agreements are those who participate in the above-mentioned activities, and not only research and related companies, laboratories, undertakings, or universities with laboratories where research is carried out. Jones and Sufrin (2011, p. 995) point out that “R&D agreements may be between companies but sometimes they involve a company cooperating with an academic institution or research institute”.

## The effect of R&D agreements

Even if R&D agreement has positive economic effects, the parties should respect competition rules and avoid injury to other subjects directly or indirectly. The exceptions to the anti-competitive prohibition should not become a tool for avoiding this obligation. Yet, even if R&D agreements restrict competition they can nonetheless be permissible.

Why should R&D agreements be encouraged and sometimes excused from the applying this strict regulation? According to Faull and Nikpay (2007, p. 685), “cooperation at the level of research and development is therefore increasingly important to many companies. The costs and risks associated with R&D can be very high. Many companies choose therefore to co-operate to spread these risks. There are also potentially enormous benefits in avoiding expensive duplication of effort and in the cross-fertilization of ideas and experience that come from R&D cooperation”.

The advantages in sharing risk and expenses are especially important for the Baltic States. Baltic companies have limited resources and any failure can be detrimental or even disastrous.

Technological progress is of course highly beneficial. Among others, R&D agreements could have these positive effects:

- For the parties: possibility to achieve more difficult goals, set high-level challenges, to minimize or share the expenses;
- For consumers and other third parties: lower prices, modernized of production, and services;
- For States: the possibility to have strong internal competition and revenue increase.

It also has a positive impact on the relevant regional, and global market. This list can not be finite.

The provisions of Regulation 1217 may also have another positive impact: it may help research companies evaluate each agreement before it comes into force. A preliminary evaluation of an agreement may help detect hardcore competition restrictions, which are prohibited entirely.

Not all research companies want to intentionally restrict competition; sometimes it is a result of confusion or lack of understanding. But the main purpose of Regulation 1217 is to define some rules for R&D agreements. Clear criteria provide for legal certainty.

Notwithstanding its type or the real intentions of parties, each agreement runs the risk of being considered a prohibitive agreement, in terms of Article 101(1) because it is enough for the agreement to merely have a potential negative effect on competition. Modcona (2011) points out some of the prohibited agreements:

- Any agreement which has the objective of restricting competition is unlawful;
- Horizontal agreements, genuine R&D collaboration agreements can also be anti-competitive because they can have the effect of limiting the number of competing technologies in development, thereby limiting technology development, reducing competition in the technology market as well as in the product market and tending to increase prices;
- Some agreements may be anti-competitive (and therefore unlawful) because they contain excessive or unjustified restrictions or other anti-competitive terms which are not justified by the legitimate purpose of the agreement.

Not all problems arise at the first stage of co-operation. Even if the initial agreement contains no restrictive provisions, further cooperation redefines the situation. In any case, it is necessary to evaluate not just the agreement, but also the actual cooperation. According to Jones and Sufrin (2011, p. 995), “most of difficulties arise when the parties wish to go beyond collaboration at the R&D stages and extend their cooperation into the stages of commercial exploitation and distribution”.

R&D agreements with restrictive provisions are presumed illegal unless exceptions are established for individual agreements. Problems arise when restrictive provisions are hardcore, such as agreements on price fixing, market sharing, etc. But in such case an agreement may avoid the prohibition when the share of parties in the relevant market is tiny. According to Harms and Tupper (2011), “there is, however, no presumption that R&D agreements that do not benefit from the safe harbor breach EU competition law. Such agreements must be individually assessed to determine whether they have anti-competitive effects. If so, it must be determined whether such effects are outweighed by any pro-competitive effects”.

## Applying Article 101(3) of TFEU

Before the 2011 evaluation was conducted, in accordance with Commission Regulation (EC) No 2659/2000. Since the beginning of 2011 the scope of exemption implementation for R&D agreements has been broadened (e.g. “paid for research” agreements) and the list of hardcore restrictions has been simplified. A new regulation proves the Commission’s intentions to widen the exceptions.

Exceptions in Article 101(3) apply to the agreements that:

- Fulfill the conditions from the Article 101(1) – agreements having a restrictive effect on competition;
- Do not have hardcore restrictions (Article 5 of Regulation 1217); and

- Have a positive effect on technical or economical progress, are beneficial for customers and do not impose any unnecessary boundaries, do not eliminate competition in respect of a substantial part of the products.

In addition to qualitative criteria, Regulation 1217 also provides for the quantitative criteria:

- If the agreement is not between competing undertakings the exemption shall apply for the duration of the R&D plus an additional 7 years, from the time the contract products or technologies are first put on the market within the internal market, if the results are jointly exploited. At the end of this period, the 25 percent barrier is imposed for parties in the combined market (Article 4(3));
- If the agreement is between competing undertakings the exemption is applicable while the combined market share of the parties does not exceed 25 percent (Article 4(2)).

The assessment, according to Regulation 1217, is also based on some presumptions – e.g.: “below a certain level of market power it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of research and development agreements will outweigh any negative effects on competition”.

All of them are connected with a positive-negative impact assessment of agreement. The purpose of those presumptions is to make the process of assessment easier. Despite the qualitative and quantitative provisions, the assessment of R&D should be individual and also include an evaluation of the relevant market structure.

As Jones and Sufrin note (2011, p. 189), “The Commission now takes an economic approach to Article 101 based on a consumer welfare objective. It states that Article 101(1) is about identifying the anti-competitive effects of an agreement (agreements which adversely affect competition by restricting inter-brand or intra-brand competition) whilst Article 101(3) allows the balancing of offsetting efficiencies against these restrictive effects”. Regulation 1217 increases the possibility of protection from the general prohibition of the R&D agreement containing restrictive provisions.

## Possibility to apply “*De minimis*” rule

Even if an R&D agreement fails to meet the requirements of Article 101(3), *de minimis* doctrine can exempt it from the general prohibition.

The European Commission Notice on agreements of minor importance, which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*)” is the legal act that establishes *de minimis* exemption. The text of the Notice further provides that “In this notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition under Article 81 (current Article 101 of

TFEU) of the EC Treaty”. The Notice establishes certain quantitative and qualitative conditions. The agreements should not:

- Contain any hardcore restrictions (e.g. price fixing, market sharing, quota cartels, etc.);
- Exceed 10 pct. on any of the relevant markets affected by the agreement between competitors (horizontal agreements; the 10 pct. barrier is also applicable for mixed agreements), and should not exceed 15 pct. on any of the relevant markets affected by the agreement between non-competitors (vertical agreement).

Mixed agreements have the features of horizontal and vertical agreements. The problem arises when during the assessment process is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors.

The exception in majority cases would be applicable for small and medium-sized undertakings; it is presumed that they have no appreciable effect on competition. There are also special rules for agreements with cumulative effect.

The “*De minimis*” notice does not exclude the possibility to apply the exception to agreements, which are outside the quantitative border. For example, exceptions could be applied to horizontal and mixed agreements of more than 10 percent of the company’s market share or more than 30 percent for vertical agreements. The *Notice* further explains that “this negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this notice appreciably restrict competition. Such agreements may still have only a negligible effect on competition and may therefore, not be prohibited by Article 81(1) (current Article 101(1) of TFEU)”.

The main hardcore restrictions or restrictions by object (it is impossible to prepare the finite list) for horizontal, mixed, and vertical agreements are listed in the point 11 of “*De minimis*” notice<sup>2</sup>. But the provision about the hardcore restrictions should not be unconditional. As Professor Richard Whish (2009, p. 141) points out, exceptions also should be applied for agreements containing hardcore restrictions and the difference should be in the thresholds.

## R&D regulation in the Baltic States

In Lithuania, Latvia, and Estonia, national competition councils and authorities are responsible for national competition rule enforcement. These institutions are “Konkurencijos taryba” in Lithuania, the “Konkurences padome” in Latvia, and the “Konkurentsiamet” in Estonia.

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<sup>2</sup> Hardcore restraints as fixing of prices, limitation of output or sales, allocation of markets or customers for horizontal agreements; for instance restriction of the territory for vertical agreements.

All Baltic States have modeled their internal competition rules according to EU legislation. Like Article 101(1) of TFEU, Article 5 of the Lithuanian *Law on Competition* prohibits all agreements, which may restrict competition; Article 6 lists exemptions from the main rule which fulfills the conditions from Article 101(3) of TFEU.

According to Section 11(1) of the Competition Law in Latvia, “agreements between market participants, which have as their object or effect the hindrance, restriction or distortion of competition in the territory of Latvia, are prohibited and null and void from the moment of being entered into”. The exceptions to the rules are found in Section 11(2).

The Estonian Competition Act (Paragraph 4, Chapter 2) prohibits “agreements between undertakings, concerted practices, and decisions by associations of undertakings (hereinafter agreements, practices and decisions) which have as their object or effect the restriction of competition”. Paragraph 6 of Chapter 2 deals with exemptions.

The laws of Baltic States replicate Article 101 of TFEU. What about their R&D agreements? Regulation 1217 is binding in its entirety and directly applicable to all Member States. It is the main legal act in the Baltic States on R&D agreements.

## The background for R&D in the Baltic States

Although there are no significant R&D companies in the Baltic States, Regulation 1217 has nonetheless considerable effect on the region. The current regulation for Baltic States is important on two levels:

- The national level: when the agreement between two or more local research companies restricts competition but does not affect trade between Member States and does not have impact on internal market; and
- The EU level: the agreement fulfills the Article 101(1) of TFEU.

In the first situation, the assessment criteria are the same, but a State may apply the most lenient softest qualitative criteria (thresholds) for the local subjects. In the second situation, assessment is carried out in accordance with EU rules on the effect to the internal market and trade between Member States.

Almost all large private companies in the Baltic States are the product of foreign capital investment; yet, they still have a good background for productive R&D activity not just in one region. The R&D activity covers a list of important sectors, and in some of those sectors, the Baltic States are among the leaders. As a rule, the main partners of those states are also from the Baltic Sea region.

On the one hand, some boundaries are not imposed on major part of companies from this region because of their small size and influence on the competition. On the other hand, their small size hinders their competition with larger companies from abroad. As was mentioned above, the representatives of specific sectors in the Baltic States have already had enormous success in R&D.

In Lithuania, for example, laser companies have a lot of potential to expand their activities. For instance, the Lithuanian company “Optolita” produces some optical components for the European Space Agencies (ESA) Earth explorer Atmospheric Dynamics Mission (ADM-Aeolus). This is but one example; there are dozens of companies in Lithuania which have succeeded in the laser industry. Each year, the demand for laser technologies in medicine grows. As Städje (2010) notes, “Lithuania has a dozen companies that develop and manufacture their own laser products, with the bulk of all components – optical, mechanical, printed circuit boards, boxes, etc.”. Lithuanian lasers are increasingly being used, not only for scientific research, but also implemented in industry and medicine. The cooperation between partners (foreign companies, laboratories, etc.) is enforced by the R&D agreements.

The Lithuanians are developing “Sunrise valley” – a modern science and technology park. One of its objectives is “improving industry-higher education linkages and co-operation thereby encouraging greater investment in research and development and innovation, essential for Lithuanian companies competing in an increasingly competitive and globalised marketplace”. The latest achievement is an agreement on creating the IBM research centre. The companies from Latvia and Estonia have also made significant steps.

Companies developing their products and services have more chances to achieve their goals when they collaborate, rather than when they act alone, especially when co-operating with partners from abroad. Without a doubt, to achieve successful collaboration, Baltic companies need a financial injection, but the proper legislation is equally important – the blind protection of competition could be more harmful than the restrictions established by restrictive R&D agreements. Legal boundaries on agreements containing restrictive provisions should not be applied blindly and formalistically. In some cases, the assessment of R&D agreements should be more flexible. This position is reflected in Regulation 1217.

Between successful projects covering all three Baltic States are “BalticGrid” and “BalticGrid-II”. The purpose of the “BalticGrid” project is to extend the European Grid by integrating new partners from the Baltic States in the European Grid research community, to foster the development of infrastructure in these countries. “BalticGrid-II” is aimed at extending the infrastructure of the first project to Belarus. The provisions of the agreements are closely connected with R&D. The participants of the Grids are experienced academic institutions.

Of course, not all subjects are interested in just scientific goals. The main goal of the R&D agreements is to profit, but R&D agreements also can create and develop competitive products. True, science works for business, but business needs to inspire science – demands for new products and services create the possibility for ideas to materialize. According to Zavadskas, Kirvaitis and Dagienė (2011), progress has increased the amount of scientific research and work: “In comparison with countries that are considered to be the leaders in the field of science and technologies, the level of the productivity of researchers representing the Baltic States, including Latvia, Lithuania, and Estonia, is growing in certain research areas”.

The competition to create something new is more than just competition for scientific publications. The national programs of R&D encourage just that – increasing the count of publications. The final goal should not be increasing the number of publications. In some areas, co-operation is better – the publications with experienced partners from foreign countries should be seen as equally valuable.

The majority of R&D agreements in the Baltic States are between small subjects, which have only theoretical chances to play an important role in the internal market. Legal acts should encourage the co-operation between them. On the one hand, collaboration escapes from competition with each other, but on the other, their co-operation can strengthen the competition in the relevant market.

Some legal boundaries already have a negative effect on the R&D process. Researchers are searching for places abroad to finish their research and share their results. Although the Baltic States are leading in a few R&D sectors, they are still behind other member states. The Commission's Innovation Union Competitiveness Report 2011 (Report) notices that Lithuania's R&D intensity is still among the lowest in the EU, Latvia is characterized by a very weak performance in terms of Research and Innovation performance, and the Estonian manufacturing sector is not yet able to compete in high tech goods. However, Estonia is the leader in this region, according to a majority of criteria. All Baltic States have ambitious plans. The proper way to achieve them is through flexible policy (including financial policy), productive collaboration, and applying exceptions for agreements containing restrictive provisions.

According to the *Report*, the support for R&D in the Baltic States is tiny. EU funds and financial support through special programs is not always beneficial. In this case, the best solution for companies is cooperation with local and international partners.

## Conclusions and Proposals

1. All agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction, or distortion of competition are prohibited by Article 101(1) of TFEU and national competition laws. The R&D agreements are covered by Regulation 1217. Article 101(3) stipulates some exceptions, which are also applicable to the R&D agreements.

The rationale for these exceptions is that the agreement is permissible if it has more positive than negative impact on the competition. A proper balance between the different values must be found; R&D agreements cannot appreciably restrict competition, but competition rules cannot become a barrier for R&D agreements.

2. The application of the “*De minimis*” rule should be expanded to R&D agreements, even if they contain some hardcore restrictions. The assessment should be done individually to determine the level of impact on competition. As a rule, the assessment of the “restrictive” agreement starts with its evaluation in accordance

- with Article 101(3) of TFEU. If the agreement does not fulfill these provisions, it is still possible to apply the “*De minimis*” rule if the impact could be more detrimental, but the effect on competition is still not appreciable.
3. The “*De minimis*” rule should also be applied for agreements containing hardcore restrictions; the thresholds should make the difference.
  4. The parties of each R&D agreement should know that their will (intentions, hopes, expectations) embodied in the agreement will be safe from the application of Article 101(1) of the TFEU by being sure that some anti-competitive provisions can be exempted. Sometimes legal stability is as important as other values.
  5. Most Baltic companies are suffering from boundaries (prohibition) because of their small size and small influence on internal market competition. Yet, some undertakings are made between the international leaders of a specific sector; thus, their R&D agreements run the risk of being prohibited, especially if they contain restrictive provisions.
  6. The Baltic States in some specific sectors are among the world leaders. Despite this pleasing fact, the European Commission Innovation Union Competitiveness Report 2011 indicates that the Baltic States have to overcome plenty of challenges because a few successful R&D projects in this region cannot compensate for other shortcomings. Lithuania, Latvia, and Estonia have ambitious plans, but it is impossible to achieve them without a proper assessment of R&D agreements and encouraging cooperation between experienced parties.
  7. The number of scientific publications partially reflects the intensity of the R&D activity in each State. Yet, the final goal should be quality not quantity. Publications with experienced partners from foreign countries should be equally if not more valuable.

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## PROHIBITION OF UNFAIR COMPETITION IN LATVIA AND THE HARMONIZATION OF UNFAIR COMPETITION REGULATIONS WITHIN THE EUROPEAN UNION

### Abstract

Prohibition of unfair competition, in many aspects, is the exemption to the rule of competition law. This prohibition has two specific and important goals. The first is to protect customers from possible misleading information regarding origin, producer, or provider, main characteristics, and other objectives of the goods and services. The second is to protect authors or other lawful possessors of commercial inventions, for instance, firm name, brand and other indicators, from the un-authorized use of these inventions by other people as well as to provide a remedy for these authors and possessors, in the case of an infringement.

All these goals are important for the open market within the EU. However, the way these goals are reached in specific member states is different. Especially significant differences could be found on the issue, which persons are subject to the prohibition of the unfair competition. In the UK, people are not allowed to exploit the said inventions, without proper authorization of those persons who they compete with, in the same market. However, for instance in France or Germany, un-authorized exploitation of another person's commercial indication or allegation is not allowed and may be treated as parasitic behaviour and unfair competition. At least from the grammatical interpretation of Article 18, sub-Article (3) of the Latvian Competition Law, one may conclude that the prohibition of unfair competition protects the inventor from the parasitic behaviour of their direct rivals. Such a conclusion may have an important practical impact, therefore, it has to be examined carefully and an analysis of which amendments shall be made to the Latvian Competition Law, in order to provide for creative undertakings, has to be conducted. The legal environment has to be safer and conform to the laws of the other European Union (EU) countries. While proposals on the harmonisation of these laws, on prohibition of unfair competition, within the EU Member States have to be taken into consideration.

**Keywords:** unfair competition, intellectual property, tort law, EU law, Paris Convention

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## 1. The meaning of unfair competition

Article 10 *bis* of the Convention for the Protection of Intellectual Property of March 20, 1883 (hereinafter referred to as the “Convention”) provides the prohibition of certain activities treated as unfair competition. Thus, the first impression could be that the matters related to this issue are already harmonized between the member states of the Convention and therefore, between EU Member States.

From Article 10 *bis* of the Convention, one could find that unfair competition has such a general meaning; “*any act of competition contrary to the honest practices in industrial or commercial matters*”, which may be manifested as the “*all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor*”, “*false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor*” or “*indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods*”. It may be concluded, that Article 10 *bis* of the Convention, provides the protection for competitors and their inventions, as the minimum protection level within member states, who are part of the said convention., Whether this convention provides protection for fair competition is questionable and has to be analyzed further. Sub-Articles 2 and 3 of Article 18 of the Latvian Competition Law, follow the same structure suggested by the Convention for the determination of unfair competition. Sub-Article 2 of Article 18 of the Latvian Competition Law, gives a more general definition for unfair competition, specifically in terms of actions contradictive to “*fair commercial practices*.” Similarly, the Convention adds the existing or potential effect of “*hindrance, restriction or distortion of competition*”, while the sub-Article 3 of the same Article provides a more certain list of unfair competition cases. The list of cases is similar to those provided by the Convention, with an amendment that states;

“*...the acquisition, utilization or distribution of information, which includes the commercial secrets of another market participant, without the consent of such participant*” and “*the coercion of employees of another market participant with threats or bribery in order to create advantages for one’s own economic activity, thereby causing losses to this market participant*”,

which is also treated as unfair competition under the Latvian competition law. Similar to the Convention, the list of unfair competition examples set forth in Article 18 sub-article 3 of the Latvian Competition Law, are not exhaustive and in fact, any action, which is contradictive to the fair business usages or provisions of the laws and regulations may be treated as unfair competition (Judgment of the Latvian Administrative District Court of January 3, 2008 in case No A-3057-07/6).

Special attention has to be paid to the fact that in addition to the minimum protection level required by Article 10 *bis* of the Convention, the sub-Article 2 of Article 18 of the Latvian Competition Law, adds an existing or potential effect of hindrance, restriction, or distortion of competition as the fact which have to be found to prove the specific activity as being the unfair competition. In fact, by

adding said effect, as one more prerequisite of the unfair competition, the Latvian Competition Law significantly changes the idea of the unfair competition. According to the Latvian Competition Law, the negative effect on competition has to be proved, therefore it may be concluded that the unfair competition regulation, under the Latvian Competition Law, protects mainly the competition, not the competitors.

Article 21 of the Latvian Competition Law provides compensation for damages, as a remedy to the person injured by unfair competition.

Also, some other sources give an explanation of the meaning of unfair competition and related matters.

In legal theory, the unfair competition doctrine is treated as the specific exemption from the general competition regulation, which, in a free trade economy, provides no protection from the competitive activities of other people (Thünken A. (2002), “Multi-State Advertising Over the Internet and the Private International Law on Unfair Competition”, ICLQ, Vol.51, (4) p.910). It is justified, with a presumption, that in the case of certain competition activities, such as *per se* unfair, illegal, or contradictive to fair usages or *bonos mores (lat.)* in the business, they have to be prohibited, in order to save the inventors from possible infringements on their rights. However, this does not prevent these authors from possible future infringements on their inventions.

The unfair competition doctrine is treated as one of the best possible examples for liability for quasi-delicts and in cases where the parties rights to rely on the due performance of the contract, arising out of the *pacta sunt servanda (lat.)* principle, is protected. A Swedish academic, Bernitz (1989, p.51, 53), provides that, for instance, the prohibition of unfair competition may be applied in the case where person C gets person A to terminate a contract with person B and concludes a similar agreement with person C. As a result, person C may be held liable for the damages to person B, caused by the loss of the fulfilment of the contract.

The French legal doctrine, also accepted by German law, defines unfair competition as the ‘parasitic competition’ or *concurrence parasitaire (fr.)*, which prohibits unauthorized use of reputation with certain commercial value of the other person. (Davis J. (2010), “Why the United Kingdom should have a Law Against Misappropriations”, Cambridge Law Journal 69(3), p.562). It is important to indicate that this concept of prohibition of parasitic competition prevents the unauthorized use of reputation or other things with a certain commercial value not only for competitors. For instance, the merchant is not allowed to provide travel agency services, to use the allegation, confusingly similar to those used by the tobacco merchant (Judgement in the Case 19 IIC 695 (1988) Camel Cigarettes v. Camel Tours T v S). It is important to note, that the concept of unfair competition goes far beyond the limits of this concept within the Convention because Article 10 *bis* prohibits only certain acts of the competitor. Such an understanding of unfair competition under French law is broader than the understanding of this term within Latvian law. As already stated above, sub-article 2 of Article 18 of the Latvian Competition Law requires the existing or potential hindrance, restriction or distortion of competition for a certain act to be deemed as unfair competition. Harm has to be done to the competitor, which means that the possible injurer and the person suffering damages, from the certain activity,

shall act in the same or at least substitutable markets and have to compete with each other.

In the common law countries, there are remedies, mainly in the form of compensation for damages, especially in cases where one merchant has been accused of unauthorized use of the business value of another merchant. However, such damages may be claimed only if the competitor is at fault, and in addition, the activities of this competitor have to be proved to be unlawful. (e.g. Clerk & Lindsell, 2006, p.24) The unlawfulness of the competitor is determined through the so-called three-step test – the goodwill of the claimant, the respect of the retail goods and services under question, misleading by the defendant, and the damages of claimant (Davis J. (2010), “Why the United Kingdom should have a Law Against Misappropriations”, Cambridge Law Journal 69(3), p.562).

Hence, all definitions and findings regarding the unfair competition may be divided in two groups. One group limits unfair competition with the unfair usage of things having a business value that belong to the other person. This applies only if an unfair use of competition is undertaken between competitors and within the existing competition. The other group prevents any person from unfair and unauthorized use of things with a business value belonging to another person, irrespective of the fact there is competition between the persons in question. The distinction between the definitions of unfair competition is important not only in theory, but also in practice. It determines who the damages may be claimed from in each specific case. Therefore, if the law of unfair competition can be approximated within the EU, it shall be stated from which understanding, of those mentioned above, shall be applied. However, before coming to a conclusion of which understanding would be suitably applied to Latvia, the general tendencies on the harmonisation of unfair competition regulation have to be analyzed as well as the pros and cons of both understandings examined further.

## **2. The current tendencies regarding harmonisation of unfair competition regulations**

A significant impact on the harmonization of laws between EU Member States has been made through the regulation of cases, in many aspects similar to unfair competition and unfair commercial practices. The adoption of Directive 2005/29/EC by the European Parliament and Council on 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market, and the amending of the Council Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC by the European Parliament as well as the European Parliament's Regulation (EC) No 2006/2004 entitled “Unfair Commercial Practices Directive” means several possible actions, in the field of business with misleading effect, are now prohibited. However, this directive has been criticized by legal scholars, for its provisions being too narrow to regulation certain aspects of unfair commercial practices (e.g. Henning – Bodewig Fr. 2006, p.58) More importantly, particularly within the scope of this paper – this

directive refers to the regulation of the prohibition of unfair commercial practices, which is similar, but not the same legal instrument as the prohibition of unfair competition. Therefore, the question regarding the possible harmonization of laws regulating the prohibition of the unfair competition still remains important.

It shall be taken into account that as the unfair competition may infringe upon another person's property rights, rights of expression, rights to receive information, and other fundamental rights. Therefore, an important role in the harmonisation of national laws on the prohibition of unfair competition is played by the European Convention of Human Rights. Certain aspects of harmonisation are done through the Treaty of the European Union and the Treaty Establishing the European Community (hereinafter referred as the "Treaty"), especially Article 28 and the prohibition of quantitative restrictions. However, as mentioned by the legal academic Mr. Frauke Henning – Bodewig (2006, p.58), the harmonisation is undertaken in such a way - that it could be called a negative manner. This means that the Treaty does not provide a regulation on the restriction of unfair competition, but rather forbids the unjustified restrictions which may be imposed to prevent the market participants from unfair competition. The same kind of regulation is set out in Article 56 (ex Article 49) of the Treaty, which provides for the freedom of provision of services. The case law of the ECJ under Article 28 provides that a lot of national prohibitions have been found unjustified. For instance, in the famous *Cassis de Dijon* judgment (1979, Sub-paragraph 2, paragraph 8) the court held that:

*"...obstacles to movement within the Community resulting from disparities between the national laws relating the marketing of the product in question must be accepted in so far as these provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions orland the defence of the consumer".*

In the judgment of the *Dasonville* case (1974, paragraph 6) the ECJ held that, *"in the absence of a community system guaranteeing for consumers the authenticity of a product's designation of origin, if a member state takes measures to prevent unfair practices in this connexion, it is however subject to the condition that these measures should be reasonable and that the means of proof required should not act as a hindrance to trade between member states and should, in consequence, be accessible to all community nationals"*.

The case law under Article 56 of the Treaty could be treated as the more liberal in respect to the certain restriction imposed on merchants in order to prevent them from misleading or otherwise unfair behaviour. For example, in the judgment of the case *Sektkellerei Kessler* (1999) the ECJ held that it is upon the national courts to judge whether certain activities may be treated as misleading for the average consumer, of the respective member state.

Certain aspects, which may cause misleading or provide incorrect information, are regulated by the Directives and sometimes by the Regulations of the EU. As the examples, in addition to the already mentioned directive 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning unfair business-

to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) the Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), as well as the Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) could be mentioned as the examples. However, these directives and regulations do not play an important role in the prevention of the unfair competition because these directives and regulations regulates only narrow areas, for which they have been criticized. (Henning – Bodewig Fr., 2006, p.273) Additionally, their main target is to protect the consumer, not the competition or the competitors.

Certain aspects related to unfair competition have been analyzed within the laws of specific Member States. From this analysis some important conclusions have been made on the issue of the unfair competition regulation model. The model would be better – one, which limits unfair competition with the unfair use of things with business value belonging to the other person, if such unfair use is done between the competitors and within the existing competition only, or another one, which prevents any person from the unfair and unauthorized use of things with business value belonging to any other person, irrespective to the fact of the competition between the persons in question.

For instance, in the United Kingdom (UK), significant criticism has been expressed on the issue that Article 10 *bis* of the Convention to the law of United Kingdom is applied in a manner which may preclude the merchants, which might have suffered damages because of someone's activities, are prohibited by said directive and prevents them from seeking civil remedies in court (Morcom Ch. (2007), "Gowers: A glimmer of hope for UK compliance with Article 10 bis of the Convention". European Intellectual Property Review. Vol. 29, Issue 4., p.127).

Other legal scholars point out the significant differences between unfair competition laws among member states. They point out that the so called classical German model of unfair competition regulation, protects not so much the competition in general, but the fair competitors not the rivals in a particular market, meaning those who act as "honourable businessman" (Wadlow Ch. (2006), "Unfair competition in Community law (part 2). Harmonisation becomes gridlocked", European Intellectual Property Review. Vol.28, Issue 9., p.470). This way of thinking is not accepted among all member states and has been criticized for its idealistic and realist approach (Wadlow Ch. (2006), "Unfair competition in Community law (part

2). Harmonisation becomes gridlocked”, European Intellectual Property Review. Vol.28, Issue 9., p.473).

Due to such differences, the harmonisation or at least the harmonisation of the unfair competition law between EU Member States has yet to be achieved. However, the benefits of harmonisation are the free movement of goods, services, capital, and persons, which is important for the Latvian national unfair competition law. This may help make the legal environment in Latvia safer, particularly for new inventors and investors by providing fair and effective regulation, including compensation for damages for people injured by the unfair competition. Therefore, the author of the present paper will examine, in the following section, which possible model, the protection of competition or the protection of the competitors acting as fair merchants, could be treated as the most suited to Latvia's needs.

### 3. The most appropriate unfair competition regulation to be adopted by Latvia

Determining which of the previously stated models could be the most appropriate for Latvia requires analysing various issues under each model and coming to a conclusion of which one provides the best protection for competitors.

The unfair competition regulation model, specifically the protection of the competition not the competitors, is presently stated in sub-article 2 of Article 18 of the Latvian Competition Law. This Article states that unfair competition has to have an existing or potential effect of “*hindrance, restriction or distortion of competition*”. Within such regulation, the facts proving the existence of a negative effect on the competition have to be proved. This means that a clear definition of what a relevant market is needs to be made, especially where the competition has been or may be hindered, restricted, or distorted. Article 13 of the Commission Notification on the definition of relevant market for the purposes of Community competition law (97/C 372/03) provides that the market definition has to be made, taking into consideration the demand substitutability, supply substitutability, and potential competition. However, it shall be noted that the relevant market is not defined in every unfair competition case under Latvian law (The decision of the Latvian Competition Council from 28 February 2006 at the case No E02-64). Such a fact may raise doubt about whether such a definition of a relevant market has any real practical value in unfair competition cases.

If we follow the idea that the prohibition of unfair competition protects the competitor, acting as a fair businessman from the parasitic behaviour of any person, the relevant market has not to be defined, because there are no reasons to make such definition, as it does not change the application of law. In general, the examination of the three main conditions for the compensation of damages – illegal action, existence of damages and the causality between the relevant action and damages (Torgāns K., 2006., 195.lpp.) could be sufficient to provide the applicant with compensation for damages. However, it shall be taken into consideration that it may be necessary to

evaluate other reasons in order to achieve a fair resolution in the case. One of such reason, may be the so called duty of care or “neighbour’s principle”. The essence of this principle is expressed in the case *Donoghue v. Stevenson* presented to the English court in 1932. It provides that anybody has to take due care in order to avoid actions and omissions that may be reasonably foreseen and may cause damages to another person, which is close to the first person that shall be taken into account in any planning of the activities (Conaghan J, Mansell W., 1999, p.13). In a later case, *Anns v. Merton London Borough Council* (1978), it provided that the neighbour’s principle had to be applied in this case because the connection between the persons was obvious at the first glance or *prima facie*.

The knowledge and intention of the possible person at fault may also be examined (Clerk & Lindsell, 2006, p.1505), providing that the so called two-fold test found the person liable (Clerk & Lindsell, 2006, p.1505). The action itself is not illegal, to hold such action illegal, the person at fault, would have to recognize that there existed the an infringement of rights and has to have the intention to make such an infringement (Judgments in the cases *Rookes v Thomas* (1964), *Credit Lyonnais Bank Nederland N.V. v Export Credits Guarantee Dept* (1999)). The intention has to be examined according to the facts (Clerk & Lindsell, 2006, p.1507), which prove the recognition that the person at fault may cause harm to the other person or has the negligent attitude, even without the direct desire to injure (Clerk & Lindsell, 2006, p.1507). Also, passing – off has to be proven, particularly its three main elements – the goodwill of the claimant in the distribution or at least in the development of the goods or services under question, the defendant misleading the other person, and the damages to the applicant (Davis J. (2010), “Why the United Kingdom should have a Law Against Misappropriations”, *Cambridge Law Journal* 69(3), p.562).

These several circumstances may look difficult to prove. However, the author of the present paper wish to emphasize, that these circumstances may be useful in order to find out if a specific defender is liable for the damages of the claimant. The matter of liability is the central issue in the compensation of damages, which, according to Article 21 of the Latvian Competition Law, is the sole remedy for unfair competition. The hindrance, restriction, or distortion of competition actually cannot be treated in this aspect, because the person may be inflicted with damages in cases where competition is not interfered with.

Due to such reasons, it may be concluded that the fair competitor have to be protected from the parasitic behaviour of any person, irrespective of whether the competition itself is hindranced, restricted, or distorted. Therefore, the author proposes to delete the wording “...and which have created or could create a hindrance, restriction or distortion of competition...”, from the sub-article 2 of Article 18 of the Latvian Competition Law and express this sub-article be worded in following manner: “actions, as the result of which regulatory enactments or fair commercial practices are violated, shall be deemed to be unfair competition”.

## 4. Summary

As a result of the present paper, the author comes to the following conclusions:

1. Article 10 *bis* of the Convention provides protection for competitors and their inventions, as the minimum level of protection in the member states that are party to said Convention.
2. In addition to the minimum level of protection required by Article 10 *bis* of the Convention, the sub-article 2 of Article 18 of the Latvian Competition Law adds the existing or potential effect of hindrance, restriction, or distortion of competition as a fact which has to be found out, in order to prove that a specific activity is actually unfair competition. Due to such regulation, it may be concluded that the unfair competition regulation under the Latvian Competition Law protects mainly the competition, not the competitors.
3. The present EU directives and regulations do not provide sufficient harmonization of the unfair competition laws between EU Member States because these directives and regulations only regulate narrow areas of unfair competition, The main goals of these directives and regulations are different from those seeking the prohibition of unfair competition.
4. The matter of liability is a central issue in the compensation of damages, which, according to Article 21 of the Latvian Competition Law, is the sole remedy for unfair competition. The hindrance, restriction, or distortion of the competition, actually cannot be treated in this aspect, because the person may suffer the damages in cases where the competition is not interfered with.
5. Due to the lack of reasonability in the provision of the remedies, in cases of unfair competition, the author proposes deleting the wording "...and which have created or could create a hindrance, restriction or distortion of competition...", from sub-article 2 of Article 18 of the Latvian Competition Law and express this sub-article in the following wording: "*actions, as the result of which regulatory enactments or fair commercial practices are violated, shall be deemed to be unfair competition*".

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## LEGAL METHODS IN LATVIA'S LEGAL ARRANGEMENT AND EUROPEAN INTEGRATION

### Abstract

Latvia's legal arrangement has gone through a transition from the Soviet legal system to a Western type democracy of continental European and Civil Law system. On this way, changing post-Soviet legal thinking in order to integrate a European way of legal thinking many new legal methods as interpretation, analogy, teleological reduction, application of the law *praeter legem, contra legem*, which were not applied by Soviet courts have become known and apparent and democratic reality. These methods have pushed the courts and other appliers of the law to use them and to deal with them. Simultaneously, the doctrine of sources of law has broaden from one source of law – normative legal acts – to diversity of sources of law, among which general principles of law and judge made law the most unanticipated. However, all these legal methods and sources of law are devoted to finding the real meaning of the legal norm applicable in a concrete case as the meaning of the legal norm itself has gone through the major changes. The goal of the paper is to analyze the transition of the motion of legal norm in connection with the methods applied in order to find the real existing and applicable norm. Historical, systematical, comparative scientific methods are used. In addition, judgments of the Supreme Court and Constitutional Court will be analyzed.

**Keywords:** legal norm, general principles of law, judge made law, legal methods

### 1. Meaning of the legal norms in the legal system of a democratic country where the Rule of Law prevails

Modern legal theory holds that there are two radically different and incompatible ways of understanding legal norms – the hyletic understanding and the expressive understanding of legal norms.<sup>2</sup> These, in turn, are based on the concept of natural

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<sup>2</sup> O. Weinberger: The Expressive Conception of Norms: An Impasse for the Logic of Norms. In Normativity and Norms: Critical Perspective on Kelsenian Themes. Oxford: Clarendon Press, p. 413. See also C.E. Alchourron, E. Bulygin. The Expressive Conception of Norms. In Normativity and Norms. Critical Perspectives on Kelsenian Themes. Oxford: Clarendon Press, pp. 384-385.

law and the concept of positive law. The hyletic approach holds that legal norms are conceptual units which exist irrespective of language, but can be expressed linguistically. For example, through sentences which possess a prescriptive meaning. The expressive understanding holds that legal norms are instructions, which is the result of the prescriptive use of language.

This paper is based on the fundamental postulate that in a democratic country where the Rule of Law prevails, a legal norm is no longer viewed exclusively in the context of a normative legal act. Rather, it is seen as a prescription with respect to which legal systems that are based on sovereign will regulate legal relationships on the basis of general principles of law in a specific country, irrespective of whether the legislature has managed to verbalize the norm to an adequate degree. A legal norm is more than just the text, and in terms of its scope it can coincide with the written text or not coincide with it. This is clearly seen in the general understanding and application of general principles of law in democratic countries in where the Rule of Law prevails.<sup>3</sup>

## 2. General principles of law

General principles of law are ones that derived from natural law, are functional in a legal arrangement based on the Rule of Law, and are universally accepted in a specific legal sector, legal system or legal arrangements.

A legal arrangement covers a wide range of issues which have to do with justice in the relevant country – all of the legal phenomena in the relevant society, including aspects of the law (and the legal system), as well as institutional issues:

- 1) All sources of the law, including legal acts that have been approved or have otherwise become obligatory in the relevant country;
- 2) All institutions which have anything to do with the creation and the application of the law (legislative, judicial and administrative institutions);
- 3) The entire set of legal relationships which exist in this system.

A legal system is just one part of the legal arrangement. It covers both written and unwritten legal norms. The legal system is objectively complete. It contains all of the necessary prescriptions for regulating existing legal relationships within the legal arrangement.

In this paper, we shall review the concept of a legal system mostly in a deductive way, looking at what kind of system it should be on the basis of an understanding of natural law doctrine and the principle of the Rule of Law. Only a deductively derived system can be complete.<sup>4</sup> In other words, a system that is derived from something that

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<sup>3</sup> For more on this, see D. Iljanova: *Vispārējo tiesību principu nozīme un piemērošana* (Meaning and application of the general principles of law). Rīga: Ratio iuris, 2005.

<sup>4</sup> N. Vinzarājs: *Jēdzienu jurisprudence* (Jurisprudence of Concepts), *Tieslietu Ministrijas Vēstnesis*, No. 1, 1937.

is of a general nature, e.g., from general principles of law, is complete. An inductively derived system – one that derives from something individual, e.g., the totality of normative acts – is a system which contains incompleteness.

Now, how can we be sure that a legal system is objectively complete<sup>5</sup> in terms of its including all of the written and unwritten prescriptions that are necessary to handle disputes that arise in the relevant country's legal arrangement? We can refer to a general principle - such as a ban on any legal obstruction by institutions and courts. This meaning that those who apply the norms of law cannot refuse to hear a case if there is no written norm in place which actually gives the legal basis for judge made law. This principle is enshrined in Section 15 of Latvia's Law on Administrative Procedure,<sup>6</sup> Section 4 of the Civil Law,<sup>7</sup> and Section 1 of the Law on Civil Procedure.<sup>8</sup> All of these guarantee an individual's right to the protection of the courts.

A law, by contrast, is objectively incomplete. In accordance with sovereign procedure, a legislature must define those norms of law which exist in the relevant legal system and use these to regulate things that can happen in the legal arrangement. These norms must be written down so that the sovereign that has authorized the legislature to do this work might find it easier to organize its operations and the relationships which exist amongst its individuals.

When an understanding of natural law differentiates between the concepts of "the law" and "justice", this suggests that in addition to written norms there are also others – unwritten norms as part of natural law norms from which general principles of law are derived. These prevail over written norms and have much to do with their content.

The next question to consider in understanding the concept of legal norms in a democratic country where the Rule of Law prevails is the true source of all norms, including general principles of law. Is the source legislature or it is a matter of the people's sovereign will?

In "Pure Theory of Law: Introduction to the Problems of Legal Theory", Hans Kelsen argues that all norms gain their legal force from a basic norm, or *Grundnorm* in German.<sup>9</sup> This is an unwritten norm from which even a formal constitution draws its power. The basic norm, as Kelsen understands it, is a hypothetical assumption of the regulations which define the procedure for approving the initial constitution

<sup>5</sup> E. Kalniņš: "Tiesību tālākveidošana" (Further Creation of Law). In: Juridiskās metodes pamati: 11 soļi tiesību normu piemērošanā (Fundamentals of Legal Method: 11 Steps in Applying Legal Norms). Rīga: Ratio iuris, 2003, pp. 126-205.

<sup>6</sup> See *Latvijas Vēstnesis*, No. 164, 2001.

<sup>7</sup> See *Civillikums: LR likums* (Civil Law: Law of the Republic of Latvia). Rīga: Arods, 1993, p. 11.

<sup>8</sup> See *Latvijas Vēstnesis*, No. 326/330, 1998.

<sup>9</sup> H. Kelsen: *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtlehre or Pure Theory of Law*. Oxford: Clarendon Press, 2002, pp. 58-59.

or a new constitution is there has been a revolutionary breakdown in the system of state.<sup>10</sup>

Kelsen regards the basic norm as not “positive” one (which means for Kelsen that it is not a norm of positive law, i.e. created by a real act of will of a legal organ, but is presupposed in juristic thinking). Hence, he argues, it is “meta-legal.” And, since it enables anyone to interpret a command, permission or authorization as an objectively valid legal norm, its legal functions are not in doubt. It is purely formal, is a juristic value judgment, and has a hypothetical character; yet it forms the keystone of the whole legal arch – it is “at the top of the pyramid of norms of each legal order”. Kelsen believes that every jurist assumes this to be the basis of the legal order; and that it merely means that the legal order is as a whole effective (i.e. that people do in fact behave according to the norms of this order), and that it may be stated in the form that men ought to behave in conformity with the legal order only if it is as a whole effective. This seems to invoke either a totally unnecessary fictitious hypothesis, on the one hand, or on the other, a statement of fact, dressed up in the shape of a general norm. Moreover, the basic norm is propounded as the means of giving unity to the legal system, and enabling the legal scientist to interpret all valid legal norms as a non-contradictory field of meaning.<sup>11</sup>

Similarly to Kelsen's theory of the basic norm, Hart believes that the restrictions on legislative power are “parts of the rule conferring authority to legislate and they vitally concern the courts, since they use such a rule as a criterion of the validity of purported legislative enactments coming before them. Legislation, in these terms, which infringes such limitations is void.” This leads us to consider the rule of recognition. The rule provides authoritative criteria for identifying valid law within a particular legal system. How then is the rule of recognition to be ascertained? Hart points out that such a rule is often not expressly stated, but can be shown by the way in which particular rules (“primary” rules) are identified by courts and other legal officials. It is a form of social practice. Harris is led to the conclusion that the rule of recognition must be “an abstraction, a pure norm, arrived at inductively from observations of what lawyers do, but not itself witnessable.”<sup>12</sup> Whatever its juridical status, Hart tells us that the rule of recognition is ultimate and as an ultimate rule it can “neither be valid nor invalid.” For Hart, the only point is whether the rule of recognition is accepted as such by those who operate the system.

Following above mentioned theories and developing the idea of a basic norm (or rule of recognition) further, it leads to the conclusion that both phenomena Kelsen

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<sup>10</sup> For more on this see J. Pleps: Normatīvo tiesību aktu hierarhija: profesors Hanss Kelsens un mūsdienas (I) (The Hierarchy of Acts of Legal Norms: Professor Hans Kelsen and the Present Day), *Likums un Tiesības*, Vol. 8, No. 2(78), 2007, p. 49. See also P. Morton: An Institutional Theory of Law: Keeping Law in Its Place. Oxford: Clarendon Press, 1998, p. 7.

<sup>11</sup> M.D.A. Freeman: Introduction to Jurisprudence, Sweet & Maxwell Ltd., London 1994, pp. 282-289

<sup>12</sup> *Ibid.*, pp. 350-354; H.L.A. Hart: The Concept of Law, Clarendon Press, Oxford 1993, pp. 97-107.

and Hart is speaking about is what in contemporary legal theory could be described as general principles of law.

The source of a basic norm is sovereign, and its content represents sovereign will.<sup>13</sup> Sovereign will, in other words, defines the content of the basic norm; it speaks to the type of country in which the sovereign wishes to live. The basic norm for Latvia's legal arrangement was formulated in the declaration of independence which was prepared by the Latvian People's Council and approved on November 18, 1918. Because the People's Council was not an institution legitimated by a democratic process, the Latvian Constitutional Convention reaffirmed the basic norm on May 27, 1920, in its "Declaration on the Latvian State".<sup>14</sup> When sovereign will is formulated in a basic norm, the legal arrangement in the relevant country is governed by principles which emanate from that norm. In the case of a democratic country which observes the Rule of Law, these become general principles of law. In deciding to create a democratic system of the Rule of Law in the country, the sovereign cannot affect the existence and content of some of these general principles. If the basic norm specifies a different structure of state or political regime, then other principles will apply to the content and structure of that country's legal arrangement. For instance, the so-called "leader principle" is unacceptable in a democratic country, but it is an applied principle in the legal arrangement of the authoritarian country.<sup>15</sup>

These principles, then, define the content and structural elements of the relevant country – the norms which must exist in the legal arrangement so as to settle all disputes that may emerge. These principles offer instructions in a sense, and they can be divided into three groups in terms of what they address:

- 1) Those which identify the highest values of a system of justice, a component therein, or an institution, i.e., which reflect a certain way of life. Here we find human rights norms, for instance – those which present the individual as being of the highest value in a democratic country where the Rule of Law prevails;
- 2) Those which define the systematisation of the legal arrangement or a segment therein. These are general principles which define the structure of the legal arrangement and the legal system – sources of law, norms of justice, the hierarchy of generally binding norms, as well as the way in which power is distributed among the legislative, executive and judicial branch of government, which is the principle of the separation of power.

<sup>13</sup> "The nation stands above everything and is the foundation of everything. Its will is always lawful, it is the law itself [...] It would be foolish to claim that the nation itself is somehow linked to formalities or to the constitution to which its authorised representatives are subject." See E.Ž. Sijess: Što takoje tretje soslovie. V kn.: M.B. Pevzner (sost.): Abat Sijess. Ot Burbonov k Bonapartu. Sankt-Peterburg: Aleteija, 2003, s. 196-197.

<sup>14</sup> See J. Pleps: *op. cit.*, pp. 90-91.

<sup>15</sup> *Ibid.*, p. 90. See also E. Kalniņš: Tiesību normas spēkā iesamība un intertemporālā piemērojamība (The Validity and Intertemporal Application of a Norm of Law), *Likums un Tiesības*, Vol. 7, No. 2(11), 2000, p. 216.

- 3) And finally those which are defined by those institutions, which apply the legal norms in terms of how, the norm is to be identified, tested, and or interpreted. Here we find the general principles which speak to the application of the legal norms in the democratic country – the legal methods, prerequisites for their application, and their content in terms of interpretation methods, norms on settling conflicts, and methods of argumentation.<sup>16</sup>

### 3. Legal methods

The meaning of the general principles of law in the process of application of legal norm can be observed in two cases: 1) in the absence of written law, which solves the case and 2) when the general principle of law accompanies all the application of norm process, even if the written provision exists as all legal methods to be applied in application process (the methods of interpretation, the further creation of norm, methods of reasoning, methods of conflict resolution rules, etc.) in order to achieve a fair result are the general principles of law.

If the written rules do not provide an answer to the matter, because no provisions could be applied directly to the relevant facts, the logical and objective answer to the legal system to ensure consistency, coherence, order and security in society, have another look at the legislative level, namely, in the level of general legal principles. Written law should be regarded as an expression of legal principle. The judge himself does not need to try to figure out these principles. This is not a judge's task. The judge is obliged to hear the case, using all the sources that are necessary to a reasoned and reasonable judgment.<sup>17</sup>

All the legal methods used in case adjudication in order to reach the just decision in every case are divided in legal methods:

- 1) *intra legem* (secundum legem) – which is interpretation of the written text of the legal norm;
- 2) *praeter legem* – the method to fill with the content open legal concepts such as general principles of law;
- 3) *extra legem* – which includes analogy and teleological reduction and which stay in the limits set out by the plan of the law; and
- 4) *contra legem* – which means “contrary to the law”, “against the law”, - further creation of the law which is based on the criteria outside the law – in the general principles of law; though *Contra legem* but *intra ius* – which means that the true legal norm found by the court in the given legal arrangement is contrary to the wording of the positive law but corresponds to the whole

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<sup>16</sup> D. Iljanova: *Vispārējo tiesību principu nozīme un piemērošana*. Rīga: Ratio iuris, 2005, pp. 23-24.

<sup>17</sup> See J.C. Cueto-Rua: *Judicial Methods of Interpretation of the Law*. Louisiana: The Publications Institute Paul M. Hebert Law Center, 1981, p. 122.

legal arrangement and stays within the *ratio iuris* of the legal arrangement and according to the basic norm proclaimed by the sovereign.

Alongside with the general principles of law which are derived from the basic norm of the country accepted and proclaimed by the sovereign, and which give legal basis for the application of all legal methods in order to find the just solution for each and every case, the judgment of the Constitutional Court of the Republic of Latvia of January 4, 2005, case no. 2004-16-01<sup>18</sup> could be regarded as a general authorization for the courts of the general jurisdiction to apply legal methods. It says: "17. [...] Application of legal norms, which comply with the Satversme, includes finding the right legal norm and adequately interpreting it; assessment of inter-temporal and hierarchic applicability, use of appropriate judicature as well as further advancement of the law." By this statement the Constitutional Court once more announced the permission to the courts of general jurisdiction that in the democratic Rule of Law based legal arrangement they are free to apply all legal methods to reach fair decision. In fact only application of *contra legem* stays still as a prerogative of the Constitutional Court which the only one can announce the illegitimate written legal norm invalid.

One of the general principles of law which ensures the application of the legal methods in the norm application process is the principle of prohibition of legal obstruction. Prohibition of legal obstruction is one of the general principles of law of a democratic Rule of Law based state that provides the control and interaction of the various branches of state power, establishing that the principle of the separation of powers is not absolute.

The principle of the prohibition of legal obstruction has to be seen in conjunction with the meaning of the legal norm in a modern legal theory. As it is written above in a contemporary democratic Rule of Law state, the legal norm is no longer viewed only in relation with the written normative act, but as an legal prescription, which according to the general principles of law determined by the will of a sovereign of the legal arrangement regulate legal relations in that country, regardless of whether the legislature has failed to properly verbalize written provision or not.

A legal system consists of rules - both written and unwritten rules. Legal system itself is an objective complete. It contains all the necessary prescriptions necessary to adjust the existing relationships within the legal framework. A legal system is complete, because it is deductively derived system.<sup>19</sup> Thus, a system derived from something as general as, for example, the general principles of law derived system and not inductively - from something individual, for example, of the written legal norms; only an open legal system, can be total.

By contrast, any written law is objectively deficient - the legislature in accordance with the sovereign's mandate has to find a true legal norm that exists in the legal system and legal arrangement governing the ongoing actual cases, and record the provision,

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<sup>18</sup> Judgment of the Constitutional Court of the Republic of Latvia of January 4, 2005, case no. 2004-16-01. <http://www.satv.tiesa.gov.lv/?lang=2&mid=19> (seen 05.06.2011)

<sup>19</sup> N. Vīnzarājs: Jēdzienu jurisprudences. *Tieslietu Ministrijas Vēstnesis*, 1937, nr.1

so for the sovereign, which authorized the legislature to fulfill this function, would be easier to organize its life and relations between the sovereign's members.

The legislator's role is to write down the rules which are determined by the standards deriving from general principles of law and that there is a legal system to resolve any possible conflicts that may arise between the sovereign's members. However, such a task for a legislature is objectively impossible.

First, because the legislature is a group of people, and people are characterized by mistakes. Even more, the written law consists of the text, which consists of words. Each word has several meanings, for example, the word may be in its original (historical origin) meaning or transferred or acquired different meaning over time, or word could be in a broad or narrow sense, or the word may be conversational and legal meaning. Different thoughts can be expressed by so many words and connections.

Second, the relationship between sovereign members are so numerous and dynamic, that constantly brings new relations, which the legislature has not yet had time to regulate by the positive law, but general principles of law arising from the basic norm provides that the court may not refuse to give a ruling, if the written norm does not exist. Therefore, there is a judicial power, with responsibilities under the sovereign's authority, using the legal methods, which are also the general legal principles of a democratic Rule of Law state, to correct the legislature's mistakes and find legal norms of existing legal system and to settle the case without waiting for the legislature to adopt written rules during the long legislative process. In the case of a legislature's error, taking into account the principle of separation of powers and checks and balances, the obligation of the judge is to correct the written provision using the legal methods (for example, using the analogy, the teleological reduction) expanding or narrowing down the wording of the written provision according to the legislature's will and the *ratio legis* of the legal norm.<sup>20</sup>

Separation of power in its modern development does not mean that the branches are completely separated, but that mutual controlling and limiting should exist between them.<sup>21</sup> In western democracies, the separation of powers is not implemented strictly following its ideal model. Generally only a judge's independence from the executive interference is strictly protected. Furthermore, judiciary by interpreting and

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<sup>20</sup> For example, the sovereign was clearly intended to require the legislature determines that, if the person donates blood in Blood center, and it is found that the donor's blood contains a deadly virus, then the Blood Center communicates this information to the donor, as determined by such general principles of law as the right to health and the right to life. However, the legislature did not write down such a provision in any written legislative act, therefore the court had to find that provision in another unwritten normative level (see: LETA, October 12, 2004.). Or another example: the sovereign was clearly intended that the legislature provides for the possibility of child who has child-birth at a home to be registered by state institutions in order legally get name, surname, identification code, social benefits etc. But the legislature again failed to regulate such case, and the court had to find an unwritten rule which states that every child has the right to a name, ID number, benefits, etc. as it is clear from the general principle of law of the child protection.

<sup>21</sup> H.J. Vildbergs, G. Feldhüne: *Atsauces Satversmei: mācību līdzeklis* (References to the Satversme: Teaching Aid). Rīga: Latvijas Universitāte, 2003, 4. lpp.

filling gaps of the written legal norms taking the part in correcting and completing the meaning of the law. Thus, the judiciary is also inevitably participating in the legislation.<sup>22</sup>

Senate's Administrative Department in the judgment of the January 14 2008, no. SKA-5/2008, in the case of Riga City Registry Office's refusal to make changes to personal records of birth, sex change, and the obligation for the Riga City Registry Office to amend the birth register, and compensation for the personal and moral damage, the Court was faced with a regulatory vacuum, and applied the prohibition of the legal obstruction principle. The Court concluded: "[...] It can be concluded from the Latvian law that the state allows for the possibility to change the gender and to supplement the birth registry records [...] At the same time there is the lack of legal provisions which establish the criteria for deciding whether sex change has occurred. [...] in such cases the state as much as possible respectfully for the person determines whether and when to have an objective basis for the birth registry entry completed. In addition, the administrative processes, fact-finding and decision-making on the birth register of the addition, must comply with the twelfth part of the Article 15 of the Administrative Procedure Act, which provides for the prohibition of the legal obstruction, namely, the institution and the court may not refuse to decide the case on the ground that this matter is not regulated by the written law. [...] As there is no specific legislation, the court, has to fill term "sex change" with content as much as possible respecting human rights (Article 96 of the Latvian Constitution and Article 8 of the European Human Rights Convention - right to privacy) [...]".

Interpretation of written legal norms must be distinguished from the further creation of legal norms<sup>23</sup> which goes beyond the widest and narrowest meanings of the text.

Why is further creation necessary? Based on the natural law doctrine of knowledge, any law is objectively deficient, but any legal system is objectively complete – this includes solutions for all disputes that may arise in the system. For example, this is evidenced by the general principle of law – the prohibition of legal obstruction.

Since the object of interpretation is the wording of the written provision - interpretation is a textual science, and the border of the interpretation drawn is the verbal sense of legal norm's wording - the possible narrowest and widest sense, then interpretation takes place only within the text - nothing can be added to the text or

<sup>22</sup> J. Neimanis: *Tiesību tālākveidošana (Further Creation of Law)*. Rīga: Latvijas Vēstnesis, 2006, 74. lpp.; R. Cipeliuss: *Vispārējā mācība par valsti (General Theory on State)*. Rīga: AGB, 1998, 224. lpp.; on the separation of the law and justice and the courts role in finding just and reasoned decision see also: BVerfGE 34, 269/286 ff.; H.J. Vildbergs, K. Messeršmits, L. Niedre: *Pilsonis tiesiskā valstī. Vācu konstitucionālo un administratīvo tiesību pamati (Citizen in a Rule of Law State. The basics of German Constitutional and Administrative Law)*. Rīga: EuroFaculty, 2004, 80.-81. lpp.

<sup>23</sup> *Plašāk par tālākveidošanu skat.:* J. Neimanis: *Tiesību tālākveidošana*. Rīga: Latvijas Vēstnesis, 2006, 183 lpp.; E. Kalniņš: *Tiesību tālākveidošana (Further Creation of Law)*. Grām.: *Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā (Fundamentals of Legal Method: 11 Steps in Applying Legal Norms)*. Melņķis E. (Zin. red.) Rīga: Latvijas Universitāte, 2003, 126.-205. lpp.

taken away from the text. If in the result of interpretation the law applicator considers that the written norm does not correspond nor the legislature's objective, and the objective of the legal arrangement, in order to solve the case the next legal method should be used - the further creation of legal norm. Wherever the widest possible interpretation ends, the method of further creation - an analogy begins, but where the possible narrowest interpretation ends - the further creation method - a teleological reduction begins.

A prerequisite for application of the additional creation of law is the existence of the gap of the law. A *lacuna* in the law is the opposite gap to the plan of the law (what the legislature wanted) or to *ratio legis* of the law (ie, what by law would have had to be). As well as the preconditions for further creation of norm have to be mentioned reasonably persuasive legal arguments in support of the result and the creation of general legal norm, which would be applicable to other similar occasions.

The analogy is a legal method to fill an open gap in the law (the legal framework for verbal meaning of the written norm is too narrow - a positive legal regulation is not included, but should have been). The analogy is the transfer of the legal consequences of the similar legal norm to the situation unregulated by law, but like the regulated one. Similarity between the regulated and unregulated cases must be substantial. Substantial similarity is determined by evaluative subsumption comparing and evaluating the crucial features of the legal content of the norm - those that are directly related to the legal consequences. An assessment consists of the assessment of interests contained in the law - the ratio of the law and assessment of the interests of actual case.<sup>24</sup>

The analogy is inductive deductive conclusion - the conclusion of the individual (individual) through the general to the individual: from the one or more provisions the general rule inductively is derived, the incomplete case is subject to it deductively and the "new" rule is found.

The analogy is allowed both in the private and public law (improving the subject's position). However, modern legal theory allows the application of the analogy in public law even making the persons situation worse if the morality and fairness requirements ask for that.<sup>25</sup>

Counter-argument to analogy - *argumentum a contrario* - exclude the possibility of analogy - the legal consequences of S are provided only for the legal content of T, so they are not applicable to the actual case F. The application of *argumentum a contrario* is shown by the word "only" included in the legal content of the norm or it could be found in the legislature's intention or the *ratio legis* of the written regulation.

The argument emphasizing the use of the analogy - *argumentum a fortiori* provides:

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<sup>24</sup> See N. Vinzarājs N. Jēdzienu jurisprudēnce. *Tieslietu Ministrijas Vēstnesis*, 1938, nr. 1

<sup>25</sup> Peczenik A. *On Law and Reason*. Dordrecht, Boston, London: Kluwer Academic Publishers, 1989, p. 400

- 1) if the law sets out the legal consequences for the less significant case, then the consequences for the more significant case also should be applied even more (*a fortiori*) or when the law prohibits something less important, it is even more prohibiting something more important - conclusion from smaller to larger;
- 2) if the law does not set out the legal consequences for more significant case, even more they are not applicable to the less significant case or where the law allows for something more significant, then *a fortiori* it should also allow for something less important - conclusion from larger to smaller.

Teleological reduction<sup>26</sup> is applied to the closed gap of law (the gap of law when the provision of a written norm contrary to its meaning, but according to the plan of the law or *ratio legis* of the law should be limited). Teleological reduction is imposition of the restriction on the too broadly worded provision, resulting in the exception clause.

## Conclusions

1. Modern legal theory holds that there are two radically different and incompatible ways of understanding legal norms – the hyletic understanding and the expressive understanding of legal norms.
2. The legal norm is seen as a prescription with respect to which legal systems that are based on sovereign will regulate legal relationships on the basis of general principles of law in a specific country, irrespective of whether the legislature has managed to verbalize the norm to an adequate degree or not.
3. The general principles of law which are derived from the basic norm of the country, accepted and proclaimed by the sovereign, give legal basis for the application of all legal methods in order to find the just solution for each and every case.
4. The courts of general jurisdiction in the democratic Rule of Law based legal arrangement are free to apply all legal methods to reach fair decision. Only application of *contra legem* stays as a prerogative of the Constitutional Court which the only one can announce the illegitimate written legal norm invalid.

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<sup>26</sup> J. Neimanis: Teleoloģiskā redukcija. *Latvijas Vēstnesis Jurista Vārds*, 2005. 17. maijs, nr. 18 (373)

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## THE PRINCIPLE OF EFFECTIVENESS – THE GUARANTEE OF RULE OF LAW IN EUROPE?

### Abstract

The demand for the effectiveness of law is not only a theoretical problem of sociology of law, but a practical need of the legislator. For several decades legal scientists and even courts have outlined a new paradigm in the development of the “general principles of law”. The need for a new “principle of effectiveness”, which is closely related to the “principle of equivalence” and “principle of legal security”, can be characterized as a new developmental stage in the improvement of the quality of the Rule of Law’s functioning in Europe. This article explores the formation of this Principle from the 20th century, underlining the evolution of the idea at both a national and an international level.

**Keywords:** Rule of Law, effectiveness, general principles of law, *effet utile*

### Introduction

Already for several decades the problem of effectiveness has been the centre of attention, not only for researchers of sociology of law but also legislators. The notion of effectiveness has been more or less vividly shown in the context of the general principles of law. The legal science regarding this development has different arguments for either accepting this development or not. Sometimes, the will to stop introducing new general principles of law is connected with a will to avoid foliation of the general ideas of these principles. The notion of effectiveness is increasingly present in the latest court decisions throughout Europe, and also in programme documents concerning the quality of regulation at the state and European level. The development of the principle of effectiveness has, firstly, emerged as an international principle, while later becoming an essential characteristic of domestic legislatures and judicial competences.

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## 1. Legal science – different approaches

The concept of legal effectiveness has clearly developed in the ensemble of new targets and principles, which help to explore the new quality of laws (clearness, accessibility and effectiveness). The effectiveness as a principle has theoretically developed since “Allgemeine Staatslehre” (1900) by G. Jellinek, although by then the German scholar had not developed a theoretical terminology (Milano, 2005, p. 25). It is possible to regard the principle of effectiveness as a modern variation of the principle of legal security, which has succeeded the vitality and creativity of constitutional law. The principle of effective judicial protection in European Union law “appears to be assuming increasing prominence in the case law of the Court of Justice” and it adds a flesh to the skeleton of primacy, direct effect, and state liability, helping to bring it to life” (Arnall, 2011, p.51).

“Effectiveness is the basis of the legal quality, which by objective considerations fulfils its social function” (Touscoz, 1964, p.2). Regarding the notion of “effectiveness”, there should be a division regarding facts: creation actions, which determine the creation of laws, and conditional facts, which help to access the legal qualification of facts. The first will include the true values, but the second will let the values, which are put in the norm, to be materialized in life. If we use the division of the general principles offered by French legal scholar Boulanger, then effectiveness as a demand of quality is best fitted in the group of legal security (certainty). It provides, for example, inadmissibility of the legislation with retroaction, and the demand for the observance of laws (Iljanova, 2005, pp. 38-39). If principles are divided according to prof. Bruno Oppetit - value principles, normative principles, and legal system principles (Oppetit, 1989, p. 14) -, then it is doubtful, whether efficacy can be regarded as a value or moral level principle. Efficacy is also not a normative principle because it is not found in the texts of statutes or jurisprudence. It is clear that the principle of effectiveness is responsible for safeguarding legal security, for example, in human rights or social rights issues, and guaranteeing normal functioning of the legal system.

During the 1960s in France, the first fundamental research by J. Touscoz was fulfilled concerning effectiveness as a general principle in international legal order. It was mapped out, before many authors (e.g., Kelsen, 1936, p.26 and Lauterpacht, 1958) had mentioned the “principle of effectiveness” or the “general principle of law – effectiveness”. Effectiveness was not yet clearly formulated as a principle, but there were efforts to outline the features and meaning of this principle in Italian, German, and English legal works, mostly, regarding international relations. As noted by legal scholars, the international level sheds further light on the notion of effectiveness, which was being outlined in relations between states or during a revolutionary crisis (Touscoz, 1964, p.4).

It is concluded that in international order the principle of effectiveness is the guarantee that the will of states is being accepted as an action with concrete consequences. Enforcing the principle of effectiveness is dependent on whether the international agreement was concluded under violence or pressure. Depending on the nature of violence or pressure (inside a

state or between states), the level of effectiveness will take different stages and force (Touscoz, 1964, p.112-113). In international law, the principle of effectiveness is sometimes connected with the problem of recognizing undemocratic regimes – for example – the USSR. The doctrine inclines to accept that the general or even the unique condition, opposed to governmental competences, internationally, is the condition of effectiveness. The existence of the principle of effectiveness in international law is seen within the context of the general activities of a state, as dogmatic and autonomous; but in regard with the internal decisions taken by the government. It is necessary to connect it with the general notion of the will of the sovereign in the state – the nation. The importance of effectiveness in international relations is mostly political, therefore, the tension from the field of politics has been forwarded to the legal field “as a principle of effectiveness” (Truyol y Serra, 1981, p. 101). It is clearly the fight of countries for the creation, recognition, prolonging or shortening of a specific legal situation in current international relations.

“In the state level positive law consists of statutes, which are issued by the state institutions (formal criteria); the law is generally effective, because of the effective order” (Touscoz, 1964, p.4). Lawyers indicate that even such laws, which have officially lost their force due to legal changes, continue to live in the hearts of people because they believe the law is still in force. Therefore, there exists an unclear zone – an unclear legal space – where only effectiveness can make the situation clear, or give the necessary respect. The norms of legal sanctions are effective, and when put into effect, become a reality.

The special role of the new principle has been outlined by B. Mathieu in his doctoral thesis “Principle of efficacy in the private law” (Aix Marseille, 1994). According to Mathieu’s opinion, the principle of efficacy is best fitted as a system principle, and it characterizes a strong tendency currently popular in the legal thought. This kind of principle fulfils a conceptual mission; helps give an in-depth value of law, and from this standpoint “its existence is unquestionable” (Mathieu, 1994, p.30). Mathieu regards the principle of efficacy from two aspects: corrective and directive, at the same time outlining that efficacy should be regarded as a principle, which favours the direction to developing a legal system instead of correcting its mistakes. “The principle of efficacy at the same time foresees its theoretical impossibility in reality. Efficacy can exist only as a guide for implementing law, as a political wish, but not as a rule” (Mathieu, 1994, p. 485-486). It is a guideline for future legislation and court decisions, which have to develop and enrich legal thought and argumentation.

For many legal phenomena, the quality of discussion and time are necessary, in order to rightly evaluate, if the proposition for a new idea (e.g., exploration and recognition of new legal principle, necessity of codification, Criminal law reforms) is rightly justified and acceptable. The exploration process of the principle of effectiveness has not been accepted by various legal scholars. As Prof. René-Jean Dupuy has marked out, “effectiveness does not form a new principle of law; it is more ancient than law. It is a condition and justification of the norm’s existence, which originates from the implementation or adoption of the law” (Dupuy, 1964, p. I – II). Criticism against acknowledgment of the “principle of effectiveness” in his case

lies with the fundamental view, that, although effectiveness is certainly an important characteristic of legal rules, it should not be regarded as a “general principle”, especially considering that only ideas (moral, ideological, philosophical, human) and values can be called principles. This opinion is shared by a small number of legal scholars.

## 2. The relationship with other legal principles

It is generally accepted that the principle of effectiveness can be added as a real and working principle and can be connected with other principles: legal security is just another condition for the effectiveness of law. Thanks to the idea of effectiveness, the Constitutional Council of France has added to the legal availability and clarity the element of legal security: “equality (...) could not be effective, if the citizens did not obtain enough knowledge about the norms, which apply to them” (Conseil constitutionnel, 1999). Therefore, the accessibility and clarity of laws are regarded as conditions for the effectiveness of law (Piazzon, 2009, p.66). Piazzon rightly says that legal security creates a technical feeling, but does not create a legal aim or objective (*Fr. finalité*). The objective of law can not be foreseeable or accessible (Piazzon, 2009, p.32). Legal security is a value, which internally participates in achieving a more general value or objective of law. The social security and stability is the general aim of law, as well as aims with moral or material characteristics, such as justice, and common good. Many smaller targets of legal statutes must together guarantee the legal security and stability. The principle of legal security has been mentioned only rarely before the end of 1990s. In French legal science, there has developed a conclusion that security lately has become a value, something more than a formal legal argument, but it also lies in the “foundation of solution” (Piazzon, 2009, p.117).

The principle of subsidiary, often regarding the legal and political relationship between the lower authorities to a higher body, becomes more and more present both in European and Member States’ law. The determinant criteria, assesses whether the problematic issues should be solved in the central or local/ higher or lower level, is effective. Therefore, the connection and even tension or “competition” (Rouillois, 2006, p.8) between both principles is becoming very tight.

During the 20th century, judges have transformed the legal decisions in accordance with the values and ideals of modern society. This tendency first appeared in 1892, when the French Cour de Cassation (judgement Patureau-Miran v. Boudier, 15.06.1892.) in the name of the principle of justice ruled the opposite from the written text in the statute. This case was later criticized in France, as it succeeded the development of “unclear general principles” (Friedmann, 2002, p.836-839). This criticism is similar to today’s discourse about “legislative inflation”. Similar to economic processes, it means an increase in the amount of legal norms, but a decrease in their value. There have been even more developments in the field. Several authors (e.g. Giudicelli- Delage, 1993, p.119 and Pouille, 1985, p.115) have mentioned “the principle of powerful effect” and “the speed principle”, which is connected with the necessity to improve “efficiency and competition” (Amrani-Mekki, 2008, p. 43) in private law.

### 3. Legal and political importance of the principle of effectiveness

The principle of effectiveness is a continuous source of debate due to clarity of legal issues and the importance of assessing and outlining national procedural autonomy, where possible. In France, the “inflation of laws” is acknowledged as an essential problem. In order to observe the principle “nobody is supposed to ignore the law”, French are obliged to know more than 10 000 statutes, 120 000 decrees, 7400 treaties, and approximately 17 000 EU texts.

The battle against the “legislative machinery”, which inherently signifies a tendency to become uncontrollable, has been a vivid platform of action at the European level. For example, the European Commission, other EU institutions and Member States implement “Better Regulation strategy”, which deals with contemporary problems of “inflation of legislation”. Simplification, codification, impact assessment, consultation, evaluation, and recasting are just some of the methods used to analyse and make sure, whether or not the legislative efforts have met their objectives. By involving the leading experts of Member States, the Communication “Smart Regulation in the EU” in October 2010 set forth the European Commission’s plans to further ensure the quality of regulation. The problems raised by the unsatisfactory quality of regulations forced the European institutions to critically re-evaluate the politics and the style of legislative work.

Already since the 1970s, the European Court of Justice (ECJ) –has accepted the existence of the principle of effectiveness and also used it, acknowledging and providing the *effet utile* of Community law. In the beginning, the principle of effectiveness was used to strengthen the idea of direct effect and demonstrative provision (Case 9/70 [1971] ECR 825, Case 41/74 [1974] ECR 1337). There have been references to the “effectiveness of Community law”, which has not been clearly acknowledged as the “principle of effectiveness” (Case 106/77 [1978] ECR 629, §18, §20, §22). Therefore, the principle of effectiveness has developed as a tool for the implementation of Community law in national courts, connecting it with the character of Community law, direct effect, etc. Tridimas has connected the actuality of the principle of effectiveness with the idea that the rule of law and the guarantee of effective legal defence, especially in regards to its jurisdiction in the Article 230 [173] and 234 [177] (Tridimas, 1999, p. 277). For example, in the 1990s this was demonstrated by three cases (Case 294/83, [1986] ECR 1339; Case C – 70/88 [1991] ECR I-4529; Case C-309/89 [1994] ECR I-1853). In the name of effectiveness, the ECJ developed a stronger approach and demands to diminish all national legal obstructions, which prevent the full and effective implementation of Community law.

During the past decade, the principle of effectiveness, more or less explicitly, has been acknowledged by the Court of Justice in such legal spheres, as agriculture and food, urban transport, general services, free movement of persons, public

procurement, and environmental protection (Arnull, 2011, p.51-70). The EU puts pressure on Member States to meet the objectives of the Directives, but at the same time, enables the states to determine the model of implementation. Critics point out, that the EU Court interferes with national procedural autonomy in the name of the effective protection of Union law rights. It may likely be that the general principle of effective judicial protection establishes itself as hierarchy, superior to that of national procedural autonomy. Legal scholars, evaluating this tendency, are critical about the excessive efforts of implementing the “force of Directives”, claiming that the Court “might have gone too far” (Arnull, 2011, p.54). In the *Fantask* case, the Court ruled that “Community law, as it now stands, does not prevent a Member State which has not properly transposed Directive (...) from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law” (Case C-188/95).

The ECJ regards effectiveness not only as a separate principle, but also as a necessary characteristic for just judgement. For example, having such a sanction has “a real deterrent effect on the employer” (Case 152/84 [1986] ECR 723). At the same time, the “principle of effectiveness does not impose a duty on national courts to raise a plea based on [Union] law of their own motion, even when the plea would concern a provision of fundamental importance to the [Union] legal order” (Van der Weerd (C-222/05, C-223/05, C-224/05 and C-225/05) [2007] E.C.R. I-4233, Opinion of A.G. Maduro at [29]). This is an interesting argument, leading to the conclusion that Member States and the Court should develop a successful dialogue, by using the preliminary rulings procedure.

In order to implement the principle of effectiveness and overcome the problem of an overwhelming amount of legal disputes, several new initiatives have taken place, in order to ensure the uniform interpretation of Community law and promote its harmonious development throughout the EU. One of the most innovative, is the so-called “green light procedure”. Under this procedure, when making a preliminary reference, national courts would be encouraged, some experts suggest even an obligation, to include a proposal suggesting the answers to be given. The Court of Justice, after studying the case, are either given a “green light” to the proposal, or making some modifications to it. The urgent necessity for changes is the only way to secure the ideas of the Rule of Law in the EU: “if no preventive measures are taken there is a risk that the efficiency of the preliminary ruling system will be seriously threatened” (Broberg and Fenger, 2009, p. 36).

The 20th century has brought new concepts by using “the law of the state to restructure, plan, and encourage economic enterprise on a massive scale, to promote peaceful revolution in social relations (for example, through anti-discrimination law)” (Cotterrell 1992, 44). The state, therefore, actively hands over its competences to the

social partners, who are experts in “human rights”, “consumer rights”, and “health care”. The modern law works as an ideological tool to promote, for example: the tolerance, patriotism, and self-assurance in society. The power of this “soft law” is expressed as an invisible network of various ideological forces through state-funded social projects; such as the “information campaigns” in mass media, which are in the process of changing societies attitude toward the legal, economical, and other processes. Thus, the legislator becomes less effective, as it faces many competitors (e.g., NGOs, social partners).

In 1917, Roscoe Pound offered his view about the factors that limit effective legislation:

1. Laws can only govern external actions, not the internal sentiments of individuals;
2. Laws have to rely on the institutional background that will ensure the implementation of legislation;
3. It is possible to point out interests and aims in the laws, but it is no guarantee that these aims will be regarded as important during the life of the law (Cotterrell, 1992, 51).

The German scholar, Pauline Westerman, observed that it becomes difficult to even group norms. In addition to the traditional mandatory rules of the prohibitive type, Westerman suggests new types of norms: a) aspirational norms, which “directly prescribe the achievement of goals”, for example “safe environment conditions” b) result-prescribing norms, for example, food storage standards or allowing loud music in a club (Westerman 2007, 117). These new types of norms are regarded as outcome-oriented, bearing similarities to business management strategies.

The problem with the borders of executive power has been raised in many EU countries, including Latvia. While adoption of a new law in Parliament usually takes several months, executive power becomes a stable competitor in governance matters with the help of regulations issued by, for example, the Cabinet of Ministers. The appeals to the principle of effectiveness, in this case, may be used in a cruel way, as a veil for inadequate use of power.

A recent example in Latvia illustrates the problem. In 2007, the Cabinet of Ministers met during the Parliaments’ holiday and manipulated Article 81 of the Constitution of the Republic of Latvia:

“Article 81 of the Constitution:

In cases of urgent necessity between sessions, the Cabinet of Ministers shall have the right to issue regulations which shall have the force of law. These regulations may not amend: the law on Saeima elections, laws concerning judicial constitution and procedure, the budget and budget rights, and laws passed by the Saeima then in power; they shall not apply to amnesty, state taxes, customs, loans and they shall become null and void if not presented to the Saeima within three days of the opening of the following session.”

Although in several cases it was doubtful, whether there existed “urgent necessity” to force the issuing of a law, the issue reached its highest peak when President Vaira Vīķe-Freiberga reprieved the promulgation of the National Security laws, deeming their amendments to be a threat to national security. This was the reason for modifications to the Constitution of Latvia, in order to prevent future manipulations. On May 3, 2007, Article 81 was ruled out. Nevertheless, the discussions about the necessity to reinact the famous “Article 81” still remain active.

The notion of the effectiveness of law has become more acute, as state-edited norms faced competition and were confronted by various norms. such as the results of globalisation, the diversification of state powers, and the delegation of state functions to private sector. This creates legal insecurity, which more than ever demands the real effectiveness of state laws, in order to be able to influence the legal and social processes. France has made various innovative efforts to diminish the dangerous consequences of “decline of law”. In 2004, a proposition of constitutional law, aimed at strengthening the authority of law, was introduced by the president of National Assembly, Jean – Louis Debré. Arguing that “the laws now indulge in gossip, featuring more of purely declarative or descriptive annexes with the objectives and principles of action that can be rewarding at the programmatic level, but have nothing to do with the responsibility of the legislature and even create ambiguity about the scope of its intervention” (Debré, 2004). As a result, the president of National Assembly offered the following amendments:

”Article 41 of the Constitution:

Proposals and amendments introduced by Members of Parliament can not be put into discussion, if not within the scope of the law, when contrary to a delegation granted under article 38, or when they have no normative.”

It is worth mentioning that since 2004 already several Laws on the simplification of the law have been voted by the Parliament of France. These laws are related with various legal fields, and are aimed at improving the quality and clearness of existing laws.

The Constitution of Switzerland is an example of a governments’ concern about the effectiveness of the state laws. Since 2000, the constitution *expressis verbis* rules:

”Article 170 Evaluation of Efficacy

The Federal Parliament provides for the fact, that the measures of the Federation are reviewed for their effectiveness”.

The evaluation of the effects of laws in Switzerland is regarded as important tool to realize efficient and economical politics. Nevertheless, legal scholars expect to have fundamental results only later. The international comparison of the evaluative function in different countries assure that high standard of practical results of evaluation is only in those countries that developed their evaluation policy in the late sixties (e.g.

Sweden, the Netherlands, USA, Canada). Including the principle of effectiveness in the Constitution of Switzerland consolidates and strengthens civic society, as it can demand and control the quality of decisions and laws.

It is important to notice, that the new principle, the “principle of effectiveness”, will be the new guarantee to secure the common values in both national and international order. As argued above, this principle will never become the valuable enough, but will help to succeed in the efforts for the Rule of Law in the legal order.

The history of development of the principle of effectiveness clearly shows that the essential tension between legal and political aims of the different political actors is currently taking place. The questions, if the traditional “three – branch” power model should erode in the name of effectiveness, or how the effectiveness of Community law should be ensured, still remain topical. Both the Member States and the EU wish to strengthen the Rule of Law. The success of various approaches depends on their effectiveness.

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## PECULIARITIES OF CRIMINALISTICS IN THE FIELD OF STATE ANTI-CRIMINAL POLITICS

### Abstract

History of the development of anti-criminal politics in Latvia has demonstrated that, according to the declared values for constructing democratic society, the most optimal during the investigation of criminal offences is using scientific means and methods. Investigation of criminal offences is not complete without achieving a definite amount and content of knowledge necessary and sufficient for the interpretation of criminal offences in the language of criminal law. The aim of this article is to formulate, in an academic point of view, the role of criminalistic knowledge during an investigation of criminal offences. The base for the approach set forth is the contemporary notion about the process of investigation of criminal offences using criminalistics as a science (cognition object, cognition topic, cognition methods in criminalistics).

**Keywords:** international cooperation in criminal matters, investigation of criminal offences, criminalistics, elements of criminalistic cognition process

On 1 December, 2009 the Lisbon Treaty<sup>3</sup> came into force; one of the conditions for building up the space for freedom, security, and rule of law in the European Union in this treaty is providing a high level activities directed to the struggle against criminality, racism, and xenophobia. The base for such activities is coordination and cooperation between the police and court systems, as well as harmonization of criminal laws. Specifics of these activities are described in different Conventions, for example, European Convention on Mutual Assistance in Criminal Matters, the Convention on Mutual Assistance in Criminal Matters between Member States of the EU, United Nations Convention against Transnational Organized Crime, and the United Nations Convention against Corruption.

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<sup>3</sup> Lisbon Treaty – Official Journal of the European Union, C 115, Vol.51, 9 May 2008.

The anti-criminal politics of the European Union member states at first was directed to developing of stability of states to such a negative phenomenon in society like criminality is. Contemporary conception about criminality discloses in recognizing legality of statement about the fact that criminality is the specific quality of society to originate criminal offences. European Union member states struggle against criminality is carried out using different means and methods. One of the effectual means to fight against criminality is an effective investigation of criminal offences, as well as clearing up persons that have committed a criminal offence and applying fair punishment to guilty persons.

On June 13, 2002 the Framework decision of 2002/465/JAI of the Council on joint investigation teams<sup>4</sup> came into force. In the Preamble of this decision it was said that joint investigation groups were working according to legal act sand functioning within the territory of EU member states. Making use of such an effective means, like forming a joint investigation group, in the territory of Latvia predicts clear conception about the peculiarities of investigating criminal offences in the territory of Latvia.

The history of the development of anti-criminal politics in Latvia has demonstrated that according to the declared values for constructing a democratic society the most optimal during investigation of criminal offences is using of scientific means and methods. Any investigation of a criminal offence cannot be completed without achieving a definite amount and content of knowledge necessary and sufficient for the interpretation of a criminal offence in the language of criminal law. Correctly using knowledge accumulated in criminalistics<sup>5</sup> provides necessary completeness and depth to the investigation of a criminal offence. But how to ascertain that exactly criminalistic knowledge is giving the opportunity for high level professional investigation? In order to answer this question it is necessary to look at the essence of the cognition object, cognition topic, and special cognition methods in criminalistics.

An object is defined as something that is opposite of the subject in his/her practical cognitive activity. Many researchers (criminalists) have not mentioned anything about cognition object in criminalistics<sup>6</sup>, while some researchers, for example, 'N.Yablokov (Yablokov N., 2001, p.1-2) have mentioned that criminalistics has two cognition objects'.

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<sup>4</sup> on 23 August 2005 the Convention on Mutual Assistance in Criminal Matters between Member States of the EU came into force replacing the Framework decision of 2002/465/JAI of the Council of 13 June, 2002 on joint investigation teams.

<sup>5</sup> There are different points of view about understanding criminalistics. The main of them authors have analyzed, for example, in publications „Logically Methodological Aspects of Positioning Criminalistics in the System of Scientific Knowledge”. *Jurisprudencija*, 2005, t.65(57), p.29-36. , „Problem of Defining Cognition Object in Criminalistics”. *Criminalistic and Forensic Examination: Science, Studies, Practise. Research Papers*. 2007, p.97-100. etc.

<sup>6</sup> see, for example, Kavalieris A., Konovālovs J.(1999), *Kriminālistikas būtība un saturs*. In: *Kriminālistiskā tehnika*. Rīga: LPA; Belkin R.(1997) *Course of Criminalistics*. Moscow; *Criminalistics. Textbook*. (2000), by A.Philippov, Moscow; *Course of Criminalistics*. (2004), by O.Korshunova, A.Stepanov. Saint Petersburg.

Cognition object in criminalistics is a criminal offence as the event reflected in material reality. Offences having only an ideal form of manifestation (idea, opinion, conviction etc.) are not criminal offences, according to our contemporary understanding of criminal law in Latvia.

Any event in the material world, *inter alia* criminal offence, on principle can be examined as some entirety (system) composed of two components (subsystems). Components of the event are formed by objects (things) of material world (alive and inanimate) and processes (interactions), in which definite objects of the material world are „taking part”. In addition, during the processes of the event, appear links, qualitative and quantitative relations, between objects (things) taking part in a definite event. Ascertaining objects (things) and processes formed from the event is the basis for cognition of the essence of definite event under investigation. For a simplified description of the system of vestiges, the scheme offered by Klaus Dieter Pohl (Pohl, 1981, p.291) is often used by criminalists.

One of the peculiarities of criminal offences as the object of criminalistic cognition is the fact that for the person, investigating the given event, it is an event of the past. This fact establishes specific characters of criminal offence, as the cognition object in criminalistics. The historical development of investigations into criminal offences has demonstrated that in no cases were fixed when a criminal offence was investigated, during committing it or before committing criminal offence. It is not possible to observe the object of criminalistic cognition directly. Criminal offence does not appear directly; it appears with the help of vestiges. Vestiges of criminal offence are vestiges in which qualities of objects (things) and processes of the material world form a definite event.

In the theory of scientific cognition the subject (individual) of cognition activity does not have any fixed, including incidental, characteristics of the object. There is a definite scheme for access to the object under research; this scheme is determined by targets and means of research. ‘Due to that separation of more or less consistent characteristics of the object is taking place; totality of these characteristics is presumed to call the topic of cognition’ (e.g. Zotov, 1973, p.18). The topic of cognition in criminalistics is regularities of investigating criminal offence<sup>7</sup>, though there are also other points of view. For example, ‘A.Kavalieris and others (Kavalieris A., Konovālovs J. (1999, p.15) have declared that the topic of cognition in criminalistics is regularities of criminal activities’, in other words, not regularities of investigation of criminal offences, but regularities of committing criminal offences. Criminalistics, as science, is not interested in how crimes are committed, but how crimes are investigated. Analogically it is in medicine: medicine as science is not interested of how to devitalize people in order to take this knowledge as the base, in ‘A.Kavalieris

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<sup>7</sup> see also indepth, Terehovics V., Nimande E. (2008), The Problem of Defining Cognition Topic in Criminalistics. In: Theory and Practise of Forensic Examination and Criminalistics. Scientific Papers, no.8, Kharkov, Pravo, p.114-120.; Terehovics V., Nimande E. (2009), Peculiarities of the Topic of Criminalistic Cognition. In: Criminalistics and Forensic Examination: Science, Studies, Practice. Corporate Study., p.130-139.

terminology (Kavaleris A., Konovālovs J. (1999, p.15), for creating technical means, tactical modes and methods for finding out truth about' fact of death; medicine as science is interested in how to treat people.

In order to find out priorities in science it is necessary to turn to the imperative of ethos science. Imperatives of ethos science are the base distinguishing science from other systems of activity and knowledge. The given circumstance explains the fact that pilot who bombed Hiroshima is not called physicist-experimenter, and workers of fascist concentration camps carrying out biological tests on people are not called representatives of experimental medicine.

One of the realities in Latvia is the fact that any investigation of a criminal offence, with the aim to apply criminal law, is taking place only within the framework of Latvian criminal procedure. This circumstance defines the peculiarities of criminalistics in Latvia; criminalistics finds it's expression in „national tonality” of criminal law and criminal procedure in Latvia. Indisputable is the fact that criminalistics in Latvia has the nature of a criminal procedure and is the specific element of a contemporary criminal procedure during pre-trial procedure. Relations between criminalistics and criminal procedure are manifesting themselves in a fact that material of the criminalistics science is one of the means with the help of which problems of criminal procedure are solved. This circumstance puts limits on possibilities of criminalistics.

Investigation of a criminal offence, like an act of cognition, uses methods and means of criminalistics, as science, that prescribe to use vestiges (traces) of criminal offence as a starting point. Vestiges of criminal offence are the source for credible information about the event of criminal offence. Only by clearing causal relationship between vestiges and the event of criminal offence as well as by researching qualities of things and processes, the possibility appears to judge objectively the peculiarities of a definite event under investigation. For this purpose the following methods of criminalistic cognition are used: general (universal) methods and special methods.

During the process of applying methods of criminalistic cognition peculiarities of criminal procedure in Latvia reflect. In order to establish a causal relationship between a vestige and a thing, criminalistics has developed a special method - criminalistic identification. Method of criminalistic identification is a process formed by a number of stages. The basic stages of criminalistic identification process are the beginning of criminalistic identification, individualization, identification and the end of criminalistic identification.<sup>8</sup>

In order to establish a causal relationship between a vestige and the process of an event, criminalistics has developed a special method. This method is called criminalistic diagnostics. The method of criminalistic diagnostics is a way of establishing a causal relationship between the process following the development of vestiges and vestige itself, as the result of interaction of two material objects. The method of criminalistic diagnostics is in contradistinction to the method of criminalistic identification, which

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<sup>8</sup> see also indepth, Terehovics V., Nimande E. (2011) The Essence of Criminalistic Identification. International Research and Practice Juridical Journal “Criminalist” no.2, p.29-39.

establishes the circumstances following the developing of vestiges; this fact in its turn lets to evaluate character of the process under research in a right way.

Requirements of theory and praxis in the field of applying criminal law are directed to use concepts of definite generalization as well as prescribe to adjust different objects (things) forming the objective side of *corpus iuris*. This adjusting has to be in the form of classification as a more strict form of the division concept. Classification (*classis* latin – turn, group; *facere* – to do) is a division of things, concepts into groups by using general features. The right of classification lets to find out qualitative, quantitative and logical links and relations between groups of things, concepts. There is not any research done (unlike about criminalistic identification and criminalistic diagnostics) by scientists – criminalists about classification as one of the special methods for solving the basic task – clearing circumstances of a criminal offence. Nevertheless the right of qualification for some criminal offences needs to have facts obtained with the help of classification research. For example, to establish if the thing is a cold steel, a firearm or an arm, narcotic drug etc, it is necessary to use the method – “criminalistic classification”. The fact that many scientists do not use the title of method “criminalistic classification” could be explained, firstly, by inertness in introducing new terms in criminalistics and, secondly, by unclear conception about the essence and potentialities of a given method.

In order to overcome carefulness in this sphere, by using the example of “cold steel” concept’s classification research in criminalistics some essential statements were formulated; these statements could be put as the theoretical base of “criminalistic classification” as specific method of criminalistic cognition.<sup>9</sup> For the criminalistic concept of “cold steel” essential features are not only the kind of energy used for realization of this kind of arm, not only the number of persons necessary for using this arm, but also technical state of definite arm. For illustration of these statements vertical-horizontal figures for intersection classification were used. In such a way volume of any notion (in which legal values are introduced) could be obtained.

For equipollent, explicit use of definite concepts in legal praxis of investigating criminal offences, criminalistic classifications of concepts have to be built, for example, classification of arms, firearms, cold steel, explosives, narcotic drugs, psychotropic substances etc. Only with the help of classifications is it possible to introduce legal values into definite concept and to use these concepts equipollent during qualification of criminal offences.

Use of special cognition methods in criminalistics in Latvia is the base for correct carrying out investigative activities: forensic examination, investigative experiment and presenting for identification. Accordingly, special methods of criminalistic cognition – criminalistic identification, criminalistic diagnostics and criminalistic classification as well as general (universal) methods of scientific cognition are necessary and sufficient for cognition of the essence of event under investigation as criminal offence.

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<sup>9</sup> see, Terehovics (2009), Basics of Forensic Examination of Cold Steel. Riga; Terehovičs V., Nīmande E. (2009) Criminalistics. Conspectus of Lectures. Study aid. Riga.

## Conclusions

One of the effectual means to fight against criminality throughout the European Union is an effective investigation of criminal offences. Correctly using criminalistic knowledge provides necessary completeness and depth of investigation; it is also affirmed by the essence of cognition object, cognition topic, and cognition methods in criminalistics.

Cognition object in criminalistics is a criminal offence as the event reflecting in material reality. The topic of cognition in criminalistics is regularities of investigating criminal offence. Special methods of criminalistic cognition – criminalistic identification, criminalistic diagnostics and criminalistic classification as well as general (universal) methods of scientific cognition are necessary and sufficient for cognition of the essence of the event under investigation.

It should be pointed out that the historical development of forming criminalistic knowledge, leads to the formation of two main directives:

- 1) purposeful summarizing of criminal offences investigation experience with the aim to create a more effective means and ways of contemporary criminal offences investigation, *id est*, direction to utilitarian attitude to scientific knowledge;
- 2) purposeful work on developing the theory of criminalistics in order to describe and explain the sphere of reality related to the criminal offences investigation. This direction is guided by perfection of knowledge in the area of applying criminal law.

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## DEVELOPMENT TENDENCIES OF UNDERSTANDING CAUSAL RELATIONSHIPS IN CRIMINAL LAW

### Abstract

The aim of this article is to underline the problematic aspects linked with the causal relationships in criminal law. A causal relationship in criminal law is fixed as a feature of the objective side in cases of material criminal offences, and is therefore one of the necessary preconditions for the establishment of criminal liability. While there are many theories on the understanding of causal relationships in criminal law, most of them are criticized as being deficient. Therefore in order to evaluate causal relationship more broadly.

In order to identify the essence of causal relationships it should be pointed out that causal relationships are objective, and not a subjective category. It should not, for example, overlap with *mens rea*.

The significance of understanding the causal relationship manifests itself in cases when considering questions of liability of participation and co-commitment, as well as about uncompleted crimes.

**Keywords:** causal relationship, criminal law, criminal offence

It is justly specified in the doctrine of criminal law that causal relationships are some of the most basic and complicated questions to consider (e.g., Малинин, 2000; Козаченко, Курченко, Злоченко, 2003; Langsted, Greve, 2004). In connection with cognition of the essence of causal relationship in criminal law it is considered that causal relationships have deep and undeniable philosophical content in modern day science. (e.g., Ярмыш, 2003, с. 443).

It should be stated that in some aspects interpretation of causal relationship in criminal law differ from similar interpretations in philosophy dependent on how broad cause and causal relationship are interpreted. It is necessary to find out the phenomenon, which is the cause of consequences and which necessarily and with regularity caused stated or possible consequences (Гаухман, 2001, с. 156-157). One

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can also find in foreign legal doctrine an appeal to separate legally significant cause from cause in a broader philosophical sense (cause in general) during legal disputes (Torgāns, 2007). There are also coefficient circumstances that in their turn help cause to develop in time and space (Michael, S. Moore). Another important question considers causes with equal importance. *The Principles of European Tort Law* provides that for each activity which separately could be sufficient cause for causing harm, is reviewed as cause for the harm (3:12) (Principles of European Tort Law).

It is confirmed that the objective of causal relationships in criminal law is to maintain a link between unlawful activities or inactivity causing subsequent harm; activities or inactivity that prepares or determines the possibility of consequences; and activities or inactivity. (Krastiņš, Liholaja, Niedre, 2008, 133.lpp.; Krastiņš, 2000, 70-71.lpp.). One and the same cause (activity or inactivity) in any given circumstance will always create one and the same consequence. Therefore it is necessary to understand the complexity of all causes and coefficient circumstances (Baumanis, 2008, 32.lpp.). Causal relationship is defined by the following features:

- 1) Objectivity and universality,
- 2) Necessity and certainty (cause in a stated circumstances creates stated consequences), and
- 3) Stated sequence order (cause in a sense of time always exists before consequences) (Гайрман, 2001, с. 156, 157; Causation in the Law).

There are also some preconditions for activity or inactivity as a cause of stated consequences in criminal law doctrine:

- 1) The activity or inactivity has to take place before the harmful consequences,
- 2) It has to be established that harmful consequences are the direct result of such activity or inactivity,
- 3) Consequences have to be unavoidable (necessary) (Krastiņš, Liholaja, Niedre, 2008, 130-133.lpp; Krastiņš, 2000, 68-69.lpp).

It is accepted in criminal law science and court *praxis* that a causal relationship between criminal activity (inactivity) and the resulting harmful consequences are objective and it has legal sense in criminal law only in case it is direct (necessary), but not random (Шарапов, 2001, с. 138). In order to characterize the objective side of criminal offence or *actus reus* also Clarke C.T. has pointed out that behavior has to be in a direct causal relationship with originated harm (Clarke, 1996, Қинис, 2005, 86.lpp.).

It should be noted that during the 1950s and 1960s the theory *conditio sine qua non* (named also as *precondition theory* (Шарапов, 2001, с. 138)) was developed in order to find a precise and uniformed understanding of causal relationships in criminal law. According to this theory, activity or inactivity in a sense of criminal law arouses consequences with necessity (Прохоров, Прохорова, с. 66) and any activity (inactivity), without which harmful result would not take place, is recognized as cause of the result. Also comparatively new researches (Малинин, 2000, с.121) about causal relationships are speaking about *conditio sine qua non* theory as the one reflecting objective character of causal relationship between activity (inactivity) and harmful consequences in the most completely way.

In connection with understanding causal relationship, the question arises as to whether the establishing of causal relationship is limited only to material criminal offences' *corpus delicti*? It should be admitted that in some cases in criminal law, causal relationship has to be evaluated also in case of formal and split *corpus delicti*. It should be taken into account that *corpus delicti* is the legal base for qualification of a criminal offence (Liholaja, 2007, 20.lpp.).

Cases where causal relationship has to be established also outside *corpus delicti* can be found in several Articles of Criminal Law in Latvia; necessity for evaluation of caused harm, existing of heavy consequences is pointed out in these Articles of Criminal Law (Krimināllikums, 1998), for example, handing down punishment (Article 46 Section 2), making decision about releasing from criminal liability (Article 58 Section 1), and conditional release from criminal liability (Article 58<sup>1</sup>) etc.

In order to substantiate the necessity for establishing causal relationship in the above mentioned cases it has to be stated, that during evaluation of caused harm in a broader sense every offence causes harmful consequences manifesting themselves as threatening of interests protected by Criminal Law (Krastiņš, 2000, 34.lpp.). Harmful consequences in turn can express itself like harm conforming to evaluation and comparing, for example, physical harm, material damage as well as moral harm, harm with political or organizational character. Harm of such kind is characteristic for criminal offences with formal *corpus delicti* (harmful consequences are not included) as well as splitted *corpus delicti*.

It is also stated in Criminal Law (Article 48 Section 4) that aggravating circumstance is not a circumstance which is mentioned in Criminal Law as a feature of criminal offence *corpus delicti*. Similarly it is regulated in Criminal Code of Russian Federation (Article 63 Section 1 point b) (Уголовный кодекс Российской Федерации, 2010). Also, for example, in the Criminal Code of Austria it is stated that punishment has to be as severe as heavy is harm or loss caused by guilty person (Fourth part, 32§) (Austrijas kriminālkodekss, Krastiņš, Liholaja, 2006, 240-336.lpp.).

At the same time it should be mentioned that causal relationship in criminal law does not have to be understood too broadly, for example, in cases when criminal offence is committed because of heavy personal or domestic reasons (Criminal Law Section 47 Section 1 fifth point). Here one can see some link, but it isn't law-governed, regular link – criminal offence is not law-governed and conditioned result of the mentioned reasons (circumstances).

Besides the above mentioned the main problematic aspects linked with causal relationship in criminal law are the following: causal relationship in cases when criminal offence is committed by several persons, peculiarities of causal relationship in cases when objective side of *corpus iuris* manifests in inactivity, link between causal relationship and guilt, causal relationship in incomplete criminal offences. Each of these aspects is worth to be researched.

Another problematic aspect is about causal relationship in offences the objective side of which manifests itself in a form of inactivity. Inactivity in criminal law doctrine is called also as „passive cause” (Кузнецова, 2007, с.188), because it considered to be a cause only in the system of social relationships prescribing duties (official, legal,

moral etc.) of person. Therefore inactivity is a cause of definite consequences only in case if corresponding activity is necessary and sufficient base for creating converse consequences (Vedins, 2008, 274.lpp.).

In turn, while evaluating the role of causal relationship in criminal offences committed by several persons it has to be pointed out that in these cases causal relationship is not defined diverse to general understanding of causal relationship in criminal law.

Proper qualification of criminal offence, criminal liability depends on correct understanding of correlation between causal relationship and guilt because causal relationship as well as guilt is necessary preconditions for criminal liability (Малинин, 2000, с. 229). In order to incriminate consequences caused as the result of the offence it is necessary to prove also ability of person to be aware about process of causal relationship.

Problematic aspects of establishing causal relationship are linked also with its constructions in material *corpus delicti*. There are several approaches to this problem, for example, analyzing in interconnection aspects of causal relationship and uncomplete crimes (Церетели, 1963), and reviewing causal relationship accordingly in the frame of actual mistake (Козаченко, Курченко, Злоченко, 2003).

Professor P.Mincs in connection with uncomplete crimes has stated that there are points of view expressed in subjective and objective theories. Subjective theories ignore the role of the objective element in criminal activity, but the criminal psyche is instead stressed. On the other hand, objective theories are based on the position that “criminal impulse is punishable taking into account it’s *expanding* into activity” (Mincs, 2005, 144.lpp.). As it is known, the stages of incomplete crimes are possible only in case of crimes committed with direct intention, but causal relationships in cases of incomplete material crimes also have to be established on the basis of the possibility of a real link between activity or inactivity and harmful consequences.

Summarizing all the above mentioned, it could be concluded that many theories are known about the understanding of causal relationships in criminal law, however most are often criticized as deficient. It should also be concluded that the theory more completely reflecting the essence of causal relationships, is *condition sine qua non* or necessary cause theory.

Causal relationship in criminal law is fixed as the feature of the objective side in cases of material criminal offences; so it is reasonably admitted that it is one of needed preconditions for criminal liability.

Nevertheless in some cases causal relationship should be evaluated broadly. That are cases linked with formal and splitted off *corpus delicti* – when the harm is not included in *corpus delicti* as sequences, but is really possible, for example, in case when the question about punishment is ascertained.

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## LEGAL ASPECTS OF NEIGHBOURING RIGHTS

### Abstract

The concept of intellectual property is more and more frequently referred to in Latvia, and the understanding of legal categories related to this concept is gradually improving.

Development of copyright as a sub-field of intellectual property has also served as a basis to the development of new, sufficiently independent legal institutions requiring legal regulation. Such legal institutions include neighbouring rights related to authors' rights.

Legal relations associated with activities of the subjects of neighbouring rights indisputably deserve serious attention and proper legal regulation. Wholesome regulation of neighbouring rights is required for protection of not only the results of artistic activities but also great financial investments.

Development of the field of copyright in Latvia, unlike other countries, has started quite recently; however, development of neighbouring rights is in a very premature stage.

It is recognized that the Copyright Law of the Republic of Latvia is formally harmonized both with the principles of international law and European standards; however, there are visible imperfections not only in the legal regulating of neighbouring rights, but also in the understanding of issues associated with neighbouring rights. Moreover, there is lack of good judicial practice in Latvia interpreting the issues of neighbouring rights and facilitating their further development. This situation in turn does not contribute to the European integration of the neighbouring rights, and as a result causes a real threat to protection of foreign capital invested in objects of the neighbouring rights and activities of subjects of the neighbouring rights in Latvia. To improve this situation, it is first necessary, to improve the understanding of issues associated with the neighbouring rights, and secondly, to improve the written legal norms and the law protection system.

**Keywords:** intellectual property, neighbouring rights

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The paper is aimed at outlining the legal aspects of neighbouring rights and the issues related to neighbouring rights in Latvia, as well as the improvements to be made in legal Acts. Moreover, the paper focuses on the legal development of neighbouring rights on a regional level, particularly those of the European Union.

## 1. Origin and use of the concept of neighbouring rights

Discussion of the institution of neighbouring rights related to copyright started at the beginning of the 20<sup>th</sup> century when technologies had developed to the level enabling not only recording of sound but also reproduction, successful distribution and publishing of records. Discussion of this institution of rights, however, takes place only in the countries using the concept of “authors’ rights” in their normative acts. This is because the institute of neighbouring rights is not common in the countries using the term “copyright” to describe the rights of subjects having invested financial means in the creation and distribution of work.

The notion of neighbouring rights is traditionally used to describe the rights associated with various intangible benefits capable of being tangibly evaluated. Problems of understanding of the concept of neighbouring rights in Latvia are also reflected by the fact that the legal literature presents two opinions related to the construction of intellectual property (including the neighbouring rights).

The first position that intellectual property is not analogous to ownership of a thing (in wide meaning) derives from the concept that subject of ownership may not consist of intangible things including exceptional title to the objects of intellectual property (among them the right-holders of the neighbouring rights to the objects of neighbouring rights) (Grūtups, Kalniņš, 2002, p. 20). The above opinion is not justified by legal norms. It may be retorted by the fact that the provision of Section 929 of the Civil Law of Republic of Latvia stipulating that the subject-matter of ownership may be anything that is not specifically withdrawn from general circulation by law is wide enough to include the objects of intellectual property as well. Provisions of Section 841 of the LR Civil Law to the effect that intangible property consists of various personal rights, property rights and rights regarding obligations, insofar such rights are constituent parts of property, is sufficient to hold that “..the Civil Law of the Republic of Latvia also provides for no restrictions or impediments concerning intellectual property as a specific form or property..” (Rozenfelds, 2008, p. 17).

According to the second opinion, intellectual property means the traditional ownership of intangible things because proprietary rights to the objects of intellectual property constitute the subject of ownership (Grudulis, 2006, p. 12).

The latter opinion is also supported by the fact that the right to use intellectual objects traditionally constitutes the subject of civil circulation, and this fact is directly acknowledged in the Preamble of European Parliament and Council Directive 2001/29/EC on the harmonization of certain aspects of copyright and neighbouring rights in the information society.

A quite peculiar note, however, can be found in the opinion issued by the European Committee for Economical and Social Matters where it is mentioned without any special clarification that copyright is often confused with the right to property, but should be considered as a temporary monopoly on use and an exclusive right to issue usage licences for protected works for as long as they remain protected. (Opinion of the European Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Enhancing the enforcement of intellectual property rights in the internal market” COM(2009) 467 final, *Official Journal C 018, 19/01/2011 P. 0105 – 0108*).

Given that the neighbouring rights are closely associated with copyright (the two fields of law have similar regulation of collective management and protection of property rights and most of restrictions imposed on the rights are also analogous), one can meet the view that copyright in wide sense may be construed to include neighbouring rights. Therefore, neighbouring rights may be included the wider category of copyright. Moreover, national normative acts trend to regulate the two fields of law in a single legal act.

### **Lack of legal definition**

Albeit the concept of “neighbouring rights” has no legal definition, though the wide prevalence of the term “neighbouring rights” in the national legislation is related to signing of the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. Simultaneous requirement for protection of certain interests has probably served as criterion to consolidation of the three subjects.

According to the Russian scientist L.Bentli, such a consolidation of the subjects of rights theoretically should be treated as a legal absurdity (БЕНТЛИ, ШЕРМАН, 2004, p. 471). Notwithstanding that the Rome Convention has re-echoed worldwide and outreached national laws of the countries that have joined the Convention one can speak about improper direction exerted by the Convention on national normative acts in this field. It would be incorrect, however, to conclude that consolidation of the subjects of rights should be treated as a legal absurdity since the concept of neighbouring rights is a fruit of not only the Rome Convention but also the provisions of doctrines and national judicial practice.

Though even the range of subjects with similar interests subject to protection has extended along with development of the rights of performers, producers of phonograms and broadcasting organizations, no uniform definition of such rights has been drafted.

The national normative acts construing the neighbouring rights traditionally list the rights rather than define the concept thereof. Defining is a logical action of interpreting the basic contents of a concept while explanation by listing means an approach similar to defining the essence of which is more or less complete listing of constituent elements or subclasses of the notion to be explained. Therefore, the

interpretation of neighbouring rights included in the normative acts should not be mistaken for definition of the concept of neighbouring rights.

### Wide and narrow use of the term

The concept of neighbouring rights is tentative due to lack of express determination of its scope and content. It is verified by the following. Any concept comprised content and scope. “Content of a concept forms from the body of relevant features. Scope of a concept forms, on its turn, from the body of relevant items” (Vedins, 2009, p. 39). The term “neighbouring rights” is used in doctrine and normative acts, though it is quite vague from a legal point of view because this term does not reflect the features of subject of legal regulation; instead, it spontaneously unifies subjects. Apart from that, the obstacles of logical definiteness are also present, that is, the qualitative limits of things and phenomena are not always certain, and logic reference of a human is often based on certain social and personal values. Therefore, the notion of neighbouring rights with its insufficiently express content may be treated as a tentative one.

The tentative nature of the term “neighbouring rights” alone enables distinction between wide versus narrow use of this term. Neighbouring rights are differently denoted in different languages, and in certain languages they even have more than one denotation (for example, *смежные; примыкающие; родственные права, related rights, neighbouring rights, droits voisins*). In a narrow sense, the above formulations are used to denote the protection of rights of performers, producers of phonograms and broadcasting organizations. The above conclusion is also based on the fact that the first international normative act has been dealing with the protection of rights of the above-listed right-holders. In certain countries, however, the concept of neighbouring rights is understood to include the rights of the three above-listed right-holders – for example, in Russia and Japan.

The range of subjects entitled to protection of their rights by analogy by the means of neighbouring rights has gradually expanded; namely, protection applies to the rights related to the activities facilitating distribution of the author’s work, rather to creation of such work. Therefore, neighbouring rights in wider sense are understood to include not only the rights of performers, producers of phonograms and broadcasting companies, but also those of comparable subjects – producers of films.

In certain countries (such as United Kingdom and Japan, for example) the above-mentioned category of rights also applies to protection of ordinary photographs included in catalogues and selections due to lack of appropriate preconditions to ensure protection of such photographs on equal level to that of self-contained works of authors. The above-mentioned category of rights is also applied to a number of various owners of different products such as databases and software developers, for example.

### **Doctrinal definition**

Given the fact that artistic activities of performers call for adequate income as a basis to their continued activities, and the fact that production of sound records and films as well as operation of broadcasting organization is related to high, risky investments, it has been crucial to develop regulation of the legal relations of performers, producers of phonograms and films as well as broadcasting organizations. Since the activities of the right-holders of neighbouring rights are primarily associated with the use of authors' works, and the use of authors' works involves close interrelation of the interests of the authors and holders of neighbouring rights, the traditional model of relations between copyright holders and users of works has proven to be inadequate.

The factor uniting the right-holders of neighbouring rights is their activity thanks to which the works designed for public performance are made available not only to direct listeners and viewers but also to wider public, and activities of such subjects of neighbouring rights in general are compatible with the interests of authors. The real circumstances have called for recognition by performers of authors' works of the rights in this sphere; though derived from the rights of authors, such rights are incomparable to those made available by the authors on the basis of agreements existing between the parties.

Nature of the rights of performers is a debatable issue, though it is quite clear that no creative approach is involved in the activities of sound/film recording operators or broadcasting organizations. Activities of the above-listed right-holders of neighbouring rights constitute exceptions from the general principle stipulating that law is aimed at protection of objects resulting from intellectual activity, rather than products of simple mechanical, technical or similar work (Grudulis, 2006, p. 11). The rights of all the said subjects though may be rightly denoted as neighbouring rights thanks to their relation with copyright. Therefore, neighbouring rights are understood in the doctrine to mean the set of rights that regulate the legal relations arising from performance, recording and broadcasting of an author's work or any other object (Липчик, 2002, p. 304).

The Glossary of Terms of the Law of Copyright and Neighbouring Rights (hereinafter – WIPO Glossary) developed by World Intellectual Property Organization interprets neighbouring rights (related rights) as the rights including the title of performers to their performances; the title of producers to their phonograms; and the title of broadcasting organizations to their radio and TV broadcasts (WIPO, 1980).

## **2. Legal regulation of neighbouring rights in Latvia**

The rights of performers, producers of phonograms and broadcasting organizations were subject to no protection until 15 May 1993, enactment of the Law on Copyright and Neighbouring Rights, since the USSR had not joined any of the International Conventions governing the implementation of legal regulation of the institute of neighbouring rights; the institute of neighbouring rights was not regulated in the Civil Code of the USSR either.

Use of the term of “neighbouring rights” (*blakustiesības*) in Latvian language in the first written legal act intended to regulate the rights of performers, producers of phonograms, film producers and broadcasting organizations was discussed and it was agreed that the term was not successful. It was held, however, that clarification of such term should not be included in the relevant legal act.

It is probably the unsuccessful terminology that has given raise to the common opinion in Latvia that neighbouring rights are of somewhat secondary nature. Māris Grudulis points out that “the very term “neighbouring rights” is indicative to the accessory nature of the rights, i.e. they do not exist *per se* since in general they are related and subordinate to some other right. In case of performers, producers of phonograms and films, as well as broadcasting organizations in is copyright” (Grudulis, 2009)

Relation of the neighbouring rights to copyright can be certainly agreed with, yet author would like to question the nature of subordination based on the following considerations. Subordination (lat. “subalternatio) applies to the concepts of genus and kin: the scope of one includes the other in its entirety without exhausting the latter” (Vedins, 2009, p. 60) “Alternative subordination” (lat. “coordinatio notionum”), on its turn, applies to mutually exclusive concepts included in the scope of a wider concept (Vedins, 2009, p. 61). One could therefore conclude that neighbouring rights are in fact related to copyright on alternative subordination basis, within the scope of the concept of “intellectual property”.

The Copyright Law drafted in more details was adopted on 06 April 2000. The draft law introduced the term of “neighbouring copyright”; the term gained no responsiveness, however, and therefore the rights of performers, producers of phonograms and films, and broadcasting organizations continued to be known as neighbouring rights.

Along with the Latvia’s intention to accede the European Union, the Copyright Law was largely amended to transpose into it the requirements of all Directives of the European Union of the given field. Unfortunately, the amendments entailed inclusion of certain absurdities in the Law, which were modified in the course of time.

Latvia acceded the International Conventions and Treaties in the field of neighbouring rights during the period from 1995 to 2002. However, in spite of the formal coordination of the current Copyright Law of the Republic of Latvia with the principles of international law and the standards of European Union, certain imperfections can be observed in the legal regulation of neighbouring rights, such as in case of collective performance or protection of the rights of cable operators, etc.

The Film Law was adopted on 17 June 2010 to regulate administration of the film rights in case of authors whose exclusive proprietary rights or neighbouring rights have been taken over by the State, as well as preservation and protection of the audio-visual heritage. Given the dispute of national importance pending as from 2007 concerning the right to films produced before 15 May 1993 and the fact that certain speculations have emerged to the effect that the State is seeking to apply the Law to vest in State the rights in films produced during the Soviet time, it should be pointed out that the Film Law is not intended to change holding of the right by one

or another subject of rights. The dispute concerning the lawful holding of the rights in question has to be settled by court.

### **Theoretical problems in Latvia**

The term of “phonogram” has been defined since the very beginning of international regulation of the neighbouring rights as exclusive audial fixation of performed or other sound (a record perceived exclusively by ear) (Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, paragraph 1.a), similarly – Rome convention International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, paragraph 3.b), also Copyright Law of Latvia, paragraph 1.7). The above mentioned definition was recently analyzed by Ingrida Veikša, a law scientist who has stated that “tangible items in the field of neighbouring rights would include, for example, a film or phonogram, while intangible items would include the rights and benefits gained by producer from permitting others to use such item (or thing)” (Veik a, 2010, p. 47). A tangible item should be understood as an impersonal, autonomous, spatially separated three-dimensional object that can constitute a subject of human operation (Grūtups, Kalniņš, 2002, p.18). Therefore, a record that can be perceived exclusively by ear should not be considered a tangible item.

Also, the activities or the producers of phonograms or other subjects of neighbouring rights do not necessarily include the element of creativity; otherwise there would be no phonograms subject to protection. Therefore, phonograms are not treated as scientific, literature or art work protected by copyright. The idea of granting protection to the producers of phonograms has initially received repeated declining within the scope of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations for the above-mentioned reason of the lack of creative element in the production of phonograms (WIPO, 1981, p. 68). Taking into consideration the legal regulation as well as the interpretation of legal norms, perplexity arises from the opinion of Professor Jānis Rozenfelds concerning sound records. The Professor has included their clarification in the sub-title concerning copyright objects (Rozenfelds, 2008, p. 36). A phonogram is certainly an object of neighbouring right, rather than of copyright. Such opinion is shared by a number of law scientists with worldwide reputation. Hence, inclusion of the given objects of right in the section concerning objects of copyright seems incomprehensible. Moreover because the Professor is also discussing neighbouring rights further in his book (p.p. 58) the above-mentioned leads to suspect problems in distinguishing between the objects of copyright and neighbouring rights, respectively.

Taking into consideration the above-stated, it has to be concluded that opinions of individual law scientists of Latvia who are driving the thinking of lawyers concerning certain aspects related to neighbouring rights unfortunately differ from the internationally recognized opinions and legal norms.

## Practical issues in Latvia

Notwithstanding that opinions on the matters related to neighbouring rights differ even among law scientists, a number of absurdities is also observed in the work of those responsible for application of laws.

- 1) Analysis of the Judgment of the RL Supreme Court Senate in the matter No SKC-22 of 14 January 2004 shows some perplexity concerning whether or not the criterion of novelty creation (creative work) mandatory in cases of works to protection by copyright should be present in activities of a performer. It is pointed out in the Judgment that demonstration of clothes by a photo model does not constitute performance due to the “lack of creative contribution by the performed”. Regardless of whether or not the model is a subject of neighbouring rights in the given matter, the essential fact is that, unlike in the case of copyright, there is no need to establish the presence of creation (or creative work, as this term is used in constitutional and human rights) criterion in the activities of subjects of neighbouring rights. Moreover, no legal acts, international or regional, governing the matters of neighbouring right, provide for the presence of such criterion as a precondition to protection of the rights of a holder of neighbouring right.
- 2) Legal successors of the subjects of neighbouring rights are understood to mean any persons who have taken over all or any individual rights of a subject of neighbouring rights. Section 47, Part 3 of the Copyright Law of the Republic of Latvia also stipulates that subjects of the rights specified in this Section include performers, producers of phonograms and films, or broadcasting organizations, or their legal successors and heirs. Similar regulation is also contained in regulatory legal acts of other countries.

Having reviewed the Judgment made by the Civil Division of Riga Regional Court on 26 March 2007 (Judgment made by the Civil Division of Riga Regional Court on 26 March 2007, Case No. C04268106, unpublished), it may be concluded that the Court lacks understanding of the above-mentioned legal norm, since it refers to subjects of neighbouring rights as performers, rather than subjects of copyright; therefore, the legal successor has been prevented from protecting their infringed rights.

The above-described examples are subject to criticism to the highest extent. Given, however, that there is very minor judicial practice in Latvia in the matters of neighbouring rights, such examples can have negative effects on the willingness of foreign holders of neighbouring rights on distribution of the objects of their respective neighbouring rights on the territory of Latvia since there is space for concerns regarding safe protection of their capital.

### 3. Novelties aimed at improvement of legal regulation in the EU

On regional, just like on national level, issues of the highest concern include those related to unlawful use of intellectual property objects. The final version of Communication of the European Commission to the European Parliament, the Council, the European Committee for Economical and Social Affairs, and Regional Committee on the implementation of the European Parliament and Council Directive No 2004/48/EC of 29 April 2004 on the application of intellectual property rights was published on 22 December 2010 (Opinion of the European Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Enhancing the enforcement of intellectual property rights in the internal market”, 2009, p. 0105 – 0108). At first evaluation of the impact of the Directive it has been accented that noteworthy progress has been made since it was adopted and implemented in the Member States. The Directive created high European legal standards to enforce different types of rights that are protected by independent legal regimes. However, despite an overall improvement of enforcement procedures, the sheer volume and financial value of intellectual property rights infringements are alarming. One reason is the unprecedented increase in opportunities to infringe intellectual property rights offered by the Internet. The Directive was not designed with this challenge in mind.

Specific challenges of the digital environment are that the multi-purpose nature of the Internet makes it easy to commit a wide variety of infringements of intellectual property rights. Goods infringing intellectual property rights are offered for sale on the Internet. Search engines often enable fraudsters to attract Internet users to their unlawful offers available for sale or download. File-sharing of copyright-protected content has become ubiquitous, partly because the development of legal offers of digital content has not been able to keep up with demand, especially on a cross-border basis, and has led many law-abiding citizens to commit massive infringements of copyright and related rights in the form of illegal up-loading and disseminating protected content. Many online sites are either hosting or facilitating the online distribution of protected works without the consent of the right holders. In this context, the limitations of the existing legal framework may need to be clearly assessed.

Taking into consideration the fact that no registration is required in case of copyright and neighbouring rights, unlike in the case of patents or other intellectual property rights, the European Committee for Economical and Social Affairs has studied the annual growth and made conclusions on the basis of which there have been formulated recommendations to improvement of the field of neighbouring rights as well. Such recommendations include development of a coordinated system, applicable in particular to the works by unknown authors and to holders of the unknown objects of neighbouring rights, for registration and regular updating of copyright and neighbouring rights to facilitate identification of various right holders (Opinion

of the European Economic and Social Committee on the “Annual Growth Survey: advancing the EU’s comprehensive response to the crisis”, 2011, p. 0026 – 0038).

Opinions concerning the duration of neighbouring rights differ on national as well as regional levels. Some people believe that duration of neighbouring rights is excessive (given the need of information society and knowledge economics for updates and exchange of knowledge) (Opinion of the European Economic and Social Committee on the “Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Enhancing the enforcement of intellectual property rights in the internal market”, 2009, p. 0105 – 0108), while others find the neighbouring right protection periods to be sufficient (Krūmiņš, 2000), and still others believe the relevant terms should be extended (in relation to performers as subjects of neighbouring rights) from 50 to 70 (85, according to the initial draft) years. Preference is given on the level of regional legislator to the latter mentioned opinion; therefore, a resolution has been adopted in favour of the proposal to amend the European Parliament and Council Directive 2006/116/EC concerning the protection period of copyright and certain neighbouring rights (Term of protection of copyright and related rights \*\*\*I, P6\_TA(2009)0282, European Parliament legislative resolution of 23 April 2009 on the proposal for a directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, 2008, p. 0331-0337) Further, there is willingness to improve the rights of performers who have transferred their right to fixation of performance to the producers of phonograms, while the latter have failed to offer sufficient number of phonograms for sale; and to improve the possibilities available to performers to receive compensation for transfer of their respective rights.

Other issues that could need special attention are the use of provisional and precautionary measures such as injunctions, procedures to gather and preserve evidence (including the relationship between the right of information and protection of privacy), clarification of the meaning of various corrective measures, including the costs of destruction, and calculation of damages.

#### 4. Improvement of legal regulation in Latvia

Major problems in the field of neighbouring rights in Latvia, just like elsewhere in Europe, include illegal activities involving objects of neighbouring rights on the Internet. As noted in the Cabinet Regulations of the Republic of Latvia No 521 of 26 August 2008, at present there is no vehicle established and no set of legal norms required to limit and cease the maintenance of FTP servers and file exchange networks enabling unlawful access to (downloading of) objects of copyright and neighbouring rights. The opinion of the Court of European Union interpreting the EU Law is reflected in the view expressed by J. Kokott, Attorney General, who has also been participating in the matter handled by the Court of European Union *Productores de Música de España (Promusicae) versus Telefónica de España SAU* that in the given matter “balance between the respective matters of basic rights [protection of

intellectual property, electronic trading, and special provisions concerning protection of personal data – note by the Author] should be achieved first of all by the Legislator of Communities”, and that “Member States should take it into consideration when exercising their remaining competence in the course of transposing the directives” (Case C-275/06, 2008, p. I-00271). Fortunately, the above view can be shared because intellectual property rights have supranational nature, and therefore coordinated involvement of all Member States in this battle is required.

The Latvian legislator, however, should eliminate the shortcomings present in the Copyright Law of the Republic of Latvia in relation to collective performance, verbosity in case of cable operators, etc., and arrange the chapter dealing with neighbouring rights to meet the requirements of legal technique.

Further, Latvia has the possibility to improve legal acts to facilitate exercising of the right of the holders of neighbouring rights to fair compensation for copying of the objects of neighbouring rights for private needs. Attention to the improvement of the above-mentioned legal regulation has been paid by the Baltic collective management bodies of authors and holders of neighbouring rights (Resolution on private copying in the Baltic States, 2011). The importance of such right of the holders of neighbouring rights (to fair compensation) has also been emphasized by the Court of European Union when rendering pre-judicial awards.

## Summary

Neighbouring rights are a relatively new legal institution, whose development is lagging behind the global technical progress. Therefore, understanding of these rights and issues related thereto is important to achieve that application of existing legal provisions ensures establishing and maintaining a balance between the interests of owners of neighbouring rights and the public interests.

Unfortunately, there are certain problems in Latvia regarding understanding of this legal institute not only among persons applying neighbouring rights in practice, but also among scientists. This situation does not contribute to the integration of neighbouring rights into a uniform regional and international system, which in turn may be a threat to both development of these rights and development of supposedly protected activities in Latvia. This situation is not favourable to investments in the creation of legal objects protected by neighbouring rights and improving the public cultural life because there is a threat to protection of foreign capital. To prevent the said threat, it is necessary to improve the legal system, give more extensive explanations of the neighbouring rights institute, as well as hold discussions among persons applying neighbouring rights in practice and law scientists.

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## Part III

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# EU INTERNAL MARKET AND SOCIAL DIMENSION

**Laine Fogh Knudsen<sup>1</sup>**

## **A CLASSIFICATION OF CONSUMER ADR SCHEMES – A WAY TOWARDS A BETTER UNDERSTANDING OF THE CONCEPT OF ADR SCHEMES**

### **Abstract**

This article is the first of two articles which are investigating the issues regarding consumer knowledge and possibilities to turn for help in case of cross-border complaints, over viewing in-depth the concept of *alternative dispute resolution*<sup>2</sup> (hereafter ADR) schemes and trying to determine which of the ADRs is the most effective from consumer cross-border complaint resolution perspective.

**Purpose** - The purpose of this article is to develop a classification of consumer ADR schemes in the EU which would demonstratively depict the concept of ADR and the diversity of ADR aspects and help consumers and other stakeholders to better understand the concept of ADR.

**Design / methodology / approach** – The article is created from constructive and secondary research perspectives. Within this frame, the article starts with the introduction, which argues the need for a better understanding of ADR mechanisms

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<sup>2</sup> ADR schemes are known as out-of-court mechanisms, which have been developed across the EU to help citizens who have a consumer dispute, but who have been unable to reach an agreement directly with the trader. ADR schemes usually use a third party such as an arbitrator, mediator or an ombudsman to help consumer and trader reach an amicable solution. The advantage of ADR is that it offers more flexibility than going to court and can better meet the needs of both consumers and professionals. Compared to going to court these schemes are cheaper, quicker and more informal which means they are an attractive means for consumers seeking redress.(Commission(L-I),2011)

for consumers, it continues with the exploration of ADR concepts, and ends with the development of consumer ADR scheme classification.

Findings – There is “a massive variety of ADR schemes that currently exist in the EU” which is possible to arrange in the classification including diverse aspects of ADRs.

Originality / value – The potential value of this article is in the developed classification of consumer ADRs consisting of 11 groups which can help increase understanding and transparency of ADR schemes, thus encouraging consumers to seek help within ADR institutions. At the same time the classification will be used as a criterion in the next article to analyze correlations between the types of ADR and the effectiveness of ADRs.

**Keywords:** consumer protection, alternative dispute resolution, classification

## Introduction: the lack of information

The European Commission’s (hereafter EC) vision declared in the *Consumer Policy Strategy 2007 - 2013* is “to be able to demonstrate to all European Union (hereafter EU) citizens by 2013 that they can shop from anywhere in the EU, from corner-shop to website, confident that they are equally effectively protected”. (Commission(II),2007,p.13)

The importance of consumers shopping cross-border<sup>3</sup>, according to the EC, lies in that, the consumers would have comparable opportunities to benefit fully from the potential of the internal market in terms of greater choice, lower prices, and the affordability and availability of essential services. M. Monti (2010, p.38), for example, highlights that there are many ways in which the Internal Market benefits consumers horizontally across policy areas, through widening the choice of providers, services and products or expanding mobility options and ensuring safety of traded products. Barriers to cross-border trade should therefore be overcome in order that

<sup>3</sup> According to the EC any consumer purchase made from retailers or providers located in other European Union countries, either in person or via distance selling, is defined as “cross-border shopping”. This includes (Commission(IV), 2006):

- Travelling to another country with the primary purpose of purchasing goods or services there;
- Purchases, which are made in another European country on the occasion of a business trip or holidays (excluding goods and services which are part of the trip itself, such as transport, accommodation, leisure activities, meals, etc.);
- Distance shopping, via the internet, by phone or by mail from suppliers situated in other EU member states; and
- Purchasing from sales representatives based in other European countries who may come and offer their goods or services directly to consumers. Cross-border shopping does not include purchases of foreign-made products bought from retailers or suppliers situated in a respondent’s own country.

the consumer dimension of the internal market could develop in parallel with its business dimension (Commission(I), 2002, p.7).

The Eurobarometer Flash Nr.299 indicates that in 2010 cross-border purchases while on holiday, shopping or business trip in another EU country in the last 12 months were made by 24 % of the EU citizens and other 9 % used other cross-border shopping methods such as ordering by post, phone or shopping on the Internet from a trader located in another EU country. Increase of shopping cross-border comparing to 2009 in total has been only by 1 percentage point (Commission(I), 2011, p.13, 17-18, 23).

One of the main obstacles withholding 57% of EU consumers from cross-border transactions according to the above mentioned Flash is the worry concerning difficulties that could arise if there was a need to resolve problems such as complaints, returns of faulty products, etc. (Commission(I), 2011, p.30).

Another quantitative research made by the EC revealed that in many national cases, where there was a desire to seek redress, consumers experienced difficulties with seeking out information on the consumer redress mechanisms as it appeared hard to locate such information (Commission (I), 2009, p.39). Within this context, cross-border complaints were presumed to be even more difficult, if not impossible to address. 71% of consumers anticipated that the difficulties they would experience in their home countries would be multiplied if they were to seek out information on redress mechanisms and the processes consumers need to follow in order to seek compensation for cross-border complaints. As a result, consumers were even less likely to pursue these complaints (Commission(I), 2009, p.39; Commission(III), 2006, p.55).

The above mentioned shows that consumers lack the information and the knowledge of where to turn for help in case of a consumer cross-border complaint with a trader, thus withholding them from the possibility to shop cross-border and by that refusing to enjoy benefits provided by the Internal Market.

This article is the first of two articles which investigates the issue regarding consumer knowledge and possibilities to turn for help in case of cross-border complaints, over viewing in-depth the concept of ADRs and trying to determine which of the ADRs is the most effective from consumer cross-border complaint resolution perspective.

This article will focus on issues concerning consumer unawareness of redress mechanisms, understanding of ADR concept and elaboration on characteristics of ADRs which could be classified. Thus the purpose of the article is to develop a classification of consumer ADR schemes in the EU which would demonstratively depict the concept of ADR and the diversity of ADR aspects and help consumers and other stakeholder better understand the concept of ADR.

Hence the research question of this article is: how can ADRs be classified? This classification will include different aspects of ADRs and will focus on principles which are easily understandable for consumers.

The article consists of four sections, where the first section involves elaborating on the need for information consumers need to know regarding where to turn for

help in case of cross-border complaints and an overview of the bodies which can help consumers in cross-border complaints. In the next section consumer knowledge and understanding of ADR schemes are evaluated. This is followed by the third section, which is an in-depth overview of the concept of the ADR. Finally the last section will develop a classification of ADRs and at the end conclusions and avenues for the future research.

## 1. The bodies that help consumers to solve cross-border complaints

Today if consumers are facing consumer cross-border complaint, which according to the EC definition, means a statement of dissatisfaction by a consumer concerning a cross-border transaction with a seller or a supplier (Commission(II), 2006, p.52) he or she can turn, depending on the nature of the complaint, to national enforcement bodies (hereafter NEB), the courts, alternative dispute resolution schemes (hereafter ADR) or the European Consumer Centre Network (hereafter ECC-Net).

### *NEB*

NEBs are national institutions which monitor if traders are complying with existing consumer legislation. For example, according to the EC requirements, stated in several EC regulations concerning passenger rights of diverse transportation, Member States have to designate a new or existing body or bodies responsible for the enforcement of particular regulations as regards regular services from points situated on its territory and regular services from a third country to such points. Each NEB has to take the measures necessary to ensure compliance with these regulations, which means that NEBs are responsible for protection of consumer rights when it comes to consumer passenger rights including cross-border consumer passenger rights (Regulation 261/2004/EC; Regulation 1177/2010/EC; Regulation 181/2011/EC).

### *Court*

In most countries consumer disputes are generally not brought before the courts due to the costs of litigation as compared to the value of the dispute. And as cross-border disputes, including consumer cross-border disputes are involving complex private international law, they are more complex and expensive to handle compared to national litigation. Therefore it is suggested that before going to court, which can be stressful, time consuming and expensive, to try to resolve dispute amicably or to consider a use of an ADR procedure, which is also promoted by the courts, as ADRs are more relevant in cross-border consumer disputes because the value of the disputes traditionally remain low (Nordic Council, 2002, p.13).

## *ADR*

The EC has also promoted that one of the most effective consumer cross-border complaint solution methods is *alternative dispute resolution* (hereafter ADR) schemes, which are known as well as 'out-of-court mechanisms' (Commission(I), 2006, p.2; Commission(II), 2007, p.11). These mechanisms have been developed across Europe to help citizens who have a consumer dispute, but who have been unable to reach an agreement directly with the trader. ADR schemes usually use a third party such as an arbitrator, mediator or an ombudsman to help the consumer and the trader to reach an amicable solution. The advantage of ADR is that it offers more flexibility than going to court and can better meet the needs of both consumers and professionals. Compared to going to court these schemes are cheaper, quicker and more informal which means they are an attractive means for consumers seeking redress (Commission(L-II), 2011).

## *ECC-Net*

The ECC-Net is a European network consisting of 29 European Consumer Centres (in all 27 Member States, Iceland and Norway), which work together to provide consumers with information on cross-border shopping, assist in the resolution of cross-border complaints and find appropriate out-of-court mechanisms for their disputes (according to the EC definition - *dispute* means a referral to an out of court scheme) (Commission(II), 2006, p.52; Commission, 2008, p.1-2).

Although the latest findings have shown that the ECC-Net can help on its own to reach amicable settlement between the consumers and traders almost in a half of the cross-border complaints, there is still more than one third of the complaints closed without a solution because of the lack of the ECC-Net competence (Knudsen, 2011, p.169).

Considering above mentioned advantages and disadvantages of cross-border complaint solution institutions and benefits towards using ADR in the consumer cross-border complaints and considering the limited size of the article, further focus in the article will be only on ADR schemes which deal with consumer cross-border cases.

## **2. The need for better understanding of ADR schemes**

The EC report "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings" made at the Katholieke Universitet Leuven in Belgium poses that there is a gap between a consumer deliberately deciding not to take any action and a consumer wishing to take action, but refraining from doing so because of the perceived disadvantages of an ordinary court procedure. Generally, the larger the gap between no action and ordinary court action, the more remote private enforcement of consumer claims is. In other words, mechanisms of ADR that bridge this gap have the unique capability of

increasing access to justice. Consumers who otherwise might decide not to take any action, are now able to access intermediate methods of having their claims examined and, if proven true, enforced (Commission (I), 2007, p.6).

This report also indicates that there is a massive variety of ADR schemes that currently exist in the EU. According to another ECs report, the number of ADR schemes in the EU reached 750 in the 2009 (Commission(II), 2009, p.8). This makes it impractical or impossible for consumers from one Member State shopping at cross-border level to know exact means where to obtain redress in the other Member State (Commission(I), 2007, p.8).

Another EC qualitative research revealed that many consumers across most Member States were unfamiliar with the concept of ADR at all. Although once they understood the basic concept, they tended to find it an interesting and potentially attractive option. However, many felt they would need more information about how and when it can be employed before feeling confident that they would use it (Commission(I), 2009, p.11, 92).

At the end of 2010, the Commission announced a *Public consultation on the use of ADR as a means to resolve disputes related to commercial transactions and practices in the EU* where all Member States, traders, consumers and consumer protection institutions were welcomed to state their opinion on different issues on ADR mechanisms and their procedures including as well their future development possibilities by that acknowledging some existing problems within ADR mechanisms dealing with consumer and consumer cross-border complaints. The summaries of the responses received during the *Public consultation* suggested that enhanced awareness and strengthened trust in the quality and transparency of ADR schemes would persuade consumers and businesses to use ADR and comply with their outcome more, which thereby emphasized the importance of raising awareness with consumers and businesses as a fundamental condition to improve the use of consumer ADR schemes (Commission(II), 2011, p.3).

Considering above mentioned issues regarding consumer unawareness of ADRs, unfamiliarity of the concept of ADRs, the massive variety of ADRs and the results of the EC's Public consultation, one can consider that it would be useful to have a classification of consumer ADR schemes in the EU which would demonstratively depict the concept of ADR and the diversity of ADR aspects and help consumers and other stakeholders better understand the concept of ADR and in the future help to choose the best scheme for the resolution of their complaints (Estes, 1994, p.4; Gordon, 1999, p.1).

### 3. The concept of ADR

To be able to classify ADR schemes, first there is a need for in-depth overview of the concept of ADR.

ADR is a relatively new term which modern origins can be dated back to the 1970s and 1980s. The literature available on Alternative Dispute Resolution is very

broad and it examines different perspectives of ADR in a wide range of areas in various regions and countries. Legislation alone in the EU, USA and Canada covers 600 various legislative documents including Laws, Acts, Directives, Regulations, Recommendations and Decisions etc.(WestLaw) The term alternative dispute resolution when queried on publicly accessible Google Books search engine is offered in around 60,000 books from which almost 7,000 holds this term in the book title.

N. Atlas considers that “the concept of ADR is extremely broad” and “defining ADR is difficult because an infinite variety of procedures properly fall into a category of “not a trial” (Atlas, 2000, p.2). Overall various sources provide readers with different definitions and explanations of the term alternative dispute resolution. In general, the common understanding of this term was alike, but it expressed by different means.

There are number of authors such as Breger (2001, p.35), Chatterjee (2008, p.4), Jacqueline (2003, p.3), Kerley (2008, p.11), Staff (2002, p.1) and others which indicated that alternative dispute resolution stands for a system which offers “an alternative to or outside the court proceedings or litigation”.

Another definition which is often used in the literature provided by Altman (1997, p.5), Arnavaš (2004, p.1), Atlas (2000, p.2, 18), Partridge (2009, p.xi), Van Gramberg (2006, p.ix) and other authors is that the term alternative dispute resolution covers “a variety of dispute resolution techniques” and/or “usually involves intervention or facilitation by a neutral third party”.

Then some of the authors such as Sourdin (2004, p.2, 4), Hörnle (2009, p.48), Donegan (2002, p.121), Zhao (2005, p.9, 33), Dinnen (2003, p.106) offer to merge two or more aspects of the above- mentioned in combination with other aspects. Hörnle has summarized the definition of ADR from different sources as follows: “ADR is a collective expression for all dispute resolution mechanisms that interpose a neutral third party but which are outside the courts, and is a synonym for extra-judicial or “out-of-court” dispute resolution”.

The EC on the other hand has not clearly defined ADR mechanisms in the EU legislation although they have tried to describe the concept of ADR in some of the legislation.

A first attempt to describe the ADR was made in the Commission’s Recommendation 98/257/EC *on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes*. It highlighted different principles which should be “respected by those out-of-court procedures which, no matter what they are called, lead to the settling of a dispute through the active intervention of a third party, who proposes or imposes a solution, usually by means of a binding or non-binding formal decision, upon the parties.” Later in 2002 a *Green Paper on alternative dispute resolution in civil and commercial law* was prepared, where „Alternative methods of dispute resolution, for the purposes of this Green Paper, are defined as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper. The alternative methods of dispute resolution will therefore be referred to below by the acronym that is tending to be accepted universally in practice, i.e. “ADR” (Commission(II), 2002, p.6). In later norms on ADR published by the EC most references regarding the term of ADR are associated with these two documents and

today in the EC's homepage the ADR term is explained in an easier understandable manner for all consumers as follows "Alternative Dispute Resolution (ADR) schemes or out-of-court mechanisms as they are also known have been developed across Europe to help citizens who have a consumer dispute but who have been unable to reach an agreement directly with the trader. ADR schemes usually use a third party such as an arbitrator, mediator or an ombudsman to help the consumer and the trader reach a solution" (Commission(L-I),2011).

#### 4. The classification of ADR

The classification of ADRs so far has confined with the classification of legislative procedures of ADRs such as arbitration, mediation, negotiation as the basic methods and up to at least 20 other types of procedures including a variety of different hybrid procedures (*see paragraph – 4.5.*).

Before the further development of classification of ADR schemes, a pre-research in different scientific journals was made to determine if the classification of ADRs, besides the above mentioned, has been done already. In total following 5 journal data bases - Scopus, SpringerLink, Emerald, ScienceDirect and Sage Journals Online - were inspected using Boolean method and key words which would indicate to the ADR classification, including synonyms to word classification, such as alternative dispute resolution classification, ADR classification, alternative dispute resolution classificatory, ADR classificatory, alternative dispute resolution categories and ADR categories. Mostly search was limited within the title, keywords and abstract and where abbreviation ADR was used, additional limitation "and not - drug" was used to avoid articles on medical issues. In total 84 articles were offered within the whole search from which 91% after qualitative assessment was determined to be outside the alternative dispute resolution expertise and left 9 % were not relevant to classification of alternative dispute resolution. Thus it was confirmed that there was no general classification available.

The classification was developed based on the various literature and previous researches made by the EC and carried out by organizing ADRs in groups which were created based on pre-defined organizational and procedural characteristics of ADR schemes. Under organizational characteristics where selected following categories: 1) if the ADR is notified under the EC recommendations 98/257/EC and 2001/310/EC, which significance has been highlighted by the EC (Commission(II), 2007, p.11); 2) the type of organization – private or public, or partially private schemes; and a type of funding - funded by public or industry or partially by public, partially by industry; 3) the type of geographical competence – national or regional; 4) the type of sectorial competence – cross-sectorial or sectorial competence. Under procedural characteristics were chosen the following categories: 1) the type of legal procedure; 2) the character of trader participation within the ADR procedure; 3) the character of the ADR decision; 4) the communication method; 5) limitations of value of the dispute; 6) the existence of participation fee from consumer side; and 7) the origin of the complaint. Last nine divisions were chosen according to previous research

that revealed the obstacles withholding ADRs from effective consumer cross-border dispute resolution (Knudsen, 2011, p.170-172).

Below ADR classification with extensive description of each group:

*1. After notification type – notified or not notified under the EC Recommendations 98/257/EC and 2001/310/EC*

The EC has highlighted the importance of ADRs to be notified under the EC Recommendations 98/257/EC and 2001/310/EC since passing the first recommendation. Additionally a clause “The Commission will reinforce the monitoring and encourage the use of the existing recommendations which establish a number of minimum guarantees for Alternative Disputes Resolution (ADR) schemes” has been added to the EU Consumer Policy Strategy 2007 – 2013 (Commission(II), 2007, p.11) and similar clause to Consumer Policy Strategy 2002 – 2006 to highlight the significance of this process (Commission(I), 2002, p.38). The importance of both recommendations lies in that both encourage ADRs to follow the principles of transparency, independence, liberty, effectiveness, representation, legality and adversarial principle. To display the seriousness of matter and at the same time to promote and encourage ADRs to notify themselves under particular recommendations, the Commission has created a list of ADRs notified under recommendations in their homepage which is available for all interested in this issue (Commission(L-II), 2011). In the end of 2009 there were 750 ADRs recognized from which 462 were notified under the above mentioned recommendations. Remaining 288 ADRs were not notified under the recommendations although some of them were working in accordance with the principles of the recommendation (Commission(II), 2009, p.30-33).

*2. After organization and funding type – public or private or partially public, partially private schemes; funded by public or industry or partially by public, partially by industry.*

Almost half of the ADR schemes in the EU are public schemes. One third of the ADRs are private schemes, i.e. established by the industry and they often operate in one sector only. There is a high correlation between the nature of the scheme and the funding, i.e. private schemes are usually financed by the industry and public schemes are in majority financed, fully or partially, by public funds. However, ADR bodies which are established by public law can also be entirely financed by the industry, especially in highly regulated markets (e.g. Commission for Energy Regulation in Ireland, Schlichtungsstelle der Energie-Control in Austria, Commission de Surveillance du Secteur Financier in Luxembourg, the Insurance Ombudsman in Poland, the Financial Ombudsman Service in the UK). The majority of schemes that are established by a trade association and operate in one sector are financed by the members of the trade association. Few schemes are totally or partially financed by the parties taking part in the procedure (Ingenieurkammern in Germany, Mediation Centre in Malta, Mediation, Arbitration and Conciliation Scheme in

Slovakia). Some national schemes, like the Consumer Complaints Board in Denmark or the Foundation for Consumer Complaints Boards in the Netherlands require the party who initiates the procedure to pay a fee to have a case heard by the board (Commission(II), 2009, p.30-33).

### *3. After geographical competence - national or regional*

In most EU countries like Denmark, Estonia, Finland, France, Ireland, Lithuania, Luxembourg, Latvia, the Netherlands, Poland, Slovakia, Slovenia, Czech Republic, Malta, United Kingdom and Sweden, the geographical coverage of ADR schemes is national rather than regional or local, i.e., these ADRs accept complaints from all the citizens of that country no matter from which regions citizens come from. In other countries, such as Germany, Italy, Portugal and Spain the system is decentralised with ADR schemes providing their services at regional or local level, i.e., only certain region citizens or / and for certain traders of that region can complain to certain ADRs (Commission (II), 2009, p.56-57).

### *4. After sectorial competence - cross-sectoral or sectoral;*

From the sectoral perspective ADR schemes can be divided into two main groups: ADR schemes that deal with disputes in several sectors of industry (cross-sectoral schemes) and ADR schemes that deal with disputes in only one sector of industry (sectoral schemes). Both types of ADR schemes are represented in the majority of Member States. Cross-sectoral schemes can be schemes which are dealing with several type of disputes, like, different financial services including insurance, banking and investment, or tourism services, financial and low quality good disputes. These type of schemes can be single central ADR schemes at national level that deal with most types of complaints, or arbitration boards with a broad coverage of industry sectors operating at regional or local level. In the EU cross-sectoral schemes are Danish Consumer Complaints Board, Estonian Consumer Complaints Committee, Latvian Consumer Rights Protection Centre etc. Sectoral schemes mean that ADRs are dealing only with one type of dispute, for example, only banking, insurance or tourism etc. When sectoral schemes are public, they sometimes can deal with disputes in sectors that provide essential services to consumers, such as transport, postal services and telecommunications. These type of schemes in the EU are, for example, the Luxembourg Commission for the Supervision of Financial Sector, the Ombudsman of the Association of Commercial Banks of Latvia, the Insurance Ombudsman of Poland, the State Energy Inspectorate of Lithuania etc.(Commission(II), 2009, p.56-57; Commission(I), 2006, p.12, 14, 39, 41, 43, 49).

### *5. After legislative procedural type – arbitration, mediation, consumer board or ombudsman.*

Two main forms of ADR are mediation and arbitration (Hörnle, 2009, p.47; Partridge, 2009, p.xi). All other forms are considered as variations and hybrid

forms of ADRs which are negotiations, conciliation, med-arb (using the two forms consecutively), expert evaluation (mediation with an expert issuing a recommendation), mini-trial (having a senior figure recommending a decision after representation of argument by the parties), (neutral) fact finding (a dispute are referred to a competent neutral who makes factual determinations that are binding on the parties), neutral early evaluation (counsel meet with qualified neutral at early stage, who assists in identifying the important issues and crafting a discovery plan that is efficient and focused), summary jury trial (is a nonbinding ADR process presided over by a district or magistrate judge and designed to promote settlement in trial-ready cases) etc. In a consumer protection typical consumer ADR forms are arbitration, mediation / conciliation, consumer complaint boards and ombudsman schemes (Hörnle, 2009, p.50; Atlas, 2000, p.2, 18, 475).

*Arbitration* – A process in which a one or more neutral third party is empowered to decide disputed issues after hearing evidence and arguments from the parties. The arbitrator's decision may be binding on the parties either through agreement or operation of law. Arbitration may be voluntary (i.e., where the parties agree to use it), or it may be mandatory and exclusive means available for handling certain disputes. Arbitration is generally considered to offer the following advantages: speedy proceedings, anonymity, low costs, binding decisions and enforceability of the award and the free choice of the parties of the body responsible for arbitration, the arbitrator, the procedural law applicable to the dispute.

Unfortunately, not all of the above mentioned advantages could be directly transferred to consumer arbitration. In the consumer arbitration the parties are not equal partners and therefore the full control of the procedure is not always desirable to the consumer. The choice of law, procedure and arbitrator requires knowledge and experience that the consumer cannot be expected to have. This leaves the business with liberty as to the choice of legal framework. However once the rules have been chosen, the procedure is transparent and follows a comprehensive set of rules (Altman, 1997, p.12; Arnavas, 2004, p.24; Nordic Council, 2002, p.15-16).

*Mediation / conciliation* – a process in which a trained independent third party helps disputants negotiate a mutually agreeable settlement. The mediator has no authority and does not render a decision but may suggest some substantive options to encourage the parties to expand the range of possible resolutions under consideration. Any decision must be reached by the parties themselves. Conciliation is usually more intervention than mediator and can propose a solution and sometimes make a non-binding decision.

The advantages of mediation and conciliation are generally considered to be relatively simple procedural rules, the speedy procedure, the flexible structure and the affordability. The lack of legal framework ensures flexibility, but the lack of a strict procedure has disadvantages of making the decision-making process less transparent, hence less comprehensible (Altman, 1997, p.12; Hibberd, 1999, p.17; Nordic Council, 2002, p.16-17).

*Consumer complaints board* (hereafter CCB) - consumer organizations, trade and industry associations, public administrations, etc. may jointly or independently organise schemes which offer out-of-court dispute settlement of consumer complaints.

CCB are generally instituted on the basis of national legislation or at initiative of industry as a measure of self-regulation ("soft law"). CCB are collective bodies with equal representation from consumer and trade associations and the procedure pertaining to the boards often regulated either by law or by comprehensive guidelines adopted by the industry. However the decision by the boards are mostly non-binding, though sometimes binding for the businesses involved, which is advantage because a decision against a business, though non-binding, is more harmful to the business' reputation than no decision at all, but most complaints boards only apply to the members of a specific trade associations which is a disadvantage.

The advantage of CCB is generally considered to be their simple and speedy procedure, and the low costs for the complaining party, as well as their use of law as the basis for their decision (Nordic Council, 2002, p.17-18).

*Ombudsman* – a neutral third party designated by an organization to assist a complainant in resolving a conflict. An ombudsman provides confidential counselling, develops factual information, and attempts conciliation between disputing parties. The power of the ombudsman lies in his or her ability to persuade the parties to accept his or her recommendations. Ombudsman generally is a person of high standing and good reputation. Generally this scheme is instituted at the initiative of the industry as a measure of self-regulation.

The advantages of ombudsmen schemes generally considered to be a simple and speedy procedure, and the low costs for complaining party, as well as their use of law as the basis for their decision. However, ombudsmen because of the multiple use of the term are not always perceived as independent, which is a major disadvantage as it impairs the credibility of the schemes (Altman, 1997, p.12; Nordic Council, 2002, p.18).

6. *After the character of decision – a non-binding recommendation, a decision which is binding on the business but not on the consumer, a decision which is binding on the business and on the consumer or a consensual agreement mediated by the scheme.*

As already mentioned before, mediation schemes are more known of non-binding decisions whereas arbitration is known of their binding decisions although in the literature extract as well non-binding arbitration schemes (Arnavas, 2004, p.240; Atlas, 2000, p.141). It is as well possible that the same institution can take both types of decisions which is a subject to the particular complaint. Binding decision to one or both parties mean that party/-ies has to implement the decision of the ADR obligatory, whereas the non-binding decision means that this is a voluntary whether to implement or not the decision of the ADR (Commission (II), 2009, p.37-39). In some countries there could be different sanctions applicable if the trader is refusing to fulfil the decision, although it may have been only recommendatory character

decision, for example, traders name can be published in special “black lists” or he may be refused of further membership of certain trader association or certain Trustmarks etc. (ECC Denmark, 2009, p.61-66).

### *7. After character of trader participation – voluntary or mandatory*

Participation from trader’s side in the ADR procedures can be voluntary and it can be mandatory. In some EU countries it is possible to start an ADR procedure even though the trader is refusing to participate. Some countries have sanctions to those traders which are unwilling to participate in a procedure such as “black lists” or a penalty due to public administrative law. Often if the trader is a member of a trade association this is compulsory for him to participate in the ADR procedure (ECC Denmark, 2009, p.61-66).

There is still no consensus between the academics and other involved parties in the ADR, which type of decision and participation is the best for the consumer, trader and procedure in total. The question is still open and there are lots of discussions regarding the most appropriate character of decision and participation status. Consumers are more in favour of binding decisions with mandatory participation while traders on the contrary are in favour of voluntary participation and non binding decisions. This issue was one of the top issues at the ADR summit on 16<sup>th</sup> of March, 2011.

### *8. After type of procedural communication – ADR or ODR*

The technology has a transforming effect – it makes dispute resolution for Internet disputes more effective and hence more accessible, thus contributing to fairness. ODR is therefore dispute resolution carried out by combining the information processing powers of computers with the networked communication facilities of the Internet (Hörnle, 2009, p.74-75).

ODR definition is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the Internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather they might communicate solely online (Kaufmann-Kohler, 2004, p.7).

Right now only eight EU countries from 29 (EU, Iceland and Norway) have ODR mechanisms. It has to be highlighted that ODR mechanism advantages has a significant role in the future development of consumer cross-border ADR development (ECC Denmark, 2009, p.24).

### *9. After the origin of the complaint - cross-border ADRs and ADRs accepting only national complaints.*

The EC report indicated that almost all countries’ ADRs accept complaints from foreign consumers (exception was Slovakia). The only precondition that might have been was that the case has to be submitted in the ADR’s national language and/or English and/or another regionally accepted language. In this matter traditionally is

helping the ECC-Net (ECC Denmark, 2009, p.67-68; Commission(II), 2009, p.110; Commission(L-III), 2011). Reason for retaining this category is to confirm the above mentioned research in the future.

*10. After limitations of value of the dispute – no limitations, minimum and maximum value limitation, only minimum or maximum value limitation.*

Some ADRs have chosen to lodge a complaint of minimum and / or maximum value limitation to avoid spending resources on low value complaints or too high value cases which otherwise should be brought before a court. For example, in Estonia Consumer Complaint Committee do not accept complaints which value is under 19 Euros. Similarly some ADRs in Portugal have lodged a maximum value limitation of 30 000 Euros where cases over this limitation are not accepted (ECC Denmark, 2009, p.67-68).

*11. After participation fee – no fee, fee for consumer and trader, fee only for consumer or trader*

There are ADRs which have chosen to require a fee for a case handling. The fee for consumers can consist from 5 Euros up to 380 Euros and this is to avoid low value and unjustified cases as consumers will consider more carefully before submitting the complaint to the ADRs. There are also ADRs which require a fee from traders if the case from consumer side versus the trader is brought before the ADR. For example, in Denmark trader has to pay fee of 2000 Euros in case a consumer has submitted a dispute against the trader in Telecommunications Complaint Board and the trader has lost the case. Thus this fee is a motivation for traders to try to deal with the case amicably directly with the consumer without involving an ADR (ECC Denmark, 2009, p.67-68; TCB, 2011).

As it is seen from above, classification of 11 groups was created which include different aspects of ADRs and mostly are based on obstacles which consumers face when trying to solve their disputes via ADRs. Above developed classification will be used as groundwork for future research which will try to analyse the correlation between the effectiveness of ADRs dispute resolution and a different organizational and procedural aspects of ADR.

## Conclusions and avenues for future research

This research has highlighted that almost two-thirds of EU consumers are not shopping cross-border thus denying themselves from using the benefits provided by the Internal Market. The main obstacles withholding consumers from shopping cross-border is unawareness of institutions, where to turn to, if there is a need to resolve a problem such as complaints, returns of faulty products, etc.

The article states that one of the most appropriate institutions where to turn in a case of cross-border consumer complaints is ADR. However, other research has shown that many consumers are unfamiliar with the concept of ADR. This article also indicated that the concept of ADR is broad and that ADRs are implemented differently across the EU which generates a problem if there is a wish to explain foreseeable the concept and varieties of the ADRs to consumers and other stakeholders. The variety of ADRs makes it as well difficult to compare effectiveness between different types of ADRs. Thus it became a purpose of this article and created a research question: how can ADRs be classified, including diverse aspects of ADR that would be slightly demonstratively comparable for the consumers and in the next article used as criteria to analyze correlation between the types of ADR and the effectiveness of ADRs?

As the result, a classification with 11 categories was created covering ADR characteristics from organizational and procedural perspective. The classification included such divisions as grouping after notification type, organizational and funding type, geographical competence, sectorial competence, legislative procedure type, decision character, character of trader participation, procedural communication, the origin of the complaint, limitations of value and participation fee.

This article and development of the classification was a first step towards a future research which is going to look into if there is a correlation between the different aspects of ADR organization and procedures and effectiveness of ADR consumer cross-border complaint resolution. The following research will be carried out using quantitative research and analysis methods.

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## INTERNAL DYNAMICS OF RECENT MIGRATION: THE CASE STUDY OF LATVIANS IN GUERNSEY

### Abstract

This paper examines a conceptual model of internal dynamics of migration, developed by human geographer Hein de Haas (2010). This paper focuses on endogenous accelerating forces and contraction factors of migration, emphasised by this model.

In order to illustrate and analyse the conceptualisation of the model, the empirical data draws from original research on Latvian migrant workers on the Guernsey Island, one of the first destinations for recent migrants. The paper argues that this model can be well suited for meso level explanations of recent migration. However, the paper also highlights that macro structures and agency of migrants should be more deeply incorporated in the theoretical basis of the model as a constitutive part of the internal dynamics of migration.

**Keywords:** Latvia, the British Channel Islands, labour migration

### Introduction

Since Latvia regained its independence and after it joined the EU, it has experienced a considerable rate of outward labour migration. It is difficult to establish exact numbers due to the lack of reliable statistical data and the temporary nature of recent migration. However, outward migration and the ambiguous feeling of possible loss of the country's labour force in public discourses, confirms that migration is among the most serious concerns in Latvia.

To date, the most comprehensive study of outward migration from Latvia assesses that altogether at least 86-thousand Latvian nationals were working abroad in 2006 (Krisjane *et al.*, 2007). The difference in the level of remuneration was the main driving force and the most frequent motivation of those with secondary/vocational education and in low paid workplaces in Latvia, who were more likely to be found outside the capital city (*ibid.*). The study also found that international mobility was twice as high among 20-29 year olds compared to all other respondents, while the majority of respondents intended that their migration be short term. The main destinations for recent migration were Great Britain and Ireland, but there were no specific questions

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asked about the British Channel Islands as a destination. Another study (Hazans and Philips, 2009) on migration from the Baltic States, estimates that about 76-thousand Latvians have worked in Great Britain between 2004 and 2008.

After the economic crisis in late 2008, several sources say that outward migration exceeded 100,000. However, there is no statistical evidence to prove this, and when fragmentary data is compared, the assessment demonstrates that approximately 5-7% of economically active Latvians lived abroad in 2010 (Krišjāne, 2011).

Various theories and concepts on migration can explain how migration begins and continues, often highlighting macro contextual changes, and in particular, the fundamental transformations in countries like Latvia, which has gone through profound social changes during the past twenty decades. However, the internal dynamics of the migration process, which captures causal abstractions of decline of migration flows, is often under-theorized. This article examines a model on how we can learn more about the nature of recent migration in Latvia by understanding internal factors. The paper draws on a case study of a particular destination for Latvian workers -- the British Channel Island of Guernsey, which has been among the first places for Latvians to search for work abroad since the mid-1990s.

Guernsey, an island of 63.3 square kilometres and around 62-thousand inhabitants (Policy Council, 2010), is a naturally bounded place, but it is also a shifting and rapidly changing social space, mainly due intensive migration. It should be stressed that Guernsey is a special case, which cannot be generalised to other migrant destinations, but despite or even because of this, situational research allows us to see more sharply some mechanisms of internal dynamics of migration that we might overlook in other territorial contexts.

## Endogenous processes of migration

Previous literature on migration has addressed the question of internal dynamics in multiple ways: chain migration, migrant networks and cumulative causation theory should be mentioned among the most discussed perspectives in 20<sup>th</sup> century and early 21<sup>st</sup> century literature. The main assumption in these theories is that migration creates more migration in self-perpetuating processes. For example, decades ago the concept of *chain migration* has maintained that migration continues as a chain effect because others follow pioneer migrants (MacDonald and MacDonald, 1964; Tilly and Brown, 1967; see also Castles and Miller, 2009).

The *Migrant Network approach* highlights that networks facilitate locally specific social capital and the resources available through these networks tend to decrease migration costs (Gurak and Caces, 1992; Massey, 1998). When initial migration reaches a critical mass, embedded social relations push the migration forward internally. Krissman (2005), Rogers and Vertovec (1995), however, criticised the theoretical basis of the Migrant Network approach because this concept has not been consistently derived from the social network theory, rather relying on studies of social adaptation and neglecting the internal dynamics of the networks themselves.

In turn, the *cumulative causation theory* assumes that social and economic structures change due to migration and these changes in turn, yield more migration (Massey, 1990; Massey *et al.*, 2005). For example, cumulative causation maintains flows of remittances and aspirations among non-migrants to migrate.

However, most of these theories assume that social capital and flows of information and resources in migration chains and networks would lead to more migration and thus having a positive effect on the overall persistence of migration. De Haas (2010) rightly draws our attention to fallacy of this assumption. Namely, these theories undermine the reverse effects, which lead to an opposite process, the decline of migration. Above all, these approaches explain initiation of migration but do not explain in detail, how it can change over time. The implicit logic of these approaches suggests that theoretically migration would continue until all who wanted/were able to migrate, had done so. But international labour market is also often segmented and therefore we should take into account a demand for specific migrants, not migrants in general. For example, there has been persistent demand for cheap labour in low skilled work and those who are ready to join temporary to secondary labour market, seasonal and/or precarious work in Western countries (Castles, 2009). This demand differs significantly from recruitment of highly skilled professions. Therefore employment practices in receiving countries contribute to internal dynamics of migration but attract potential migrants, who are ready and suited to fill these specific workplaces.

## Concept of diffuse dynamics of migration

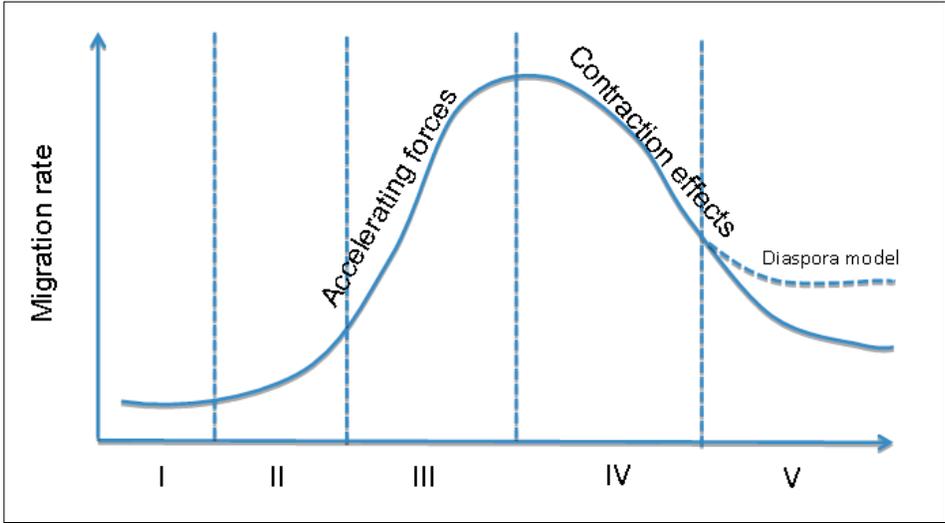
By his ideal-type concept,<sup>2</sup> human geographer Hein de Haas proposes to distinguish between endogenous and contextual feedback in migration to track the internal dynamics of migration. While recognising the paramount importance of macro contexts, he deliberately focuses on the meso level -- networks, localities and communities -- to underline that migration has its internal dynamics, which should be seriously taken into account in the current migration scholarship.

This model, depicted in Figure 1, proposes a framework of how to embrace both selective and heterogeneous sequential formations of migration dynamics.

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<sup>2</sup> In this sense ideal-type is interpreted as a theoretically analytical model, which can and should be varied in a situated research as in reality it cannot suit to all research situations but it depicts main characteristics of internal dynamics of migration at the meso level.

Figure 1. Simplified model of the internal dynamics of migration.



Source: Adapted by the author of the paper. See more detailed original model of the spatio-temporal diffusion process of migration, de Haas (2010)

This spatio-temporal diffusion process model suggests that internal dynamics develops in five stages. During the first stage, when pioneers (innovators) establish migration trajectory, the ‘herd effect’ subsequently develops migration further into the second stage of early adaptors. Epstein (2008) coined the ‘herd effect’ notion, which holds assumption that after pioneers’ have established a certain spatial trajectory, migration tends to gravitate around small numbers of destinations. This corresponds also to the assumptions of the chain migration theories.

During the second stage migration rises particularly fast and reaches the highest point -- the third stage --, which de Haas calls as the early migrants’ stage. If potential migrants do not know, where to go, they tend to follow the routes, where others have already migrated due to information facilitated through the migrant networks or wider public information flows.

Massey (1987; 1990; 1994) also draws attention to the phenomenon of network saturation in ethnically segmented migrant labour market, which might have a negative feedback and result in decrease of migration. Hein de Haas takes into account these factors in his model and underlines that those, who were helping compatriots at the beginning, in these situations become ‘gatekeepers’ and impede the inflow of new migrants (Collyer, 2005, as quoted in de Haas, 2010) Accordingly, depletion of social capital within migrant networks can take place, which is known as negative factors of social capital (Portes, 2010; Wilson, 1998, Haug 2008 as quoted in de Haas 2010, p. 1599). These negative factors of internal dynamics could also be more pronounced, for example, among low education and income migrants as they are more likely to cluster and rely on resources available though social networks, while highly skilled

and more well-off migrants tend to be rather diffused (Portes and Manning, [1986] 2006).

Accordingly, de Haas presumes that during the fourth, the late migrants' stage, negative network externalities, such as network saturation and 'gatekeepers', who do not allow new migrants to enter into the destination country, come into force and migration flow tend to decline. Finally internal dynamics reach the fifth stage (or in de Haas' terminology, the 'laggards' stage). It could be a rather small amount of people, compared to the early migrants' stage, if they disperse to other destinations due to lack of opportunity structures in the current destination. However, a rate of migrants might stay remain rather high at this stage and form *diasporas* in the destination country.

## Internal dynamics and migration stages in Guernsey

Latvians form possibly the largest ethnic group of the East European migrants in Guernsey. Starting in the mid 1990s, Latvian nationals have typically worked in horticulture, warehouses, cleaning services, care homes for the elderly, factories, hotels, restaurants and cafeterias, various shops and services, construction, and other domains. A few are employed in the education sector, banking and financial sector or even in governmental institutions, and several have established their own businesses. Some Latvian migrants themselves believe five to eight thousand compatriots have worked on the island, replacing each other over 1997-2007. The numbers have declined after 2007, but started climbing again in 2009 with the impact of the severe recession in Latvia. However, despite lack of statistical data and reliable quantitative evidence of this highly mobile Latvian migrant community in Guernsey, consisting some people, who work just for several months, while many travel back and forth in constant transnational shuttle for several years, qualitative approach provides insights enabling us to increase understanding of the causal forces of migration. Thus, the analysis takes a qualitative approach, based on participant observation, 55 in-depth interviews and additional 100 structured interviews in Guernsey, conducted during four phases of fieldwork between January 2010 and July 2011.

By tracing sequential stages of migration on the Guernsey Island, we can yield answers to questions, why people moved to Guernsey instead of other places and which were the most typical migration channels in various periods of time.

### *Pioneers: organised recruitment 1997-2002*

In the mid-1990s Guernsey's employers in the horticulture sector were seeking migrant labour from their previous source, the Island of Madeira, which was rapidly growing into a tourist destination and could no longer provide a sufficient number of workers. Madeira is part of Portugal, which joined the EU in 1986 and as a member state was entitled to generous grants from the EU in order to improve its economy. It also enabled the Island of Madeira to create more domestic workplaces. Guernsey's employers therefore decided to seek and establish contacts with another source

country. At the same time Latvia was on its way to 'return to Europe', undergoing profound restructuring, and had just applied for accession to the EU.

Since 1997, at the first stage, only women were recruited to work in the horticultural sector (greenhouses and related seed-packing factories or individual farms) on the Guernsey Island. Recruitment was carried out through a private agency in Latvia, but was paid for by the Guernsey's employers. The tourism sector (work in hotels and restaurants) was opened for Latvian nationals in 2001. Recruitment for this sector was also organised by the same recruitment agency. Housing and working licences were issued for nine months per year, stipulating constant change-out of migrant workers.

To summarise, the pioneer migrants, who established the trajectory to Guernsey, almost exclusively went there through the channel of a formal recruitment process.

### *Herd effect*

In most of the interviews, regardless the fact, when individuals came to Guernsey for the first time, they stressed that they had not heard about Guernsey before. So migrants went to a destination, where the pioneer migrants had already established a migration route (see the model of the internal dynamics of migration above). The place itself was not important neither during the first stage of migration, when workplaces was proposed by the recruitment agency, nor later, when work on the Guernsey Island was more obtained through social networks and individual direct contacts with employers. Rather, of critical importance were and up to date are the structural opportunities in this place, namely, the possibility to get a job and a comparatively higher wage. Thus, the analysis of this particular case study confirms, that there are several herd effects on various time-space scales. De Haas is right that the herd effect becomes a social structure of the endogenous process of migration as it has causal power to shape migrants' decision, where to search for work abroad. We can also assume that some part of those, who went to Guernsey, would have chosen other destinations, if migration would be a purely individual and rational decision.

Due to regulations of the migration regime, some people returned to Guernsey each year and new migrants continued to join them. It should be highlighted that the hospitality sector was specifically open for Latvian nationals since employers of the horticulture sector already employed migrants from this country and had gained required knowledge, how to manage requirements of immigration and work-permits' system for Latvian nationals. Besides, several employers either openly or implicitly acknowledged in interviews, that they had become familiar with the Latvian culture and that played also an important role to recruit more Latvians. These factors allow us to put forward an assumption that the herd effect reaches beyond the migrants' themselves and include also so called migration industry, namely, recruiters and employers.

*Early adaptors: pre-EU accession stage 2002-2004*

On the eve of joining the EU, recruitment for the horticultural and tourism sectors continued, and various other sectors were also opened up for both men and women. More diverse housing and work permits were also issued for nine months and up to five years. More Latvians started working in the hospitality sector as well as in shops and care homes for the elderly, in warehouses, construction, factories and in other work. Parallel to the agency's work, recruitment through social networks spread widely -- settled Latvians invited their relatives and friends to work in Guernsey.

This migration stage can be the best characterised as rapid growth of migrants due to formal recruitment and emerging migrant networks.

*Early migrants: since Latvia joined the EU: 2004-onwards*

Some of those, who had started working in Guernsey in previous years, continued to travel back and forth, many changed employment sectors several times and climbed the career ladders on the Guernsey Island. To date, recruitment is now very heterogeneous: agency recruitment still continues for the horticultural sector and the fulfilment industry to some extent, social networks are particularly strong channel to obtain work on the island, while individual contacts have also become one of important ways to search for work abroad, due to the information circulating through the cyberspace and social networks. For example, the social internet portal *draugiem.lv* is often used by potential migrants to inquire about work opportunities abroad. According to de Haas model, the migration process from Latvia to Guernsey still could be described as ongoing stage of early migrants.

The Guernsey's case draws our attention to several following aspects of the internal dynamics of migration in this particular place.

Firstly, parallel to rapid growth of migration, negative factors of social capital come into force already at this stage. Some workplaces mainly employed Latvians and those, who were longer on the island, started acting as gatekeepers. Furthermore, as mentioned already before, Guernsey's housing and work permit laws stipulate constant rotation of migrants and those, who could not qualify for longer stay there, are forced to leave the island.

Also, labour migrants themselves in most cases do not want to stay on the island for good, even if they cannot name exact time, when they would like to return to Latvia or search for work in other places. Taken together these aspects should create internal mechanisms of endogamous and contextual factors to curb migration. However, in reality a migrant flow from Latvia did not decline due to two fundamental macro factors: unemployment in Guernsey stayed low, while Latvia's economy contracted rapidly as of 2008, which pushed more people to seek for employment abroad. The established trajectory to Guernsey continued to be a strong endogamous factor for re-acceleration of migration.

Consequently, simultaneous factors of internal dynamics of migration co-exist in the Latvian community on the Guernsey Island. Some people leave due to network saturation and depleted employment or career opportunities for them individually,

while others continuously move back and forth due to place-specific attachments to Guernsey, Latvia and other places. There is also increasing community of Latvians married to local Guernsey people or having other stable connections to the island, which allow them to obtain a permanent residence permit. According to de Haas model, this could be analytically viewed as an emerging Latvian *diaspora* on the island. All in all, individuals may only be in Guernsey for a short time, yet Latvians as a migrant community have already become established in the place and are permanently present and as by 2011, fourteen years after the migration trajectory was established, its dynamics do not indicate the decline trend.

## Conclusions

This model has a strong capacity to describe retrospectively internal dynamics of migration at the meso level. However, as Massey *et al* (1998) suggest, a formation of a migration theory should be build on four fundamental elements: (1) structural forces promoting emigration in areas of origin, (2) structural opportunities and constraints in the destination country, (3) agentic capacity, or, in other words, projections and motives of migrants themselves and their immediate circles, e.g., transnational family, and subsequently, (4) transnational social and economic structures that connect migration in two or more places.

All these elements form not only contextual factors of internal dynamics of migration but also become constitutive parts of it, which is vaguely addressed by de Haas' model.

One possible way to improve this model would be to see it as more flexible in terms of interlinked and constitutive mechanisms of contextual and endogenous factors of migration and multiplicity during the all stages: there are various raises and declines of migration in specific industries and several herd effects due to the demand of migrant workers in Guernsey but also due to recent economic crisis in Latvia.

Secondly, although de Haas deliberately focuses on internal dynamics at the meso level, the Guernsey's case shows that the meso analysis cannot be analytically separated from the macro contexts such as government migration policies, labour markets etc, as they significantly shape migration flows.

In addition, the model by de Haas seems to have overlooked the importance of cultural structures of migration in nowadays Latvia. A wage earned abroad becomes an integral part of a household, and work options in Latvia are no longer considered, even if there are vacancies and in reality it is possible to earn sufficient income. By having a stronger emphasis to the internal dynamics of migration from the viewpoint of destination countries, this model neglects general contextual and endogenous factors in a sending country, which keep pushing the migration forward. If opportunity structures decrease in one destination, migrants would search for work in other places, but it does not curb migration as such from a sending country.

Finally, the model should include also analytical strategies to incorporate agency in terms of migrants' goals and aspirations. Social structures, maintaining the migration

flow are not something external to society as they are created and maintained by social practices and migrants themselves have various stimuli to migrate during the life course and different future orientations that also shape the internal dynamics of migration.

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**Ksenija Ijevleva**<sup>1</sup>

## **MORTGAGE MARKET DEVELOPMENT: CURRENT TRENDS AND CHALLENGES**

### **Abstract**

Bank product marketing is in a mode of evolution. It's developing from common product promotions to refined segmentation strategies.

The author believes Latvian Commercial banks have made great strides in marketing during the past three years, chiefly due to crisis, the Web possibilities, and a variety of delivery channels.

Purpose – This paper aims to investigate how the Latvian commercial banks provided marketing information and the way they strategically used various appeals through their advertising before and during the current financial crisis.

Methodology – Data for this study were collected by analyzing the two Latvian commercial banks marketing strategies and content of marketing activities from 2008 through 2011. Internet marketing and WEB channels are important sources for consumers in the financial marketplace. Although more marketing expenditure might be spent on television advertising or the non-business newspapers and finance magazines, more firms and private customers use WEB any other media form.

**Keywords:** Financial services, Marketing strategy, Commercial banks, Home loan, Internet

### **Introduction**

Consumer confidence has been adversely affected as a result of the global economic slowdown and turbulence in the financial markets all across the world. In this current business scenario, the banking industry has become highly competitive. Bitner (2000, p. 139) note that Information technology (IT) is extensively used in this competitive environment to deliver banking services to the consumers. In fact, rise of information technologies and the internet in particular, have changed the consumption process of retail banking as human-human interactions in service delivery is becoming increasingly redundant.

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Moreover, Parasuraman's (2000, p. 311) study found that so traditional banking or branch banking is increasingly being replaced by the technology-based banking (e.g. usage of ATMs, internet and phone banking). Hence human-human interactions or face-to-face interactions between customers and bank employees are being replaced by interaction of customers with technology. In fact a large number of IT tools are utilized to increase the efficiency and effectiveness of service delivery. With the patterns of consumer behavior changing with the increasing use of technology in the delivery of banking services, there is a need to cultivate customers' confidence in using the tech-based services. This is so because customers may not be ready to avail the tech-based service delivery and there is proof of growing customer frustration while interacting with the technology based service delivery interfaces.

Ganguli (2011, p. 169) argues that since the products offered to the customers of a bank are more or less standardized in nature, banks are feeling an increasing need to differentiate themselves from the competitors on other criteria that can influence customer satisfaction and loyalty. This is so because customer satisfaction and loyalty has been shown to be of utmost importance for firm performance in the long run. In order to increase the customer confidence in the capabilities of a service provider customer satisfaction and customer loyalty are the key factors considered in the existing literature. In this context the importance of technology based service delivery is increasing. The developments in technology have provided the service companies with a weapon which helps them to design and deliver superior services to customers and thus in turn boost their confidence in the service provider. There are several other competitive advantages like entry barrier creation, productivity enhancement and revenue increase which are associated with technology adoption by service companies.

Also Ganguli (2011, p. 169) adds that as a result the perception of customers regarding service quality of technology banking has gained importance because service quality has been shown to be a strong predictor of customer satisfaction and loyalty.

Yanamandram (2010, p. 570) identified: the financial service sector is characterised by highly calculatively committed customers, because the types of services offered are heterogeneous and highly complex, and are characterised by long-term investments. These attributes mean customers have difficulty gaining enough knowledge about the services in order to compare different service provider solutions to defect to another service provider. The immobility of customers is exemplified by the substantial number of claiming to dislike their bank, yet the level of churn is relatively low.

Perera (2010, p. 30) notes that the required marketing policies formulation and implementation should be based on accurate information as the decisions based on inferior data might increase costs and reduce both the quality and quantity of banks' home loan products.

## Methods

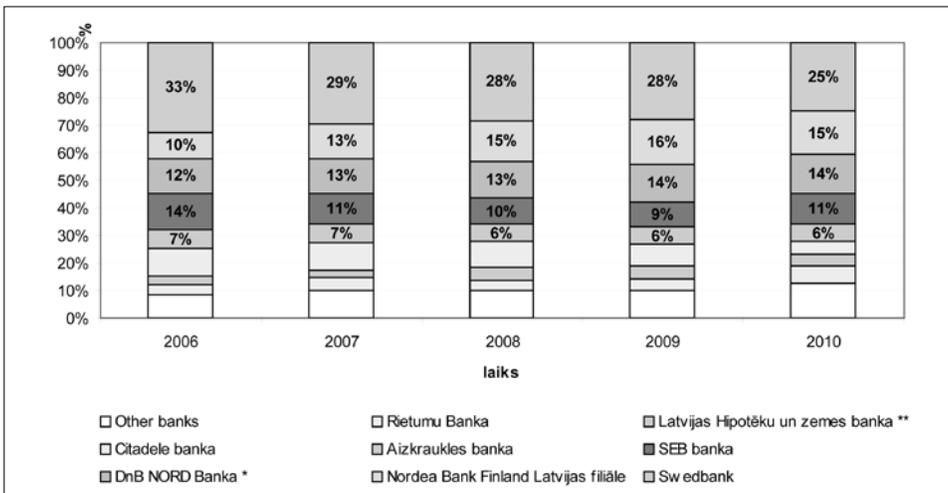
Data for this study were collected by analyzing the marketing strategies and content of national business and finance magazine ads from 2008 through 2011. Business and finance magazines are important sources for consumers in the financial marketplace. Lee (2011, p. 153) suggests that although more marketing expenditure might be spent on television advertising or the Business and finance magazines, more firms and private customers use WEB any other media form. Considering the profiles of strategies content, advertising target audience, delivery channels were chosen banks for this study: *DnB NORD Bank* and *Nordea Bank*.

In the early 2000s, many foreign banks (including *DnB NORD* and *Nordea*) had entered the Latvia banking system, attracted by the opportunities brought about by the boom in the economy resulting from the increased real estate market.

According to the Association of Latvian Commercial Banks statistics in the reporting year the five leaders of assets were *Swedbank*, *SEB Bank*, *Nordea Bank Finland*, *DnB Nord Bana*, *Aizkraukles Bank*; the leaders of deposits were the same banks excepting *DnB Nord Bank* – in its place was *Rietumu Bank*. In the list of leaders of loans were *Swedbank*, *SEB Bank*, *Nordea Bank Finland*, *DnB Nord Bank*, *Latvijas Hipotēku un zemes bank*.

According to the Annual reports of Association of Latvian Commercial Banks the same situation was in mortgage loan market in 2006-2010 years (see Figure 1).

Figure 1. Market share of five largest banks of mortgage loans in 2006-2010 in Latvia



According to the Financial and Capital Market Commission data the last five years the leaders of mortgage loans was *Swedbank*, *Nordea Bank Finland*, *DnB NORD Bank*, *SEB Bank*, *Aizkraukles bank*.

The author concludes that market shares of *Nordea Bank Finland* and *DnB NOR Bank* are approximate. *Swedbank* is not included in the study, because this bank stopped active lending in 2009 – 2010 years.

## Overview of Latvian commercial banks' marketing activities

Bank product marketing is in a mode of evolution. It's developing from common product promotions to refined segmentation strategies.

The author believes Latvian Commercial banks have made great strides in marketing during the past three years, chiefly due to crisis, the Web possibilities, and a variety of delivery channels.

- Overall *Nordea* marketing strategy

As argues Klaus (2006, p. 44) the differentiation strategy of *Nordea* is based on the concept of the personal adviser. The employees have all the information concerning their accounts; enabling the advisers to better serve their clients. *Nordea* would like its employees to differ through their enthusiasm and their accessibility. It practices an internal marketing which fits with its external marketing. *Nordea*, by for example organizing training camps for its workers, considers its staff as internal clients.

- Overall *DnB NOR* marketing strategy

The overall marketing strategy of *DnB NOR* is aligned with the marketing concept proposed by e.g. Kotler as having a customer focused approach. This approach encourages branches to invent own ideas, which makes sense, since they are closest to the customer, and if successful, other branch managers can evaluate these tactics according to the usefulness to their branches.

## Banks' home loan marketing strategy before crisis

Five years ago marketing was more product-focused. Commercial banks have raised the bar in terms of marketing strategically rather than just doing finance product promotions.

Another surveillance: Many banks are turning to complicated segmentation strategies to understand consumers' needs. They're exploring their databases, identifying clients' lifestyle segments, and creating very targeted marketing.

Banks increasingly try to find technology tools to guide them. Marketing customer information file systems are the primary tools banks use to identify their best marketing users.

Banks use such systems to query their own or purchased databases, run statistical models, and create lists of consumer or potential customer likely to need concrete loan products. They use financial services data, demographics, and credit history to identify likely clients and group them into households by address. Those systems also help banks track their marketing success.

For example, *DnB NORD bank* is targeting clients age 25 to 30 who don't have a home loan and who live in Riga, excluding those bank has turned down for a loan in the past two years. Then analysts run the query and identified target households.

*DnB NORD Bank* and *Nordea Bank* started with a new housing loan campaign in 2007 year. The campaign message brought attention at the possibility to decrease the housing loan interest rate by asking for a lower margin rate from another bank.

The marketing strategies lasted for 1.5 year and were addressed to people who had a housing loan with a higher margin and who wished to decrease it, and for those who wanted to increase the loan sum. The offers were attractive to the target group because the clients gave a possibility to save money for a long time.

Up to 2008 autumn the campaign has been very successful for the *DnB NORD Bank* and *Nordea Bank* and the results show that many people in Latvia used this kind of possibility. Hundreds of people contacted the banks.

An important aspect activating the retail banks in Latvia in 2006 – 2008 is the cooperation with real estate agencies. Therefore the banks have co-projects with real estate partners throughout the whole three years.

## Banks' home loan marketing strategy during crisis

The current financial crises in Latvia presented, that households took out risky loans that were pushed by lenders who didn't care about the riskiness of these loans as they would be packaged and sold.

After the heavy fall in economy 2009 the Latvian commercial banks' mortgage credit portfolios are more prudent and in 2011 the changes in credit politics should continue. According to the Worthington's (2011, p. 190) research the financial crisis and the subsequent distrust of the existing banks have created an opportunity for new competitors to enter the market for financial services. Organisations from outside banking could use their trusted brands, their stronger grasp of information technology and their stronger customer service ethos to potentially shake-up the provision of financial services and hence to take business away from the "traditional" players.

So all Latvian commercial banks should direct their marketing steps to reach customers' trust. Banks cannot always have the lowest rate in market. Banks have to differentiate themselves and find new competitive advantages.

The author is examining the mortgage loan market's offers and is resulting that there are two strong participants *DnB Nord* and *Nordea*. According to the author's investigation in 2011 April (Ijevleva, 2011, p. 88) the main factors are interest rate, maturity, loan facility and grace period. Both *DnB Nord* and *Nordea* offer better conditions of these factors as they can allow such lending.

Comparing result with author's investigation in 2008 spring it is clear that all banks establish strictest conditions for loan getting. It is related with banks' fear of risks and with wish to reduce costs and accumulate the money for unsafety credits.

There is no war for any clients in the mortgage loan market. There is no more aggressive policy using lowest interest rates. Banks work with long-term reputation and thinking about safety.

For example, *DnB NORD Bank* offers to secure interest rate payments:

Economy (collared) dwelling loan subject to hedged floating interest rate within certain limits will guarantee to clients secure and predictable interest payments regardless of changes on financial markets, and a chance to project long-term expenses.

Economy dwelling loan is unique, as it sets out both cap and floor interest rates: Clients will not pay more, and due interest payments will not exceed the pre-agreed cap rate in case the rates on financial markets get over the set ceiling.

According to the information from *DnB NORD Bank's* home page borrowers will pay less and save money in case the interest rates fall (down to the pre-agreed floor). Under the present circumstances floor rate is particularly good, as it probably has reached its lowest point, whereas increase in Euribor will bring along increase of the floor level as well.

Also in order to create long-term reputation *DnB NORD Bank* on regular basis conducts various surveys, polls and reviews addressing live issues that are of particular interest to the general public in order to provide everyone with an opportunity to follow up actualities on financial markets both locally and globally, find out about the expected development trends in economy as well as familiarize themselves with expert opinions and forecasts.

Every week financial experts of *DnB NORD Bank* prepare market reviews highlighting the most important news of the week as well as pointing out to the further development trends: "Baltic Rim Economies Weekly" – prepared by the group of Economic Survey of *DnB NORD* - accessible in English.

Also *DnB NORD Bank's* home page contains information about its activity as publications: on monthly basis is published the survey conducted by *DnB NORD Bank* and called "DnB NORD Latvian barometer", representing the very first long-term survey of public sentiments and actual events in Latvia.

The one of ways of home loan indirect marketing is WEB project [www.jaunsmajoklis.lv](http://www.jaunsmajoklis.lv) that helps to find a home in primarily real estate market.

In order to be close to their customers *DnB NORD Bank* supports such WEB social projects as [www.nekrize.lv](http://www.nekrize.lv) and [www.izglabsim.lv](http://www.izglabsim.lv). The first was created to explain the economic processes and help people to overcome the crisis. And the second project is referred to save environment and ecology.

*Nordea Bank* tries to reach customers' trust too. As one of advantages is savings from mortgage loan: Credit is applied grace period of 6 months. 6 months fixed amount of money the next loan payment of principal amount with periodic payments should be directed to current or savings account opened for this purpose. Loan repayment period is not extended, but the grace period, the unpaid principal amount of the offset the remainder of the repayment term (slightly increasing the monthly payment).

## Market segmentation

After identifying a key consumer segment, some commercial banks use Marketing customer information file systems to generate personalized direct mail pieces. And then clients are developed a series of home loan marketing direct mail pieces. The project segmented clients by the types of houses they thought they'd be interested in. So young person might receive a personalized piece picturing a flat that cost less than 35000 LVL including home loan offer with floated interest rate, while an older person might get a piece showing a house that cost 120000 LVL including home loan offer with fixed interest rate.

*Nordea Bank Finland* and *DnB Nord Bank* also download client information from a Marketing customer information file systems to their e-mail systems. They're combining member segmentation and e-marketing. For example, one bank can identify five consumer segments. One will be driven by the lowest interest rate, another by the lowest fee – whatever the members' propensity is. The bank sent a different home loan offer to each client group, targeted to its likely buying behavior.

Also now people are looking at channel management, integrated marketing through electronic channels such as home banking programs, voice response units, automated teller machines [ATMs], and kiosks. It's the next step in the evolution of target marketing.

When a client uses an ATM or other electronic channel, a message is transmitted to the banks' MCIF, which identifies its marketing profile. The screen displays an offer designed to appeal to client with an appropriate rate. With direct mail and other activities, customer receives messages at times when they're not necessarily interested in doing business. But if they're logging into home banking, their mindset is on financial services.

## Innovative marketing

Some examples:

Indirect marketing, in which banks partner with companies to get referrals. For mortgages, banks might partner with a realty company. The partners list each other's logos on their Web sites and refer members to each other. Some banks even locate loan officers in realty offices to handle mortgage financing on the spot.

If the bank and real estate broking operations were better at following up potential customers at home viewings, banks could dramatically increase the number of mortgage customers.

More than ten thousand people will attend home viewings this year in Latvia. These are people who are searching for their dream home. They may not buy a home there and then, but they will, sometime in the future.

These are "ripe" mortgage customers, people who are positive to having a talk with an adviser from banks – if they were asked. In according to the State Unified Computerised Land Register statistics last 2010 year, sold 35535 real estates in

Latvia. If we assume that 50 per cent of all those who attend a real estate viewing are potential mortgage customers for bank, the potential is considerable.

The author investigated a unpublished material of DnB NORD and concluded that everyone who attends a home viewing registers their details on a viewing list. These lists are delivered to the bank which then follows up these customers. At some places, the cooperation between the bank and our real estate brokers is exemplary, at other places, it is, unfortunately, not good enough. Banks must recognise that they must work closer together – between the bank and real estate broking operations. Banks must implement efficient processes and learn from those who succeed in this area.

People at home viewings will often say “yes please” if they are offered a mortgage on good terms. Therefore, the bank must be there, early on in the process and enter into a dialogue with them. Bank cannot contact a potential customer several days or weeks after they have been at a viewing. Customers must be contacted right away.

Combining education with marketing. Banks are offering first-time home buyer seminars, one hosts a weekly radio show with other vendors such as an appraiser and a real estate agent, and another has developed a mortgage booklet that walks borrowers through the process of finding the best deal. It doesn't just discuss credit union products. These strategies engender member goodwill while raising awareness of banks' loan offerings.

Regional pricing, in which banks customize loan prices for different cities based on market research.

An online lending decisioning package, a consulting system that delivers a bank's product message clearly and consistently while it asks members questions and helps them decide what type of loan they need.

Relationship pricing, which offers clients better rates if they have multiple services with the bank.

Open-end loan agreements. Banks will ask customers to fill out a loan application when they join the bank, even if they aren't looking for loans at that time. But when they do ask, they'll be approved almost instantly. Clients are used to instant response on the Web. They don't want to wait for loan approval.

## Results

This study investigated how the two Latvian commercial banks changed the way they provided marketing strategies and the way they used various appeals through their activities before and during the financial crisis. The results of this study showed three significant findings:

- because of the economic struggle, there was a significant decline across the two periods in the total number of banks' marketing activities;
- the economic crisis led to a significant increase in the use of Internet message strategies;

- financial value and atmospheric appeals were predominant after the crisis. However, each bank appeals in a different way.

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Larisa Naumova<sup>1</sup>

## PUBLIC PROCUREMENTS AS A EUROPEAN INTEGRATION INDICATOR

### Abstract

European integration has proceeded rapidly over recent decades and nowadays European integration has primarily happened through the European Union. Integration involves a number of dimensions such as economic, social, cultural, educational, political and legal. Public administration in daily routine with public procurements can influence European integration through the economic integration and creation an environment that supports cross-border competition and cross-border procurements.

This article summarises literature and other sources collected in connection with cross-border procurements and different aspects of European integration, analyses usage of cross-border public procurements in the Member States of the European Union in comparison with Latvia and identifies possible solutions to a closer economic integration. The article is based on literature review and a study of statistical information from the European Commission and Latvian Procurement Monitoring Bureau.

**Keywords:** cross-border competition, economic integration, public procurement

### 1. Introduction

Integration involves a number of dimensions from the economic, social, cultural, educational, political and legal realms. European integration is not an isolated process and it is not an objective in itself; it is a tool for reaching higher objectives – economic welfare, peace and security, democracy and human rights (Molle, 2006, p. 4).

Integration concerns complicated phenomena and refers to a very widespread field (Council of Europe, 1997, p. 10), which can be described by different types of indicators and can be used as a tool for (Niessen et al., 2009, p. 5):

- Quantifying and qualifying integration processes;
- Summarising complicated integration policies;
- Monitoring development and trends and measuring progress;

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- Setting targets and benchmarks for integration processes and policies;
- Identifying unintended impacts of laws, policies and practices;
- Identifying actors with an impact on the realisation of integration;
- Revealing whether the obligations of actors are met;
- Giving early warning of potential distractions;
- Prompting preventive action;
- Enhancing social consensus on trade-offs in case of resource constraints;
- Exposing issues that have been neglected or silenced.

European integration based on two dimensions of negative vs. positive integration and strong vs. weak integration, that lead to four different types of European integration (see Figure 1) (Vink, 2002):

*Figure 1. A matrix of European integration.*

	<b>Negative</b> (Deregulatory)	<b>Positive</b> (Regulatory)
<b>Strong</b> (binding)		
<b>Weak</b> (non-binding)		

*Source:* Vink, 2002

The negative integration denotes the removal of discrimination in national economic rules and policies under joint surveillance, but positive integration refers to the transfer to common institutions, or the exercise, of at least some power. In practise, negative and positive integration will go together. By combination of negative and positive integration was removed European integration barrier – discrimination in public procurement (Pelkmans, 2006, p. 7, 99).

The core principle of European integration is the creation of a single market which consists of the free movement of products (goods and services) and production factors (labour and capital) (Beryl, 2009, p. 2). International economic integration has proceeded rapidly over recent decades and nowadays European integration happens primarily through the European Union. Although the importance of economic integration changes over time (before the economic crisis, during the crisis, following the crisis and in the long term) (Monti, 2010, p. 7), public sectors in daily routine with public procurements can influence European integration through the economic integration and creation an environment that supports cross-border competition and cross-border procurements. Cross-border procurements metrics can be used as European integration indicators.

Cross-border procurements are divided into two groups (GHK, 2010, p. 14):

- **Direct cross-border procurement:** the company that granted the right of entering into a contract is located in a different country than the contracting authority;
- **Indirect cross-border procurement:** the company that was granted the right of entering into a contract is located in the same country as the contracting authority, but the main responsibility for the delivery of the contract lies with a company based abroad (e.g. local subsidiaries, local dealers or a domestic firm imports goods in order to supply them to a contracting authority). Foreign bidders can submit offers in consortia with local firms (European Commission, 2010, p. 16).

Direct cross-border procurement statistics can be easily indicated by comparing the country of the public administration and winner of public contracts, but it is usually not possible to indicate indirect cross-border procurements; therefore only direct cross-border procurements are discussed in this article.

This article summarises literature and other sources collected in connection with cross-border procurements and different aspects of European integration, analyses usage of cross-border public procurements in the Member States of the European Union in comparison with Latvia and identifies possible solutions to a closer economic integration.

The article is based on literature review and a study of statistical information from the European Commission and Latvian Procurement Monitoring Bureau.

## 2. Public procurements across national boundaries in the European Union

Gross domestic product (GDP) are the total value of goods and services produced in a country by the factors of production located in that country, regardless of who own them (An Encyclopaedia of Macroeconomics, 2002, p. 308). One of the factors that are included in GDP is government spending (the sum of government expenditures on final goods and services); therefore public procurements are an essential part of every country economics. Furthermore, public procurements are an integral part of the concept of economic integration (Bovis, C., 2006, p. 599).

According to the information by the Commission of the European Communities, 16% of GDP of the European Union accounted for public procurements spending in 2002 (A report on the functioning ..., 2002, p. 2). However, in 2009 total expenditure on works, goods and services was estimated at around 19.4% of GDP of the 27 member countries of the European Union (EU 27) (Public Procurement Indicators, 2009, p. 10).

According to the information by Tenders Electronic Daily database (TED, <http://ted.europa.eu/>), direct cross-border procurements are between 1.2-1.5% of the number of awards, however, in some Member States direct cross-border procurements account for more than 10% (see Table 1):

*Table 1. Number of cross-border procurements, % of the number of awards (2008-2009).*

Country	2009	2008	↑/↓
Austria	5.61%	4.84%	↑
Belgium	4.29%	4.26%	↑
Bulgaria	1.36%	1.95%	↓
Cyprus	8.68%	7.31%	↑
Czech Republic	1.07%	2.39%	↓
Germany	1.44%	1.54%	↓
Great Britain	1.18%	1.55%	↓
Denmark	4.37%	3.18%	↑
Estonia	7.10%	7.20%	↓
Finland	1.27%	1.75%	↓
France	0.59%	0.72%	↓
Greece	1.87%	1.70%	↑
Hungary	1.06%	1.91%	↓
Italy	0.82%	1.35%	↓
Ireland	13.22%	17.66%	↓
Latvia	1.34%	3.31%	↓
Lithuania	2.26%	2.35%	↓
Luxembourg	12.24%	15.07%	↓
Malta	18.18%	14.17%	↑
Netherlands	2.73%	2.78%	↓
Poland	1.73%	4.41%	↓
Portugal	0.77%	0.95%	↓
Romania	1.94%	2.27%	↓
Slovak Republic	4.21%	4.11%	↑
Slovenia	1.18%	1.73%	↓
Spain	0.55%	0.86%	↓
Sweden	2.27%	2.22%	↑
Average:	1.21%	1,49%	↓

Source: European Commission, 2010, p. 17

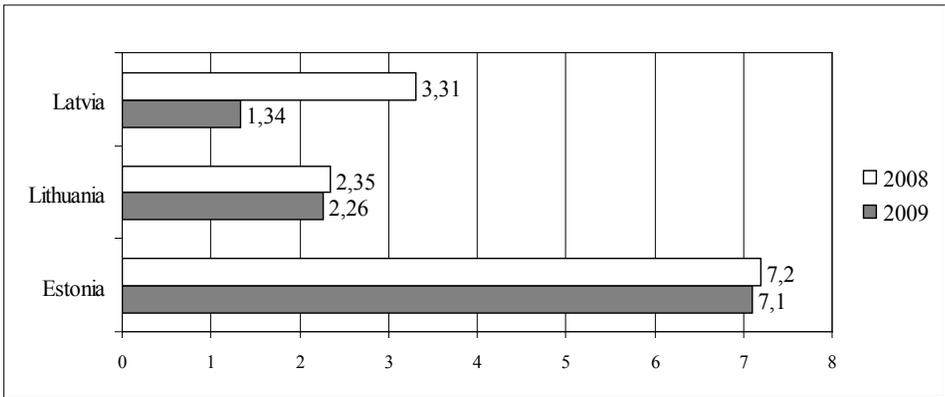
The table above shows that only in 8 countries the numbers of cross-border procurements increased in 2009:

- In Austria, Belgium, Greece, the Slovak Republic and Sweden the number of cross-border procurements increased by less than 1%;
- The number of cross-border procurements increased by more than 1% in Cyprus (1.37%) and Denmark (1.19%);
- In Malta the number of cross-border procurements jumped by more than 4%.

Indirect cross-border procurements represent 30% of European public procurements (European Commission, 2004, p. 2), while direct cross-border procurements in 2008 correspond to 1.49% of all public contracts (1.29% in 2009 due to global economic crisis).

In Latvia, similarly to other Baltic States - Estonia and Lithuania, in 2009 the numbers of cross-border procurements decreased (see Figure 2):

Figure 2. Number of cross-border procurements in the Baltic States, % of the number of awards (2008-2009).



Source: European Commission, 2010, p. 17

The figure above shows that in Estonia and Lithuania the number of cross-border procurements decreased by less than 0.1%, but in Latvia the number crashed to almost 2%.

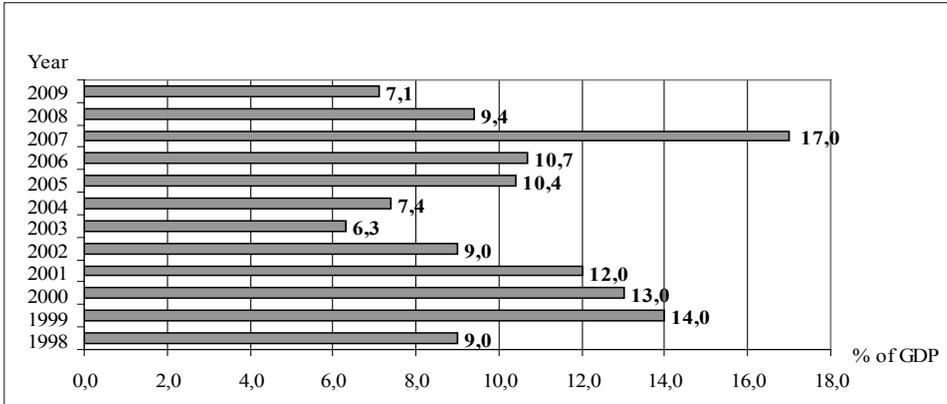
Numbers of cross-border procurements vary in different countries. Integration amount across national boundaries is affected by (GHK, 2010, p. 15):

- The size of the country (the size of its internal market) – in Malta, Luxembourg or Ireland it reaches 14 to 18%, but for large countries such as France, Spain or Poland, this proportion is less than 1%;
- Cross-border procurements also tend to be associated with the comparatively high importance of local (decentralised) procurements (for example, France and Germany).

### 3. Public procurements across national boundaries in Latvia

In Latvia total expenditures by public administration ranged from 6.3% in 2003 to 17% in 2007 of Latvia's Gross Domestic Product (see Figure 3):

Figure 3. Total price of procurement contracts, % of Latvia's GDP (1998 – 2009).



Source: Latvijas Iepirkumu uzraudzības birojs, 2010

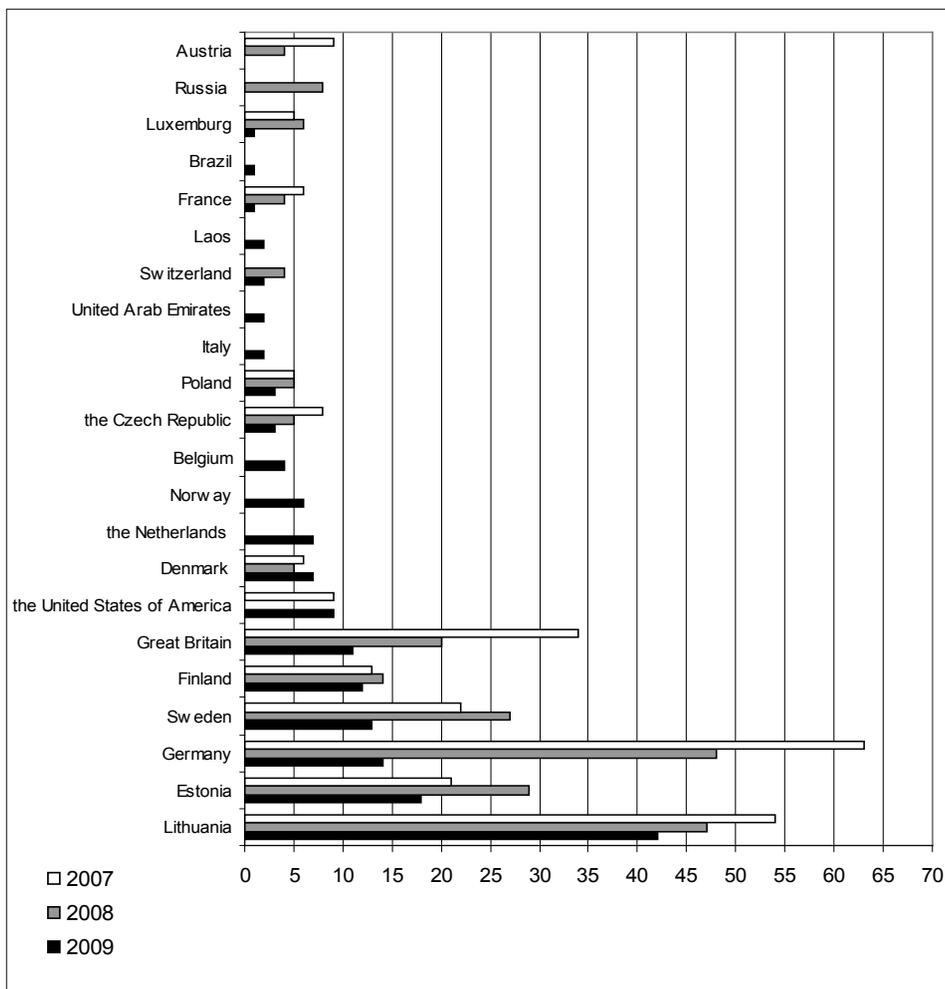
The figure above shows that in 2009 total public procurements expenditure in Latvia, due to national budget cuts, decreased by 7.1% of GDP, which is less than last year and even less than in 2006 and 2005.

Similarly to other countries in the European Union, Latvia tends to favour domestic companies in the awarding of government contracts. According to statistical data, public administration of Latvia (government as well as local authorities), granted the right of entering into a contract to companies from Latvia from 96.69% in 2008 to 98.66% in 2009 of all the published notices about the granted right of entering into contracts (not including subsidiaries of foreign companies in Latvia):

- In 2008 in Latvia there were 17,060 notices published in total about granting the right of entering into contracts, including 3.31% companies from foreign countries (1.82% higher than in the European Union on average);
- In 2009 in Latvia there were 15,870 notices published in total about granting the right of entering into contracts, including only 1.34% companies from foreign countries (0.13% higher than in the European Union on average).

The figure below shows that the main suppliers from foreign countries in the period from 2007 - 2009 have been Lithuania, Estonia, Germany, Sweden, Finland and Great Britain. Lithuania, Estonia, Germany and Sweden belong to top 5 in all years, but Great Britain succeeds in 2009, and Finland in 2007 and 2008 (see Figure 4).

Figure 4. Number of the granted right of entering into contracts, by countries (2007 – 2009).



Source: Latvijas Iepirkumu uzraudzības birojs, 2008, pp. 28; 2009, pp. 37; 2010, p. 51

Germany has been an observable partner in Latvia, especially in 2007 and 2008, when German companies were granted the right of entering into contracts more than 20% of all contracts from foreign countries. Even more, in 2008 German companies were the leaders bidding on foreign markets, winning public contracts in other Member States for a value of 3.5 billion EUR (GHK, 2010, p. 16).

Latvia shares borders with four countries – Belarus, Estonia, Lithuania and Russia, but economic integration in public administration is only with three countries - Estonia, Lithuania and Russia.

According to statistical data, the right of entering into a contract granted companies from Estonia was approximately less than a half of the number of total

contracts from Lithuania, but with Russian companies the cooperation was only in 2008. Similarly to other countries in the European Union, Latvia tends to focus more on neighbouring countries in direct cross-border public procurements. In the majority of Member States, neighbouring countries account for more than 50% of the direct cross-border revenues of the companies from public procurement (GHK, 2010, p. 19).

#### 4. Conclusions and opportunities

One of the factors included in gross domestic product is government spending (the sum of government expenditures on final goods and services); therefore public procurements are an essential part of every country economics.

Procurements across national boundaries are called 'cross-border procurements' and can be divided into two groups: direct cross-border procurements and indirect cross-border procurements. Only direct cross-border procurements can be easily indicated in statistics (comparing the country of the public administration and the winner of public contracts). This is the reason why only direct cross-border procurements have been discussed in this article.

Integration involves a number of dimensions from the economic, social, cultural, educational, political and legal realms. European integration is a political priority and a key strategic objective for Europe. Numbers of direct cross-border procurements vary in different countries. Cross-border procurements metrics can be used as integration indicators. According to statistical data, the amount of integration across national boundaries is affected by two factors: the size of the country and importance of local governments.

Although economic integration motivated companies to become actors in global economic competition, companies of the European Union in direct cross-border public procurements tend to focus on neighbouring countries.

Cross-border procurements open market and the country economic benefits by substantial savings to the public sector rationalize and allocate more efficiently human and capital resources, and increase productivity and competitiveness of the European firms (Bovis C., 2010, pp. 85-96). Foreign providers can also stimulate domestic industry and promote innovation. On the other hand, as a result, in economic integration, many domestic companies may lose business to competitors in other countries that can provide higher quality and services at a lower cost.

Usage of cross-border procurements in public administration is still insufficient and considerably drops behind the private sector. Furthermore, European economics integration through cross-border procurements today exists in the theory, but in practise there are still many problems and barriers, therefore the full potential of the European integration through cross-border procurements has not yet been delivered. In particular, it does not really work for the small and medium sized enterprises.

A typical European company is a small and medium sized enterprise, and nine tenths of such enterprises consist of the ones with less than 10 employees. The 20

millions of micro-enterprises and small and medium sized enterprises of the European Union are the basis of European economy that generates an increasing share of value added and give a crucial contribution to employment generation; but only 8% of small and medium sized enterprises engage in cross-border procurements, and only about 5% have set up subsidiaries or joint ventures abroad (Monti, 2010, pp. 42-43).

Reasons why governments through hidden administrative rules and practices try to favour domestic companies are employment creation, protection of infant industries and fostering of economically underdeveloped regions.

For a successful European integration through cross-border procurements it is necessary not only to set a goal for economic integration and approve directives (legislation), but share this policy in practise by all 27 Member States. Public administration needs to create business environment that is suitable for the needs of small and medium sized enterprises and promote in cross-border public procurements using different forms of cooperation (subsidiary, joint venture partner, distributor or sub-contractor located in the relevant country).

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Romans Putans<sup>1</sup>

## YOUTH POLICY IN NATIONAL STRATEGIC PLANNING IN BALTIC STATES

### Abstract

Public administrations use national strategic planning to set the state's long-term vision, goals, prioritize development areas, directions and general tasks for future development in order to ensure state's sustainability. Another important precondition for state's sustainability is the society, the people. One of the strategically important parts of the society in the perspective of future development, creation of added value and state's physical and economic sustainability is youth. In order to educate and engage young people thus giving a contribution to state's future development and sustainability, public administration implements the youth policy, which is a service to the clients – the youth. Although the main objective of national strategic planning and national youth policy is to improve the welfare and the life quality of young people, in specific terms of development, as every organization, also public administration must ensure the sustainability of not only the impact, but also the process – the implementers of these policies must think of how and who will implement them in long-term future.

On one hand, Adam Smith's "invisible hand" in interaction between the supply and demand (including public administration labour market) most probably is still working at full force. On the other hand, demographic statistics in Baltic States, in particular in Latvia and Lithuania, reveal low birth rates, high emigration rates and the much related economic statistics with high unemployment, debt and low income. Taking into account the statistics and the overall public attitude toward public administration, the answer to the abovementioned question about youth involvement in public administration development might seem debatable.

The paper will review Youth policies including their elements that are integrated in national strategic planning documents in Baltic States and will partly compare whether and how the government leaders' expectations as well as the goals and visions set in national strategic development documents, including youth policy documents, are in line with youth's plans for participation in public administration development.

**Keywords:** strategic planning, youth policy, public administration, customer relationship, Baltic States

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## Client and customer service in national strategic planning

What constitutes a 'client' in the public sector is a problematic issue, complicated by the fact that there are many terms dealing with the same phenomena, mostly derived from the private sector, such as customers, users, buyers or consumers, each with many contending definitions.<sup>2</sup> There are also different names and titles used for describing public administration actions which objective is give benefits to individuals. Most commonly used terms are public service, social service, government service, and public administration service. Public services are material or nonmaterial benefits defined in legal acts that are offered to individuals by government institution in order to ensure society's need for receiving these services<sup>3</sup>. According to the author – client of public administration is everybody, every person of society, who receives at least one service given by any of public administration institutions, like, social security, state border control and protection and many others.

Government reformers urge the adoption of a private-sector-style "customer focus," but some critics see it as inappropriate to the public sector, in particular because it devalues citizenship. Many public sector organization-client interactions differ from the private-sector customer transactions. One of the features of the customer model – the notion of exchange – can be broadened in a way that emphasizes the importance of administrators' responsiveness to their publics. In a social-exchange perspective, government organizations need things from service recipients, such as cooperation and compliance, which are vital for effective organizational performance; eliciting those things necessitates meeting not only people's material needs but also their symbolic and normative ones. Engaging in these different forms of exchange with clients is not necessarily inconsistent with an active citizenship model.<sup>4</sup>

Although public administration's strategic planning in terms of customer relations management is as important as it is in private sector, but the private business sector in contradiction to public administration for longer time already admits that the most important is the client but not profit, quality or other business matters. Both quality and profit depend on client. Client defines these matters. Ironic, but public administration has to cover everybody's needs for public administration services while the private sector is willing to do so and may cover the specific part of society and their needs according to company's specialization. In recent decades

<sup>2</sup> Alford, J. Public value from co-production by clients. New Zealand School of Government. May 2009. <http://ips.ac.nz/events/downloads/2009/Building%20the%20Public%20-%20Spring%20Series/ALFORD%20-%20Client%20coproducers.pdf>

<sup>3</sup> "State and local government's services electronization model. Guidelines for implementation of public services electronization project", The Secretariat of the Special Assignments Minister for Electronic Government Affairs, Riga, 2006. <http://www.eps.gov.lv/files/ELM.EPAK.NOD.EMODEL.Vadlinijas.1.1.0.2006.07.31.doc>

<sup>4</sup> Alford, J. (2002), 'Defining the client in the public sector: a social-exchange perspective', *Public Administration Review*, 62, 3, 337–346. Available at <http://onlinelibrary.wiley.com/doi/10.1111/1540-6210.00183/abstract;jsessionid=FBEF2624C02E7E37181544E94B421EC0.d03t02>

similar customer relationship ideas from private sector have come also in public administration. A new public administration culture is being created, where in the centre of attention is recipient of public services – the client. Public institutions are implementing the principles of private business, focusing more on cooperation, cost reduction and achievement of results. Public administration is becoming more flexible and transparent meeting the needs of customer instead of bureaucracy. Cooperation between the client and public administration has to become as simple as possible in terms of diminishing administrative burden on individuals and businesses in order to save customers' time and money and support development of businesses. Importance of the client in public administration recently has been even more highlighted in the objectives of national and EU strategic documents that underline expanding the availability of public services. A lot of public administrations in Europe are increasingly focusing on particular strategic objective – to become such an organization so that clients' consider them to be client-orientated. Main activities for obtaining the mentioned objective are – simplification of legal acts, simplification of meeting state liabilities, formation of call centres, designing and perfection of web pages, particular attitude and specific information to new clients, and implementation of electronic working environment and electronic services in order to ensure quick and convenient information and document exchange both inside the organization and between the public institution and client<sup>5</sup>.

Different client researches about customer service quality, client needs and satisfaction are a need of an organization to maintain a link with clients and identify their needs, which the very client may possibly not be aware of. Many organizations, including public administration institutions, already for some time in the past have declared and also in many works have manifested its client-oriented attitude. Organizations are focusing on their clients and would be pleased to see them happy. Therefore they need to clarify what is the main thing for the clients in co-operation with organization – simple language and pleasant attitude, client training, employees' competence, etc. Some clients may possibly feel fear of or take a distance in relationship with specific public administration institutions, as they are not aware that these institutions are simply a tool in the public administration, which performs government tasks. Of course, the cases are different and people are different, and much work should still be contributed both in public administration, as well as in society in order to reach a mutually beneficial and harmonic co-operation. The explorations and researches about customer relationship are organizations' step towards co-operation with clients.

There is a simple three steps example from life – first: “if I suddenly don't like the grocery I'm usually shopping, I change it to another one, but the shop's manager doesn't sorrow much – they still have other clients; second: if I suddenly don't like the bank I usually use, I change it to another one, but the bank's manager is fairly

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<sup>5</sup> G.Schneider, H. auf der Springe “Effects of Change Management in National Tax Authorities on Human-Resources Management”, magazine of the Intra-European Organisation of Tax Administrations “Tax Tribune”, Issuer: Kompkonzult KFT. Budapest, Hungary, 2005.

sorrowful, because he or she knows that losing a client is slowdown that at the end leads to bankruptcy; and third: if suddenly I'm not satisfied with the services given to me by the government and its institutions, I change the service provider just like shop or bank, using the opportunity of open EU market, and move to another country, open my business and pay my taxes there”.

Customer relationship and effective strategic planning is remarkably topical and still improvable process that is being recognized as good practice of management and at the same time it also makes healthy competition in public administration and private business sector in Europe. A lot of public and private sector institutions and companies are very interested in exploration of new ideas and research methods and results in this field. Researching, developing and discovering questions of customer relationship and effective strategic planning, and rapid implementation of solutions have become a true necessity for progress of social, political, and economical processes.

## Importance of youth

Youth represents a specific, large and strategically important group of state clients – receivers of state services. Youth has always been an important part of the society. „Youth is our future” is a slogan we can hear quite often in different discussions. Although, for objective reasons, youth – being the future – is not in the very centre of focus of public administration, nevertheless it is given a significantly important part of public administration resources, including, personnel, money, attention, time, place, legal acts and many other.

On one hand the national youth policy's direct aim and main objective is to improve the life quality of young people. A national youth policy is a declaration of the commitment a country gives to its young people.<sup>6</sup> In the field of youth, the European Commission has a double mission: to develop a framework for political cooperation and to manage the Youth in Action programme.<sup>7</sup> Implementation process of youth policy maintains three dimensions – coordination of youth policy, youth participation and useful utilization of leisure time, youth socio-economic development, competitiveness and inclusion in society – which are connected and affects each other.<sup>8</sup> Although the very role of youth policy must not be the development of public administration itself, the development of youth, of course, give benefits back to public

<sup>6</sup> The seminar “Youth Policy – Here and now” report. Ministry of Youth in Egypt, the Council of Europe, the Youth Partnership with the European Commission, the Swedish National Board for Youth Affairs and the Swedish Institute. p.7, 2005. Available at <http://www.swedenabroad.com/SelectImage/54130/YouthPolicyReportRevised.pdf>

<sup>7</sup> Mission of the European Commission Education and Culture DG Youth Policy. Available at [http://ec.europa.eu/youth/who-we-are/doc134\\_en.htm](http://ec.europa.eu/youth/who-we-are/doc134_en.htm). Last update: 08 August 2011.

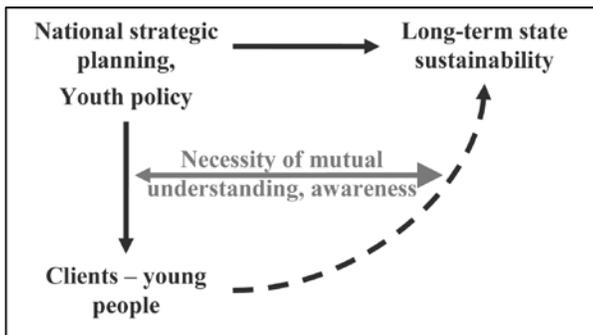
<sup>8</sup> Latvian Youth Policy Forum. Available at <http://www.jaunatneslietas.lv/page/959>. Last update: 09.09.2011

administration indirectly, i.e., through nations sustainability, welfare, socio-economic development, cultural and intellectual growth, competitiveness and other factors.

On the other hand, in specific terms of development, as every organization, also public administration must ensure its own sustainability, its growth in performance. It is important that a government policy-makers and performers have a clear position on the involvement of younger generations. This will make it possible to develop an appropriate youth policy planning documents. It is also important to be aware weather the expectations contained in stand of the current government leaders and youth policy planning documents are in line with young people stands. This, in its turn, will enable appropriate and clear mutual understanding, thereby promoting the participation of civil society and more efficient public administration, increasing its membership and customer satisfaction.

The overall long-term goal of national strategic planning performed by government is nation`s welfare and sustainability. Conceptual national strategic plans include also youth affairs, recognizing young people as an essential part of society and their involvement as a crucial precondition of development of the society. In terms of customer relationship in youth policy, young people are the main target audience – the clients – of national youth policy and youth affair aspects of national strategic planning. If the target audience of youth policy “buys” the service well, the service provider – the government – may hope for clients` loyalty, i.e., in this case for involvement of young people in civic and public development, which in its turn lead to a country`s sustainability. Another, very important precondition of a successful interaction of national strategic planning, including youth policy, public customer service and the common goal – long-term state sustainability, is a mutual understanding and awareness of two-sided reversible process – customer relationship from government to clients (youth in this case) and youth involvement in development of state sustainability through public and civil life (see Figure 1). It is important for government to know and understand their clients, as well as it is important for young people to understand the government plans. Although, this interaction requires the involvement of both, the government and ther clients – youth, still the government holds more responsibility towards successful outcome of this process.

Figure 1. Interaction of national strategic planning, client service and state sustainability



Source – author.

Here are various different perspectives of the role of national youth policy:

- 1) Youth policy is also a part of national and supranational strategic planning leading to a sustainability and welfare of the state.
- 2) Youth policy is also an important part when we think of human resource management in a government institutions. The better youth policy is being developed and delivered in a country the better will be future co-workers of government institutions. In one or another way we can connect the existing and upcoming times, and say that main role players in the future, whatever the role, will be those people who are now considered as youth. Many big organizations all over the world, including public institutions, make their own future workforce.

A good example is the German Federal Bank (*Deutsche Bundesbank*) which has its training centre and professional college, where future experts and employees of the bank are being prepared. Unlike other higher education institutions that prepare specialists for labour market in many different fields, German Federal Bank has contract with every student guaranteeing them to offer a job after successful graduation, however if a student fails in final exams, the money invested in studies must be reimbursed. But in this case many other banking and financial institutions, knowing the high quality of knowledge and skills deliver to students, are willing to take over unsuccessful students and pay their debt to German Federal Bank training centre and professional college.

The National State Tax Service University of Ukraine is another good example where future tax specialists are being prepared.

In the same manner Riga Technical University has The International Business and Customs Institute. Since 1994, the institute has had good cooperation in terms of education with the State Revenue Service (SRS), the National Customs Board, the National Tax Board as well as regional SRS offices. To ensure quality of education Department of Tax and Customs is also actively involving highly-qualified SRS customs and tax specialists having solid experience in organisation and administration of customs and taxes. The institute also collaborates with the World Customs Organisation, educational and research institutions of customs education and training.<sup>9</sup> Every year SRS takes many students for internships in different areas of tax and customs administration work and many students after graduation start to work full time in SRS. Existing workers of SRS improves their skills and knowledge in Riga Technical University International Business and Customs Institute, too.

Bearing in mind that state's tax and customs administration relatively ensures the existence of the state by protecting fair business environment that drives the economy and by providing money flow into the state budget, it is very reasonable to put effort in its sustainable development.

<sup>9</sup> The International Business and Customs Institute; [http://www.sesmi.lv/?page\\_id=46](http://www.sesmi.lv/?page_id=46). April 8, 2011.

- 3) Youth is a considerably big group of government service target audience – clients. Customer relations management system also comes into force when developing and implementing youth policy. It is important to think and be aware of whether the expectations contained in stand of the current government leaders and youth policy planning documents are in line with intentions of young people. In this context we can relate to youth as our future only if it gives confidence for sustainable development, i.e., if the young people in the country show willingness or at least do not deny the commitment to participate in country's development in one or another way.
- 4) Sustainable development. Taking into account all previous perspectives together we can say that planning youth policy as a part of national strategic planning, educating them as our next co-workers and leaders, treating youth and satisfying them as clients and taking into account their visions, makes it very relevant to sustainable development of a country and the alternative costs for any of these perspectives related to youth, i.e., not paying enough attention, can lead to even bigger changes, including possible crashes in our socio-economic and politic environment than other relatively important existing challenges such as financial stability, tax policy, health system reform and others.

## Youth policy in Baltic States

Although youth policies in Baltic States are separate policies areas, they are also integrated in overall country's strategic planning and other policies areas. In comparison, the Denmark government does not have separate youth policy, but youth affairs are fully integrated in Denmark's overall strategic planning and other policies areas. The Danish Government has not instituted a specific youth policy with a certain defined purpose. Every sector has its own field of responsibility regarding measures and policy for young people. However, the individual sectors dealing with young people all support initiatives that create a foundation or forming young people who are capable of leading independent lives and of putting these lives into a broader perspective and, at the same time, helping these young people become active, democratic citizens who can participate constructively in the development of society, while also giving them real influence and responsibility in matters that concern them. The youth policy in Denmark begins with the Danish attitude towards childhood education allowing the individual child a great deal of latitude but also giving them the responsibility for his or her own education and participation, thus laying down the foundation for a democratic attitude. This attitude is nurtured throughout the educational system, enabling young people to take a stand and make their own decisions.<sup>10</sup>

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<sup>10</sup> Haarder B. Minister of Education and Youth. The Danish democracy is built upon its youth. Policy Forum 21. Copenhagen. 2009. [http://youth-partnership-eu.coe.int/youth-partnership/documents/EKCYP/Youth\\_Policy/docs/YP\\_strategies/Policy/Danish\\_youth\\_policy\\_Forum21.pdf](http://youth-partnership-eu.coe.int/youth-partnership/documents/EKCYP/Youth_Policy/docs/YP_strategies/Policy/Danish_youth_policy_Forum21.pdf)

Youth policies in Baltic States are comprehensively formulated and the visions, goals and tasks set in youth policy documents fully cover all youth areas, interests and stages of youth needs in Maslow pyramid. They also include general and specific activities and visions that governments expect from young people to meet in the future.

According to Estonian national legislation youth policy is mainly aimed at young people at the age of 7-26. The main youth policy and national strategic attention for field of youth affairs is focused on culture, education, innovation, self-realization in the country, motivation, youth work, youth awareness of youth policy areas, business support, prevention of youth emigration, civic awareness, responsibility and participation in development of society and of different spheres of life, youth's ethic beliefs and public spirit (see Table 1);

*Table 1. Main national strategic and youth policy documents in Estonia*

Legal framework	Main goals, particularly expectations, oriented to youth (or related)
<ul style="list-style-type: none"> <li>• Sustainable Estonia 21 (SE21), Estonian National Strategy on Sustainable Development 2030<sup>11</sup></li> </ul>	<p>Visions, goals – preferred living place (p.17); attractive culture (p.19); motivation for the young to realise themselves in the country (p.24); business is supported by also the younger generation (p.40); knowledge and innovation will increase attractiveness of Estonia for the young (p.53); lifelong learning for all people (p.67); Threats: youth culture escaping into a passive virtual world (p.55); mass leaving and emigration of young people (p.21, p.43). Other objectives and visions related to society and its people in general, incl. youth.</p>
<ul style="list-style-type: none"> <li>• Estonian Youth Work Strategy 2006-2013<sup>12</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Unified approach to all activities targeted at young people in all areas in their life.</li> <li>• Youth work – a narrower area – one of the activity areas of youth policy that creates possibilities for young people at the age of 7-26 for versatile development of their personality in addition to curriculum education, jobs and family.</li> <li>• The main activity areas of youth policy where decisions concerning youth and young people's life are to be made are youth work, education, employment, health, culture, social policy, environment, national defence, family policy, etc.</li> <li>• The aims of youth work are: to create prerequisites and support youth in managing as members of society, to shape youth's ethic beliefs and public spirit, to strive youth participation in social order, encourage young people to take responsibility and make knowledgeable decisions about their life, values and the development of society, to use the potential of youth work in the development of different spheres of life, to increase civic awareness and education and valuation of multiculturalism, to improve the accessibility of the performed studies, to create possibilities for youth to be represented at national, county and local levels, to develop participation motivation of youth and participation habits.</li> </ul>

Source – see references in the table.

<sup>11</sup> Estonian National Strategy on Sustainable Development Sustainable Estonia 21. Estonian Ministry of the Environment . Estonian Parliament (Riigikogu): September 14, 2005. Aivalable at [http://www.riigikantselei.ee/failid/Estonia\\_SDS\\_2005.pdf](http://www.riigikantselei.ee/failid/Estonia_SDS_2005.pdf).

<sup>12</sup> Estonian Youth Work Strategy 2006-2013. The Ministry of Education and Research of Estonia. 2006. Available at <http://www.hm.ee/index.php?popup=download&id=10411>

Young people in Latvia are considered to be persons from 13 to 25 years of age. Main focuses of youth area formulated in national strategic and youth policy documents are education, entrepreneurial development, promotion of commercial activity, participation in science development, sport, reduce youth unemployment, participation in decision-making and social life; engage in discussion of the decisions affecting the youth policy, participation in development of society (see Table 2).

**Table 2. Main national strategic and youth policy documents in Latvia**

Legal framework	Main goals, particularly expectations, oriented to youth (or related)
<ul style="list-style-type: none"> <li>• Sustainable Development Strategy of Latvia 2030 (Latvia2030)<sup>13</sup></li> <li>• Latvian National Development plan (LNDP) 2007-2013<sup>14</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Goals and visions (Latvia 2030): active participation in public discussions (p.5), reduction of the digital divide between generations (p.15), flexibility of the labour market and employment flexicurity (p.23), access to all levels of education (p.28), access to equal start-up capital for implementation of their ideas (p.28), creation of the childcare voluntary nurse system (p.29), child investment funds (p.30), e-school and use of information technologies to attract the to study (p.35), lifelong education (p.36), entrepreneurial programmes (p.37).</li> <li>• Goals and vision (LNDP): to increase the capacity of youth education centres in regions (p.17), to ensure physical access to education establishments to young people with motoric disabilities (p.17), to encourage young people to be entrepreneurs (p.20), favourable environment and institutional support for young creative professionals who wish to set up a business (p.21), to attract and motivate young people to choose a career in science (p.24), to support children and youth NGOs (p.29), to encourage participation in sport (p.40), to promote cooperation in the field of health care between the state and NGOs (p.40), integration of children and young people from families at risk of social exclusion (p.41), to promote access to jobs for economically inactive working-age persons and especially for youngsters (p.42), reduce youth unemployment (p.43). Other objectives and visions related to society and its people in general, incl. youth.</li> </ul>

<sup>13</sup> Sustainable development strategy of Latvia “Latvija2030”. Parliament (Saeima) of Republic of Latvia. 2010. Available at [http://nap.lv/upload/latvija2030\\_en.pdf](http://nap.lv/upload/latvija2030_en.pdf).

<sup>14</sup> Latvian National Development plan 2007-2013. Ministry of Regional Development and Local Government of the Republic of Latvia, 2006. Available at [http://nap.lv/upload/nap/national\\_development\\_plan\\_2007-2013\\_eng.pdf](http://nap.lv/upload/nap/national_development_plan_2007-2013_eng.pdf).

Legal framework	Main goals, particularly expectations, oriented to youth (or related)
<ul style="list-style-type: none"> <li>• Youth Law<sup>15</sup></li> </ul>	<ul style="list-style-type: none"> <li>• To improve the life quality of young people – persons from 13 to 25 years of age – by promoting their initiatives, participation in decision-making and social life, as well as by supporting youth work.</li> <li>• Local governments in their activities shall provide youth organisations and youth initiatives groups with an opportunity to engage in discussion of the decisions affecting the youth policy prior to the taking thereof.</li> <li>• Young people have the right to participate in the development and implementation of the youth policy.</li> <li>• To promote non-formal education, voluntary work, physical activities and the engaging of young people in the cultural life as essential ways of useful utilisation of leisure time.</li> <li>• To provide knowledge, develop skills, abilities and attitudes, as well as promote comprehensive development and active youth participation in decision-making and social life.</li> <li>• To promote the commercial activity and employment of young people.</li> </ul>

Source – see references in the table.

In Lithuanian youth the main youth policy and national strategic attention for field of youth, young persons in age of 14-29, affairs is focused on resolving of youth problems, integration into public life, participation in decision-making and social life, civic responsibility, choosing the most appropriate form of participation in society, positive attitude towards public activity, fostering activities useful for society and the state, participation in public and civil life (see Table 3).

Table 3. Main national strategic and youth policy documents in Lithuania

Legal framework	Main goals, particularly expectations, oriented to youth (or related)
<ul style="list-style-type: none"> <li>• The Programme of the Government<sup>16</sup>. Article XXIV – Youth Policy</li> </ul>	<ul style="list-style-type: none"> <li>• Support relations of youth, academic world and public servants with the Eastern neighbours.</li> <li>• Promote and implement youth entrepreneurship programmes, with a view to creating preconditions for private start-ups and to enhance the growth of active and socially responsible society.</li> <li>• Review and update current youth civic development programmes. Develop the activities of organizations established on political and ideological basis.</li> <li>• Address the issues of youth employment and integration in the labour market, encourage youth entrepreneurship, and provide support for youth start-ups.</li> </ul>

<sup>15</sup> Youth Law. Republic of Latvia. 2009. Available at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Youth\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Youth_Law.doc).

<sup>16</sup> Programme of the Government. Republic of Lithuania. 2008. Article XXIV – Youth Policy. Available at: [http://www.lrv.lt/bylos/vyriausybes/en\\_15\\_programa.pdf](http://www.lrv.lt/bylos/vyriausybes/en_15_programa.pdf). Page last visited: September 7, 2011.

<ul style="list-style-type: none"> <li>• Law On Youth Policy Framework<sup>17</sup></li> </ul>	<ul style="list-style-type: none"> <li>• “Youth policy” means purposeful activity intended to resolve youth problems and to seek to create favourable conditions for the formation of the personality of a young person and his integration into public life, as well as activity which has the purpose of achieving understanding and tolerance towards young people.</li> <li>• Youth-related issues are solved with the participation of young people and by co-ordinating them with youth or youth organisations.</li> <li>• Youth policy fields - 1) civic responsibility and performance of conscription; 2) education, teaching, science, studies and training; 3) non-formal education; 4) work and employment; 5) provision with housing; 6) leisure, rest, creative work and culture; 7) social and health care; 8) fitness activities, physical education and sport; 9) narcotic addiction and other forms of dependence; 10) crime prevention; 11) in other fields laid down by laws and other legal acts.</li> <li>• To create conditions to enjoy all youth rights and freedoms.</li> <li>• To create conditions to obtain all-round education and to realise themselves; to choose the most appropriate form of participation in society.</li> <li>• To foster civic responsibility and respect for the family.</li> <li>• To carry out informal education, employment, sport, tourism, cultural and professional activities; to promote international co-operation.</li> <li>• Formation of a positive attitude towards public activity.</li> <li>• To foster youth activities useful for society and the state.</li> <li>• To initiate and encourage active participation of young people in public and civil life.</li> </ul>
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*Source – see references in the table.*

This short review of youth policies in Baltic States seems to be giving a confidence that in terms of youth development itself at least the intentions of governments formulated in youth policy and national strategic planning documents are comprehensive and fully covering all youth areas, interests and stages of youth needs in Maslow pyramid. It also indicates general and specific activities and visions that governments expect from young people to meet in the future.

The next chapter of the article will compare if and how these expectation are in line with youth`s plans for participation in public administration development.

## Youth intentions towards participating in public administration development

As explored in previous chapter, although main Baltic States governments` expectations and development directions towards youth slightly differs among countries, they have also quite a many common general features – all countries want

<sup>17</sup> Law on Youth Policy Framework. Republic of Lithuania. 2003.  
Available at [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_bin?p\\_id=245497](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_bin?p_id=245497)

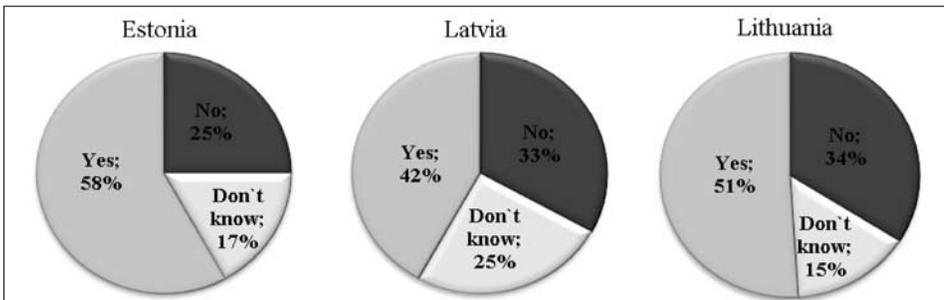
their youth to develop personally and professionally and to bring benefits to the country by being civically active and responsible, by participating in countries public and civil life, participation in development of society and of different spheres of life, being successful in business and so on.

Now, let's focus on the desires, ideas and stands of young people – the direct client target group for governments' youth policies. To identify different aspects, attitudes and plans regarding youth intentions towards participation in public administration development in the future, author conducted a research „Youth Intentions towards Participation in Public Administration Development” in academic year 2010. /2011. Almost 2000 respondents in age of 18-32 participated in the study. 66% of respondents are in age of 21-26.

According to the research, the situation with youth willingness, interests and intentions is quite different among countries. Further analyses will explore youth attitude towards 7 ways or platforms for participation in public administration development. The popularity of given seven choices of how to participate in public administration development – 1) work in a state sector, 2) work in a private sector, 3) work in a social sphere, 4) work in academia, 5) work in NGOs, 6) commenting (expressing an opinion in virtual environment and printed periodicals (internet blogs, articles, journals etc.)) and 7) becoming elected statesman – in a cross view by countries varies quite significantly, although three of the most popular and three of the least popular platforms remain practically the same in all countries covered, and they are – State, NGO, Private sectors as most popular and commenting, running for elections, and academia as least popular areas.

Regarding the interest and willingness of young people to work in government institutions, Estonian youth shows the highest level – 58% of participants evaluated this opportunity of participation positively (evaluations 7-10 on scale of 10). In Lithuania 51% and in Latvia 42% of youth expressed willingness to work in government institutions. Although the level of unwillingness to work in government institutions (amount of evaluations 1-4) in Estonia looks quite high (25%) still it is the lowest in Baltics – Latvia: 33%, Lithuania: 34% of youth would not like to work in government institutions (see Figure 2).

Figure 2. Respondents' interpreted evaluations by countries on the statement “I would like to work in a national or local government institution”.



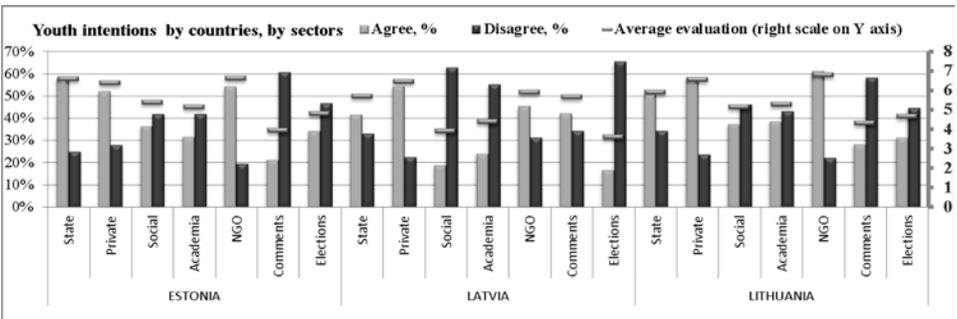
Source – author's research results.

Although working in government institutions overall seems quite popular way among youth intentions for future, it is not the only one and there even are more popular sectors. Now, let`s focus more on that part of youth who doesn`t want to work in government institutions or have no clear stand about this statement – the share of such young people are 42% in Estonia, 49% in Lithuania and 58% in Latvia. In order to identify other perspective areas where young people see themselves in the future, the participants of the research were asked to evaluate the following statements:

- 1) I would like to work in a national or local government institution (STATE);
- 2) I would like to participate in state development by running a private business (PRIVATE);
- 3) I would like to work in the social sphere (doctor, teacher, police force etc.) (SOCIAL);
- 4) I would like to work in academia and do research on public administration (AVADEMIA);
- 5) I would like to participate in state processes through the third sector (NGO);
- 6) I will express my opinion on state development in a virtual environment and printed periodicals (internet blogs, articles, journals etc. (COMMENTS)
- 7) I would consider running for parliament and local government elections to become a politician (ELECTIONS).

The statements were evaluated on scale of 10, where “1” is interpreted as strong disagreement to a statement and „10” – strong agreement. The sum of 1-4 evaluations is interpreted as disagreement to a statement, 5-6: “Don`t know”, and the sum of 7-10 evaluations is interpreted as agreement to a statement. See Figure 3 for youth evaluations on all statements by countries.

**Figure 3. Youth intentions towards participating in public administration development, by countries, by sectors**



Source – author`s research results.

Overall, the most popular platform where to act giving support to public administration development in youth perception is non-governmental organizations

(NGO). The research results showed that this sector has the highest average and positive evaluations thus ranked 1st in Lithuania and Estonia, and the 2nd among other sectors in Latvia. The second most popular sector varies among countries – private business in Lithuania, public sector in Estonia, and NGO in Latvia. And the third most popular sector for youth to participate in public administration development overall is state sector, however in Estonia state sector was ranked the 2nd, so the third most popular sector in Estonia is private sector. The least popular areas for youth intentions to participate in public administration development are commenting, running for elections and working in academia.

Overall, 57% of young people a job opportunity in public administration would perceive as any other job offer.

As main motivating factors for working in public administration several can be mentioned, for instance, more than 50% of young people consider work in public administration prestigious, around 55% of young people in all Baltic countries assessed the job in public administration as safer and more stable than in the private sector; 44% of young people in Latvia and over 60% in Lithuania and Estonia believe in changes for better in public administration.

As for dissuading factors for working in public administration 62% of young people in Latvia and 40% in Lithuania have a negative opinion of the public administration and only 19% in Latvia and 28% of young people in Lithuania have a good or very good opinion. It is interesting that despite the large share of respondents having negative opinion of the public administration in Latvia, a negative experience at work or in cooperation with the public administration in Latvia have relatively much less, but still a considerable amount or 37% of young people. In Lithuania 33% of youth have negative experience at work or in cooperation with the public administration. In Estonia these indicators are much different – only 20% of Estonian youth admits they have negative opinion of the public administration and 16% have had negative experience.

Comparing public and private sectors, 65% of youth in Latvia and around 55% in Lithuania and Estonia evaluated the work in the private sector as more interesting than in the public administration. In favor of the public administration it was evaluated by only 6% of young people in Latvia and accordingly by 13% and 19% in Lithuania and Estonia. Career growth opportunities, which in general are an important factor for 93% of young people in Baltic States, are better recognized in the private sector by 48% of young people, while in favor of public administration the career opportunities are positively estimated by 22% of young people similarly in all Baltic countries. However, on average 52% of young people would perceive a job opportunity in public administration as any other job offer.

More elaborated analyses and descriptions about different aspects, attitudes, plans, motivating factors, and dissuading factors regarding youth intentions towards participation in public administration development in the future can be found in other articles by author or requested via email.

## Conclusions

Youth policies in Baltic States are widely formulated and the visions, goals and tasks set in youth policy documents comprehensively cover all youth areas, interests and stages of youth needs in Maslow pyramid. They also include general and specific activities and visions that governments expect from young people to meet in the future, but in terms of ensuring the development of public administration itself they more resemble „leading by example” with a hope that it will attract skilled human resources for development of public administration than determined action plan.

As for the youth policies` accordance to youth intentions it can be concluded that generally the expectations and development directions contained in stand of the current government leaders and youth policy planning documents are in line with ideas and stands of young people, however there are also place for improvements. Young people in Baltic States can be considered as the future of respective country also in the context of its public administration`s development, provided that in the near future public communication will be improved as well different educational activities for the society and deeper public customer relationship researches will be carried out which results should later be considered and respective incentives and prevention activities should include action plans and national strategies.

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## **EU CITIZEN INITIATIVE AND EXPERIENCE OF SOCIAL PARTNERS IN LATVIA**

### **Abstract**

This paper provides an attempt to address some of the issues related to the governance of civil societies in the EU Member States. The authors outline the EU legislative initiative, its implementation and the role of social partners in the process of changes in the legislation system that in turn could have impact on the efficiency of employment policies. Development of the social dialogue is in particular focus of the paper. The legislative initiative will be discussed as an instrument that could be used efficiently by non-governmental organisations to influence changes in the legislation systems of the EU and New Member States in general and in Latvia in particular. The paper will provide an opinion about legal regulations that delegate legislative initiative to the non-governmental organisations. On the basis of the main findings, the paper provides conclusions and suggestions for social partners' actions.

**Keywords:** legislative initiative, non-governmental organisations, social partnership

### **1. Introduction**

The strategic aim of the legislative initiative is to ensure participation of the public in the legislative process. Social partners as well as other non-governmental organizations take an important role in implementation of the legislative initiative. In particular, by participating in the legislative initiative, social partners could enhance the effectiveness of the European employment policy and influence social dialogue through both inter-sectoral and sectoral collective agreements in the EU. It is necessary to point out that the European social dialogue is a process that stipulates relationship between collective bargaining and law specific to the EU that cannot simply be equated with such systems at the national level. First, it implies a flexible relationship between social dialogues at all levels and is contingent upon national

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traditions of social dialogue within the Member States. Second, collective bargaining and social dialogue within Member States is reflecting a balance of power between labour and capital, exercised traditionally through industrial conflict and resolved through employment policy.

In the New Member States (NMS) after their accession to the EU the scope of the tasks to be implemented by the social partners has adjusted to the general EU rules and regulations as well as have broadened. The main strategic aim of the legislative initiative as such and the role of social partners are to enhance the level of convergence of welfare in the NMS in general and in Latvia, in particular, with the other EU Member States. This is a major breakthrough which social partners, for example, employers associations and trade unions should consider how to make best use to enhance the conditions of the workers in the country and use the experience of the other EU Member States.

## **2. The EU legislative initiative: Lisbon Treaty and the European Citizen Initiative**

The right of legislative initiative by European citizens was introduced under the Treaty of Lisbon. On the basis of the Treaty, an implementing regulation is required governing the conditions and procedures necessary to enable one million European citizens to submit a request for European legislation to the European Commission and obtain from it a reasoned reply within a set timescale. The Lisbon Treaty gives the citizens a golden opportunity to participate directly the future shaping of the EU. While in many countries there are various types of citizens initiatives (from petitions to referenda) this seems to be the first time in contemporary history, that such an opportunity is offered to citizens at a multinational level, that of the European Union (e.g. Stacenko, 2011)

The Treaty of Lisbon has introduced into the primary law of the European Union for the first time a mechanism of participatory democracy: the right of any one million European citizens, providing they represent a significant number of EU Member States, to ask the European Commission to submit a proposal for European legislation within the framework of the legislative powers attributed to the European Union by that same treaty. It could therefore be argued that the European Union has gone further than its constituent Member States in terms of the direct participation of citizens in the legislative process. After presenting a Green Paper in November 2009 and holding a public consultation with over 300 associations, institutional actors, experts and individual citizens, the European Commission submitted its proposal for an implementing regulation to the European Parliament and the Council of Ministers of the European Union in March 2010.

In terms of article 11, of paragraph 4 of the Lisbon Treaty, “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its

powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties”.

The question of what is meant by a “significant number of Member States” was debated at length. Civil society organisations argued that the number should be not too high because many European issues have a regional character. The European Commission opted for one-third of Member States. The support of the European Parliament related to this initiative is shown, in particular, by the fact that European Parliament at the beginning considered this initiative as possibly encroaching on its prerogative. It set up a group of 4 reporters from all the major political groups (a very unusual procedure) to prepare the Parliament’s position on this initiative. In the end, it produced a document strongly supportive of this initiative, for example by reducing the number of Member States required to collect from one third as proposed by the Commission to one quarter.

There was, though, no change in the minimum number of signatures for each state (the number of MEPs by country multiplied by 750, the total number of MEPs). As the result of the debates, the European Parliament and European Council have adopted on 16 February 2011 Regulation No 211/2011 to ensure practical implementation of the article 11 of the Lisbon Treaty. The Regulation requires that for an initiative to be valid a minimum of one million signatures from at least 7 Member States are needed the proportion of signatures in each of the Member State being based on the number of the members of the European Parliament. Concretely this means that signatures must be collected in at least 7 Member States through appropriately formed committees.

The citizens’ legislative initiative introduced by the Treaty of Lisbon must not be equated with the right of petition available to European citizens, which can be used to address problems of poor administration and violations of individual rights. From a semantic standpoint, it cannot be compared with the right of citizens in certain Member States to submit a legislative proposal directly to their national parliaments.

The legislative initiative in Latvia is limited according to the Constitution. As it is stated in the 65 article of the Constitution, „legal proposal could submitted to the Saeima (Parliament) by the President of the State, Cabinet of Ministers, the Commission of the Parliament and no less then by 5 parliamentarians as well as by one tenth of the voters”. The legislative initiative could provide an opportunity to influence directly development of legislation. However a number of legal regulations that delegate legislative initiative to the organisations are still restricted despite of intensive political discussions and public debates on the issue. For example, the legislative initiative is not delegated to the Employers’ Confederation of Latvia that is the biggest organization representing the interests of employers and acts as a partner in socio-economic negotiations with the Parliament (Saeima), the Cabinet of Ministers of Republic of Latvia and Free Trade Union Confederation of Latvia according to the Law on ”Employers’ Organisations and their Associations Law” (1999) in relation to the article 10 on the Relationship of Employers’ Organisations and their Associations with State and Local Government Institutions.

Another important social partner in all EU Member States is trade unions. Trade unions, for example, exist in all Member States and still have considerable membership, and this despite the reduction of membership numbers, as the legitimacy of European trade unions as social actors is both rooted in history and consolidated in institutions. Trade unions can therefore be driving forces for requesting the European Commission to introduce initiatives to further improve working conditions of the workers. Free Trade Union Confederation of Latvia could actively participate in this process as the other trade unions in the EU Member States.

The trade unions should consider overcoming their ideological differences in their identities to take a real advantage of this opportunity. This would increase their value and attractiveness for their members and for the labour force in the European Union in general and consequently revitalise the trade unions movement in the EU.

### **3. Social dialogue at the national level: employment policy and legislation issues**

Social dialogue is a relatively new and not sufficiently developed world-wide concept. It has gained significant importance in public debates internationally in the last decades. An important role in promoting Social dialogue has been taken by international institutions mainly International Labour Organisation (ILO). According to ILO, the field of social dialogue is relatively weak also with respect to statistics and to statistical standards and tools to monitor progress in union membership and bargaining coverage. Although one-third of ILO member states compile, disseminate or make use of some kind of statistics related to social dialogue, there remains significant conceptual and methodological variation. No international consensus has been achieved so far. In this regard there is a need to develop international statistical guidelines on social dialogue indicators to improve the capacity of national (statistical) authorities and the social partners to make better use of them. Social dialogue is grounded in the constitution of ILO and is an integral part of its 'Decent Work Agenda' covering rights at work, employment and social protection (ILO Social Dialogue Definition). Through its tripartite structure, the ILO has unique access to the world of social dialogue. It provides a forum for a global social dialogue for representatives of workers' and employers' organizations and governments from more than 170 countries. The ILO has also contributed to the implementation of the concept of Social Dialogue by declaring in its programme of activities for 2000-2014, the strengthening of Social dialogue among ILO member States as one of its strategic objectives to be achieved as it is stated in the document of ILO (Geneva, 2011 GB.310/STM/1).

Social dialogue is defined by ILO as all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. However, a definition of Social Dialogue is not yet a concept that has been accepted unanimously. As experts commonly agree- autonomous, independent and

strong workers' and employers' organizations are critical for effective social dialogue. The quality of that dialogue is determined by the extent to which social partners are able to negotiate collective agreements that govern terms and conditions of employment and regulate labour relations. The emphasis of this particular inquiry is therefore on primary industrial relations indicators, that is, membership of organizations and the coverage of collective bargaining agreements (e.g., Hayter, Stoevska, 2010).

Social dialogue institutions can be bipartite, tripartite or "tripartite plus". Tripartism is an important mean of establishing social dialogue, refers to labour relations in which the State, employers and workers are autonomous yet interdependent partners with common interests. Bipartism is a process of determination of a network of rules and regulations concerning terms and conditions of employment, etc., through consultation, negotiation, bargaining or other consensual processes. When bipartite dialogue does not lead to dispute avoidance or settlement, tripartite interventions like conciliation/ mediation and arbitration/adjudication become necessary (e.g., Sivananthiran, Venkata Ratnam, 2003). Social dialogue has similarities and differences in its development trends across countries and world regions. It also takes place at different levels and in different ways. The most significant achievements in this area are in the European Union as Social Dialogue has become an important element in the process of decision-making already in the middle of the 1980s and since then has been strengthened further in the 1990s, through, amendments at the Maastricht and Amsterdam Treaties. Since then it became essential for EU authorities and for authorities in the Member States to consult with the social partners on legislation issues.

The recent economic crisis of 2008-2010 highlighted an urgent need to develop new policy responses to help provide social stability in the European Union and alleviate social hardship. Although labour markets deteriorated in the EU, unemployment has hit harder some countries than others. It is important to stress, that the countries with most rigid labour market regulations have suffered the sharpest surge in unemployment numbers, indicating this is an important condition that should be considered alongside stimulus programmes. The European Commission Draft Joint Employment Report (JER, 2009/2010) reaches the conclusion that socio economic inequalities have increased in Europe. It argues that "a combination of factors (including economic restructuring associated with the move towards a knowledge economy, labour market change and redistributive policies of welfare states) account for these increases in inequality in the last two to three decades."

One of the key issues is the development of effective employment policy at the level of the EU as well as at the level of nation states and to ensure internal flexibility as the core to labour market stabilisation. For example, among the three Baltic States, only Estonia has enhanced flexibility of labour market by introducing a new Employment Contracts Act, effective 1 July 2009, which shortened the lay-off notice and reduced severance payments. The new Act also allows distressed employers to cut salaries to the minimum wage for up to 3 months, and reduces bureaucratic barriers (for example, eliminating the need to gain the approval of a labour inspector when terminating employment contracts, or establishing part-time working hours).

A constructive social dialogue and decisive responses from all social partners are required to provide synergy between social and economic development, effective employment policy and a safety net for the future. A flexicurity approach, which is the European labour market policy aimed at compensating the ongoing flexibilization of employment relations (deregulation of labour markets) by means of advantages in social security was established to conciliate employers' and workers' needs, flexibility and security, by ensuring the worker safe transitions inside the labour market, while maintaining and improving competitiveness of the companies and also preserving the European Social Model. Based on consultations with the Member States, international organisations, social partners and the academic community, the European Commission has suggested "pathways" and "common principles" in order to achieve flexicurity.

In the Integrated Guidelines, Member States are asked to promote flexibility combined with employment security — 'flexicurity' — and reduce labour market segmentation, having due regard to the role of social analysis and dialogue over choice is the foundation for the flexicurity approach and the introduction of flexicurity principles. The viability of these choices is largely dependent on the willingness and the ability of social partners to engage and define dialogue in setting up national employment policy.

Flexicurity comprises activities aimed at promoting labour market flexibility and employment security by mutual interaction. It is necessary to ensure that labour legislation and agreements are sufficiently flexible and correspond to the interests of both parties – the employers and the employees. In the case of necessity, active labour market policy must efficiently facilitate the transfer from one workplace to another or from the status of an unemployed person to employment.

The Spring European Council of 2009 recommends that Latvia enact an integrated flexicurity approach, to intensify efforts to increase labour supply and productivity by reinforcing activation measures and enhancing the responsiveness of education and training systems to labour market needs. To promote implementation of flexicurity principles in Latvia, on May 15, 2009, the Saeima adopted amendments to the Labour Law, which are also related to the flexibility and security in the context of employment relations.

The need to put into practice the aims of the Lisbon Strategy and principles of flexicurity in Latvia requires ensuring effective social dialogue between the Employers' Confederation of Latvia, the Free Trade Union Federation and the government. Development of such a trend still is not included in national programmes on a large scale and does not have strong government support. Several measures have been implemented in recent years for the improvement of the social dialogue, both on the national and local levels. For example, with the help of European Social Fund financing, the social partners involved in employment partnership, include the Employers' Confederation of Latvia and the Free Trade Union Federation of Latvia, local governments and the Latvian Association of Local and Regional Governments. This partnership ensures social dialogue at the local and regional level and increases participation opportunities of social partners in the decision-making process and provision of public services. In addition, the partnership facilitates quality improvement of public services provided by non-governmental organisations.

A constructive social dialogue and decisive response from all social partners are required to provide synergies between social and economic development, effective employment policy and a safety net for the future. According to the Ministry of Economy, changes in the labour market for a timely balancing of the labour market demand and supply create necessity to develop a labour market forecasting system. The Ministry of Economy is responsible for coordination of medium and long-term labour market forecasting in the country. The ministry also works out labour market development scenarios, as well as medium and long-term forecasts. Under the Ministry of Economics, the Advisory Council of the Labour Market Forecasting is operating, which comprises representatives from the involved institutions and social partners. The task of the Council is to ensure inter-institutional cooperation by assessing the prepared forecasts and seeking solutions for further action.

Social dialogue is a fundamental element in the European social policy. The European social partners use a very narrow definition, since they reserve the notion of social dialogue for their bipartite, autonomous work. Whenever European public authorities are involved, the social partners prefer to speak of tripartite concentration. The involvement of the social partners at the European level is organised around three different types of activities:

- *tripartite consultation*, the exchanges between the social partners and the European public authorities;
- *consultation of the social partners*, which covers the activities of the consultative committees and the official consultations;
- *the European social dialogue*, the bipartite work of the social partners, whether or not it stems from the official consultations of the Commission based on Articles 153 and 154 of the Treaty on the functioning of the European Union (TFEU).

The process of launching and further development of Social Dialogue in the EU has three main stages:

- I. (1985-1991). In 1985, with the launch of a bipartite social dialogue the bipartite activities resulted in the adoption of resolutions, declarations and joint opinions, without any binding force. The bipartite dialogue takes place at cross-industry level and within sectoral social dialogue committees. As a result of their representativeness, European social partners have the right to be consulted by the Commission, and may decide to negotiate binding agreements. Another important event that strengthened Social Dialogue was the Single European Act adopted in 1986.
- II. (1992-1999). In 1991 an agreement between the social partners was adopted, which was subsequently integrated into the protocol on social policy and annexed to the Maastricht Treaty. In 1997, the agreement of 1991 was incorporated into the Amsterdam Treaty.
- III. (1999-2005). In December 2001 the European social partners presented a joint contribution to the Laeken European Council. This last phase has been characterised by greater independence and autonomy for the social dialogue.

To tackle the unemployment and to pursue active labour market policies need a fundamental change and further implementation of the European Union's strategy for jobs and smart, sustainable and inclusive growth (Europe 2020) and European Employment Strategy (EES). All Member States with the involvement of social partners, the European Parliament, European Economic and Social Committee, and the Committee of Regions in the Social Dialogue launched the EES in 1997 to encourage the exchange of information and joint discussions.

The EES is intended as the main instrument to provide, through the open method of coordination, direction and coordinate the employment policy priorities supported by the Member States at European level. Employment policy in the European Union incorporates labour law and occupational health and safety, as well as gender mainstreaming. It is also sets standards and objectives in these areas, as well as laying down the principles of anti-discrimination policy. The European Union has no powers to harmonise the numerous – and in some cases very different – systems of social protection and employment policies in the Member States. Instead, its role is to coordinate these systems and to protect the main principles of the Common Market. The European Social Charter articulates a number of fundamental rights in such areas as collective bargaining, protection from unjustified dismissal, health and safety at work, etc.

It is important to stress that collective bargaining is the process through which the social partners arrive at an agreement that regulates both terms and conditions of employment and labour relations. Collective bargaining plays significant role in labour market governance. A collective bargaining coverage rate is an indicator of the degree to which wages and working conditions are regulated by collective agreements. For example, centralized collective bargaining structures tend to be associated with high coverage rates. In Latvia, for example, collective bargaining takes place mainly at the local, company level and in the public sector. There are some sectoral agreements, particularly in the public sector and various civil service and public companies – for example, energy and water suppliers and forestry. However, higher-level collective agreements are rather policy documents, dealing with issues in social partnership, than collective bargaining on employment conditions. The principal level of collective bargaining is at the company level.

In countries, which extend the terms of a collective agreement to enterprises and workers who may not be parties to the agreement coverage rates tends to be higher than in the other.

At the company level, social dialogue was implemented in the EU by the adoption in 1994 of the European Works Councils Directive revised in 2009 as the result of constructive negotiations on promotion fairer economic development through a collaborative effort to increase productivity and enhance conditions of work.

The legal labour relations system in the country was based on the Labour Code adopted in 1972 and when Latvia regained independence in 1991. As the result a labour law reform was badly needed, which was launched in 1990s. The new Labour Law in Latvia is in force since 1 June 2002. The major part in this reform process

was implementation of the rules stemming from international laws, in particular – EU laws.

Despite the fact that Latvian legislation does not give an explicit definition of the term ‘employer-employee relationship’, a number of international agreements on human rights, welfare, and social protection have been signed and to regulate labour relations. Freedom of association and collective bargaining are at the basis of social justice and democracy. They form the core of fundamental principles and rights at work, as stipulated in a number of the International Labour Organization’s Conventions that Latvia has ratified. For example, the Law “On Trade Unions” was adopted on 13 December 1990. The Law provides that trade unions may be formed on the basis of professional, branch, territorial or other principles. Employers shall also be entitled to form associations.

The most widespread patterns in practice are the branch, undertaking and professional trade unions. The Law insures the right to join a union or also not joining or withdrawing from a union (so-called negative right). According to the Law, collective agreements, and other types of agreements shall govern property and financial relations between trade unions and the employer. In most cases the relations of a trade union and employer are regulated by collective agreements.

As a result of the labour law reform a new framework for national consultation was established. The status of a social partner and social dialogue in Latvia are regulated by the law “On Employers’ Organisations and their Associations” (29 April 1999), and the law “On Collective Labour Agreements” (26 March 1999). These legal documents are in line with EU principles on social dialogue and social partnerships.

In addition, the trilateral consultation mechanism between government representatives, the largest employers’ and trade union organisations - the Latvian Employers’ Confederation and the Free Trade Union Federation of Latvia was launched. The National Tripartite Co-operation Council and its institutions – the Sub-council for Vocational Education and Employment, the Sub-council for Labour Matters, and the Social Insurance Sub-council aimed at promoting cooperation between the social partners at national level. This institutionalization of the social dialogue helps to find a framework for agreements between all social partners in solving social and economic problems. Such framework also increases responsibility of social partners in decision-making process. Starting from 1996, the Free Trade Union Federation of Latvia and the Latvian Employers’ Confederation are obliged to annually sign a bilateral social partnership agreement.

The agreement allows both institutions to agree, for example, on the conditions related to level of the minimum salary level. Furthermore, labour disputes and matters related to the social dialogue are regulated by the Labour Code of Latvia (1 January 2001), the law “On Collective Labour Agreements” (26 March 1999), the law “On Strikes” (23 April 1998), the Civil Procedure Law (1 March 1999) and the law “On Labour Protection” (4 May 1993). Latvia accepted and implemented in full the *aquis communautaire* in the area of social policy and employment before its accession to the EU on 1 January 2003.

During the process of accession negotiations, the position of Latvia on social protection and employment policy has been developed as the result of a mutual agreement between the government and the social partners – Free Trade Union Federation of Latvia and the Latvian Employers' Confederation. In addition, the accession period required the design and implementation of the National Employment Plan (2004) that was launched in line with the Single National Economy Strategy (2004-2006). The Ministry of Welfare has issued two important strategy documents: the “Conception of the Development of labour protection from 2007-2010” and “The Programme for Development of Labour Protection from 2007-2010”. This process was not always systematic and often demand-driven.

## Conclusions

The legislative initiative is a relatively new and not sufficiently developed concept in the EU New Member States. It has gained significant importance in public debates in the EU before and after the accession to the EU. The strategic aim of the legislative initiative and the role of social partners in the process of its implementation is to enhance the level of convergence of welfare in Latvia with the other EU Member States.

The legislative initiative could provide an opportunity to influence directly development of legislation. At the same time, the initiative does not ensure the same rights to those who are not members of, for example trade unions and as the result do not have that much of influence on the process of development of the legislative process. However, in Latvia a number of legal regulations that delegate legislative initiative to the organisations is limited despite of intensive political discussions and public debated on the issue.

An important element in the process of decision-making became social dialogue. Social dialogue has similarities and differences in its development trends across countries and world regions. However this concept is not widely accepted internationally. The most significant achievements in this area are in the European Union, as social dialogue has gained an important role in promoting social values in the EU Member States in general and in Latvia in particular.

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## **REGULATORY COMPETITION OF THE EU'S SINGLE MARKET: UNDERLYING THEORY AND EVIDENCE**

### **Abstract**

The concept of Regulatory Competition is a phenomenon in law, economics and politics. It concerns the competitive adjustment of rules, process or enforcement of regulatory regimes, in order to secure an advantage by attracting business or other activities in an area or in a country. The aim is to create a more favourable environment. That environment should be in the specific context of the EU's single market with key elements such as free movement, mutual recognition, information, enforcement of EU's regulations, which can attract business activities. Regulatory Competition has become an important issue internationally since the mid-20<sup>th</sup> century due to the intensification of economic globalisation.

This paper considers the preconditions on which the degree of regulatory competition depends, its complementarily or substitution to EU's driven harmonisation, and also the implications for single markets' functioning and the division of economic activities.

Despite the long process of implementation and harmonisation of the EU's regulatory framework, there is significant room for variations in regulatory requirements in the degree and the ways of implementation.

As a result of this, divergent regulatory standards across jurisdictions arise sometimes significantly with practical impacts for EU's countries' regulatory environment.

By using appropriate indicators created by international institutions mirroring the above divergences, we can evaluate existing regulatory regimes and make comparisons on the basis of their actual enforcement and efficient functioning. Identified differences make evident the existence of Regulatory Competition and to some degree the countries' economic performance, advising for necessary policy measures on particular fields.

**Keywords:** regulatory competition, harmonisation, regulation enforcement, single market.

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## 1. Introduction

The globalization process has resulted in sharp reductions in border controls and other forms of state intervention. This has created more fluidity and openness in the world economic system through its explosive increase in the flow of goods, services, capital and labour between jurisdictions. In this context, differences in national arrangements, including regulatory systems, have been questioned, particularly in how they can act as 'non-tariff-barriers' by hindering cross-border flows and competition.

Global competition can both challenge regulation and cause its withdrawal or alteration, or lead to the creation of new regulatory regimes. Economies based on well-established and relatively stringent regulatory systems are forced to re-evaluate or relax their requirements in response to a threatened loss of business.

Countries, regions or cities wishing to attract investment, offer a diversity of tailor-made features going far beyond the fiscal laxity of earlier 'offshore' havens.

In this paper, the notion of Regulatory Competition is going to be defined and the necessary preconditions for its existence will be described. No one in today's globalized world, with intensified competition, can ignore the importance of this phenomenon without severe repercussions.

In the continuously integrating European market, regulatory competition is recognised as a crucial factor, driving regulatory reform. We examine single market's harmonization process, as well as the market's principles and efforts to overcome the problems of broad regulatory heterogeneity among member states.

Despite the long ongoing process of coordinated harmonization and regulatory effort by all European countries, divergent regulatory standards, mirroring mainly differences in regulatory achievements, are widespread.

Using indicators constructed by international institutions and presenting the latest estimations by them, we try to depict the reality of today's regulatory environment in EU countries.

The real picture of the regulatory environment can be a very useful instrument for understanding the degree and importance of regulatory competition, but mainly can serve as a guide for necessary policy measures and structural reform.

## 2. Defining Regulatory Competition

The increasing realization that a country's economy in today's globalized world, with widespread intensified competition, does not operate in isolation has decisively affected regulatory policy. Regulators seem to compete with each other over the rules, processes, and enforcement regimes, offering regulatory advantages by creating a more favourable business environment. In this context, regulatory competition can be defined as the competitive adjustment of rules, processes, or enforcement regimes in order to secure an advantage (Baldwin R., Cave M. 1999).

The end goal of this effort is to attract investment and business activities or to promote regional or national industries by providing them lower administrative or other compliance costs, than their competitors enjoy.

Competition among regulators does not necessarily lead to lowering of standards, or a 'race to the bottom'. Regulatory competition does not imply a degradation of standards or following the way of the best known case in United States corporate law, the so-called Delaware effect, through which a great number of companies were attracted to New York (Trachtman J. 1993).

It may lead to a rise in standards and quality of products, creating a competitive advantage for local business under certain conditions. Within the framework of quality rules and control, environmental or safety degradation, coming from weak regulatory regimes, cannot be a subsidy to polluting producers, but a severe disadvantage.

Regulation is essential for the good functioning of market economies. By increasing the role of competitive forces, the regulatory environment that promotes competition has moved towards a more liberalized attitude, which has had important beneficial effects on GDP and social welfare. On the other hand, rigid regulatory environments with structural backwardness, incapability to adjustment and reform, are 'punished by the markets' and suffer from relative low foreign direct investment and GDP growth.

The correlation of the above has become more obvious in today's economy and has been supported by many empirical studies. Regulatory competition strongly affects the degree of convergence in regulation, which has become more homogenous across countries.

### 3. Necessary preconditions

*Regulatory competition presupposes a national acceptance for economic mobility. The Freedom of Movement for producers of goods and services between the jurisdictions of the regulators implies that they are able to choose between regulatory regimes and operational flexibility or mobility for workplace, capital, services and products. The acceptance of this free movement may arise from international obligations or by unilateral policy decisions, which abandons or rules out laws prohibiting this deliberating framework.*

In this context, competition forces, as in Tiebout's model (1956), producers to manufacture the products that consumers want and competition will produce the regulatory regimes that consumers and citizens want (Baldwin R., Cave M. 1999). According to this optimistic theory, Regulatory Competition forces regulators to tailor their regulatory regime and if they do not, they will be voted out of office or residents will move out from their jurisdiction.

The potential movement, due to regulatory regimes and the necessary information about such alternative regimes, is another precondition for Regulatory Competition.

Regulators also must possess information about other regimes in order to react and respond competitively. In this case, the estimation of the effects from regulation's different parameters and rules, isolated from their factors, is an important task.

Information is crucial for choice and diversity of regulation for consumers and also to compare goods and services, controlled by different regimes.

If competitive forces are in place, they will also affect enforcement practices that citizens and consumers desire. The existence of Regulatory Competition presupposes another precondition, related to the degree of enforcement, and is similar to the enforcement practices, especially when comparing regulatory systems. Regulatory failure due to bad political compromises and the resistance of powerful interests or regulatory capture can be reduced, if competition remains on track.

#### **4. Regulatory Competition versus harmonization in the EU's Internal Market**

In the rapidly integrating world economy, the question of Regulatory Competition has come to centre stage with widespread fears of a 'race to the bottom' attitude. The integration of markets has created a policy dilemma, whether to harmonize regulatory systems or rather to permit competition between them. It has been the hottest policy question on both sides of the Atlantic with various aspects and dimensions of the debate being discussed (Esty D., Geradin D. 2001).

There are circumstances that would yield gains from Regulatory Competition and at the same time, in other cases heightened cooperation within the standard setting or broader regulatory harmonization might increase social welfare.

The EU's regulatory framework, dominated by the harmonization principle, Regulatory Competition remains an active element. The nature of the interrelation between competition and coordination also has a distinct character within the EU (Bratton W. et al 1996).

Within the EU, free movement implies the right to access the market of the member states (MS) and hence the de facto irrelevance of intra-EU border controls. But when a certain product, service, or factor in the market is regulated, free movement is not a sufficient condition for market access.

An important innovation which facilitates free movement is the principle of mutual recognition, which is based around the idea of establishing equivalent regulatory objectives. Given such equivalence, regulatory instruments can no longer deny market access (Sun J.M. Pelckmans J. 1995).

At the same time under mutual recognition regimes, which guarantee the entry into member states of products complying with the regulation of another member state, each member state has the incentive to set low standards that benefit its own firms.

In such cases of imperfect Regulatory Competition the race will tend to be towards the bottom or else towards the interests of groupings that have captured the regulator (Baldwin R., Cave M. 1999). In order to limit such adverse effects that harness Regulatory Competition, a number of measures have been taken.

Firstly, harmonizing measures can be taken to set minimum standards for regulation, putting a floor on regulatory levels. Secondly, the ability of a minority of

member states to block legislation can be used to protect the minimum standards. Thirdly, national regulators can maintain standards above those of the common EU level in response to local political pressures and national policy objectives. Also, consumer preferences may also place a floor below standards.

Finally, regulatory drift and policy uncertainties can be controlled through measures such as framework directives that reduce national differences.

Regulatory Competition and harmonized measures like the ones mentioned above should not be seen as direct alternatives, but as modes of influence that can be used to limit each others weaknesses (Baldwin R., Cave M. 1999).

Since harmonization removes distortions and uncertainty arising from the legal framework, businesses concentrate on essential requirements, offering flexibility through various means, intensities, and scope. On the other hand, because of the 'all-or-nothing' character of the regulation under implementation, it can be disproportionate to the market failure that it intends to address. Due to the above, it can become more costly to implement, enforce, and monitor because of the continual need to adapt to technological progress (Sun J-M., Packman's J. 1995).

Using the same Cost Benefit analysis for Regulatory Competition we can mention such benefits as a greater choice of regulation, the discipline effect on national regulatory systems, and the promotion of strategies for research, development, and innovation.

On the other hand, costs can arise due to the distortion of different regulations, potential obstacles in application, imperfect information regarding regulatory differences, too little or too much, too high or too restrictive regulation.

The European approach to harmonization – essentially harmonization combined with mutual recognition – gives space to complementarity and subsidiarity, which amounts to a forum that negotiates the level of harmonization, according to each participant's maximization of preferences and interests. The application of this principle relies on centralized and decentralized regulatory authorities, which operate within a flexible framework.

The main benefits resulting from decentralization are that competition in regulation remains on track to produce the benefits mentioned above as well as the related diversity and cultural specificity in regulations.

On the other hand, the benefits of centralization arise from economies of scale and the reduction in learning costs as well as the reduction of costs due to undesirable regulatory arbitrage: evasion, externalization, and extraterritoriality. Reduction of these costs can be achieved by avoiding double compliance, due to overlapping and differing regulation (Trachtman J. 1993).

In this context, regulatory coordination constitutes the most important precondition for the application and functioning of the whole European regulatory structure.

A large number of problems may arise, which would require a coordinated solution.

Regulatory coordination, despite the difficulties and resistances, may produce positive benefits resulting from greater transparency, higher levels of expertise, common statistical and accounting techniques, standardised procedures, improved information, reduced regulatory capture, and better monitoring (Baldwin R., Cave M. 1999).

## 5. Estimating EU countries Regulatory performance

### a) The intensified Regulatory Reform Process

Seeking more regulatory efficiency in a globalized economic environment, all countries have been engaged and intensified their regulatory reform process. In this effort to move towards a more liberalized and flexible regulatory framework that promotes competition, the cornerstone for economic efficiency, countries have to change their attitudes and principles, on which the functioning of their economy and society is based upon.

It is not a simply a change in standards, but a change in the whole institutional – legal system as well as the system of values of a jurisdiction, that has a tendency to “compete” with other systems.

The overall degree of competition and the level of convergence must include this approach and not only in isolated cases (Radaelli Cl. 2004).

Structural reforms of business regulation, are relating to a number of factors that restrict competition. The effort to reduce the regulatory burden for firms, including start-up administrative simplification, undue restrictions on firms entry and expansion, eliminates state involvement on business and markets functioning, and establishes new roles for the market and the state.

These reforms, are of crucial importance, in fostering the catching-up processes necessary for a friendly business environment, attracting foreign direct investments, productivity growth, speeding up the diffusion of technology, and increasing the GDP per capita.

Empirical research suggests a significant correlation between the above and delayed reforms, or slowing adjustment process. This potentially explains the persisting differences between countries.

Regulation that restricts competition, partially explains the divergences in productivity trends and different abilities of countries to integrate ICT technologies into the production process and use them efficiently (Conway P., Nicoletti G. 2007).

Despite harmonization efforts to increase the degree of regulatory convergence, the observed divergences reveal the broad space for Regulatory Competition. A considerable number of appropriate indicators constructed by International Institutions are used to estimate countries regulatory efficiency and performance.

Their estimated results mirror the existing divergences in the European context.

In the following tables, we present the main indicators constructed by OECD, World Economic Forum, and World Bank, as well as the Lisbon Targets indicators.

## b) The OECD Product Market Indicators

The role of product market policies for competition has been of central importance for many years in OECD analysis. Since the end of 1990s, the OECD has constructed a system of indicators termed product market indicators (PMR), aimed at measuring regulations that are potentially anticompetitive.

The 1998 version of the PMR indicators system, incorporated some improvements and extensions, which were applied in 2003 and 2008. These were also revised in order to preserve its policy relevance in light of evolving regulatory and competition issues in OECD countries. The 2008 version of the indicator includes a large set of countries that are not OECD members (Wolf A. et al 2010).

Indicators are based on qualitative information mainly derived from national administrations, guarantying a high level of comparability across countries, estimating quantitatively their performance.

The economy wide PMR integrated indicator covers both general and sectoral regulatory issues in the domains of “state control”, “barriers to entrepreneurship,” and “barriers to trade and investment”. The PMR indicators account for formal government regulation.

Informal regulatory practices, such as administrative guidance or self disciplinary measures of professional associations, are only captured to a very limited extent in the PMR indicator system (Conway P. et al 2005).

Due to product market liberalization reducing the rent firms accrue; informal regulatory practices have to be combined with a liberalized Employment Protection Legislation (EPL), as a complement.

EPL may reduce the incentive for labor to maintain or increase the bargaining power aimed at capturing part of these rents on protecting “insiders” by means of restrictive EPL, while firms in competitive markets may also find it less easy to bear the cost of restrictive EPL (Conway P. et al 2005).

For the purpose of the current analysis, we present below in Table 1, E.U. countries regulatory performance, as it is estimated by OECD over all PMR and subdomains for the years 1998, 2003, and 2008, for which related data exist.

This data, mirrors during this period, E.U. countries continuous effort for regulatory reform, and their convergences or divergences. Despite the lack of updated data, in a fast changing regulatory environment, we can draw conclusions about tendencies, countries achievements, and regulatory performance.

Also in this table, comparisons can be made to two other large economies, the US and Japan.

Table 1. EU OECD's PMR indicators of E.U. countries, USA, and JAPAN

E.U. Countries	Product Market Regulation			State control			Barriers to Entrepreneurship			Barriers to Trade and Investment		
	1998	2003	2008	1998	2003	2008	1998	2003	2008	1998	2003	2008
<b>Austria</b>	2.33	1.76	1.45	3.8	2.7	2.01	2.19	1.71	1.18	1.0	0.86	1.16
<b>Belgium</b>	2.17	1.59	1.43	3.52	2.58	2.59	2.33	1.88	1.43	0.68	0.31	0.32
<b>Czech Republic</b>	2.99	1.98	1.62	3.67	2.78	2.43	2.27	2.09	1.55	3.03	1.05	0.88
<b>Denmark</b>	1.59	1.18	1.06	2.46	1.34	1.37	1.82	1.43	1.15	0.49	0.79	0.65
<b>Estonia</b>	-	-	1.31	-	-	2.01	-	-	1.4	-	-	0.52
<b>Finland</b>	2.08	1.3	1.19	3.01	2.01	1.75	2.41	1.42	1.36	0.81	0.46	0.45
<b>France</b>	2.52	1.75	1.45	3.75	2.89	2.62	3.05	1.79	1.28	0.77	0.55	0.46
<b>Germany</b>	2.06	1.6	1.33	3.18	2.13	1.96	2.31	1.83	1.31	0.7	0.83	0.71
<b>Greece</b>	2.99	2.58	2.37	4.8	3.91	3.85	2.68	2.51	1.95	1.5	1.31	1.32
<b>Hungary</b>	2.3	1.91	1.3	3.67	2.79	1.9	1.85	1.8	1.7	1.36	1.15	0.28
<b>Ireland</b>	1.65	1.35	0.92	2.97	2.44	1.27	1.6	1.26	1.17	0.38	0.34	0.32
<b>Italy</b>	2.69	1.81	1.38	4.2	3.11	2.33	2.74	1.58	1.08	0.84	0.74	0.72
<b>Luxembourg</b>	-	1.48	1.56	2.08	2.41	2.51	-	1.54	1.7	-	0.48	0.47
<b>Netherlands</b>	1.66	1.36	0.97	2.46	1.87	1.71	2.05	1.78	0.87	0.47	0.44	0.33
<b>Poland</b>	3.97	2.95	2.26	3.99	3.66	3.35	3.72	3.11	2.32	4.22	2.08	1.12
<b>Portugal</b>	2.25	1.64	1.43	3.94	2.78	2.65	2.15	1.59	1.17	0.65	0.56	0.46
<b>Slovenia</b>	-	-	1.46	-	-	2.65	-	-	1.08	-	-	0.64
<b>Slovak Republic</b>	-	1.84	1.63	-	2.02	1.65	-	1.9	1.55	-	1.61	1.73
<b>Spain</b>	2.55	1.68	1.03	3.71	2.8	1.62	2.39	1.63	1.2	1.54	0.22	0.28
<b>Sweden</b>	1.93	1.49	1.3	2.77	2.77	2.38	2.11	1.15	0.96	0.92	0.56	0.57
<b>United Kingdom</b>	1.07	0.82	0.84	1.51	1.28	1.5	1.45	0.95	0.82	0.25	0.24	0.2
<b>USA</b>	1.28	1.01	0.84	1.41	1.19	1.1	2.02	1.63	1.24	0.42	0.2	0.18
<b>Japan</b>	2.19	1.41	1.11	3.15	2.59	1.43	2.97	1.38	1.37	0.45	0.26	0.54

Source <http://www.OECD.org/dataoecd>

### c) E.U. countries Global competitiveness Ranking

International competitiveness rankings, presented below, tend to be used as yardsticks for assessing the achievements of governments in their efforts at regulatory reform. The rankings are based on the assumption that the determinants of competitiveness do not differ between countries, and continue to deliver a consistent message, particularly in terms of the ranking of countries (Rosenbaum E. 2011).

In the following Table, the Lisbon Ranking indicators have been designed to assess progress of the Member States against the backdrop of the Lisbon objective to “make Europe by 2010 the most competitive and the most dynamic knowledge based economy in the world”.

This table is based on the EU’s short list of “structural indicators”, using data from respective institutions and the World Economic Forum’s executive opinion surveys.

The first column presents the relative Lisbon Review index for years 2008 and 2010, and also the most related to regulatory environment sub indexes for year 2010, which are liberalization and enterprises environment. In Table 2, the E.U.’s countries rankings on global level are presented using related data from the World Economic Forum.

Since 2005, the World Economic Forum has based its competitiveness analysis on the Global Competitiveness Index (GCI), a highly comprehensive index for measuring national competitiveness that captures the macro and microeconomic foundations of national competitiveness.

This report defines competitiveness as a set of institutions, policies, and factors that determine the level of productivity of a country. It considers the twelve pillars of competitiveness as the most important determinant driving productivity and competitiveness. Two of these pillars, directly related and affecting the regulatory environment, are institutional environment - legal and administrative framework, and goods markets efficiency.

The EU countries are presented in the below in Table 2, according to their global ranking.

A governance structure with effective and transparent public institutions insures a level playing field and enhances business confidence, including the independent judiciary, strong rule of law, and a highly accountable public sector.

Countries with efficient markets are well positioned to produce the right mix of products and services as well as ensure that goods are effectively traded.

It also ensures healthy market competition, both domestically and foreign, eliminating disproportionate taxes, and restrictive discriminatory rules on foreign direct investments.

Finally, another index, created by the World Bank, is the Easy of Doing Business Index. This index measures regulations directly affecting businesses based on ten sub indexes, such as starting business procedures, dealing with corruption, employing workers, difficulty of hiring index, registering property, getting credit, etc.

A higher ranking on these indexes indicates a better than usual and simpler regulation for businesses and stronger protection of property rights.

*Table 2.* EU countries regulatory and competitiveness performance on EU and GLOBAL ranking

Countries	Lisbon Ranking				Global Competitiveness Index				Doing business	
	Lisbon Review Index		2010 sub indexes		GCI Index		Pillars 2010-2011		2009	2011
	2008	2010	Liberalization	Entreprise environment	2009 – 2010	2010 - 2011	Institutions	Good Markets Efficiency		
Austria	5	7	3	10	17	18	15	19	26	32
Belgium	10	10	8	8	18	19	29	16	20	25
Bulgaria	27	27	27	22	76	70	114	82	42	51
Cyprus	13	13	13	13	34	40	30	20	36	37
Czech Rep.	16	15	12	19	31	36	72	35	66	63
Denmark	2	3	5	7	5	9	5	13	5	6
Estonia	12	12	14	3	35	33	31	29	22	17
Finland	3	2	7	2	6	7	4	24	14	13
France	8	8	11	12	16	15	26	32	31	26
Germany	6	6	4	17	7	5	13	21	27	22
Greece	23	23	25	26	81	83	84	94	100	109
Hungary	22	21	21	20	58	52	79	67	41	46
Ireland	11	11	9	5	25	29	24	14	7	9
Italy	24	25	23	27	48	48	92	68	74	80
Latvia	21	22	22	14	68	69	75	72	29	24
Lithuania	19	20	24	18	53	47	60	73	25	23
Luxemburg	7	5	6	1	21	20	9	3	53	45
Malta	18	17	16	23	52	50	34	36	-	-
Netherlands	4	4	2	6	10	8	12	8	28	30
Poland	26	24	20	24	46	39	54	45	72	70
Romania	25	26	26	21	64	67	81	76	45	56
Portugal	14	16	19	16	43	46	48	52	48	31
Slovak Rep.	20	19	17	9	47	60	89	51	35	41
Slovenia	15	14	18	15	37	45	50	39	57	42
Spain	17	18	15	25	33	42	53	62	51	49
Sweden	1	1	1	4	4	2	2	5	17	14
United Kingdom	9	9	10	11	13	12	17	22	6	4

Sources :

The Lisbon review 2010. Towards a more Competitive Europe, World Economic Forum.

World Economic Forum. Global Competitiveness report 2010-2011

World Bank : Easy doing Business

The above presented indicators, allow us to develop a consistent picture of Member States regulatory performance, their convergence or divergence, and their achievement on this time period.

In this context, we see there is room for the further development of Regulatory Competition.

## 6. Conclusions

Regulatory Competition not only remains an active element in today's integrated Europe and globalized world, but becomes more important because in this environment the necessary preconditions for its development are fulfilled in a much higher degree.

Divergent regulatory standards, rigid or flexible regulatory environments create room for Regulatory Competition with severe implications for countries attractiveness of investment, productivity, competitiveness, and economic welfare.

In 2012, the European Single Market celebrates its 20<sup>th</sup> anniversary and is no longer comparable to the Single Market of 1993. Two decades of deepening and widening of the 'single market', reflect European attempts to improve the Union's potential for innovation, competition, and adopting modes of regulatory efficiency.

Despite this on-going process and intensified efforts of convergence and regulatory reform by all countries, significant divergences and heterogeneity exists, creating broad room for Regulatory Competition.

The latter seems to function complementarily to harmonization.

The related regulatory indicators constructed by International Institutions, such as OECD, World Economic Forum and World Bank, reveals the reality of EU's regulatory environment, which is evident by their recent estimated results presented above.

Using relatively similar approaches, we reach relatively similar results. In the continuously improving regulatory framework, significant divergences in regulatory performance among countries exist due to rigidities, excessive regulation, and delayed reforms among some countries.

We also have to mention that in the process of fast reforming countries, the data presented above no longer reflects the current situation. Conclusions drawn from the above indicators and rankings call and necessitate for further coordination, harmonization, and intensification of regulatory efforts, particularly by the group of countries with 'relative restrictive' regulatory regimes.

The above measures and indicators will improve the necessary homogeneity, a significant factor for efficient functioning of EU's internal market.

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## Part IV

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# TRANSPORT, TELECOMMUNICATIONS, ENVIRONMENT AND ENERGY

**Tim-Ake Pentz<sup>1</sup>**

## **MARITIME GOVERNANCE IN THE BALTIC SEA – A EUROPEAN SEA BETWEEN CO-OPERATION AND CONFLICT**

### **Abstract**

An increasing demand for the limited space and resources of the Baltic Sea and a lack of planning instruments lead to conflicts between maritime sectors and may jeopardize the sustainable development and prosperity of the Baltic Sea Region as a whole. Based on recent project work and on-going comparative policy studies this paper gives an overview on how national states around the Baltic Sea – namely Sweden and Germany – may adapt to this challenging situation. Furthermore, focusing on the introduction of Maritime spatial planning (MSP) as a new tool for coordinating different maritime uses and solving conflicts between different maritime sectors this paper discusses two different governance scenarios and their impact on managing the Baltic Sea.

**Keywords:** maritime governance, maritime spatial planning, European integration, Baltic Sea

## **1. A crowded Baltic Sea**

Uniting more than 85 million people within its drainage area the comparatively small, shallow and environmentally vulnerable Baltic Sea stands as a symbol for integration and growing prosperity. During the last two decades the Baltic waters

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have become a vibrant hub for a vast variety of human uses like transport of goods and passengers, tourism, energy production especially offshore wind power, fishing and aquaculture, sand and gravel extraction, as well as military activities or carbon sequestration and storage. Despite the last world economic crisis most figures predict a continuing and substantial growth in traditional as well as new coastal and maritime uses. Looking at the Baltic Sea from a planner's perspective there is almost no single spot not allocated to at least one maritime use. Most likely, the sea will become even more crowded in the future. The most prominent example for new maritime uses and the hunger for space is the politically driven growth of offshore wind power in the Baltic Sea with predicted mega watt growth rates of a staggering 3.473% until 2030 (OffshoreGrid, 2010).

These developments may seem beneficiary in a short-run economic perspective or from a single-sector perspective. From a more holistic viewpoint they cumulatively endanger the Baltic Sea as an ecosystem. HELCOM states that besides some successes – for example the decreasing number of pollutant hotspots – the overall status and health of the Baltic Sea is still a subject of concern, and none of the Baltic Sea basins have an acceptable ecosystem health status at this time. The resilience of the Baltic Sea has been undermined today and its capacity to deliver ecosystem goods and services to the people is hampered (HELCOM, 2010a). Additionally claims of different user groups for the same space or resource are likely to end up in conflict and project deadlocks or like Douvère states in “A lack of investment certainty for marine developers and users of ocean resources” (Douvère, 2008, p.763).

Taking this as a starting point the *first* question to be addressed is what challenges whether naturally set or anthropogenic stand between the smooth use of a common sea where space and resources are managed with taking into account the resilience of the Baltic Sea as ecosystem, possible synergetic effects between uses and trans-boundary cooperation. *Secondly* elaboration is needed on how the Baltic Sea states may overcome these challenges through the introduction of Maritime spatial planning as a new governance tool triggered in the first place by the EU Integrated Maritime Policy. In a *third* step two scenarios for the possible future developments of maritime governance in the Baltic Sea Region are presented based on the national experiences of the Baltic Sea states with a special focus on Germany, Sweden and a recent international project on joint Maritime spatial planning in the Baltic Sea.

## 2. Challenges of maritime governance

What is maritime governance? Ehler (2003, p. 335) defines governance as a “process through which diverse elements in a society wield power and authority and, thereby, influence and enact policies and decision concerning public life and economic and social development”. In accordance to this definition *maritime governance* can be defined as the structures and processes used to govern public and private behaviour in maritime spaces as well as maritime resources and activities. In a nutshell this means that the Baltic Sea states have to come up with solutions, rules, instruments and structures to manage the common sea space toward collectively beneficial outcomes

and away from outcomes that are collectively harmful (Young, 2009, p.12). However, this is easier said than done. Maritime governance in the Baltic Sea is confronted with a phalanx of challenges that have to be dealt with.

- a) *Natural challenges of sea space governance*: One of the basic principles of good maritime governance stated, for example, by the joint HELCOM-VASAB working group on maritime spatial planning is that all marine management as well as specific policies should be based on the best scientific knowledge available (HELCOM, 2010b). Curiously enough even though the Baltic Sea belongs to the at best researched seas around the world marine scientists often refer to the lack of data to build up better models to monitor or predict the effects of human uses. This shows that governance in and for maritime systems is afflicted with a high degree of uncertainty regarding marine biological processes. Marine ecosystems are by nature *always changing, highly complex and deeply interconnected*. This makes predictions of the effects of human interference in seas and oceans or predictions about their resilience a real brainteaser.

For the semi-enclosed Baltic Sea this is especially true. Its breath does not exceed 400 nm; therefore the Exclusive Economical Zones (EEZ) of the Baltic Sea countries connecting directly. In some narrow areas, such as the Danish Straits, even territorial waters border. In effect this means – for example – that spoiling spawning grounds for fish through the promotion of ship traffic in one country may lead to a decrease in fish stocks and a decrease in the incomes for fishermen in another country. Another example is the discharge of nitrate or phosphate through farming run-offs of fertilizers and the direct discharges of sewage from single hotspots or boats resulting in algae blossoms that threaten the tourist economy and cause vast dead zero-oxygen zones on the sea floor (e.g. Steckbauer et al, 2011). These pose a real menace for the future supply of marine ecosystem products and services in all Baltic Sea countries. More simply put the most challenging aspect of maritime governance is that fish, hazardous substances, the best spots for wind-farming or ecosystem degeneration in marine systems do not know national borders.

- b) *Man made challenges of sea space governance*: Frequently the Baltic Sea is taken as an example of what Hardin called “the commons”. It is characterized as an area or space used by a multitude of users. Each user group tries to maximize in a completely rational manner their shares and outputs of this given area. Even though the maximization of output by a single user group may not have an effect on the whole system the cumulative activities of all user groups are leading to the overuse and depletion of this space and its resources. This is what Hardin called the *tragedy of the commons* (Hardin, 1968). If the Baltic Sea states do not want to end up in a *Baltic Sea tragedy* they are obliged to govern the commons as suggested by Ostrom in collective action (Ostrom, 1990). For this the reshaping of the national and regional maritime governance structures seem to be necessary. Following HELCOM maritime governance in the Baltic Sea today “is insufficient and does not match the dynamics of the complex marine ecosystem.” (HELCOM, 2010a, p. 48). This is due to the fact that maritime space and resources have been managed on a sector-by-sector approach and on

an ad hoc basis. Even though Baltic Sea states like Germany, Poland or Sweden have started to adapt their administrative systems, legislation and policies in more holistic manner maritime governance along the Baltic Sea is in general still affected by shortcomings as:

- Different and sometimes contradictory policies (transport vs. energy vs. environmental policies etc.)
- Fragmented administrative competencies split *horizontally* (e.g. ministries of environment, ministries of transport etc.) and *vertically* between different administrative levels (e.g. local, national, regional, international)
- A lack of regional trans-boundary consultation, coordination and cooperation
- Different methods, instruments and scales of collecting and analysing data
- The absence of a coordinating body or institution

The above discussion of natural and man-made challenges show that there is a need in the Baltic Sea Region for a more integrated governance framework with appropriate tools that help policy makers and economic as well as environmental actors to “join up their policies, interlink their activities and optimise the use of marine and coastal space in an environmentally sustainable manner” (Schäfer, 2009, p. 1).

### 3. Introducing maritime spatial planning: a good example of European integration in the Baltic Sea Region?

Maritime spatial planning is understood here as „*a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process*“ (Ehler & Douvère, 2009, p. 18). The evolution of maritime spatial planning in Europe first in the North Sea and later in the Baltic Sea is closely related to the EU Integrated Maritime Policy. Maritime spatial planning can be seen as the backbone and most prominent tool supporting the implementation of a more integrated maritime policy (EC, COM(2010) 771) as put forward first in the form of the EU Green Book (EC, COM(2006) 275), and later in the Blue Book on EU Integrated Maritime Policy (EC, COM(2007) 575), in conjunction with an Action Plan (EC, SEC(2007) 1278).

The main driving force for the European Commission to develop the EU Integrated Maritime Policy and with it maritime spatial planning was the perception of an economic need to encourage economic maritime activities in Europe's seas and make them more predictable at the same time. The EU Integrated Maritime Policy and maritime spatial planning are thus aiming at the co-ordination of different maritime sectors and the standardization of maritime governance throughout Europe. For this rather business-oriented approach EU Integrated Maritime Policy and maritime spatial planning have been criticized from nature conservation activists who fear a marginalization of environmental regulation, for example, the Maritime

Strategy Framework Directive. There is an on-going debate if this concern is justified or if EU Integrated Maritime Policy and maritime spatial planning are truly based on the ecosystem-approach and ecological sound decision-making like their supporters tend to state.

However, from a policy perspective the EC initiatives already had an impact on the EU member states first and foremost on those states along the shores of the North and Baltic Sea. In the Baltic Sea, for example, where many uses and environmental functions are pan-Baltic in their scope, impact, and relevance, the EC initiatives created an important momentum for the national governments to evaluate their national maritime policies and existing national maritime governance structure. Additionally they stimulated the exchange of experiences and best practices about maritime governance. Today maritime spatial planning has become widely acknowledged as necessary tool for co-ordinating spatial use in the seas. Nevertheless it seems still a long way to go until this tool is being fully established in practice in all Baltic Sea Region countries. The introduction of maritime spatial planning in the Baltic Sea states will be a litmus test for the EU Integrated Maritime Policy and a good example for the study of European integration.

#### **4. Experiences from the field: MSP, national adaption and trans-boundary cooperation**

It could be argued that it is not feasible to introduce maritime spatial planning in all the Baltic Sea states in a joined and harmonized way due to the specific features and power plays within the different political systems. From a solely national point of view this may seem plausible. However, from a comparative perspective the problems that have to be solved to promote maritime spatial planning are quite similar in all Baltic Sea countries. It is true that maritime spatial planning can only be successful if it gets the necessary political backing and becomes part of the political agenda within the political system of each Baltic Sea state. It is also true that the implementation of maritime spatial planning may lead to adaption or even change of the accustomed governance structures. This means it will be vital to take all policy cycles, the self-preservation or persistence of existing institutions and structures as well as the linked power-shift dilemma in each Baltic Sea state into consideration. Even though it would be naive to promote a single role model for maritime spatial planning on a national level there are examples of states embracing this task of adapting governance structures and legislation for this purpose. The cases of Germany and Sweden can be seen as encouraging examples for the other Baltic Sea states regarding the co-ordination of maritime spatial planning across different governance levels and the adjustment of administrative structures.

*Co-ordinating maritime spatial planning across different governance levels in Germany:* In the European Union Germany is known as a forerunner regarding legislation and planning processes for marine spaces even though the authority of planning maritime spaces in Germany is divided between the single federal states (Bundeslaender)

like Mecklenburg-Vorpommern or Schleswig-Holstein and the federal government (Bund). The Bundesländer are responsible for planning in the coastal zone and territorial waters up to 12nm. The EEZ falls under the authority of the federal state namely the Federal Maritime Hydrographic Agency (Bundesamt für Seeschifffahrt und Hydrographie). In the beginning of introducing a more holistic management for maritime areas Germany was confronted with two major problems. First: A legal debate about the existing competencies to elaborate holistic spatial plans in areas not belonging to the inland or territorial waters. Secondly: The high political and commercial pressure regarding the demand of space for the development of offshore wind-power and the shortage of time.

The first problem was tackled when, in 2004, the Federal Spatial Planning Act had been made applicable to EEZ after the Federal Ministry of Transport elaborated legally binding targets and principles for the application of the ordinance, within the framework of the United Nations Convention on the Law of the Sea. Finally the federal state of Mecklenburg-Vorpommern took the lead in 2005 when it introduced integrated maritime planning for the first time in the coastal waters in its development programme (Landesverordnung über das Landesraumentwicklungsprogramm Mecklenburg-Vorpommern, 2005). Schleswig-Holstein published a Spatial Planning Report Coast and Sea the same year (Raumordnungsbericht Küste und Meer Schleswig-Holstein, 2005) and presented a legally binding spatial plan in 2010 covering the whole land territory and the whole territorial sea. On national level the first draft of the Maritime Spatial Plan for the EEZ was distributed in 2008 with the legal ordinance for MSP coming into force in 2009. Preparatory work including strategic environmental assessment and public participation had been taken care of by the Federal Maritime and Hydrographic Agency (BSH) on behalf of and in close co-operation with the Federal Ministry of Transport, Building and Urban Affairs and in cooperation with the federal states. The example of Germany shows that even under severe time pressure and split competencies between different governance levels maritime spatial plans can be prepared and implemented if the will of co-operation is at hand.

*Adjusting administrative structures for an integrated maritime management in Sweden:* Sweden, on the other hand, has currently no comprehensive system or legal framework for MSP. However, relevant legislation is underway and is expected for 2012. The proposed legislation will cover the whole marine area starting from 1nm to the outer boundary of the EEZ, and will overlap with existing regulations. It will be adjusted in order to match with the new MSP legislation. First and foremost the Swedish case is interesting in relation to the possibilities to rearrange agencies and authorities on national level if beneficiary for the implementation of MSP without ending up in a power-shift dilemma as stated above. The Swedish government decided to establish a new agency responsible for sea-, water- and fisheries management (SOU 2010:8 En myndighet för havs- och vattenmiljö). The new agency will be a merger between the Swedish Board of Fisheries (Fiskeriverket) - which will be closed down - and parts of the Swedish Environmental Protection Agency (Naturvårdsverket) relevant for maritime and water related issues. The new agency inaugurated in July

2011 is going to have comprehensive competences for maritime spatial planning, the implementation for water quality standards, fisheries management and act as facilitator for national processes concerning these areas. With the introduction of this new agency, Sweden strives to forge a “Third Way” between the two approaches of economic maritime development and ecologic planning for maritime reserves (Dir. 2009:109/SOU 2010:91, p. 523). However, this agency does not cover all relevant maritime sectors. It comes much closer to what is called a “one stop shop” concerning the integrated management of maritime spaces. The Swedish case shows that even rearrangements of agencies and authorities are feasible and there is excuse for not acting on introducing MSP on national level.

*Cross-boundary cooperation:* The transfer of knowledge and expertise as well as the consultation about common goals, principles and methods are vital to develop maritime spatial planning jointly. Trans-boundary consultation like the HELCOM-VASAB working group on maritime spatial planning or international projects like the EU co-financed project “BaltSeaPlan – Planning the Future of the Baltic Sea 2009-2012,” can thus be seen as the cornerstones of future integrated maritime governance in the Baltic Sea Region and beyond. Within the BaltSeaPlan project alone, 14 partners from seven Baltic Sea region countries provide key input into the realization of the EU Maritime Policy, HELCOM Baltic Sea Action Plan and the VASAB Gdańsk Declaration. Following the project description seven important areas were chosen for trans-boundary pilot maritime spatial plans. All data gathered will be harmonised according to requirements of the EC INSPIRE directive (Dir. 2007/2/EC) and additionally, BaltSeaPlan will provide key input into national maritime policies as required by the EU Blue Book on Future Maritime Policy. Finally the project partners will come up with a common spatial development vision for the Baltic Sea as a synergy of the national visions and plans of all Baltic Sea Region countries. This portfolio of work packages gives a first insight in how important projects like BaltSeaPlan are for the development for future maritime governance in the Baltic Sea region. They help to bring the more theoretical scientific debate about Integrated Maritime Policy and maritime spatial planning to practice and help to bridge the frequently stated science-policy gap (e.g. De Santo, 2010) making the joint work visible and manifest for decision-makers.

## 5. Scenarios: convergence or diversity in maritime governance in the Baltic Sea Region?

It should not be blurred that problems of marine resource allocation are in its core no problems of maritime systems. They are “*human problems that we have created at many times and in many places, under a variety of political, social, and economic systems.*” (Hilborn & Walters, 1993, pp. 17-36). Even though there is a momentum and a realistic chance to find common solutions to the challenges of maritime governance in the Baltic Sea Region today the European Commission's maritime spatial planning impact assessment (2010-2011) evaluating expert views on the future of maritime spatial planning show too that maritime spatial planning and with it Integrated

Maritime Policy are at the crossroads now. Two scenarios – labelled here as diversity and convergence– are likely to evolve in the upcoming years.

- a) *Diversity scenario*: In this scenario the Baltic Sea states did not come up with common principles and goals of maritime governance in and for the Baltic Sea. Maritime spatial planning did not find the needed political backing and did not get an appropriate representation on the political agenda on national level. Planning in the Baltic Sea Region countries takes place in different paces and under different assumptions, mostly unilateral or bi-lateral. Sectoral differences in the definition of maritime spatial planning lead to conflicts on how maritime space should be used thus making maritime spatial planning vague and no priority. Baltic Sea region countries do not take long-term developments or cumulating effects of their maritime activities into account. The marine ecosystem of the Baltic Sea will be harmed by the status quo finally leading to a point that the ecosystem fails to deliver ecosystem goods and services to the people and thus leading to an overall loss of prosperity and quality of life.
- b) *Convergence scenario*: The Council of the European Union, the European Commission and the European Parliament agreed upon a Maritime Spatial Planning Directive in conjunction with the Marine Framework Directive (Dir. 2008/56/EC) to secure coherence in maritime governance within the European Union. Strategic national level Maritime Spatial Plans are in place in all Baltic Sea Region countries in this scenario and detailed and harmonized maritime spatial planning information is available on demand and free of charge to manage existing and new sea uses and to find possible synergies. Agreement on joint maritime spatial planning goals and principles among the Baltic Sea region countries including the protection of the Baltic Seas resilience has been reached and a mechanism or body to facilitate constant coordination and cooperation between the Baltic Sea region countries concerning maritime spatial planning has been installed. The marine ecosystems of the Baltic Sea are protected in a way that the ecosystem may deliver ecosystem goods and services to the people today and in the future.

The two scenarios presented here show a great disparity calling for explanation. Even though the Baltic Sea Region is seen as a pioneer in creating new structures for common governance (e. g. Joas, Kern & Sandberg, 2007) the debate about the future of integrated maritime governance in general and about maritime spatial planning in general is an on-going and completely open process. At the moment the EU countries are not obliged to carry out maritime spatial planning and as long as there are member states which have not even started a legislative process which would make the adaption of a directive possible, it is not very likely that a maritime spatial planning directive will be in place soon. What can be expected in the time to come – at least in the North and the Baltic Sea – is an increasing standardization of data gathering and interpretation, surveillance and licensing.

If scientific work in general is always preliminary and work in progress this is especially true for studies about the evolvement of maritime governance in the Baltic Sea Region. As Mee states “New ideas take time to be accepted by the scientific

community and eventually - usually by very indirect routes - trickle down to policymakers and may become enshrined in policy” (Mee, 2010, p.8). However it can be anticipated that the coming months will be decisive and revealing regarding the future of maritime governance in the Baltic Sea Region.

## Conclusion

The seas are commonly understood as vast and almost limitless entities belonging to all and no one at the same time. This interpretation can be simply explained by the remoteness of offshore sea spaces. Another explanation is today’s international law of the seas going back to Hugo Grotius work *Mare Liberum* from 1608 and the notion of the freedom of the seas, which stands in rough contrast to the developments we experience today in the Baltic Sea and beyond.

This paper described that the increasing demand for the limited space and resources of the Baltic Sea is leading to conflicts between maritime sectors and endangers the sustainable development and prosperity of the Baltic Sea Region as a whole. It showed the rationale for a joint maritime governance of all BSR countries and what challenges - whether natural or man-made stand between integrated, maritime management. Maritime spatial planning has been introduced as the most prominent tool for developing integrated maritime governance and as an indicator for European integration. The cases of Germany and Sweden showed that change of legislation and institutions towards a holistic sea-use management is feasible. Trans-boundary projects and cooperation have been addressed and defined as crucial for the further development of maritime spatial planning. In a final step two scenarios for possible future developments of maritime governance in the Baltic Sea Region have been set up for further discussion.

As mentioned above, maritime spatial planning has become widely acknowledged as necessary tool for co-ordinating spatial use in the seas. Still it seems a long way to go until this tool is being fully established in practice in all Baltic Sea Region countries. A more standardized way of planning the maritime space is an important step to manage our common Baltic Sea in a truly pan-Baltic and integrated way. To reach this goal the national governments around the Baltic Sea will have to further strengthen their efforts in developing national maritime policies, in establishing the legal basis for maritime spatial planning and to promote the exchange of best governance practices between the Baltic Sea states.

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## BALTIC PORTS: STRATEGIC INTERACTION FOR CLEAN SHIPPING

### Abstract

During the past decade, there has been a growing interest in tackling the problem of vessels-based pollution in the Baltic Sea Region, in both technical and administrative terms. In this study, the role of ports in ensuring clean shipping was investigated. In order to enhance heuristics regards vessels' compliance incentives; game-theoretic models of vessels interaction with port authorities were developed and illustrated on the case of the Big Port of St. Petersburg. The absence of effective and efficient monitoring in the port of St. Petersburg showed to likely undermine the environmental performance of vessels, both in the port and at high seas. The results suggest that the role of ports as a loci of authority and sites of rule enforcement is crucial to the development of clean shipping in the Baltic Sea Region.

**Keywords:** Baltic Sea Region, maritime policy, clean shipping, port regulation, marine environment

### 1. Introduction

The environmental state of the Baltic Sea is far from satisfactory. The Baltic Sea receives heavy pollution loads from bordering countries and vessels. In addition, the increasing oil transport in the Baltic Sea poses a particular risk to the ecosystem. Some special geographical characteristics make the problem of Baltic Sea pollution even more complex. The area of the Baltic Sea (ca. 370,000 km<sup>2</sup>) has only a narrow connection with the open seas, i.e. the North Sea, enabled by the Danish Straits, which hinders the water exchange. If harmful substances are introduced, they will remain in the Baltic for a very long time (Fitzmaurice, 1991, p.1). For example, a minor oil spill can have serious consequences for seals, fish, and sea birds. A large number of islands and the long periods of ice coverage make cleaning operations particularly difficult (WWF, 2003). Thus the sensitive ecosystem of the Baltic Sea necessitates special treatment.

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The Baltic Sea has some of the busiest shipping routes in the world, with an average of 2000 vessels at sea at any time, increasingly contributing to the region's economic growth (Mäkinen, 2008, p.13). However, seagoing vessels are responsible for a wide range of discharges in the water, atmosphere, and shores (e.g. oil, hazardous substances, garbage, sewage, alien species, recycling impacts, CO<sub>2</sub>, cargo etc). Recently, there has been a growing interest in addressing the issue both technically and administratively. The research has tended to focus on the rules designed for clean shipping, as well as on their implementation and monitoring in the interplay of national and international legal systems (e.g. Tan 2006, Basedow and Magnus 2007). Very little attention has been paid to the role of ports in ensuring clean shipping (Braathen, 2011, p.13).

This paper addresses the role of ports in environmental performance of shipping. It exploits the propositions of game theory (GT) to investigate the means of enhancing the vessels' environmental performance. Specifically, it asks how a well-functioning port can function in order to promote safe, secure, and environmentally-sound shipping.

The scope of the investigation is limited to commercial seaports, leaving out naval activities and fishery. The subject is also limited, avoiding discussions on logistic and cargo operations, and concentrating upon vessels' clearance and maintenance. Since design of incentive schemes which rely on the actions of a monitoring agent is considered to be an independent research area (Athanasoglou, 2009, p.2), this paper does not touch upon mechanism design either. It is limited to a modest goal of suggesting how GT could be applied to interactions of vessels and authorities in ports.

The paper proceeds as follows. The second section put port clearance regulation and compliance incentives in a speculative interaction through the means of formal modeling. The models in this study serve the purpose of simplification of actual situations, coherent argument-building and concise description. In the third section, the models of adequate waste treatment, fuel supply, inspection and control are illustrated in the case of the St. Petersburg seaport. Discussing empirical evidence, this paper concentrates on the obstacles to clean shipping emerging from existing interaction of ships and authorities in ports. The fourth section concludes, claiming the crucial role of ports as the loci of authority and sites of rule enforcement. Finally, the paper indicates the need for an improvement in the existing structures.

## **2. The study: a game-theoretic argument for the role of ports in clean shipping**

This section establishes a theoretical argument for the role of ports in environmental performance of shipping. First, it indicates the major environmental risks connected to shipping and the potential of ports to decrease those risks. Secondly, it exploits methodological advances of game theory, in order to create basic models of strategic interaction in ports. The modeling part of the study compares those simple

abstract models under different conditions. Though formal modeling of the study is simplistic in nature, it serves the goal of bringing complicated empirical issues to a basic comparable form (e.g. Martin, 1978; Morrow, 1994, pp.1-15). The models discussed below do not pretend to be isomorphic with respect to reality, but rather sketch the essential features of the situations under scrutiny.

## 2.1 What happens in ports?

There are several ways in which ports can facilitate cleaner shipping: providing ecological services, encouraging environmental behavior and monitoring the vessels. This section will take a closer look at those options.

All ships generate waste in their daily operation. Ballast water discharges by ships can endanger the marine environment. They contain lots of biological material (e.g. animals, plants, bacteria), which might include invasive alien species damaging the ecosystem. In this respect the Baltic ecosystem is particularly sensitive; it has already experienced species extinction due to ballast water discharges (e.g. Pacific oyster substituted native Baltic oyster (Godoy, 2011)). Similarly, any waste generated onboard – sewage, grey water, solid garbage and bilge water – can have negative environmental impact if dumped directly into the ocean. Untreated or improperly treated waste water contains pollutant substances, bacteria, viruses and nutrients, such as nitrogen and phosphorus, which lead to eutrophication. Solid waste tends to accumulate in marine debris, which damages the aquatic life.

Ship waste, however, does not constitute a major problem as long as this waste is adequately treated. Waste reception facilities in ports are essential to ensure waste collection and treatment in an environmentally sound way. For the shipping business, where punctuality is highly evaluated, effective waste handling means that reception of waste is organized in such a way that it does not cause any operational delays. At the present moment, responsibility for waste generated onboard normally lies with the port authority, which has to comply with national legislation and international commitments of the state regarding waste treatment, such as the MARPOL Annexes I, IV and V or the Ballast Water Management (BWM) Convention. Respective port authorities are supposed to maintain a comprehensive port waste management plan, whereby waste handling operations might be outsourced to private companies.

The procedure of bunkering – ship fueling and lubrication - is environmentally risky as well. Though oil spills originating from bunkering are not uncommon, due to their relatively small size, they used to receive less attention than big spills from oil tankers. Since 2001, The International Convention on Civil Liability for *Bunker Oil Pollution Damage* ensures the legal basis for necessary coverage in case of an *oil bunker spill*. Therefore, for the time being bunkering is subject to regulation, at both the national and international level. Bunkering safety is tightly connected to environmental monitoring in ports. Usually, the responsible body in port (e.g. the harbor master) issues permits to vessels intending to bunker. By completion of bunkering operations, another notification has to be given. In case a spill occurs, port authorities shall be informed, since it coordinates the work of auxiliary and environmental fleet in the harbor. Another environmental issue related to fuel supply

is the quality of fuel. Composition of a particular fuel has a direct impact on the level of air pollution from vessels. The MARPOL Annex VI, regulating the air emissions from shipping, states that it is for the port authority to monitor the quality of fuel and vessels' discharges to air (Regulation 5 and Regulation 18).

Apart from the provisions of a number of ecological services, ports can contribute to vessels' environmental performance by encouraging respective behavior. Green awards, special conditions, and fee reduction can be offered to vessels voluntarily adopting stricter environmental measures.

The last contribution a port can make for the enhancement of environmental safety of shipping is monitoring. The two main monitoring instruments are the flag State control (FSC) and the port State control (PSC). The FSC is usually carried out by the Classification societies or independent audit schemes, aiming at the fleet flying the national flag. Every vessel is required to pass through national register inspection, particularly in regards to its compliance with national and international standards. The PSC was introduced as a complementary instrument, allowing the inspection of foreign ships in national ports, in order to verify that the condition of the ship and its equipment comply with the requirements of international regulations. Additionally, the ship is inspected to ensure that it is properly manned and operating within these rules<sup>2</sup>. The PSC starts with an examination of the documents and can be extended to a direct verification, which means that the condition of the vessel and its installations will be checked to ensure their compliance with international norms. The inspection requires a number of documents to be presented, including those which indicate the ship's environmental safety (e.g. Certificates Oil Pollution prevention, Air Pollution Prevention, Sewage Pollution Prevention, Journals of Operation with Waste, Oil, Sewage etc.). As a result of the inspection, the PSC officer (PSCO), affiliated with the national maritime authorities, issues an inspection report. The PSCO has the power to detain any vessel in case serious deficiencies are revealed. Once deficiencies have been identified, the report will indicate the follow-up action that needs to be undertaken. In case of substantial non-compliance, the ship might be prohibited to leave the port, or banned from operating until the deficiencies have been fixed.

Summing up, there is a wide range of "green" options available in ports. Together with ecological services, awards schemes, and penalty power, ports are the key loci of authority, especially in regards to vessels environmental performance.

## 2.2 Model building: assumptions, conditions, and limitations

Game theory is a specific type of modeling, which belongs to a larger body of rational-choice theory. Game theoretic models usually represent interactions between two (or more) rational actors in a situation of strategic choice, i.e. a situation where actors' decisions are interdependent. The assumption of rational behavior is the cornerstone of game theory. Rationality means that individuals maximize their

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<sup>2</sup> IMO, 2011. Port State Control. The PSC procedure described thereafter is derived from the Paris MOU on PSC.

utility function under the constraints they face; choose the best means to gain their preferred outcome (e.g. Tsebelis, 1990, pp.18-51). Though the rationality assumption is unrealistic, it is crucial in terms of modeling. It creates the possibility to specify actors' goals, range their complete and transitive preferences over outcomes, and make predictions about their behavior. Models are formulated in an abstract form, isolated from any case-specific context. In this respect, a game shall be understood as a formal model, which attempts to depict the general characteristics of a situation.

The models built in this section, mainly function as heuristic devices, they can beneficially be approximated to suit the content of the study and to clarify the argument. For the purpose of this paper games are represented in extensive form, where the basic elements are: the players, the decisions they face, the order and consequences of their choices, and the results. In our models, two players are introduced: *the State* (e.g. represented by the port authority) and *the Vessel* (e.g. ship-owner or operator). The players interact in a port in a series of choices dealing with reception of waste, bunkering, and other potentially environmentally-risky procedures.

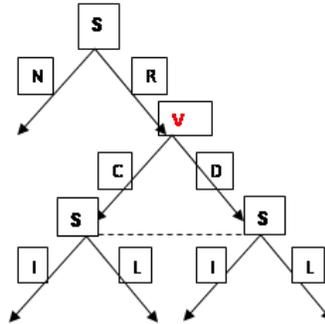
The *State* is assumed to be a benevolent and environmentally-oriented rule-maker, willing to protect its territory and citizens from environmental pollution; regulation and economic incentives are the means to achieve its goals. The *State* is the protagonist of sustainable development, as a sound complementary achievement of environmental, economic and social improvements. The *State* wants companies to comply with environmental regulation. It also expects them to bring revenue and contribute to economic growth and social welfare. The second player, the *Vessel*, is assumed to be a commercial actor, active in the market and interested in making profits. It also seeks to avoid sanctions. From the *State's* perspective any *Vessel* is a potential polluter and a potential tax-payer.

The basic design of their strategic interaction can be represented through the following decision sequence. First, the *State* makes a decision whether to regulate some sort of activity. It might, for example, choose to license the bunkering, or to make obligatory the reception of waste or ballast water treatment through tonnage declaration. When this decision is taken, the *Vessel* is in play. Any *Vessel* has the option to comply with the regulation, which is usually costly, or to deviate, hence breaking the law. As long as the deviations stay unrevealed, the *Vessel* will enjoy benefits from deviation, unless the incentive to comply will not become stronger than to deviate. In order to eliminate the possibility of law infringements by the *Vessel*, the *State* has the option to monitor the *Vessel's* operations. If during such an inspection an infringement is revealed, the *State* can activate the sanctioning mechanism. One shall not forget though, that sanctioning is costly not only for the *Vessel*, but also for the *State*. The *State* will always prefer a mechanism which ensures compliance without spending resources on monitoring.

The interaction of the *Vessel* and *State* regards the reception of waste, air emissions, ballast waters treatment, or port State control can be roughly reduced to the same sequence of moves. The *Vessel's* decision to comply, as well as the *State's* decision to inspect, represent classic interdependent choices and constitute the central interest of the models. The basic model is represented by a game-tree (Figure 1), resembling the

classic *auditing game* with complete, but imperfect information (Rasmusen, 2007, p.85).

Figure 1.



In this model players are denoted as S – State and v – vessel; their respective strategies are N – not regulate, R – regulate, C – Comply, D – deviate, I – inspect, L – not inspect. However, it is just a template with a sequence of moves, which does not give us any information on the structure of pay-offs of the players. The further discussion is devoted to the possible variation in pay-offs, deriving it from the properties of interaction as well as from contextual factors.

The following types of games will be considered: a one-shot game (Figure 2) and a repeated game (Figure 3). The sequence of moves does not change from one case to another, but the pay-offs change depending on the structure assumed. Comparison of those models will give some clues as what shall be investigated, more precisely, in the empirical case.

First we assume a one-shot game, which stands for a single interaction - a vessel calls a port only once (Figure 2). In this case we shall explore the motivation of the ship to comply with the regulations adopted in this port. The probability that the *Vessel* will not act environmentally-consciously, but will feel free to pollute is conditional. It depends on how probable the *Vessel* estimates the chance of being inspected and punished as opposed to the chance of profit maximization when deviating. At this stage we introduce the pay-offs equal to H – high, M – medium, S – small, and L – lowest (given in the order of moves)<sup>3</sup>.

<sup>3</sup> For the matter of simplicity, the pay-offs are standardized for both players and represented in non-numerical values. For both actors reaching their goal is assumed to be the desired outcome. On this way a player might need to invest some resources which will consequently decrease the pay-off. Basing on this, the following gradation is being applied, where  $H > M > S > L$ : (1) the goal is achieved and resources not spent is the highest pay-off H, (2) the goal is achieved, but resource is spent is the medium pay-off M, (3) the goal is not achieved, but resource not spent represents the small pay-off S, (4) and the goal not achieved but resource spent represents the lowest pay-off L. The balance between the utility increase of reaching the goal and its decrease by sending resources must be decided for each case separately.

Figure 2.

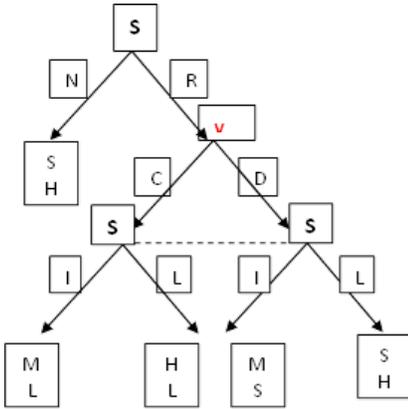
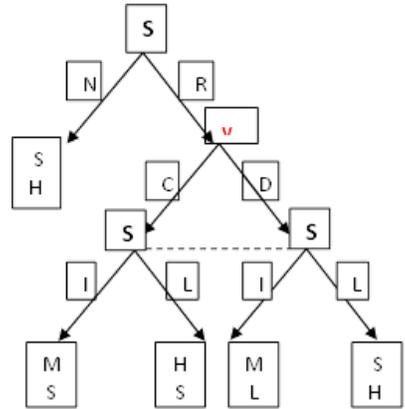


Figure 3.



As a result, if the game is played only once, in a mixed equilibrium, the *Vessel* is likely not to comply and the *State* is likely to inspect. This result is suboptimal, since both players can achieve better outcomes to a common satisfaction.

If assumed that a vessel plans to call on a port more than once, a repeated game can be modeled (Figure 3). Whereas, the *Vessel* considered the risk of being caught worth taking in the one-shot game, here it loses its attractiveness. In this new situation, when the pay-off structure changes, the equilibrium changes as well. It suggests that *the State* inspect and *the Vessel* comply. However, neither move results in severe penalties or rewards added in this model change. The ship's behavior is still to deviate, though less so than in a one-shot game.

However, the heuristics of the model suggests that in the case of a total inspection, so that the option “not to inspect” is absent in the *State's* strategies, has the potential to alter the vessel's behavior. If 100% of ships are inspected, the *Vessel* is better-off spending resources on compliance than being prosecuted or banned. The problem is that the 100% target is difficult to achieve, especially for a big port with a large number of vessels calling.

Based on the logic presented above, a hypothesis appears that in a simplified game-theoretic form, the monitoring and associated punishment-reward mechanism is as effective as its potential to alter the *Vessel's* behavior. The later depends on the expectation to be inspected, estimation of the effectiveness of punishment, and expectation of the positive influence of the “green” reputation. Thus, the *Vessel* is likely to turn its behavior to compliance, if the inspection expectation is high, the punishment is severe and the “green” reputation is awarded. In order to illustrate the theoretical propositions presented above, the next section turns to the evidence from the St. Petersburg port case. The empirical analysis of these models will be limited to the evaluation of this prediction.

### 3. Discussion: evidence from the empirical case “The Big Port of St. Petersburg”

The crucial question to be tackled here is how the evidence from the empery relates to the hypothesis derived from modeling. First, procedures of ship clearance and monitoring in the port of St. Petersburg are described. Thereafter, the basic environmental services provided there are discussed. The empirical basis for this chapter comes from the legislation analysis and a series of expert interviews with authorities and companies affiliated to the port services conducted from April 2011 until June 2011.

#### 3.1 Ship clearance in the Big Port of St. Petersburg

The seaport, *The Big Port of St. Petersburg* (thereafter – the Port of St. Petersburg), located in the eastern part of the Gulf of Finland, can be categorized as a land-lord port, where land and superstructure are owned by the state, whereas infrastructure and operations are provided by private companies. *The Federal Government Agency Administration of the Big Port of St. Petersburg*, administratively unites 5 ports (St. Petersburg, Ust-Luga, Vyborg, Primorsk, and the Passenger Port), provides the organizational framework for operations with vessels and cargo in the seaport, and is behind in its limits to establish zones of responsibility of the Russian Federation (RF). The port authority functions mainly under two legislative acts: *the Law on Seaports of the RF* (N261-Φ3 from 8.11.2007) and *the Code Of Merchant Shipping of the RF* (N 81-Φ3 from 30.04.1999). Port suprastructure is managed and operated by *The State Unitary Enterprise Rosmorport*.

The Port of St. Petersburg is a large port according to the Baltic standards, however, in the global scale it is a minor port (e.g. 10,786 calls with overall seaborne cargo handling 50408,4 tt in 2009 (Portnews, 17.02.2010)<sup>4</sup> in comparison to 10,131 calls on the port of Hamburg with an overall seaborne cargo handling of 110381,0 tt<sup>5</sup>). In terms of cargo structure, containers have a minor role, whereas dry cargo, bulk, and especially oil and LNG prevail. Serving as an import port for nuclear waste, the Port of St. Petersburg has a large turnover of hazardous substances and chemicals, which raises environmental risks.

A seagoing vessel entering or leaving the Port of St. Petersburg crosses the state border of the RF. The port clearance is therefore governed by the federal regulation of the Ministry of Transport. However, since this regulation is formulated in a general form, the Captain of the Port of St. Petersburg, the head of the port authority, issues special clarifications accounting for geographical, meteorological, technological, navigational conditions, and other specificities of the port. Vessels are required to notify the port authority about their arrival in advance. The Captain of the vessel is supposed to present documents, diplomas, and qualification certificates, required

<sup>4</sup> St. Petersburg Open City, 2011. Gruzooborot Bolshogo Porta.

<sup>5</sup> Port of Hamburg, 2011. Facts and Figures.

for entering the port in accordance with a list issued by the port authority. This data set contains general information on the vessel (e.g. the IMO number, name, port of registry, flag State, type of ship, gross tonnage etc.) and security-related information (according to SOLAS, ISPS and IMDG Codes). Though specific information on the ship's environmental performance is not included, if something appears suspicious to the port authority (any physical characteristic as noise, smell, leakage etc.), additional information can be requested.

In accordance to the federal clearing procedure, at the entrance buoy, a vessel is supposed to receive a commission, consisting of border guards, custom service, and sanitary control i.e. the inspector of the navigation and ecological safety department of the port administration. This commission is ensuring the custom clearance as well as the ship's compliance with international safety, security, and environmental standards, as well as the working and living conditions of the crew. However, since ships entering the Port of St. Petersburg follow the Maritime Channel, the documental check is performed at a special post, not onboard<sup>6</sup>.

A detailed technical inspection of the vessel might be performed in accordance with the PSC procedure. The PSC is governed in the Baltic Sea Region by the Paris Memorandum of Understanding on port State control (The Paris MOU), based on the principal of shipowner's/operator's responsibility for compliance with the requirements of the international conventions. The Paris MOU does not create a legal obligation to conduct the PSC. However, the EU states are under such obligation imposed by EU Directive 2009/16/EC on port State control<sup>7</sup>. This might make a difference between an EU and a non-EU port. As for the RF, the Constitution ensures the principle of priority and direct action of international law (RF Constitution, 1993, Art. 15(4)), creating a legal obligation to conduct the PSC, in particular according to the IMO Resolution A. 787(19) on Procedures for PSC from 23.11.1995 and Chapter 5 on PSC of the Russian Maritime Code from 30.04.1999.

Important to keep in mind, that though port State control is to ensure compliance with international standards, enforcement is always local. A concrete PSC officer in a concrete port is the one to decide upon the vessel's condition. The thoroughness and strictness of particular inspector can make a difference. Knudsen and Hassler noted that "Russian port inspections in their Baltic oil export terminals are prefunctionary to say the least, if not outright careless" (Knudsen, Hassler, 2011, p.205). The formalism of Russian authorities, known from the other fields, extends to the area of port State control. This means, that though the vessels inspection rate is high in the port of St. Petersburg, consequentially, the vessels expectation to be inspected is high, this does not induce a change in vessels behavior due to the absence of an effective threat. A nominal inspection differs qualitatively from a thorough inspection, since the chance to reveal any deficiencies and strict punished is lower.

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<sup>6</sup> FGU Administraciya morskogo porta Bolshoy port Sankt-Peterburg. Oformlenie Prihoda.

<sup>7</sup> Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control. OJ L 131, 28.5.2009, p. 57.

### 3.2 Port facilities, local regulation, and clean shipping in practice

The environmental pressure of the regular vessels' operation is particularly high in ports (Ng, Song, 2011, p.301). Therefore measures to lower the negative impact of ships are undertaken in ports. The Mandatory Regulations of the Big Port of St. Petersburg contain a chapter on the prevention of environmental pollution<sup>8</sup>. They require all entering vessels to comply with MARPOL 73/78 and the Helsinki Convention of 1992. They prohibit discharging overboard any contaminated water, garbage or other waste, burn or discharge waste into atmosphere, making any vessel's renovation or cleaning to the tanks without special permission. These regulations prescribe to apply special rules to ballast, to deliver waste to port reception and to notify of any oil spill or another visible pollution to the MRCC when detected. Infringement of these rules is considered an administrative infraction and is subject to sanctions.

The reality in which those rules are to be applied poses obstacles to their full and effective implementation. The majority of vessels calling on the Port of St. Petersburg belong to the bulk shipping industry, flying a flag of convenience. Though most of the ships are chartered for more than one call, the ship-owner's strategy differs from the one followed by a liner shipping industry, especially in terms of environmental standards (e.g. Huebner, OECD, 2001). The model developed in Section II predicts that in the case where the incentives to comply are produced through thorough monitoring and an effective punishment/reward system. As already mentioned, the monitoring system in the Port of St. Petersburg suffers several deficiencies, namely, the absence of an effective punishment, the lack of qualified personnel and corruption. The PSC service has a work overload with only 7 certified PSCO who, more often than not, do not have legal power to sign the detention documents in the absence of the Captain of the Ports signature. This intricate management system does not create room for improving the routine of PSC operations.

An example can also be derived from bunkering, which is mainly performed by the service vessel, belonging to the bunkering companies operating in the Port of St. Petersburg. Though bunkering is subject to compulsory licensing in the RF, the dimension of bunkering-related accidents is quite impressive. For example, in 2009 101 oil spills were registered at the St. Petersburg aquatic zone and 42.5 tons of oil-containing water was brought to the treatment facilities (Lovetskaya, 2010). Due to these accidents, the rules for bunker vessels were restricted, e.g. compulsory fencing and stricter tonnage control of bunker vessels were introduced. Though the oil spills in the port aquatic zone cannot stay unnoticed, the method of damage calculation leaves gaps for underreporting and fraud. In a recent incident, involving a bunkering vessel, Hogland, carrying heavy grade oil, the deadweight limit was exceeded almost twice, breaking the MARPOL Annex I Regulation 21. Nevertheless, the vessel was

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<sup>8</sup> FGU Administraciya morskogo porta Bolshoy port Sankt-Peterburg. Obyazatelnye Postanovleniya.

punished with a fine equivalent to ca. 25 euros<sup>9</sup>. Clearly such fines are too low to serve as a counterweight to possible gains from non-compliance, thus, they are not an effective punishment/reward system.

However, not only the strictness of regulation and thoroughness of its enforcement, but also the quality of the facilities play a substantial role. By providing an adequate treatment of garbage and sewage, ensuring safe bunkering and shore-side electricity, ports can decrease the environmental pressure on the port itself, surrounding city, and the closest aquatic zones. The port of St. Petersburg is providing a number of ecological services under the no-special-fee principle. Waste reception in the port of St. Petersburg is organized in accordance with international norms. Any vessel entering the port is under an obligation to leave the waste, generated during the voyage, otherwise problems with ship's clearance when leaving the port might appear. There are several companies in the port which provide ecological services, i.e. waste reception, and all of them are required to have a contract with the companies which take care of waste utilization. Though fines for non-compliance are low, the monitoring system functions effectively in this case, preventing waste from being thrown overboard. Whereas waste reception has improved, the equipment for large-scale shore-side electricity provision in the Port of St. Petersburg is not in place. Though technically it would be viable, bearing in mind the closeness of the nuclear power plant in the Leningrad region, the leverage of financial (the scale of initial investment) and legal (a competence to sell electric energy) obstacles seem to be too high.

Though Russia is not a party to the BWM Convention, clearance rules in the port of St. Petersburg require filling in a form regards the vessel's ballast based on the IMO standards. According to the current regulation, ballast water can be discharged in the port of St. Petersburg only if it was taken in the Baltic and North seas<sup>10</sup>. Nevertheless, adequate ballast water treatment still cannot be provided, and ballast water is exchanged outside the port, which is still harmful for the Baltic environment.

Despite its preliminary character, the analysis in this section would seem to indicate that the absence of effective and efficient monitoring in the port of St. Petersburg is likely to undermine the environmental performance of vessels, both in the port and at high seas. It negatively supports the hypothesis derived from the models in Section II, which suggests that in order to ensure clean shipping port authorities shall alter a ship's behavior, which depends on the beliefs about the expectation to be inspected, estimation of the effectiveness of punishment, and expectation of the positive influence of the "green" reputation. The evidence from the case of the Port of St. Petersburg showed that the reality of the port's operation is different and that the port authority falls short to fulfill the conditions for ensuring environmental change. Though the findings do not imply a causal relation between the two, a statement can

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<sup>9</sup> FGU Administraciya morskogo porta Bolshoy port Sankt-Peterburg. Administrativnye Prevarusheniya.

<sup>10</sup> FGU Administraciya morskogo porta Bolshoy port Sankt-Peterburg. Predotvrashchenie zagryazneniya.

be made that the absence of hypothesized conditions shows together with the absence of the desired outcome. Since the reality of many other Baltic ports is similar to the Port of St. Petersburg, further investigations are desired to allow for a qualitative comparison.

## 4. Conclusion

This paper has investigated the role of ports in the environmental performance of shipping. The case for clean shipping is theoretically underpinned by a fundamental problem of public or collective goods (Samuelson, 1954). Benefits from cleaner and safer vessels – cleaner environment - are collective and nobody can be effectively excluded from enjoying them, whereas the cost of high-class environmental performance is private. This creates a temptation to enjoy the outcome without contributing to its provision, to “free-ride” the good provision hoping that the others will bear the cost. For that reason, the role of the state as a regulator, judge, and overseer gains importance.

First, the models presented in this paper suggested that an effective credible threat from the side of the state, enabled through the port authorities, has the potential to enhance compliance. Similar, awards in repeated game potentially enhance motivation to comply. However, these means can only partially change the situation without inducing a change in the logic of interaction. This paper claims, that the existence of strict regulation or commercial incentive as such is not enough. An effective threat is what makes ships comply. This threat persuades the vessels to take care of their performance, in order to create a “green” reputation (“ship risk profile” in Paris MOU terms). Eventually, the reputation of the ship influences the decision by the port authority whether to control it or not. At the same time, the vessel’s belief about the intensity of inspections and severity of punishment influences its choice to comply or deviate. As a result, the vessels’ belief that monitoring in port will be effective and efficient has a crucial role to play.

The general conclusion from those propositions is that the function of a port, as an authority loci, is central to its role of environmental guard. Monitoring cannot be substituted by any economic incentive; the full effect can be reached through a well-thought combination of those. This would create a demand from the port to clear its administrative build-up, including its own environmental monitoring service and outsourcing to the specialized agencies, helping to reduce the monitoring cost and improve its quality and precision. As shown in the scholarship, even imperfect monitoring will make a difference under certain conditions (Athanasoglou, 2009).

Secondly, the State port control procedures should be more routine, in order to be more effective. This will help avoid problems with incoherent implementation and build inspection spaces within certain basins. As a result, the port would have the incentive to preserve the environment, e.g. environmental taxes coming to its budget. Subsidies can help create reception facilities and shore-side electricity infrastructure, reallocating the burden of environmental spending from the port authority to

larger budgetary sources. Moreover, the port shall be sustainable as such, so that its functioning can serve as an example of a green industry.

The normative propositions made above are grounded in a speculation that the port is a central element in ensuring clean shipping. Since monitoring on the high seas is technically complicated and costly, port monitoring is the most attractive option for ensuring clean shipping. The discussion in the literature is therefore crucial for further understanding and development of efficient procedures in ports, in regards to monitoring and rules implementation. The case of the Port of St. Petersburg presented in this paper contributes considerably to the understanding of some of the underlying mechanisms and pitfalls in the existing port governance system. Both regulation and facilities can be improved for better port performance in ensuring clean shipping in the case of St. Petersburg. Such environmentally-oriented harbors as Gothenburg or Helsinki set an example in the BSR. However, for the purpose of comprehensive policy improvement further study on the implication of new monitoring schemes and the inspection rules are desired.

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**Laura Kersule<sup>1</sup>**

## **THE MOTIVATION FACTORS OF CREATIVENESS TO EMPLOYEES IN THE TELECOMMUNICATION INDUSTRY OF LATVIA**

### **Abstract**

The rapid development of telecommunication technologies in Latvia has led to a struggle and competition in the telecommunication industry. Companies demand that their staff be educated, creative, efficient, motivated, and loyal. The preparation of good practitioners, able to perform activities for the creation of competitive products and services, takes time and huge efforts. Companies are interested in keeping their professional staff for the company's further development. The research methods used include a scientific literature review and a survey of employees. Skills were evaluated using a 7-point scale, where 1 indicated a strong disagreement and 7 indicated a strong agreement. For data analysis, indicators of central tendency or location and indicators of variability were used, as well as cross-tabulations and multivariate analysis - factor analysis and correlation analysis.

**Keywords:** human resource management; personnel motivation

### **Introduction**

Motivation is the key to successfully obtaining the benefits of skilled employees' performance, in a team-based environment. There have been continuous efforts among researchers to distinguish the influential drivers of motivation and performance. The telecommunication industry is one of the most competitive in Latvia, but it is facing big competition for skilled employees as well as pressure on material compensation. The purpose of the study was to explore the relationships between motivational factors and self-rated job performance, as well as to examine factors that are associated with the likelihood that employees will engage in effective and efficient business performances. The author compared the findings with factors associated with the likelihood that employees will engage in effective and efficient business performances. The author also analyzed what relationships exist among motivation, self-efficacy, and self-rated productivity in the telecommunication field, as well as in other industries in Latvia. A survey of employees in the telecommunication industry was taken to illustrate these relationships. Skills were evaluated using a 7-point scale: 1 indicated

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that employees strongly disagreed and 7 indicated that they strongly agreed. For the data analysis, indicators of central tendency or location and indicators of variability were used, as well as cross-tabulations, multivariate analysis, factor analysis, and correlation analysis.

## Theoretical background

There are many findings in academic research related to job motivation. Extrinsic needs are those that motivate an individual to achieve an end result. Extrinsic motivation occurs 'when employees are able to satisfy their needs indirectly, most importantly through monetary compensation' (Osterloh, Frost, Frey, 2002, p. 61-77). In contrast to extrinsic needs, intrinsic needs exist when individuals' behaviour is oriented towards the satisfaction of innate psychological needs rather than to obtain material rewards (Ryan, Deci, 2002, pp. 3-33). Intrinsic motivation is that which encourages one to "perform an activity for itself" (Tan, Tan, 2008, p.89 - 108) trying to experience the pleasure and satisfaction inherent in the activity. Intrinsic motivation appears to be self-defined and self-sustained (Deci, Ryan, 2000, p. 227-268), which is fostered by a commitment to the work itself. As far as the relationship between intrinsic motivation and work outcome is concerned, intrinsic motivation seems to be a good predictor of work performance. There is some empirical evidence as well as an assumption that monetary incentives (or extrinsic motivation) significantly improve task performance (Perry, Mesch, Paarlberg, 2006, p. 506-523). However, findings, from the reviews of 72 field studies, (Perry, Mesch, Paarlberg, 2006, p. 506-523) found that work performance improved by 23 percent when monetary incentives were used, whereas stimulation with social recognition improved performance by 17 and feedback by only 10 percent. Some interesting conclusions emerge from these studies, regarding different fields of activities; for example, a combination of financial, non-financial, and social rewards produces the strongest effect in manufacturing, whereas for service organizations financial stimulus produces more influential effect than non-financial rewards (Perry, Mesch, Paarlberg, 2006, p. 506-523). The relationships between motivation and productivity can be summarized in that productivity is directly linked to motivation. A suitable approach of motivating employees (Vroom, Jones, (1964), p. 313-320) can be hypothesized as a key contributor to maximizing the productivity of the workforce.

Effective performance is a measure of task output or goal accomplishment to meet the daily production targets, both quality and quantity. On the other hand, efficient performance also refers to the cost-effective goal accomplishments with the realization of high outputs with less input consumed. Job performance is commonly used to evaluate employee's effectiveness and efficiency; however, the concept is poorly defined (Indartono, Chen, 2010, p. 195 -200). Efficiency is the ratio of actual output generated to the expected (or standard) output prescribed. Effectiveness is the degree to which the relevant goals or objectives are achieved (Sumanth, 1998). Efficiency improvement does not guarantee productivity improvement. Efficiency is a necessary, but not a sufficient condition for productivity (Sumanth, 1998). However,

both effectiveness and efficiency are necessary in order to be productive. Both of them refer to whether a person performs his/her job well. Further interesting approaches to motivational issues are examined by Posner (Posner, 2010, p. 535 – 541) and Tan (Tan, Tan, 2008). Factors influencing accountability and performance ratings are important issues (Roch, McNall, 2007, p. 499 – 523). Work motivation and job satisfaction are of the great importance (McFillen, Maloney, William, 1988, p. 21-35) (Locke, Latham, 2004, p. 388–403) (Vroom, Jones, 1964, p. 313-320). These findings of theoretical research are used in the current empirical research.

Motivation, especially monetary rather than moral, has proven its influence on employee's productivity. Research has been conducted over the past 40 years on the relationship between motivation and productivity in different manufacturing industries; however, little research has been devoted to this relationship in the service industries or the public sector, where we cannot define the objective and even measurable output of an individual or a team (Locke, Latham, 2004, p. 388–403).

Based on the literature review, the authors have stated that the aim of this paper is to find out how important material factors are for employee motivation.

## Method and measures in the study

The following research methods were used to conduct this study: a scientific literature review and a survey of employees. The study was conducted among 1050 internet users. The study population was 67% female and 33% male; 54% of respondents had a higher education; 52% were working at their current profession for more than 7 years; 73% had worked at no more than two companies in the last seven years; and 46% worked in a company with more than 50 employees. The questionnaire was distributed to the respondents by use of a GfK (GfK – Custom Research Baltic – one of the world's leading research companies) web panel service.

The survey was designed to 1) provide a list of motivators; 2) provide a list of statements on skills, engagement, and resources available in the company; 3) show a perceptual performance; 4) reveal a demographic profile of sample (age, gender, occupational type and detailed information on position “specialist”, education, income, and industry). The survey method was chosen to get information from respondents the best possible way: interviews could take much more time and would be very expensive. In the survey information mentioned, theory was included. Survey data could be processed using different data processing methods, including multivariate analysis. This helps find the relationships that are not able to be found using qualitative methods.

## Results of empirical research

The respondents were asked to use a 7-point scale ranging from 1 (inapplicable) to 7 (applicable to a high extent) to indicate which motivational instruments are applied in the respondents' current work places.

Skills were also evaluated using the 7-point scale. In this scale, 1 indicated that the respondent strongly disagreed, and 7 indicated that they strongly agreed to statements given. Examples of these statements include, “I feel fully confident in my skills to perform this job according to highest expectations”; “this is the best job to do”, “I help my co-workers with my expertise and knowledge”, and “I am fully confident on ability to solve problems in my daily work”

Resources were also evaluated using a 7-point scale. This scale ranged from 1 (strongly disagree) to 7 (strongly agree), and addressed statements such as “In my job I am provided with the proper technologies to do the job”, “In my job I am provided with technical, and other forms of support necessary to do my job”, and “All necessary management and quality systems are provided in my job”.

Engagement was evaluated using a 7-point scale as well. In this scale, 1 indicated strong disagreement and 7 meant strong agreement to statements such as, “this company inspires me to do the best I can”, “I am ready to go the extra mile to make my company successful”, “the future success of my company means a lot to me”, and “I am ready to recommend my company as a great place to work”

Feedback from the job is able to impart information about an individual’s performance (Humphrey, Nahrgang, Morgeson, 2007, p.1332-1356). Individually, a range of knowledge, skills, abilities, available resources, and other characteristics are needed to perform a job. Knowledge of a job and technical skills appear to be essential to the effectiveness of a job. In contrast, self-efficacy theory employs an understanding in the level of employee belief, in order to achieve high performance with their actual skills (Latham, Pinder, 2005, p. 485–516). For example, the author formulated the following question in the survey: “I am fully confident in my skills and knowledge to perform this job according to the highest standards”. Self-efficacy beliefs functioning in an important set of proximal determinants of human motivation, affect and action which operate on actions through motivational, cognitive, and affective intervening processes (Indartono, Chen, 2010, p. 195 -200). Bandura (Bandura, Schunk, Dale, 1981, p. 586-598) argues that perhaps the most important determinant of individuals’ decisions to engage in performances that exceed previous levels is self-efficacy. Self-efficacy is defined as an individual’s perceptions of their task-related capabilities (Bandura, Schunk, Dale, 1981, p. 586-598).

Taking into account the aforementioned, efficient performance was proposed to be measured using a self-reported scale consisting of seven points. Questions revolved around certain themes, such as, “adequately completes assigned duties”:

*I always achieve my targets in time and in good quality*

*Job quality and volume that I perform daily usually fits with or even exceeds expectations towards me.*

The author then performed a factor analysis based on the survey data that included statements about how respondents felt about themselves. For this, the varimax method (most often used rotation method for calculating complex factors in factor analysis (Hair, Anderson, Tatham, Black, 2008, p.614) was chosen. A rotation

was performed in 6 iterations with Kaiser Normalization (most often used rotational method for calculating complex factors in factor analysis – one of the most popular multivariate analysis methods (Hair, Anderson, Tatham, Black, 2008, p.614). The results of this factor analysis are presented in table 1.

*Table 1. Rotated Component Matrixa*

	Component			
	1	2	3	4
Competitive salary	,279	<b>,724</b>	,154	,156
Additional payments/premiums for team results	,241	<b>,839</b>	,025	,088
Additional payments/premiums for individual results	,222	<b>,817</b>	,061	,138
Additional social benefits: health insurance covered by employer, pension funds, etc	,153	<b>,743</b>	,061	-,185
Company has good reputation	<b>,666</b>	,189	,210	,038
Social security (all taxes paid)	,349	,099	,138	<b>-,592</b>
Good and comfortable work conditions (including location, modern equipment, methodologies at work)	<b>,456</b>	,391	,327	,013
Understandable internal regulations, procedures and policy	<b>,672</b>	,169	,285	-,027
Flexible working time	,288	,295	,115	<b>,591</b>
Freedom, autonomy at work	,442	,218	,205	<b>,583</b>
Respectable work (possibility to perform significant job)	,264	,348	<b>,628</b>	,142
Potentiality to take responsibility	,355	,002	<b>,646</b>	,147
Career development	,210	<b>,666</b>	,298	,087
Potentiality to acquire new skills and knowledge (personal development scope)	,314	,371	,562	,164
Regular control of my work performance	,104	,094	,579	-,395
Enjoyable colleagues	<b>,710</b>	,080	,134	-,050
Interesting job	,284	,230	<b>,642</b>	,221
Good cooperation in collective	<b>,719</b>	,189	,203	-,043
High requirements	,223	-,052	<b>,685</b>	-,243
Chief's competence	<b>,698</b>	,252	,239	,043
Appreciation	,479	,459	,360	,178
Feedback on professional performance	<b>,512</b>	,442	,351	,144
Fair attitude	<b>,627</b>	,404	,202	,185
Clearly stated aims	<b>,562</b>	,238	,454	,060
Timely and fenceless communication	<b>,702</b>	,322	,246	,135
Chief's support and example	<b>,699</b>	,355	,220	,104

Extraction Method: Principal Component Analysis. Rotation Method: Varimax with Kaiser Normalization. a. Rotation converged in 6 iterations.

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)

Scale 1 – 7, where 1 – do not agree; 7 – fully agree

From the results of the factor analysis, the author has identified four complex factors on the feelings of employees, regarding how they feel in their work place. The author gave the four factors of the following complex factor names:

- 1) Work professional aspects factor;
- 2) Pay or emolument factor;
- 3) Work creativity factor;
- 4) Work organisation elasticity factor.

A more detailed analysis was performed for the creativity complex factor as it is not possible to make a more detailed analysis for all complex factors in one paper. The main statistical indicators (arithmetic mean, mode, median, variance, standard deviation, range, standard error of mean) of the creativity complex factors are reflected in table 2.

*Table 2. Main statistical indicators of work creativity complex factor components*

		Respectable job (possibility to perform significant job)	Possibility to take responsibility	Interesting job	High requirements
N	Valid	1098	1098	1098	1098
	Missing	0	0	0	0
	Mean	4,92	5,60	5,34	5,50
	Std. Error of Mean	0,051	0,042	0,049	0,040
	Median	5,00	6,00	6,00	6,00
	Mode	6	7	7	6
	Std. Deviation	1,682	1,395	1,617	1,313
	Variance	2,830	1,946	2,616	1,723
	Range	6	6	6	6
	Minimum	1	1	1	1
	Maximum	7	7	7	7

*Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)*

*Scale 1 – 7, where 1 – do not agree; 7 – fully agree*

The results of the calculations from survey responses indicated how the respective issues are applied to the work of employees. The responses are all very different: all grades are given for every statement by the respondents. Most of the employees indicated that they have the possibility to take responsibility by giving the highest evaluation (mode is 7 – gave 31,7% of respondents for the respective factor). Mode means was the most often evaluation. The highest evaluation is given for statement - an interesting job (the mode is 7 – given by 29% of respondents for the interesting job factor). Other indicators of central tendency or location show that half of the respondents had the possibility to take responsibility, interesting job, as well as high

requirements with less than 6, half of respondents gave evaluations of more than 6 (showed by median = 6), for respectable job (possibility to perform significant job) the median was 5. There is a big variability for all factor components: all indicators of variability are very big, especially for the respectable job (the possibility to perform a significant job) what is indicated by range, variance, standard deviation, and standard error of mean. The biggest average evaluations are for the possibility to take responsibility and the smallest for a respectable job (the possibility to perform a significant job). Average grades of respondents by evaluation grades for factor components are included in figure 1.

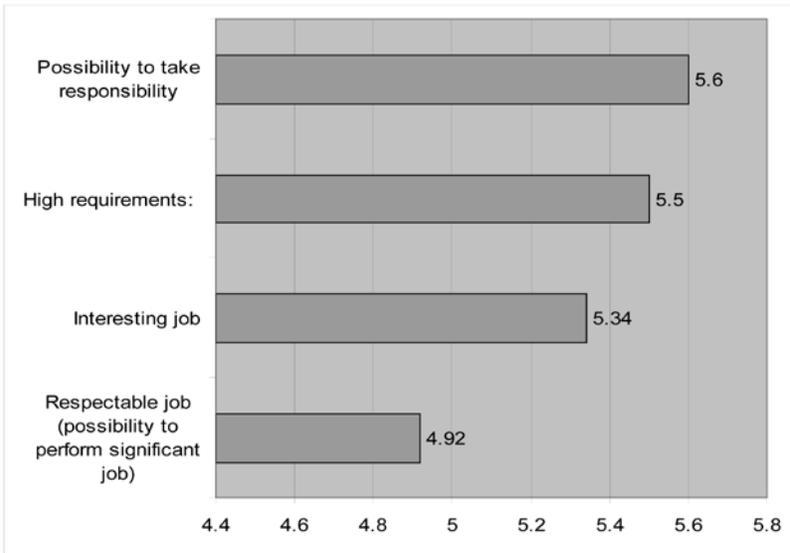


Figure 1. Average grades of responses by evaluation grades for factor components

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)  
Scale 1 – 7, where 1 – do not agree; 7 – fully agree

As the evaluations of the respondents for each statement are so different, it is interesting to know the distribution of views of the respondents. Distributions of all responses by evaluation grades (1-7) for factor components are included in table 3.

Table 3. Distribution of responses for work creativity complex factor components

	Respectable job (possibility to perform significant job)		Possibility to take responsibility		Interesting job		High requirements	
	n	Percent	n	Percent	n	Percent	n	Percent
1	60	5,5	18	1,6	36	3,3	10	,9
2	60	5,5	27	2,5	47	4,3	23	2,1
3	93	8,5	45	4,1	76	6,9	45	4,1
4	167	15,2	111	10,1	124	11,3	148	13,5
5	233	21,2	227	20,7	202	18,4	261	23,8
6	289	26,3	322	29,3	295	26,9	324	29,5
7	196	17,9	348	31,7	318	29,0	287	26,1
Total	1098	100,0	1098	100,0	1098	100,0	1098	100,0

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)

Scale 1 – 7, where 1 – do not agree; 7 – fully agree

Data of table 3 indicates that most of the evaluations for all factors are evaluated very high: 5 and more grades were given by more than 65% of respondents. It means that they are satisfied with the current situation in their work, particularly related to the analysed issues. As the evaluations are so different, it is interesting to know the distribution of views of the respondents by sex. Distributions of all responses by evaluation grades (1-7) for factor respectable job (the possibility to perform significant job) and by sex are included in table 4.

Table 4. Distributions of all responses by evaluation grades (1-7) for factor respectable job (possibility to perform significant job) and by sex

	Evaluation	Sex		
		Female	Male	Total
Respectable job (possibility to perform significant job)	1	38	22	60
	2	36	24	60
	3	52	41	93
	4	100	67	167
	5	148	85	233
	6	193	96	289
	7	118	78	196
Total		685	413	1098

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)

Scale 1 – 7, where 1 – do not agree; 7 – fully agree

The data displayed in table 4 indicates that most of the female and male respondents gave an evaluation of 6 (from 1-7 evaluation grades possible). It means, that respondents highly evaluated their job as a respectable job or the possibility to

perform a significant job. Very often male and female persons have different views, therefore, the responses by sex were analysed in more detail. The distributions of all the responses by evaluation grades (1-7) for the possibility to take responsibility and by sex are included in table 5.

*Table 5. Distributions of all responses by evaluation grades (1-7) for factor possibility to take responsibility and by sex*

	Evaluation	Sex		
		Female	Male	Total
Possibility to take responsibility	1	11	7	18
	2	12	15	27
	3	30	15	45
	4	66	45	111
	5	139	88	227
	6	202	120	322
	7	225	123	348
	Total	685	413	1098

*Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)*

*Scale 1 – 7, where 1 – do not agree; 7 – fully agree*

The data in table 5 indicates that most of the female and male respondents gave the highest evaluation, 7. It means that the respondents have an important and responsible job, which confirms the statement above; that management of the company has to keep their employees in the work places, as training new staff could take time and consume considerable material. For job satisfaction, it is important to have an interesting job. Distributions of all responses by evaluation grades (1-7) for the factor of interesting job are included in table 6.

*Table 6. Distributions of all responses by evaluation grades (1-7) for factor interesting job and by sex*

	Evaluation	Sex		
		Female	Male	Total
Interesting job	1	21	15	36
	2	25	22	47
	3	47	29	76
	4	69	55	124
	5	137	65	202
	6	188	107	295
	7	198	120	318
	Total	685	413	1098

*Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)*

*Scale 1 – 7, where 1 – do not agree; 7 – fully agree*

The data given in table 6 indicates that most respondents gave the evaluation a 7 for statement; that they have an interesting job. It means that most of the respondents evaluated felt that they have an interesting job. This is a very important finding for

management decision making. It is also important to know, that different evaluations for male and female employees, on this statement, were undertaken and related to the high requirements for the job. Distributions of all responses by evaluation grades (1-7) for the factor of high requirements are included in table 7.

*Table 7. Distributions of all responses by evaluation grades (1-7) for factor high requirements*

	Evaluation	Sex		
		Female	Male	Total
High requirements:	1	5	5	10
	2	16	7	23
	3	26	19	45
	4	85	63	148
	5	153	108	261
	6	208	116	324
	7	192	95	287
	Total	685	413	1098

*Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)*

*Scale 1 – 7, where 1 – do not agree; 7 – fully agree*

The data in table 7 indicates that most of the female and male respondents gave the evaluation a 6 for the statement that they have high requirements from their job. For this statement, more than 80 % of female respondents and more than 77 % of male respondents gave high evaluations of 5 or more. For management decision making, it is important to know, that evaluations of their employees differ by age. Distributions of all responses by evaluation grades (1-7) for the factor of a respectable job (the possibility to perform a significant job) and by age are included in table 8.

*Table 8. Distributions of all responses by evaluation grades (1-7) for factor respectable job (possibility to perform significant job)*

	Evaluation	Age						Total
		Till 18	18 – 25	26 – 40	41 – 50	51 – 62	More than 62	
Respectable job (possibility to perform significant job)	1	0	5	24	18	13	0	60
	2	0	6	15	19	20	0	60
	3	1	7	28	37	19	1	93
	4	0	16	60	59	29	3	167
	5	0	19	89	69	54	2	233
	6	0	21	110	90	66	2	289
	7	0	29	58	58	45	6	196
	Total	1	103	384	350	246	14	1098

*Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)*

*Scale 1 – 7, where 1 – do not agree; 7 – fully agree*

The distributions of all responses by the evaluation grades (1-7) for factor of the possibility to take on responsibility are included in table 9.

*Table 9. Distributions of all responses by evaluation grades (1-7) for factor possibility to take responsibility*

	Evaluation	Age						Total
		Till 18	18 – 25	26 – 40	41 – 50	51 – 62	More than 62	
Possibility to take responsibility	1	0	1	9	4	4	0	18
	2	0	3	10	7	7	0	27
	3	1	4	12	16	10	2	45
	4	0	10	45	39	16	1	111
	5	0	25	87	71	41	3	227
	6	0	32	109	90	87	4	322
	7	0	28	112	123	81	4	348
	Total	1	103	384	350	246	14	1098

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)

Scale 1 – 7, where 1 – do not agree; 7 – fully agree

The distributions of all responses by the evaluation grades (1-7) for the factor of an interesting job are included in table 10.

*Table 10. Distributions of all responses by evaluation grades (1-7) for factor interesting job*

	Evaluation	Age						Total
		Till 18	18 – 25	26 – 40	41 – 50	51 – 62	More than 62	
Interesting job	1	0	7	16	8	5	0	36
	2	0	5	17	17	8	0	47
	3	1	9	26	23	17	0	76
	4	0	19	39	49	16	1	124
	5	0	14	85	55	45	3	202
	6	0	20	104	94	72	5	295
	7	0	29	97	104	83	5	318
	Total	1	103	384	350	246	14	1098

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098)

Scale 1 – 7, where 1 – do not agree; 7 – fully agree

The distributions of all responses by the evaluation grades (1-7) for the factor of high requirements are included in table 11.



		Respectable job (possibility to perform significant job)	Possibility to take responsibility	Interesting job	High requirements:	Age	Sex	How long do You work in the profession	How long do You work at the current employer?
Age	Pearson Correlation	-,009	,052	,116**	,124**	1,000	-,121**	,455**	,367**
	Sig. (2-tailed)	,755	,083	,000	,000		,000	,000	,000
	N	1098	1098	1098	1098	1098	1098	1098	1098
Sex	Pearson Correlation	-,025	-,043	-,036	-,062*	-,121**	1,000	-,098**	-,128**
	Sig. (2-tailed)	,407	,156	,230	,040	,000		,001	,000
	N	1098	1098	1098	1098	1098	1098	1098	1098
How long do You work in the profession	Pearson Correlation	,073*	,058	,194**	,078**	,455**	-,098**	1,000	,670**
	Sig. (2-tailed)	,015	,057	,000	,010	,000	,001		,000
	N	1098	1098	1098	1098	1098	1098	1098	1098
How long do You work at the current employer?	Pearson Correlation	,087**	,037	,167**	,086**	,367**	-,128**	,670**	1,000
	Sig. (2-tailed)	,004	,218	,000	,005	,000	,000	,000	
	N	1098	1098	1098	1098	1098	1098	1098	1098

\*\* Correlation is significant at the 0.01 level (2-tailed)

\* Correlation is significant at the 0.05 level (2-tailed)

Source: Author's calculations based on employees survey results, August – September, 2010 (n=1098) Scale 1 – 7, where 1 – do not agree; 7 – fully agree

The distribution of responses shows that the evaluations of the respondents are very different; this indicates that employees feel differently about work creativity factors. However, there are many respondents that gave the highest evaluation for all the statements, especially for factor of respectable jobs (the possibility to perform a significant job). In order to feel comfortable in the work place, it is important not only to have high ranking material and creativity factors, but also other complex factors mentioned above (work professional aspects factor; pay or emolument factor and work organisation elasticity factor). These will be evaluated in further research. The evaluations of male and female results do not differ.

## Conclusions

Through this study, the author was able to identify four complex factors, from 26 statements, on the feelings of employees about their workplaces and named them: work professional aspects factor, pay or emolument factor, work creativity factor, and

work organisation elasticity factor. Work creativity factors are very important for the motivation of employees, this was in the focal point of the study: respectable job (the possibility to perform a significant job); possibility to take responsibility; interesting job; and high requirements. Many of the employees in their evaluations indicated the highest grades, but most of the employees also felt that the work creativity factors were at very low levels. The evaluations of male and female results do not differ. The variability of responses was very big, but there is evidence that most of the employees surveyed feel comfortable with the work creativity factors: they have a respectable job (the possibility to perform a significant job), the possibility to take on responsibility, they have an interesting job, and they have high requirements from their job.

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## **DEVELOPMENT OF AEROBIOLOGICAL MONITORING IN LATVIA**

### **Abstract**

Aerobiological monitoring in Riga was started in 2003. The increasing number of allergic reactions and asthma cases in the population caused by pollens and spores stimulates the development of aerobiology as an independent scientific discipline. Today pollens and spores affect as many as 20% of Riga's population. The main method of aerobiology is based on pollen and fungi spore sampling using a volumetric trap.

The basis for data analysis is aerobiological and meteorological parameters. Aerobiological processes can be divided into four main parts: production, release, distribution, and deposition. All mentioned processes are influenced by meteorological parameters such as air temperature, sum and intensity of precipitation, relative humidity, wind velocity and direction, atmospheric pressure and stability. Prediction of plant productivity, amount of pollen and trajectories of pollen clouds transportation are closely related to the aforementioned meteorological conditions.

**Keywords:** aerobiological monitoring, pollen concentration, *Burkard* trap, Riga

### **Introduction**

One of the most important rapidly developing ecological research concerns environmental problems including soil, water, and air pollution. This development has especially increased in the last two decades. Great attention has been given to the anthropogenic impact on the nature processes, such as decreasing biodiversity, changes in the structure of the air, and water pollution.

Pollution of the air can be divided into two parts – from anthropogenic and natural sources. European normative document envisages the limit for anthropogenic pollution in the air – for example the concentration of micro particles (PM<sub>10</sub>) and gases (N<sub>2</sub>, O<sub>3</sub>). Documentation which regulates the concentration of micro pollution

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coming from natural sources – for example pollen or fungi spores still does not exist. There is gradation of concentration for pollen and spores used by scientists. For example, 4 levels for volume of pollen concentration determination are used in Latvia - low, moderate, high, and very high.

All mentioned biological particles are not only pollen and spores but also viruses, bacteria and micro fragments of plants, passively transported by the air belong to biological aerosols.

As previously mentioned, aerobiology is the discipline which investigates biological aerosols, its related processes and influence on human well-being. Aerobiology is interdisciplinary branch of science which merges a number of scientific fields including meteorology, ecology, medicine, phenology, forestry science, climate change, and range of other disciplines.

Aerobiological monitoring is a relatively new investigation method carried out in Latvia; while in Europe “Pollen services” of many countries have already established 30-50 years of pollen records. It was started in 2003 in Riga (Latvia), similarly in Lithuania. The reason for the development of aerobiological monitoring, especially in the last 30 years, is closely related to decline of human health. The increasing number of allergic reactions and asthma cases in the population caused by pollens and fungi spores stimulates the development of aerobiology as an independent scientific discipline. Today, they affect as many as 20% of Riga’s population – that is nearly 100 thousand people, about half of whom are children (Purina et. all, 2004). According to World Health Organization (WHO), approximately 15% of the population in Europe is sensitive to pollen allergens (WHO, 2003). People need to be warned about high concentration of dangerous pollen types.

The main methodic of aerobiology is based on pollen and fungi spore sampling using a volumetric trap. An aerobiologist counts, analyzes, and predicts the volume of pollen and spore concentration. Almost all pollen grains monitored by aerobiological methods come from the wind, pollinated (*anemophilous*) by plants. These are forced to produce large amounts of pollen to increase the possibility of reaching female flowers for pollination.

## Methods

Aerobiological surveying in Riga, Latvia has been operating since 26th March 2003 by the 7-day *Burkard* trap, which was supported by *GlaxoSmithKline* company.

Aerobiological survey is operating with the collaboration of:

- 1) aerobiologists from the Faculty of Geography and Earth Sciences at the University of Latvia (trap management, pollen analysis, forecasting);
- 2) alergologists from „The Centre of Diagnosis and Treatment of Allergic Diseases” (alergological information and work with media).

The samples for pollen studies in the air were collected by a 7-day *Burkard* trap (Fig.1), situated at a height of 24 m above the ground on the main building of the

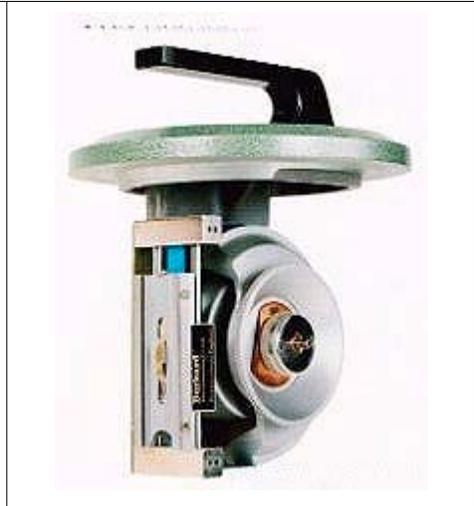
University of Latvia. The aforementioned height is standard for this kind of volumetric traps because of the necessity to observe pollens at a height of free air circulation. Using the lower height for aerobiological monitoring gives incorrect results because air turbulence forms in-between buildings and the differences in temperatures of air-ground interface. One *Burkard* trap represents a pollen concentration in a 30 km diameter, if it is located at 15-25m above ground level, without any obstructions which limit free air passage.

According to information from Finnish meteorological Institute, birch pollen grains may be transported up to 1000 km from their place of emission (Sofiev et.al. 2006). Some pollen can be transported to Latvia from at least 8 European countries during the pollen season. Transported pollen keeps their allergenic elements and is dangerous for pollen-suffers (Rantio-Lehtimäki, 1994).

The methodic of pollen observation is based on pollen collecting on a sticky plastic tape, inside the volumetric instrument.



*Fig. 1.* Burkard volumetric pollen – spore trap. Source -[www.burcard.co.uk](http://www.burcard.co.uk).



*Fig. 2.* Drum with the tape for particles accumulating. [www.burcard.co.uk](http://www.burcard.co.uk)

The transparent plastic tape was sticky with a solution of Vaseline and fixed around a drum (Fig.2), which rotated by 7-day clockwork at a speed of 2mm per hour. A built-in vacuum pump continuously sucked in air through a slit against the tape, on which the airborne particles were attached. The speed of air imbibing is 10 litres per minute, which is the same average speed of human breathing. Daily sections of the tape were mounted with *gelvatol* (polyvinil alcohol) under a covered glass. Then all pollen spores and other hard micro particles were determined in the light-microscope "*Axiostar*". In each slide 12 vertical lines were usually counted. In general, the exception period had a low concentration of pollen when 24 vertical lines were analyzed.

Pollen sum which is counted by microscope was recalculated to concentration by using this formula:

$$C = \text{sum} * f, \quad (1)$$

C - concentration of pollen, sum – sum of the pollen from one slide, f – factor of the microscope based on number of its parameters.

The data obtained was evaluated and compared by statistical tools with the information of temperature, precipitation, wind direction, and speed.

The data was put in special tables and sent to allergologists at The Centre of Diagnosis and Treatment of Allergic Diseases for comments and additional information for patients. Afterwards, pollen information and doctor instructions for patients were sent to the media (radio, newspapers). This information is also available by phone. Information on pollen concentrations were published in the website <http://www.polleninfo.org> and the data has been submitted to Data Base of EAN.

## Results and discussion

The Latvian aerobiological team at the Riga station monitors and predicts the concentration of the most allergenic tree and shrub pollen for Latvia. There are about 35-40 different pollen types observed every year. Due to aerobiological monitoring, 47 different types of pollen belonging to 24 families were identified. The observed species included both allergenic pollen and exotic plant pollen from the introduced trees and shrubs in parks.

Thus, the pollen of plants with higher alergerity for Latvia is: alder (*Alnus* Mill.), birch (*Betula* L.), hazel (*Corylus* L.), grasses (*Poaceae*) and mugwort (*Artemisia* L.).

General pollen season, which starts in March and ends in September, can be divided into four main periods (Fig.3.). Three of them first, third and fourth are very dangerous to allergenic people.

The start of pollen season is defined by the first appearance of pollen in air which is conveyed by phenological features. The end of pollen season is defined by pollen disappearing for seven days (phenological and meteorological information is taken in account).

Eventual prediction model is as follows:

1. Estimation of data from last measuring period; pollen, phenological and meteorological data have been estimated and compared;
2. Studies of pollen information from neighboring countries;
3. Studies of pollen data from previous years;
4. Studies of weather forecasts;
5. Conclusion (prediction) and forecast making.

The highest percentage of pollen was found in the period from the last decade of April to the first decade of May which is related to the birch flowering in Latvia and also to transported pollen from another countries.

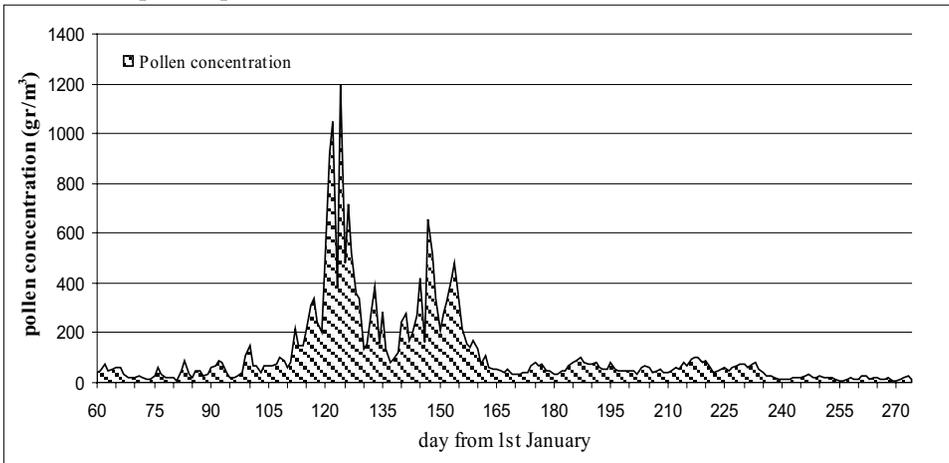


Fig. 3. Average daily airborne pollen concentration (2003-2010).

The second highest peak of the pollen in the air is related to coniferous tree (pine and spruce) flowering in Latvia. Pollen from coniferous trees does not contain dangerous proteins that may initiate the *polinosis*.

The third pollen period in the air over Riga takes place from the end of June to the beginning of July, when grass pollen reaches its maximum, while in the years 2006 and 2007 the highest grass pollen concentrations were observed from 14<sup>th</sup> to 21<sup>st</sup> June. At the same time, grass pollen peaks did not reach very high values (58-168 pollen grains per cubic meter) and were accompanied by a large diversity of other herb pollen. There are differences between pollen concentration gradation for tree and grass pollen. For trees 100 grains per cubic meter – is a high concentration, in the case of grasses, high pollen concentration begins at 30 grains per cubic meter. This is because of the different productivity, structure of pollen and biology of trees and herbs.

The last high pollen concentration in the air was found from the end of July to the first half of August, when weeds such as *Artemisia* reaches their flowering. The season of *Artemisia* pollination continues from mid-July to the end of September without much expressed peak during maximum concentrations and is accompanied by high values of *Urtica* and *Plantago* pollen. Observed peaks of *Artemisia* pollen concentration vary from year to year and are mostly influenced by precipitation and relative humidity.

Generally, the study showed that the highest pollen concentrations were found in April and June.

The most dangerous pollen in Latvia comes from birch tree. Birch produces large amount of pollen every year and its flowering time is at the end of May. The

highest birch pollen concentration values were observed in 2003. Annual sum of concentration reached about 16.5 thousand of pollen grain per cubic meter.

More than 16 000 pollen grains seem to be a large quantity. The volume of 16 542 pollen grains was calculated by using the formula:

$$V = \frac{4}{3} \times \pi \times r^3 \times n, \quad (2)$$

V - volume of the sum of annual pollen concentration,  $\pi$  - 3.14..., r - radius of birch pollen, n - number of pollen

The shape of the birch pollen was defined as spherical. The average size of one birch pollen grain is  $30\mu\text{m}$  (1microne=0.001mm). It is not possible to observe it without using a microscope because it is two times smaller than half the average of a human hair's diameter. So, the annual volume of observed pollen is only  $1033\text{mm}^3$  (Fig.4.), but it is enough for 20% Latvian population to suffer.

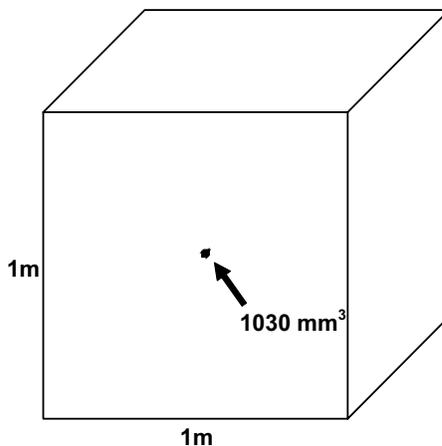


Fig. 4. Volume of the sum of birch pollen concentration in  $1\text{m}^3$  per year (2003).

Pollen related processes can be divided into four main parts: production, release, distribution, and deposition. All mentioned processes are influenced by meteorological parameters, such as biology of the species, air temperature, sum and intensity of precipitation, relative humidity, wind velocity and direction, atmospheric pressure and stability.

For example, the birch has the periodicity of pollen productivity every 2-3 years. According to a scientist from Belgium, there is a 2-year periodicity related to birch pollen productivity (Dedandt, 2000). In Latvia both – 2 and 3 year periodicity was observed in the period of 2003-2005 and 2006-2011. It was observed that birch pollen season starts faster and becomes longer, but more data is needed to define the periodicity of the birch pollen season.

The main influence on the spring pollen period is air temperature and the amount of solar radiation. The summer – autumn periods are strongly influenced by precipitation, relative humidity, atmospheric pressure, and stability.

## 4. Conclusion

Pollen is a part of air pollution which can help monitor the quality of air. Aerobiological monitoring is necessary for predicting the concentration of dangerous pollen.

Prediction of plant productivity, amount of pollen, and trajectories of pollen clouds transportation are closely related to a number of disciplines. Pollen is an object involved in geographical processes and knowledge of atmospheric physics, as the necessary background to explain atmospheric processes, regarding biological aerosols.

It is planned to improve the quality of observations and data analysis by participating in advanced courses on aerobiology. It will be improved by cooperating with biologists, allergologists, ecologists, forestry specialists and others, who may be useful in study of pollen related processes.

Funding for the aerobiological survey in Latvia is from different sources and problematic year to year. Institutions are not very interested and do not understand the significance of aerobiological survey and therefore, it is very difficult to apply for funding. In spite of problems, a team of Latvian aerobiological survey will continue pollen monitoring and try to apply for projects and develop a network with new stations in different parts of Latvia.

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**Ilze Pruse<sup>1</sup>**

## **THE EUROPEAN UNION EMISSIONS TRADING SYSTEM'S IMPACT ON BALTIC COMPANIES**

### **Abstract**

The Baltic States as many other European countries are covered by the European Union Emissions Trading System (EU ETS) and therefore since 2005 certain companies registered within these countries must participate therein. Given that the participation in the EU ETS not only brings many opportunities, but also imposes certain responsibilities the goal of this paper is to analyse the general impact of the EU ETS on companies registered in the Baltic States. Within this paper the general requirements of the EU ETS are described and the profile of companies registered in the Baltic States that are participating in the EU ETS is provided. However most importantly – this paper presents some of the main results of the data analysis on the allocation and use of European Union Allowances (EUAs) in the Baltic States from 2005 to 2010 as well as the analysis of the exclusively publicly disclosed data about the transactions of EUAs performed through the emission registries of the Baltic States. All in all data about 6 years of operation of 281 installations owned by 182 companies, *inter alia*, allocation and surrendering of EUAs and verification of emissions as well data about 1416 transactions was used. At the end of the paper conclusions are drawn with respect to what is the general impact of the EU ETS on companies registered in the Baltic States.

**Keywords:** tradable permits' system, European Union Emissions Trading System, European Union Allowance, companies registered in the Baltic States

The European Union Emissions Trading System (EU ETS) covers around 11 000 power stations and industrial plants in 30 countries, *inter alia*, those of many companies in the Baltic States. According to the estimations of the World Bank, the value of the EU ETS transactions' main currency – European Union Allowances (EUAs) – in 2010 was 119.8 billions USD (Linacre, Kossoy & Ambrosi, 2011, p. 9). Participation in the EU ETS may bring many opportunities for trading as well as investments in technology development and technology transfer, however important to recognise that the EU ETS on its participants imposes also certain responsibilities.

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The goal of this paper is to analyse the general impact of the EU ETS on companies registered in the Baltic States.

At the beginning of this paper the general requirements of the EU ETS are described and the profile of companies registered in the Baltic States that are participating in the EU ETS is provided. Further some of the main results of the analysis of data on the allocation and use of EUAs in the Baltic States from 2005 to 2010 as well as recently publicly disclosed data about the transactions of EUAs within years 2005 and 2006 performed through the emission registries of the Baltic States are presented. But at the end of the paper conclusions are drawn with respect to what is the general impact of the EU ETS on the companies registered in the Baltic States.

Taking into account the predefined goal of this paper author analyses only the direct impact of the EU ETS on companies participating therein, i.e. costs and profits related to sales / purchases of EUAs, and is not considering costs of transactions. Taking into account the specifics of the available data the author is considering the EU ETS impact over the past and is not considering its future impacts. Unless specified otherwise, analysis is based on the data obtained from the official web site of the EU ETS and the official web site of its Community Transaction Log (CTL) hosted by the European Commission (data about installations and transactions) and leading provider of carbon credits markets' news and research – *Thomson Reuters Point Carbon* (data about EUAs' prices). Being aware of the fact that on 30 May 2011 European Commission filed an appeal, author does not consider the implications of the ruling of the Court of Justice of the European Union dated 22 March 2011, which implies that Latvia is to receive 14.3 million extra EUAs (Official Journal of the European Union, C 139/15, 07.05.2011).

## General requirements of EU ETS

The EU ETS is the world's largest tradable permits' system, whereas tradable permits' system is an economic instrument that establishes a tradable permits' market with an aim at minimal costs to achieve the rationalization of the volumes of certain assets denoted by permits. The main difference of tradable permits' system from other instruments of rationalization of volumes is the fact that it not only imposes certain restrictions but also provides for means to fulfil them and gain additional benefits.

The concept of tradable permits' systems first was formulated at the end of 1960s by T. Crocker (1966, p. 61–86) and J. Dales (1968, p. 109–111), and later formalized by W. D. Montgomery (1972, p. 395–418) and T. H. Tietenberg (1985). Main elements of tradable permits' systems are tradable permits, permits' registries and participants of permits' markets (either direct or indirect) (Prüse, 2009, p. 165).

The EU ETS promotes reductions of greenhouse gas (GHG) emissions in a cost-effective and economically efficient manner. The EU ETS operates in 30 countries (the 27 European Union Member States as well as Iceland, Liechtenstein, Norway) and covers emissions from installations such as power stations, combustion plants,

oil refineries and iron and steel works, as well as factories making cement, glass, lime, bricks, ceramics, pulp, paper and board, but from 2012 it will be expanded to include also emissions from air flights to and from European airports. The EU ETS direct participants are the operators of respective installations, hereto there are not only mandatory, but also voluntary participants (Directive 2003/87/EC, OJ L 275, 25.10.2003.).

The EU ETS is an internationally regional “cap and trade” type tradable permits’ system (Prüse, 2010, p. 322–330) because of the absolute cap on amount and the ability to trade permits under the cap, keeping in mind the requirement that the amount of permits which corresponds to the predetermined cap must be surrendered or else penalty shall apply (Markandya, Harou, Bellú & Cistulli, 2002, p. 209). Within the EU ETS the European Commission in consultations with EU ETS member states determines caps. So far most permits (EUAs) have been allocated to participants of EU ETS free of charge — at least 95 % during the first period and at least 90 % in second period, however in future more and more EUAs will be auctioned. Operation of the EU ETS is structured into partly linked trading periods – first period was from 2005 to 2007, second is from 2008 to 2012, but third will start in 2013 and continue till 2020. By the end of each year’s February EUAs allocated for the current year are issued. Permits issued for the first trading period are valid for the use in the first trading period and after that they are cancelled, whereas EUAs issued for the second trading period will be valid also in the third trading period. EUAs are to be used for covering installations’ GHG emissions (surrendering of EUAs), whereas respective emission amounts are established through emission audits (verifications). Each installation has an obligation to surrender EUAs equal to the total emissions in each calendar year, as verified, within four months following the end of that year (Directive 2003/87/EC, OJ L 275, 25.10.2003.).

With regard to the above said the author concludes that if within the first trading period company has surplus of free-of-charge allocated EUAs in order to maximise profitability it is necessary to sell it, whereas in second period decision about selling must be considered in relation to company’s finance flow and EUA price developments. It is also important to recognise that company can trade with EUAs even if it does not have a surplus of EUAs and profit from EUA price fluctuations. However if the company does not have sufficient amount of EUAs for surrendering in order to cover installations’ verified emissions, it has to invest in technology improvements and reduce GHG emissions or purchase EUAs for covering its deficit. Moreover – for surrendering EUAs with respect to the previous year the company may also use EUAs, which are issued to it with regard to the current year (two months gap between deadline for issuance and deadline for surrendering).

Further in this paper the author shall explore the EU ETS implementation in the Baltic States and discuss how actively companies registered in the Baltic States are participating therein. Respective discussion is based on the analysis of data about account holders as well as allocation, verification, surrendering and transactions of EUAs (data available in CTL data base as well as in Estonia’s, Latvia’s and Lithuania’s National Allocation Plans and European Commission’s Decisions concerning National

Allocation Plans (Commission Decisions of 08 March 2006 and 16 May 2007) and in Thomson Reuters Point Carbon data base (EUA OTC Assessment).

## Profile of companies participating in EU ETS and registered in the Baltic States

The Baltic States are involved in the implementation of the EU ETS already since the beginning of its operation in 2005. Similarly to the relative differences in countries' gross domestic product, the largest number of installations actively participating<sup>2</sup> in the EU ETS is located in Lithuania, whereas the smallest one – in Estonia (Figure 1).

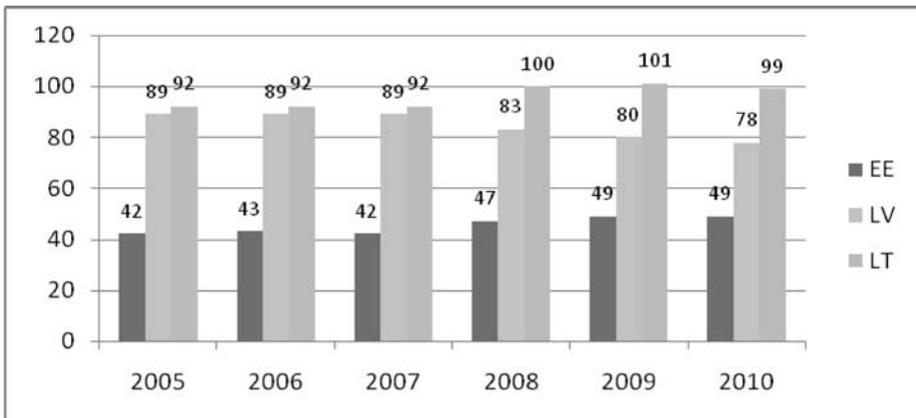


Figure 1. Number of installations actively participating in the EU ETS

Source: created by author.

However it is interesting to note that in Estonia and Lithuania the number of such installations since 2005 has gradually increased (by almost 17 % in Estonia and by almost 8 % in Lithuania), but in Latvia it has decreased from 89 to 78 installations (by 12 %). The author considers that this situation can be explained by the fact that initially in Latvia many installations participated in the EU ETS voluntarily and after some time, when they realized that it is not beneficial for them, they withdrew from it.

Some installations are owned by the same companies – some companies own even more than 5 installations. Up to 2010 in the EU ETS have been involved more than 180 companies registered in the Baltic States – most from Lithuania (79) and

<sup>2</sup> Note: As actively participating companies author considered those who either has received the allocation of EUAs or has verified or surrendered any EUAs.

Latvia (72), but some also from Estonia (31)<sup>3</sup>. Participants of the EU ETS from the Baltic States include such large companies as *Esti Energia (Narva Elektriijaamad, Iru Elektriijaam)* and *Kunda Nordic Tsement* from Estonia, *Latvenergo (TEC 1, TEC 2)* and *CEMEX* from Latvia, *Mažeikių nafta, Lietuvos elektrinė, Vilniaus energija* and *Akmenės cementas* from Lithuania.

In all the Baltic States, the majority of installations participating in the EU ETS (85%) are combustion installations with a rated thermal input exceeding 20 MW – in Estonia there are 47, whereas in Latvia and Lithuania – respectively 94 and 97 (Figure 2). And most of these combustion installations belong to energy companies, e.g. in Latvia 70 installations.

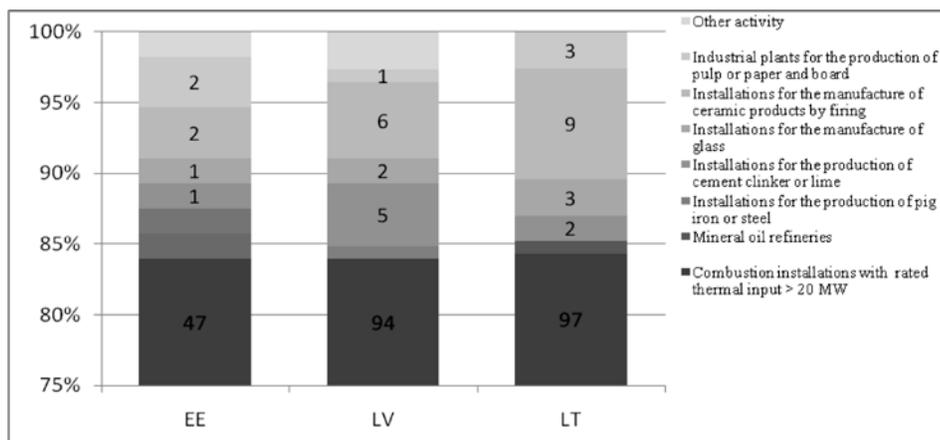


Figure 2. Installations’ activity type according to the classification of EU ETS

Source: created by author.

6 % of installations are for the manufacture of ceramic products by firing, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain (2 in Estonia, 6 in Latvia and 9 in Lithuania). 5 installations in Latvia (in Estonia 1 and in Lithuania 2) are for the production of cement clinker. The author considers that since the European Union determines the overall requirements for the participation in the EU EUTS the overall initial conditions for the participation in the EU ETS for all particular companies registered in the Baltic States are similar however due to the specifics of local markets as well as differences in companies’ size, experience and used technologies they have to follow different strategies.

<sup>3</sup> Note: If available information suggested that several companies belong to one company, in calculations they were approached as one company. In case if there was information that one company has overtaken other company’s installation, in calculations such two companies were approached as one company.

## To companies registered in the Baltic States allocated EUAs and their use

Within the EU ETS first trading period and most likely also in the second trading period to the Baltic States (except Estonia in second trading period) in total free-of-charge allocated amount of EUAs is considerably larger than the actually necessary one to cover their installations' total GHG emissions – in first trading period Estonia's and Latvia's installations for covering GHG emissions used only around 70 % of allocated EUAs, but Lithuania even less, i.e. 55 %. However analysing the sufficiency of EUAs at separate companies' level one can see that while at some installations' disposal there are considerable surpluses of EUAs, some installations are experiencing certain deficits of EUAs (Figure 3).

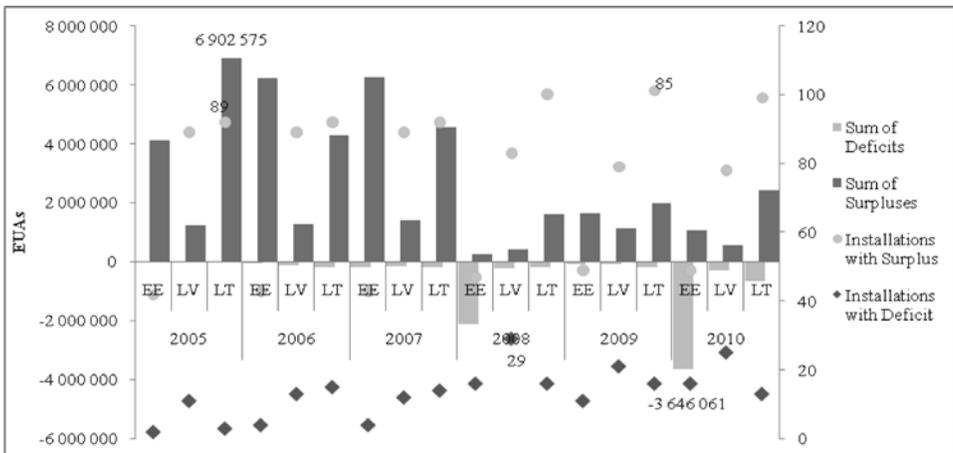


Figure 3. Summary about Installations' Surpluses and Deficits of EUAs

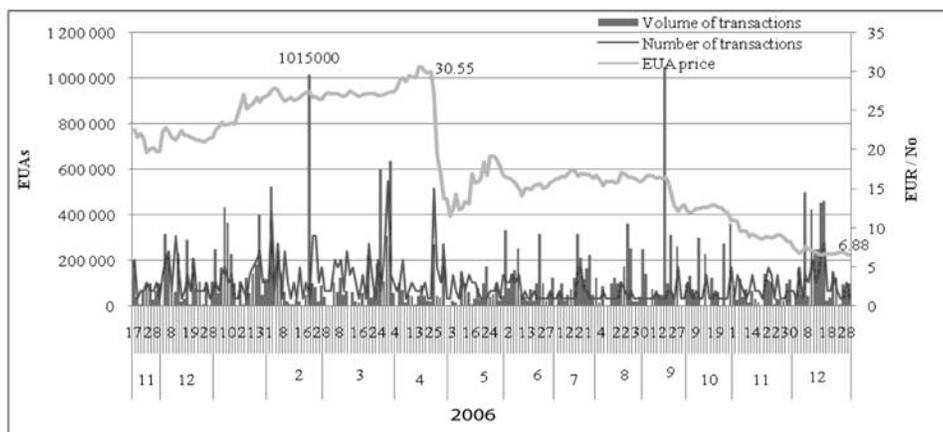
Source: created by author.

The largest number and volume of surpluses of EUAs are in Lithuania (e.g. in 2005 in 89 installations 6 902 575 EUAs) and most deficits of EUAs are in Latvia (e.g. in 2008 in 29 installations), but the largest volumes of deficits of EUAs are in Estonia (e.g. 3 646 061 EUAs in 2010). However taking into account the fact that some companies own more than one installation, deficit of one installation frequently is covered by surplus of others. Thus actual deficits of EUAs within first trading period experienced only 1 company in Estonia (*Kunda Nordic Tsement*), 4 in Latvia (*BLB Terminālis*, *Kalneciema ķieģelis*, *Papīrfabrika "Līgatne"* and *Sabiedrība "Mārupe"*) and 3 in Lithuania (*Palemono keramika*, *Plungės šilumos tinklai* and *Raseinių šilumos tinklai*). Some of these companies most likely purchased deficit EUAs, however most of deficits (e.g. all in Latvia) were covered by additional free-of-charge allocations of EUAs from national authorities and thus at the end of the trading period all companies had completely fulfilled their obligations under the EU ETS with respect to the amount of EUAs that had to be surrendered. In the second trading period

both the number and volumes of surpluses has decreased, but deficits have slightly increased. The author considers that this can be explained by the fact that within the first trading period due to the lack of experience too many EUAs were allocated, whereas in the second trading period although prognosis have been more precise, they have been inaccurate because of economic recession caused by financial crisis. By the end of 2010 the actual deficits of EUAs had 5 companies in Estonia, 13 companies in Latvia and 6 companies in Lithuania, however all companies in Latvia and Lithuania had surrendered necessary amount of EUAs, but 7 companies from Estonia hadn't done.

First transaction of EUAs by company registered in the Baltic States was performed on 17 November 2005 and since then they have performed 604 transactions<sup>4</sup>. This relatively late start of transactions can be explained with a fact that countries' registries for EUAs transactions were not in operation earlier and thus transactions were not technically executable.

The author has established that the frequency of transactions in 2005 – 2006 generally was steady (Figure 4) and was not related to the fluctuations of EUAs' price<sup>5</sup> (correlation coefficient is  $-0,095$ ). Volumes of transactions were not even essentially influenced by the radical fall of EUAs prices in March 2006. Moreover – at the end of 2006 there is even a tendency for EUAs' volumes to slightly increase, which, according to author's opinion, most likely is because of an anticipation that the EUA price will continue falling (because of large surpluses of EUAs in first trading period in 2007 the price of EUA fell record low, i.e. till 0,03 EUR).



**Figure 4.** Volumes and Numbers of EUAs Transactions in Relation to the Price of EUA

Source: created by author.

<sup>4</sup> Note: This number of transactions doesn't include transactions which have been performed between different installations owned by the same company and transactions to or from national registry authorities.

<sup>5</sup> Note: For analysis the average price of EUAs prices with amount deliveries by the end of years 2005, 2006 and 2007 is used.

The volume of one transaction ranges from 1 EUA till 1 050 000 EUAs. Transactions of 1 EUA usually are performed in order to test the operation of the registry system. However also beside these “1 EUA transactions” most of transactions are small ones. Although the average size of one transaction is 41 517 EUAs the sample variance is 66 27 547 939 and standard deviation is 81409,75. In addition, interesting to note that companies are trading not only with EUAs issued in Estonia, Latvia and Lithuania, but also with others, i.e., Estonia’s companies are trading also with EUAs originating from Belgium, Denmark, Finland, France, Great Britain, Hungary and Sweden, Latvia’s companies – with EUAs originating from Czech Republic, France, Great Britain, Hungary, Slovakia and Sweden, but Lithuania’s companies – with EUAs originating from Czech Republic, Denmark, Germany, Finland, France, Great Britain, Hungary, Netherlands, Slovakia and Spain.

Total number of companies involved in EUAs’ trading has risen from 28 companies in 2005 to 95 companies in 2006 (Figure 5), which, according to the author’s opinion, this can be explained by a fact that in 2006 companies were better familiar with the conditions of the EU ETS as well as had more exact prognosis about the amount of EUAs they will actually need for surrendering.

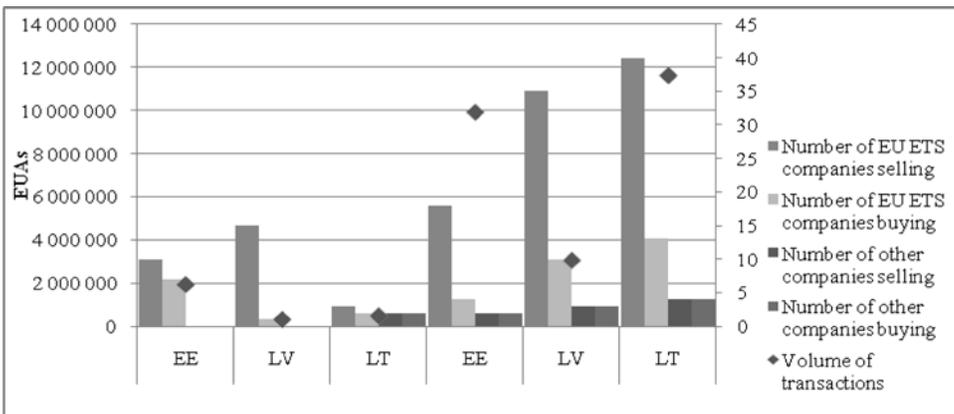


Figure 5. Number of Companies Trading EUAs and Total Volumes of Transactions

Source: created by author.

In 2005 most active EUAs traders were companies from Latvia and Estonia, but in 2006 the title of the most active trader was overtaken by Lithuania. However, it is interesting to note that in 2005 neither in Estonia, nor in Latvia in trading of EUAs participated companies which doesn’t own installations participating in the EU ETS, whereas in Lithuania there were already 2 such companies. Most companies are selling or selling and buying EUAs, however there is 1 company in Latvia and 1 company in Lithuania which had only a purchase transaction. Volumes of transactions in all three countries since 2005 have gradually increased (by 518 % in Estonia, by 924 % in Latvia and by 2376 % in Lithuania). In 2005 highest volume of transactions was in Estonia, but in 2006 Estonia had second highest volume of transactions,

which implies that in Estonia notwithstanding fewer traders separate transactions are greater.

Majority of transactions in the Baltic States are transactions to companies outside the Baltic States (Figure 6), which is because the Baltic States have overall surpluses of EUAs. Total value<sup>6</sup> of all outgoing transactions of all the Baltic States is EUR 421 784 620, whereas total value of incoming transactions is EUR 23 175 316 and total value of internal transactions (transactions between one country’s companies’) is EUR 61 677 841.

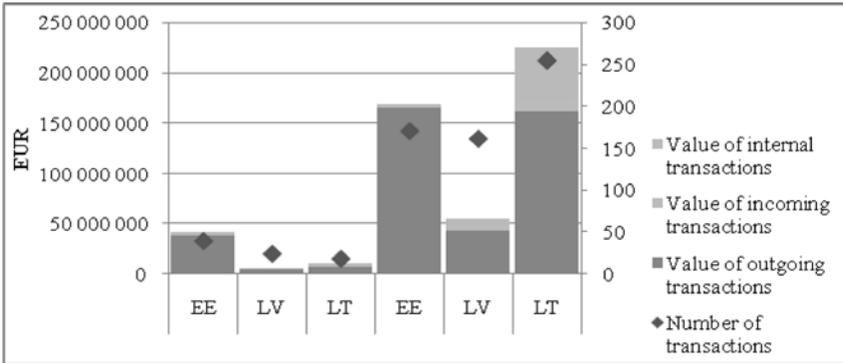


Figure 6. Values of Transactions

Source: created by author.

Largest value of outgoing transactions in both 2005 and 2006 is in Estonia (EUR 38 400 896 and EUR 165 392 770), whereas smallest one is in Latvia (EUR 6549 563 and EUR 42 669208). Most active internal market is in Lithuania – in 2006 there were 42 internal transactions at the total value of EUR 52 080 674, but least active it is in Estonia – together in 2005 and 2006 there were only 5 transactions at the total value of EUR 1 139 931. Largest value of incoming transactions is in Lithuania – EUR 12 535 096.

The most frequent destination of outgoing transactions is Great Britain (154 transactions at the total value of EUR 188 271 502), however many transactions are also towards Netherlands, Denmark, Finland, France and Lithuania (Figure 6).

<sup>6</sup> Note: Value of transactions is calculated with an assumption that EUAs are sold (not presented / granted) and that they are sold at the day when they are transferred.

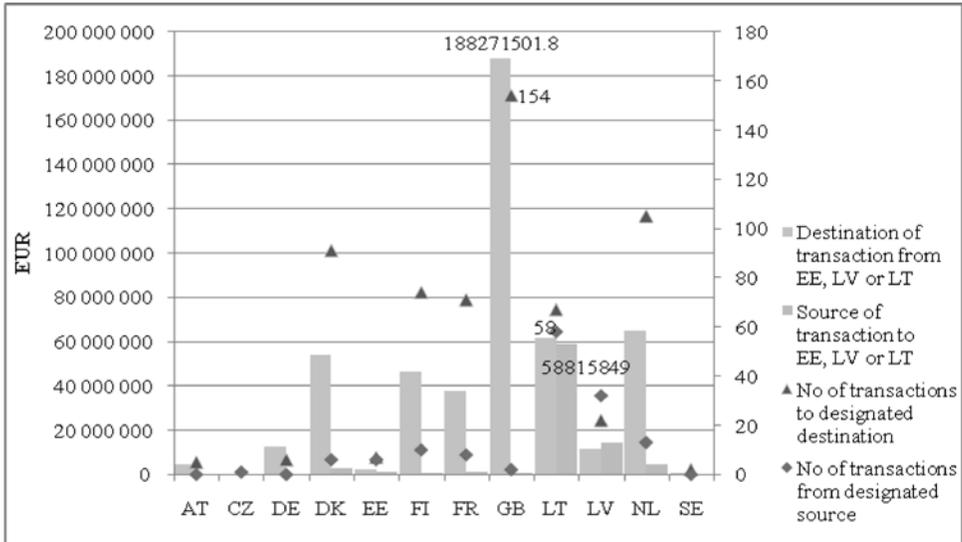


Figure 4. Destinations and Sources of Transactions from / to the Baltic States

Source: created by author.

Majority of transactions towards the Baltic States are from Lithuania (58 transactions at the total value of EUR 58 815 849) and some are also from Latvia. However transactions to the Baltic States from countries abroad are very few – in total only 40 transactions at the total value of EUR 10 204 854.

In Table 1 the author has presented the results on the estimations about the companies registered in the Baltic States which are the most active traders of EUAs (largest number of transactions, *inter alia*, sales and purchases), whereas in Table 2 – largest sellers and in Table 3 – largest purchasers of EUAs.

Table 1. The Most Active Traders of EUAs registered in the Baltic States

No	Name	Country	Information about Transactions		
			Number	Volume	Value
1.	<i>Esti Energia</i>	EE	125	9 870 000	171 200 270
2.	<i>E-Energija</i>	LT	100	1 841 231	42 126 219
3.	<i>Vilniaus energija</i>	LT	28	1 477 971	32 884 691
4.	<i>Latvenergo</i>	LV	25	1 328 000	19 184 620
5.	<i>Latgales enerģija</i>	LV	25	411 269	11 026 442

Source: created by author.

Table 2. The Most Significant Sellers of EUAs registered in the Baltic States

No	Name	Country	Information about Sales			
			Number	Volume	Value	Average Price
1.	<i>Eesti Energia</i>	EE	122	9 744 000	168 481 250	17,29
2.	<i>Lietuvos elektrinė</i>	LT	15	2 300 001	37 946 028	16,50
3.	<i>Mažeikių elektrinė</i>	LT	17	1 569 901	10 783 953	6,87
4.	<i>Vilniaus energija</i>	LT	27	1 475 000	32 797 700	22,24
5.	<i>Latvenergo</i>	LV	25	1 328 000	19 184 620	14,45
6.	<i>Kauno termofikacijos elektrinė</i>	LT	8	1 222 958	26 953 015	22,04
7.	<i>Energijos sistema servisas</i>	LT	6	1 087 136	24 577 909	22,61
8.	<i>Panevėžio energija</i>	LT	8	1 085 001	29 764 626	27,43
9.	<i>E-energija</i>	LT	51	918 243	20 779 692	22,63
10.	<i>Tallinna Küte</i>	EE	16	458 001	9 693 783	21,16

Source: created by author.

Table 3. The Most Significant Purchasers of EUAs registered in the Baltic States

No	Name	Country	Information about Purchases			
			Number	Volume	Value	Average Price
1.	<i>Energijos sistema servisas</i>	LT	7	1 082 958	23 889 815	22,06
2.	<i>E-energija</i>	LT	49	922 988	21 346 527	23,13
3.	<i>Kauno termofikacijos elektrinė</i>	LT	3	576 505	15 830 817	27,46
4.	<i>Aleksandrs Brumermanis</i>	LV	2	178 000	3 099 620	17,41
5.	<i>Latgales energija</i>	LV	9	161 748	4 436 787	27,43
6.	<i>Eesti Energia</i>	EE	3	126 000	2 719 020	21,58
7.	<i>Aurora Baltika</i>	LV	3	109 000	2 806 100	25,74
8.	<i>Ekomarket</i>	LT	8	98 726	1 533 317	15,53
9.	<i>Miesto energija</i>	LT	4	73 084	1 985 386	27,17
10.	<i>Duarte Consult</i>	EE	2	70 000	858 300	12,26

Source: created by author.

Convincingly the most active seller and also the most active trader in the Baltic States is *Esti Energia* (EE) – it has sold 9 744 000 EUAs at the total value of EUR 168 481 250 and bought 126 000 EUAs at the total value of 2 719 020 (122 transactions<sup>7</sup> of selling and 3 transactions of purchasing). Second most active trader is *E-Energija* (LT), which although does not hold any records of transactions' volumes or values, has executed 51 transactions for selling and 49 transactions for purchasing of EUAs. Moreover, almost all what *E-Energija* has bought it has sold (purchased 922 988 EUAs (EUR 21 346 527) and sold 918 243 EUAs (EUR 20 779 692)) and taking into account a fact that it does not own any installation – most likely after 2006 it will sell also the remaining amount. The most significant purchaser is *Energijos sistema servisas* (LT), which just like *E-Energija* does not have an installation within the EU ETS. It has performed 7 purchases thus purchasing 1 082 958 EUAs (EUR 23 889 815) and through 6 sales sold 1 087 136 EUAs (EUR 24577 909). But from Latvia the most significant seller and the most active trader is *Latvenergo* (LV) – it has performed 25 sales and sold 1 328 000 EUAs (EUR 1 9184 620).

The most successful sellers in terms of received price per EUA are *Lauma Fabrics* (LV), *Fortum Jelgava* (LV) and *Saaremaa Piimatööstus* (EE) which all, according to author's estimations, have achieved price above 30 EUR. However between 10 companies which has sold the most EUAs the most successful is *Panevėžio energija* (LT) – it had 8 transactions and sold 1 085 001 EUAs at the average price of 27,43 EUR/EUA (total value of transactions EUR 29 764 626), whereas *Esti Energia* (EE) sales and purchases average price is respectively 17,29 EUR/EUA and 17,78 EUR/EUA. Most successful purchaser in 2005 – 2006 was *Akmenės cementas* (LT) which has purchased 50 000 EUAs (1 transaction) at the price of 6,83 EUR/ EUA, however, according to author's opinion, the title of most successful purchaser belongs to those companies which purchased EUAs closer to the end of trading period, since EUA price then was exceptionally low.

The most active purchaser of EUAs from the companies registered in the Baltic States is *Barclays Bank*, which cooperates mainly with *Eesti Energia* (EE) and a little bit also with *Vilniaus energija* (LT), *Tallinna Küte* (EE) and *Latvenergo* (LV) – within 104 transactions *Barclays Bank* has purchased 9 120 000 EUAs at the average price of 17,67 EUR/EUA. Whereas the second most active one is *Nordea Pankki Suomi* – through co-operation with *Latvenergo* (LV), *Eesti Energia* (EE), *Lietuvos elektrinė* (LT) as well as *Mažeikių elektrinė* (LT), *Pravieniškių 2-iejį pataisos namai* (LT), *Liepājas enerģija* (LV), *Saulkalne S* (LV) and *Latelektro Gulbene* (LV) it has purchased 3 498 000 EUAs at the average price of 12 EUR/EUA.

Analysing the connectedness between the allocations of EUAs, verified emissions and transactions, it is interesting to note that in Estonia none of companies whose installations experienced deficits of EUAs participated in EUAs trading. Whereas in Latvia, only one company experiencing deficit of EUAs purchased EUAs – *Kalniciema ķieģelis* purchased 70 EUAs at the approximate price of 27,03 EUR/EUA. In Lithuania one company experiencing deficit of EUAs purchased respective amount

<sup>7</sup> Note: It is assumed that each transaction is attributed towards either a sale or a purchase.

of EUAs, i.e. *Plungės šilumos tinklai* purchased 2 560 EUAs at the approximate price of 13,68 EUR/EUA, but one more such company involved itself in both selling and purchasing – *Akmenės cementas* sold 300 000 EUAs at the approximate price of 12,84 EUR/EUA and later purchased 50 000 EUAs at the approximate price of 6,83 EUR/EUA. In fact, some companies from Estonia and Lithuania even used an opportunity to profit from EUA price fluctuations and in the light of the continuous fall of EUAs prices sold even those EUAs which they needed for surrendering – *Eesti Energia* (EE), *Kreenholmi Valduse* (EE), *Saaremaa Piimatööstus* (EE), *Nordkalk* (EE) and *Rokų keramika* (LT), *Pravieniškių 2-ieji pataisos namai* (LT), *Šiaulių energija* (LT). According to the author's opinion, unless penalties for not surrendering EUAs are higher than the actual profits from the sale of EUAs, such an approach is beneficial and advisable.

Although in order to finalise the analysis on the allocation and use of EUAs within the first trading period of the EU ETS it is necessary to wait for the disclosure of data about the EUAs' transactions in 2007 and 2008, through the analysis of data about transactions in 2005 and 2006 author within this paper has demonstrated that the EU ETS has provided many opportunities to the companies registered in the Baltic States, whereas some companies have successfully made use of them. Subject for the further research is more detailed analysis of each company's sales and purchases and respective strategy of trading in relation to the circumstances of the market as well as specific internal conditions of the company.

## Conclusions

1. For the companies registered in the Baltic States the opportunities created by the EU ETS, i.e. possibilities to sell surplus EUAs as well as trade with free-of-charge allocated EUAs, outweighs its imposed requirements for surrendering EUAs equal to the GHG total emissions in each calendar year, as verified.
2. For the companies registered in the Baltic States there are no essential losses related to the participation in the EU ETS, moreover – many companies, especially those registered in Estonia and Lithuania, successfully has used the opportunities of trading within the EU ETS thus gaining considerable additional profits.

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# MACRO REGIONS, TERRITORIAL AND SPATIAL DEVELOPMENT

**Janis Aprans<sup>1</sup>**

## **IMPLEMENTATION OF OPERATIONAL PROGRAMMES OF 2007–2013: PROGRESS, EVALUATIONS AND LESSONS FOR THE FUTURE**

### **Abstract**

After the publication of the Fifth Cohesion Report which has followed at least two earlier published principal studies on the future of the EU Cohesion policy - “Regions 2020 - An Assessment of Future Challenges for EU Regions” (2008) and “An agenda for a reformed Cohesion policy - a place-based approach to meeting European Union challenges and expectations” (2009) by Fabrizio Barca, the debate about the available funding, directions of support and implementation rules has intensified. The next important step will be in the fall of 2011 when the European Commission will be making available the draft Regulations for Structural and Cohesion funds for planning period of 2014 – 20.

The aim of this paper is to provide an overview on the implementation of Operational programmes in Latvia. The period will range from the beginning of the current EU budgetary planning period in 2007 up until the middle of 2011. This will be done by summarizing the financial progress, assessing the delivery processes of operational programmes, and elaborating the recommendations for improvements in the policy implementation framework.

Taking into account the wide public accessibility of the information on the implementation of EU Structural Funds and Cohesion Funds in Latvia - strategic planning documents, implementation reports and on-line information that is collected and stored at the official website of the Managing Authority will provide a good opportunity to undertake this type of research. Methodologically the paper is mainly based on the desk research of available documents. The paper is also partly based on

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the information obtained during the informal interviews with representatives from institutions involved in the administration of EU financial assistance.

As a result, the paper will provide up to date information about the progress in implementing EU financial assistance in Latvia, analysis of delivery of Operational programmes describing the role of such implementation tools as communication, and financial engineering and auditing. It will also discuss the results of the lately performed evaluation studies that will be used as the basis for elaborating conclusions and recommendations for improvements in Cohesion policy framework delivery.

**Keywords:** Cohesion policy, financial progress, evaluation

## Introduction

After the publication of the Fifth Cohesion Report which has followed two earlier published principal studies on the future of the EU Cohesion policy “Regions 2020 - An Assessment of Future Challenges for EU Regions” (2008) and “An Agenda for a reformed Cohesion policy - a place-based approach to meeting European Union challenges and expectations” (Barca, 2009) debates available funding, directions of support, and implementation rules.. The next step by the European Commission will be in the fall of 2011 when it makes available the draft on Regulations for Structural and Cohesion funds for the planning period of 2014 – 20.

Within this respect, it is crucial to look back and assess how the existing implementation system for managing the EU financial assistance within the framework of the EU Cohesion policy has contributed to the delivery of Programmes or has caused problems and delays in policy implementation.

The aim of this paper is to provide an overview on the implementation of Operational programmes in Latvia ranging from the beginning of the EU budgetary planning period in 2007 to the present situation. This will be done by summarizing the financial progress, assessing the delivery of operational programmes and elaborating on recommendations for improvements in the policy implementation framework.

The first Chapter of the paper, will provide an overview of the overall financial progress of Operational programmes in terms of commitments, payments, declared amounts to European Commission and received amounts provided. The second Chapter of the paper will analyze how various aspects of programme delivery are carried out. These aspects will include: communication, financial engineering and auditing. Finally, the last chapter will discuss the results of a recently published *ex-post* evaluation of Structural fund interventions during 2004 – 06.

By taking into account the wide public accessibility of the information on implementation of EU Structural Funds and Cohesion funds in Latvia such as strategic planning documents, implementation reports and on-line information provides a good opportunity for undertaking this research. Methodologically the paper is mainly based on the desk research of available documents. The paper is also based partly on the information obtained during informal interviews with representatives from Latvian institutions involved in the administration of EU financial assistance.

# 1. The financial progress of Operational programmes

## 1.1 Financial absorption

Latvia's EU financial assistance during 2007 included three structured Operational programmes (OPs) called: "Human Resources and Employment" (ESF), "Entrepreneurship and Innovations" (ERDF) and "Infrastructure and Services" (CF/ERDF). Each of the OPs has one Programme Complement divided in several priorities, which are further broken down into Measures and Activities/Sub-activities.

The Activity level usually is the smallest analysis unit used when the implementation of the OPs is reviewed. It is also the most widely used unit of analysis because many actions taken for implementation of funds are centred on the activities – they represent grouping of thematically similar projects, as the calls for proposals are launched at the activity level. Each activity is governed by a separate legal act – the Cabinet of Ministers' Regulation adopted on the particular activity and thus a set of common detailed rules for application, selection and implementation for each activity, and available financing is allocated on this basis.

However, there are limitations for the analysis of implementation at the level of activities, the most profound being a large number of activities. Although the information is available on the financial progress in 18 priorities and their 147 activities<sup>2</sup>, it is suggested to analyse the spending in the cross section of EU funds (Table 1) and at the level of Operational programmes (Table 2). This information is often designed for implementation of all three OPs and their Complements, to obtain an overall picture about the progress in implementation of EU funds, characterized by the degree of financial absorption,

*Table 1. Individual OP financial progress of EU funds from the 2007 – 13 planning period (cut off date: 31/07/2011)<sup>3</sup>*

Fund	Available EU funding	Commitments <sup>3</sup> (share of EU Funds)		Payments <sup>4</sup> (Share of EU funds)	
	EUR	EUR	%	EUR	%
ESF	583 103 709	509 200 406	87,3%	271 321 283	46,5%
ERDF	2 407 567 364	1 730 742 353	71,9%	811 246 674	33,7%
CF	1 539 776 553	1 175 112 506	84,5%	497 990 490	32,3%
Total	4 530 447 626	3 540 787 089	78,2%	1 580 558 447	34,9%

<sup>2</sup> Source: <http://www.esfondi.lv/page.php?id=939>, Retrieved: 14 May 2011

<sup>3</sup> Source: <http://www.esfondi.lv/page.php?id=909>, Retrieved: 28 August 2011

<sup>4</sup> Amounts for which the Agreements with Final beneficiaries are concluded

<sup>5</sup> Amounts disbursed to Final Beneficiaries

Overall financial progress has to be considered as satisfactory in Latvia during the Planning period between 2007 and 2013. As shown in Table 1, ERDF commitments are at 71.9 percent and payments are at the 33.7 percent level. There is a much better absorption rate observed for the Cohesion Fund allocation in terms of commitments – they are at 84.5 percent level, while the CF payment rate is very equal to that of ERDF at the 32.3 percent level. However, the most remarkable progress related to absorption might be observed in the case of the European Social Fund where commitments have been made for 87.3 percent of available funding and 46.5 percents have been already disbursed to Final Beneficiaries of the Projects. The performance numbers for separate funds aggregate on an average commitment rate of 78.2 percents and a payment rate of 34.9 percent.

There is a large gap between the level of undertaken commitments and payments made, especially in the cases of ERDF and CF (in the case of ESF, commitments exceed payments by almost 1.9 times, but for ERDF and CF this index is 2.1 and 2.6, respectively). Of course, this time lag is mostly objective in nature because beneficiaries submit their payments claims usually three or six months after the agreements about project implementation have been concluded. However, it shall also be noted that in most cases when projects are co-financed from the ERDF and CF, these are investment projects containing construction components.

Construction contracts tend to involve risks associated with delayed procurement, seasonal impact, and fluctuations in cost estimates. These assumptions on risks are supported by the consulted sources (such as Annual Implementation reports elaborated by Managing Authority for submission to European Commission) and confirmed by the inquired personnel employed in administration of EU financial assistance.

In order to avoid delays caused by unsuccessfully conducted procurement procedures, perhaps, it is worth assessing the option when procurement procedures are carried out by an independent and highly professional centralised body. To increase the credibility of such centralised procurement institutions, the possibility to attract foreign experts in capacity of observers shall be considered. Further, the advantages of procurement procedures above certain thresholds to be carried out in the English language should also be discussed as it would increase competition in the market, and thus would stabilise prices.

When the analysis on absorption of funds is carried out at the level of Operational programmes related to declared amounts to European Commission and received payments from the Commission (please, see Table 2), the Operational programme “Human Resources and Employment” stands out with expenditure at the level of 40.5 percent from the all available funds being declared to European Commission and 52.8 percents (including also advance payment) have being received by the Member State. As the Operational programme is financed through the ESF, this only confirms the pattern observed for commitments and payments within ESF. For “Entrepreneurship and Innovations” absorption level in terms of declared amounts is 27.0 percent, but the payments received from the European Commission are at level of 36.4 percent.

**Table 2.** Financial progress of EU funds during the 2007 – 13 planning period by Operational programme (cut off date: 31/07/2011)<sup>6</sup>

Operational programme	Interim payments declared to European Commission (EU funds share)		Payments (advance and interim) received from the European Commission	
	EUR	%	EUR	%
“Human Resources and Employment” (ESF)	236 150 175	40,5%	307 735 158	52,8%
“Entrepreneurship and Innovations” (ERDF)	207 418 448	28,2%	268 085 641	36,4%
“Infrastructure and Services” (CF/ERDF)	298 028 783	9,3%	643 822 242	20,1%
<b>TOTAL</b>	<b>741 597 407</b>	<b>16,4%</b>	<b>1 219 643 040</b>	<b>26,9%</b>

The implementation speed for the OP “Infrastructure and Services” has been the slowest as compared with the two other programmes – only 9.3% of amounts are declared to the Commission and 20.1% are received (including the received advances). As already mentioned above, one of the major reasons for the comparatively lower absorption rate of this OP might be the longer implementation period of investment projects if compared, for example, with training or employment activities.

## 1.2 Decommitment rule

One of the most challenging tasks in administration of EU co-financed programmes is to ensure compliance with requirements of the so called “ $n+2$ ” (or “ $n+3$ ”) rule. The consequences of non – compliance are very unfavourable, the underspent amounts are decommitted. In the case of Latvia, strong mechanisms for monitoring the decommitment rule have been introduced already in the previous planning period including Managing Authority’s regular reporting at the Government’s - Cabinet of Ministers meetings. This mechanism envisages regular quarterly reports to be elaborated and presented to the Cabinet of Ministers in various cross-sections: by separate funds, priorities of OPs, sectors. Currently (end of July 2011), the overall absorption progress is still slower than planned, this type of spending pattern is quite characteristic for midterm phase in programmes’ implementation and have been already been observed in the past. In this regard, it is important to remember that the

<sup>6</sup> Source: <http://www.esfondi.lv/page.php?id=909>, Retrieved: 28 August 2011

<sup>7</sup> Article 93 of COUNCIL REGULATION (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999: Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1083:en:NOT>, Retrieved : 28 August 2011

final results on the absorption of EU funds for the period 2004 – 06 were excellent – due to over commitments they even have exceeded 100% level.

General public control ensured through easy access to all relevant documentation about the implementation progress at the EU funds web page maintained by the Managing Authority: [www.esfondi.lv](http://www.esfondi.lv) is an additional factor that has a positive impact on absorptions rates and confirms the beneficial role of transparency in public administration.

## 2. Programme delivery

### 2.1 Project communication

There shall be two main types of communication distinguished - the communication at the level of Operational programmes and the communication at the level of activities or projects. The first group of communication activities are more targeted for raising public awareness about the achievements and positive impact of expenditure from EU funds and usually would include such forms of communication as press releases, TV programs, radio broadcasts and information available on the internet.

Regional Structural Funds Information Centres that are sources of information on opportunities provided by the EU Structural funds also serve tools for dissemination of information on the implementation and results achieved by the programs.

Whereas communication measures at the level of activities are more targeted towards potential applicants and project developers. These activities are mainly carried out not by the Managing Authority, but by Responsible (1<sup>st</sup> level intermediate bodies) or Cooperation Authorities (2<sup>nd</sup> level intermediate bodies) whose are responsible for implementation of a specific activity. The communication activities designed at potential project Beneficiaries are usually in the form of seminars and workshop, and are of rather specific nature such as specific implementation rules of the Activity, eligible costs, and or deadlines.

### 2.2 Financial engineering

Financed from the 2007–13, the Jeremie Initiative is part of Operational programme “Entrepreneurship and Innovations” (ERDF), and has been used in Latvia for designing the Jeremie Investment Fund (JIF) to provide loans to SME enterprises. A similar project was launched in March 2010 and was administrated by Latvia’s two largest commercial banks “SEB” and “Swedbank”, which allocated 60 million and 44 million euro, respectively<sup>8</sup>. The European Investment fund through JIF, co-financed by the EU Structural funds and State budget, have allocated 30

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<sup>8</sup> “European Investment Fund signs agreements with SEB banka and Swedbank totalling EUR 104 million for financing Latvian SMEs”, Source: <http://www.swedbank.lv/eng/news/260310.php>, Retrieved: 28 August 2011

million euro to “SEB”<sup>9</sup> and 22 million euro to “Swedbank”, and banks are adding the same amounts by themselves thus totalling the amount of financial resources to 104 million euro<sup>10</sup>. These funds are allowing both banks to facilitate the financing of SMEs in conditions of economic downturn.

A little later, in June 2010, European Investment funds and “Imprimatur Capital Baltics” established the first seed money and start-up capital fund in Latvia within the JEREMIE initiative framework. It specialized in technological projects and attracting private capital in very complicated risk capital market conditions. The private capital in the start-up capital fund under JEREMIE initiative is represented by pension funds that are administrated by “DnB Nord Fondi” and “LKB Krājfondi”.

Seed money and start-up capital funds are ensuring early stage financing to innovative micro, small and medium size technological companies with the international growth potential. Seed money fund in size of three million euro is ensuring financing up to 100 000 euro for one company. Start-up capital fund with an initial size of 4.2 million euro can invest up to 400 000 euro in one enterprise. In the forthcoming years, it plans to invest within 10 companies in Latvia that have sizable technological growth potential. The target sectors involve IT, telecommunications, alternative energy and natural sciences.<sup>11</sup>

### 2.3 Audit

Functions of the Audit Authority are carried out by the Audit Department of the Ministry of Finance. Audit Authority prepares and updates common audit strategy, performs audits on the EU funds management and control system, elaborates annual control reports and gives opinions on performance of management and control system. It also performs system audits for preparation of final control reports, final statement for submission to the European Commission, performs audits on expenditure approved by the Certifying Authority, and performs audits for preparation of final control report and final statement. For example, the 2011 Audit Authority planned 34 audits<sup>12</sup> varying from the audits of particular single projects to the system audits at the level of programmes or administrating institutions. Besides the Audit authority, audits and checks are performed by Internal audit divisions of Responsible and Co-operation institutions, Managing Authority, Certifying Authority, Procurement Monitoring bureau and number of external audit missions ranging from external auditors contracted by the administrating institutions themselves to European

<sup>9</sup> Source: the same as above.

<sup>10</sup> “European Investment Fund signs agreements with SEB banka and Swedbank totalling EUR 104 million for financing Latvian SMEs”, Source: <http://www.swedbank.lv/eng/news/260310.php>, Retrieved: 28 August 2011

<sup>11</sup> “EIF un «Imprimatur Capital» izveido fondu tehnoloģiju jomas projektiem”, Source: <http://www.diena.lv/bizness/finanses/eif-un-imprimatur-capital-izveido-fondu-tehnologiju-jomas-projektiem-738187m>, Retrieved: 28 August 2011

<sup>12</sup> Audit plan of Audit Authority for 2011. Source: <http://www.esfondi.lv/page.php?id=1066>, Retrieved: 14 May 2011

Commission's and Court of Auditors missions, the information is quite fragmented and it is rather difficult to obtain sufficiently precise assessment on the overall number of performed audits.

However, it has been observed and noted both by Beneficiaries and experts that the audit burden has diminished in the 2007 period when compared with the 2004 – 06 period. It is also admitted that audit functions has become more coordinated and more in-depth oriented than previously. The strategy for audit function has been to achieve the same level of control and credibility by lesser number of audits performed. Overall, Latvia has a comparatively very low error rate in result of audit checks therefore the existing control and audit system has to be recognized as having a high level of credibility.

Nevertheless, cases occur when the scopes of audit checks and even times of the visits overlap. Therefore, further coordination among various controlling and monitoring bodies has to be increased at the National level while the appropriate legal framework for such an approach has to be ensured at the EU level.

### 3. Evaluations of programmes

During the last six months two main evaluation activities have to be mentioned and reviewed. During the second half of the 2010, the Managing Authority of EU Funds had contracted three evaluators to carry out the “ex-post” impact analysis on implementation EU Structural funds Operational programme of the period 2004 – 06. The three themes covered were “Evaluation of results and impact of EU funded investments in the field of support to business during the programming period 2004-2006”, “Evaluation of results and impact of EU funded investments in the field of employment during the programming period 2004-2006” and “Evaluation of results and impact of EU funded investments in the field of education and science during the programming period 2004-2006”. Together these three themes account for little more than 50% of all amounts spent from Structural funds.

Main conclusions of the study on the evaluation of business support are the following:

- Funding had a positive impact on the business environment – the total impact on GDP from 2004 to 2009 from the LVL 400<sup>13</sup> million EU SF funding which was allocated for the business support was LVL 659.22<sup>14</sup> million, which constitutes 0.84% of the total GDP in this period of time.
- After evaluation of the performance of individual companies, it can be concluded, that greater support from 2004 to 2008 has facilitated turnover in 20% of companies, profit in 16% of companies and the number of employees

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<sup>13</sup> 569 million euro

<sup>14</sup> 938 million euro

in 10% of companies. The growth of other companies cannot be related to EU SF support.<sup>15</sup>

Some of the most relevant conclusions of the study on employment:

- During 2004-2009, the state has made successful socio-economic investments into the promotion of employment and social inclusion – in monetary expression this amounted to approximately 300 million lats<sup>16</sup> in 2004, and an estimated 10 000 000 is foreseen in mid to long term range in 2018.<sup>17</sup>
- The financing of the EU structural funds through the direct impact on reaching of the objectives of social cohesion via investments into human resources has supported approximately one fourth of the economically active inhabitants or more than 290 000 people.
- The largest reach of the EU structural funds financing was among the unemployed – during 2004-2009 more than 54 thousands of general unemployed and beginners of self-employment and nearly 26 thousands of unemployed from the social risk groups received immediate training.<sup>18</sup>

The study on education and science reveals the following few main conclusions about the impact of implementation of Structural funds' co-financed activities:

- In the context of general education the most significant EU SF support in 2004-2006 planning period was provided to education quality improvement in nature sciences and technology subjects (54%, 8,026,741 lat).
- Investment in the modernization of vocational institutions has resulted in additional 31% education programmes which meet market requirements.
- Doctorate study support has had a positive effect. The results of interventions are notable – number of doctoral students keeps growing every year, whereas the number of doctorate study graduates grew more than twice in 2003-2009.
- Planning further activities in the research field, it is important to forecast the number of required research personnel and the period. It is vital to assess what opportunities can be provided in public and private sectors to employ researchers in further 10-15 years.
- Each LVL EU SF invested has resulted in an average return of 3.66 LVL. The significant net present value of EU SF generated benefits demonstrates added value of 255.8 million LVL to Latvian GDP.<sup>19</sup>

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<sup>15</sup> Summary of "Evaluation of results and impact of EU funded investments in the field of support to business during the programming period 2004-2006". SIA "Baltijas konsultācijas". Source: <http://esfondi.lv/page.php?id=906>, Retrieved: 15 August 2011.

<sup>16</sup> 427 million euro

<sup>17</sup> 1 423 million euro

<sup>18</sup> Summary of "Evaluation of results and impact of EU funded investments in the field of employment during the programming period 2004-2006". SIA "DEA Baltika". Source: <http://esfondi.lv/page.php?id=906>, Retrieved: 15 August 2011.

<sup>19</sup> Summary of „Ex-post evaluation of results and impact of EU funded investments in the field of education and science during the programming period 2004-2006”. SIA “IS Consulting”. Source: <http://esfondi.lv/page.php?id=906>, Retrieved: 15 August 2011.

Although all three above evaluation studies recognize the positive impact of EU Structural funds interventions in respective fields, they also highlight the fields for required improvements.

One of the opportunities in improvement of effectiveness of assistance is enhanced sectoral planning. If the planning process for delivery of EU financial assistance is quite well planned in terms of required strategic documents, institutional system, division of tasks and responsibilities between involved parties, then inter linkage with planning the development of particular sectors like entrepreneurship, employment, education and others.

Although the three ex-post studies provide very valuable insight how EU Structural funds can contribute to the development of various sectors, their conclusions and recommendations would have been used much wider in planning of future interventions and correcting the existing ones should they have been produced earlier than three years after completion of 2004 – 06 Programme (two years added due to “n+2 rule”).

Recently, the Managing Authority has launched the tenders for 2007 – 13 midterm evaluation “Midterm evaluation of implementation effectiveness of NSRF priorities, measures and activities”. The midterm evaluation has been organized into four lots that each yield a separate study: basic part, active employment measures, the horizontal priority “Macroeconomic stability” and effectiveness of communication measures. The planned deadline for elaborations of evaluation studies is December 2011.

## Conclusions

1. Financial progress overall has to be considered satisfactory in Latvia at the point of the 2007 – 13 Planning period as among the three funds commitments vary between 71.9% for ERDF, 87.3% for ESF and 84.5% for Cohesion fund. In terms of payments to Beneficiaries the performance is 33.7% for ERDF, 46.5% for ESF and 32.3% for Cohesion Fund.
2. When Operational programs are compared by declared amounts to European Commission, “Human Resources and Employment” (ESF) is in a leading position with 40.6%, followed by “Entrepreneurship and Innovations” (ERDF) with 28.2% and then by “Infrastructure and Services” (CF/ERDF) with only 9.3% from total allocation being declared to Commission.
3. Comparatively slower advancement in implementation of Operational programme “Infrastructure and Services” can be explained with impact of risk factors characteristic to investment projects with construction component – unsuccessful procurement procedure, fluctuation in cost estimates, seasonal impact.
4. Good results have been demonstrated regarding the compliance with the decommitment deadline that is achieved through well elaborated and strict monitoring mechanisms and wide public control ensured by high level of transparency.

5. By using almost all available tools and forms of communication – TV, radio, internet, seminars and individual consultations, there is well organized communication strategy ensuring the reach of population in general and potential project applicants in particular.
6. In implementation of Operational programme “Entrepreneurship and Innovations”, also the financial engineering instruments such as loans for SMEs, seed money and start-up capital funds have been introduced to supply existing businesses and start-ups with much needed loan capital.
7. In order to improve the quality of procurement procedures, it is recommended to review the option that they are carried out by independent and highly professional centralised body.
8. To increase the credibility of such centralised procurement institutions, the possibility to attract foreign experts in capacity of observers shall be assessed.
9. The advantages for procurement procedures if they are above a certain threshold to be carried in English language should also be discussed as it would increase competition, and thus would have a stabilising effect on prices in construction sector.
10. Overall recommendation is that the sectoral planning should be enhanced and better aligned with planning the delivery of EU financial assistance.

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## **REGIONAL DEVELOPMENT POLICY IN LATVIA: AHEAD OR BEHIND THE EU COHESION POLICY?**

### **Abstract**

The latest EU discussions on future EU Cohesion policy stresses the role of EU Member States and their regions in promoting EU territorial cohesion and the increasing disparities between EU regions require new approach in regional development policy. It concerns (1) potential shifts in setting regional development goals, (2) defining the role of place in regional development, (3) ensuring functional institutional system, as well as (4) implementing proper financial instruments and (5) having methodology to assess the regional development. The main challenge for regional development policy initiatives relates the more effective use of territorial resources and potential towards achieving EU territorial cohesion.

The aim of this paper is analyze the latest developments and initiatives in regional development policy in EU and Latvia. Paper includes insight on the territorial dimension as the place is key objective in latest discussions on future cohesion policy.

**Keywords:** regional development, Cohesion policy, place-based approach

### **Introduction**

The emphases on finding new approaches in promoting regional development has been strongly activated by the economic crises, which had uneven impact on the regions over the Europe and over the world.

There are several planning documents and reports issued by different institutions tackling the issue of better use of territorial resources and existing potential and looking for the possible solutions in reducing territorial development disparities across the EU regions. The discussion on underutilization of resources and the need for external interventions was activated at EU level by Fabrizio Barca report (Barca,

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2009). Also the OECD<sup>3</sup> and World Bank<sup>4</sup> touched the discussion on the role of place, efficiency of the implemented regional and sectorial policies as well on the need to promote balanced regional development.

Many attempts have been on assessing the impact of cohesion policy and trying to measure the growth and development linking it with implemented Cohesion policy measures.

## EU initiatives towards territorial cohesion

The first discussions on EU territorial dimension were started at the end of 1980s, continued nowadays by looking for the best appropriate solutions to promote balances and sustainable development of EU territory and by explaining the role of place in promoting economic and social cohesion.

There is a long list of documents discussing EU Cohesion policy, showing the steps taken since 1977 (Guidelines on Community Regional Policy) followed by the latest EU initiatives e.g. Green Paper on Territorial Cohesion (2008), Barca report „An Agenda for a Reformed Cohesion Policy. A place-based Approach to Meeting EU Challenges and Expectations” (2009), Europe 2020 Strategy (2010), 5th Report on Economic, Social and Territorial Cohesion (2010). The European Spatial Development Perspective approved in 1999 was the first effort to formulate common EU territorial development framework by increasing role of spatial planning and promoting polycentric development model. Until the Lisbon Agenda territorial dimension was not on EU Agenda. Lisbon Treaty included territorial cohesion as the third dimension next to the economic and social cohesion. The Green Paper on Territorial cohesion raised list of questions to EU States to find the definition for this term and to promote common understanding towards implementation of territorial cohesion, as well as to create tools for impact assessment and the instruments for further development towards territorial cohesion. There is still no agreement on definition of territorial cohesion; however there have been many attempts to look for possible explanations of this concept.

In 2011 the territorial cohesion has been highlighted as priority in the agenda of Hungarian EU Presidency (January-June 2011) and Polish Presidency (July-December 2011).

Authors consider three key reports covering the analyses of regional disparities and economic development:

Barca report (Barca, 2009) stressing the current underuse of territorial resources and the need for external actions to reduce regional disparities un promote social inclusion;

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<sup>3</sup> The New Rural Paradigm, Policies and Governance. OECD Rural Policies Reviews. OECD Publishing, 2006

<sup>4</sup> World Bank report „Reshaping Economic Geography”. The International Bank for Reconstruction and Development and The World Bank, 2009 Available at: [www.worldbank.org](http://www.worldbank.org)

OECD report<sup>5</sup> having arguments that persistent regional disparities arises from insufficient use of territorial growth potential and supporting the investments in lagging behind areas;

World Bank report<sup>6</sup> underlying that territorial disparities are always present in economic growth.

EU Member States have elaborated on national positions stressing the role and importance of EU Cohesion policy, however common understanding of the territorial cohesion has not been achieved. The EU documents mentioned serves as background analyses for EU Member States and provides guiding principles to be included in national and regional level development planning documents. This has been the case of Latvia as current regional development initiatives show attempts to stress the territorial dimension and find more effective regional development instruments and promote better targeted EU cohesion policy.

Theses attempts are closely linked with the fact that EU funding is the main regional development policy financing source in Latvia providing 6,55 billiards euro in 2007-2013 which is 4,5 time more than the payments of Latvia into EU budget (Table 1).

*Table 1.* EU Funds allocation in Latvia 2007-2013

Fund	Billards, EUR
<b>Cohesion Fund and Structural Funds</b>	<b>4,53</b>
Cohesion Fund	1,54
Structural Funds (ERDF, ESF)	2,99
<b>Maintenance and management of natural resources</b>	<b>2,02</b>
Market intervention and direct payments	0,84
Rural Development	1,05
European Fisheries Fund	0,13

*Source:*<sup>7</sup>

Latvia in its official position paper on territorial cohesion stated that cohesion policy after 2013 has to maintain its initial goal – reduction of disparities between lagging behind territories and the rest EU.<sup>8</sup> This underlines that Latvia in the frame

<sup>5</sup> The New Rural Paradigm, Policies and Governance. OECD Rural Policies Reviews. OECD Publishing, 2006

<sup>6</sup> World Bank report „Reshaping Economic Geography”. The International Bank for Reconstruction and Development and The World Bank, 2009 Available at: [www.worldbank.org](http://www.worldbank.org)

<sup>7</sup> Information from [www.esfondi.lv](http://www.esfondi.lv) and [www.fm.gov.lv](http://www.fm.gov.lv)

<sup>8</sup> Position paper of Latvia on territorial cohesion. <http://www.rapl.gov.lv/pub/index.php?id=25&lid=2106>

of the next planning period is not interested in Objective 2 „Competitiveness and employment” which is supporting relatively better developed regions and from which Latvia is not receiving financial support.

## Socioeconomic study of regions in Latvia

The future cohesion policy concerns the socioeconomic development of regions and aims at strengthening of regions by exploring their territorial potential. The OECD report<sup>9</sup> shows that 2/3 of GDP comes from non-core regions stating that these areas are having strong growth potential which needs to be better exploit. In this point the place-based approach is seen as needed solution aiming at balanced territorial development and being on the EU agenda for the last years and serving as discussion ground for next planning period.

The changes in economic situation and global and EU level strengthen the need for deeper socioeconomic analyses at regional and local level as well as showed the need for stronger focus on regional assets. There have been rapid changes in economic performance of Latvia proved by decrease in most of economic indicators. For example the gross domestic product index in Latvia has decreased by aprox.14% from 2007 and coming two years<sup>10</sup>.

The OECD notice on the role of regions in bringing economic value only partly reflects the situation of Latvia as the there is clear dominance of Riga as capital city to be considered. At first it is reflected in number of inhabitants as around 1/3 of total population is living in Riga and surrounding territories. Second, the highest share of goods and services are produced in Riga, resulting in share of more than 50% of total GDP in Riga city.<sup>11</sup> Other biggest cities of Latvia produce up 3-5% of total GDP in Latvia.

It is important to look at the performance of the regions in Latvia in comparison with the average EU. There are five planning regions in Latvia and after the territorial administrative reform, finalized in June 2009, 119 local municipalities called “novads”. The main socioeconomic indicators show that Riga planning region performs the best, which is mainly because of high dominance of Riga city. If socioeconomic indicators of Riga city would not been counted, the average of the rest Riga planning region would be different.

Gross domestic product per capita in planning regions of Latvia in 2008 was 56% of EU average. The best performing region in Latvia is Riga planning (77% GDP per capita of EU average) region because of the high concentration of the economic activities in Riga as capital city. Performance of other planning regions in terms of

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<sup>9</sup> The New Rural Paradigm, Policies and Governance. OECD Rural Policies Reviews. OECD Publishing, 2006

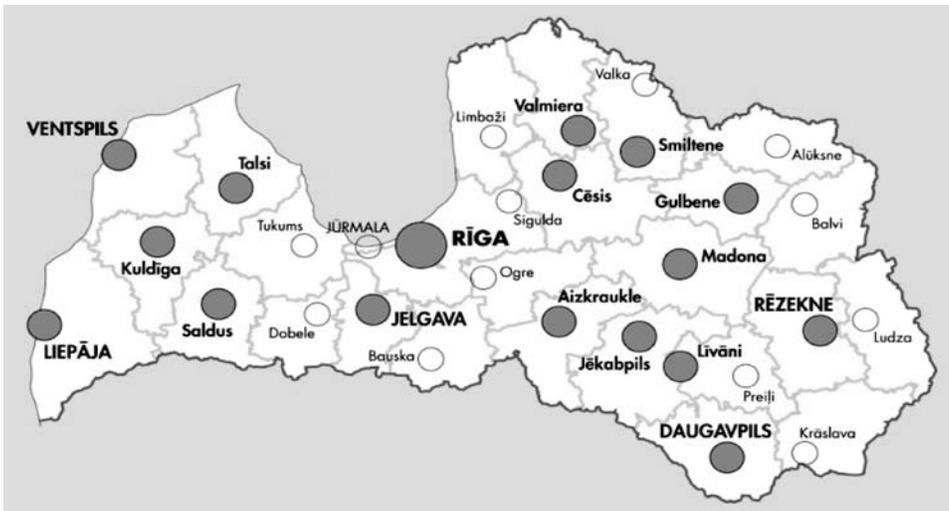
<sup>10</sup> Information from Central Statistics office

<sup>11</sup> Socioeconomic development tendencies of cities in Latvia. Research report, State Regional Development Agency, 2008

GDP varies from approx.30% to approx 45% of EU average<sup>12</sup>. The most lagging behind region in Latvia has been Latgale planning region. This situation proves that even higher allocation of EU funding to this territory has not changed the situation of this region in comparison to other planning regions of Latvia. This stresses the need for potential changed in the planning and implementation of regional development policy in Latvia.

Besides 119 counties there are 17 cities appointed as development centres of national and regional importance that are considered as strongest development centres within regional spatial planning process influencing regional and national competitiveness and having influence on surrounding territories. However research studies did not resulted in finding clear methodology behind the selection of these centres and the detailed criteria used.<sup>13</sup>

*Figure 1. Development centres in Latvia of national and regional importance*



*Source: Ministry for Regional Development and Local Governments<sup>14</sup>*

The mentioned initiatives – territorial administrative reform and appointment of development centres with allocation of specific EU Structural Funds measures can be considered as step towards the use of place-based approach in regional development planning and implementation. However due to such regional development theories as

<sup>12</sup> Data of Central Statistical Bureau of Latvia and Eurostat on the Gross domestic product per capita in planning regions in 2008, % to the average in the European Union according to the purchasing power parity standard

<sup>13</sup> Long term sustainable development strategy „Latvija 2030”. Available at <http://www.latvija2030.lv/page/226>

<sup>14</sup> Ministry for Regional Development and Local Governments <http://www.rapl.gov.lv/pub/index.php?id=2470> (viewed on 12.2010.)

endogenous growth theories, institutional theories as well as new economic geography studied by the Authors, there is strong need for certain set of activities showing the importance of territorial dimension starting from set of clear long term regional development goals and defining the role of place in regional development, ensuring functional institutional system, as well as implementing proper financial instruments and having methodology to assess the regional development.

## **Need for new approaches in regional development policy at EU and Member States level**

In the frame of future EU Cohesion policy during the last years EU Member States have strongly debated on the need to identify and mobilise existing territorial potential and to promote move from supported growth by subsidies and grants towards growth which is based on available territorial resources including human resources and innovation capacity. These discussions have been envisaged by the EU funds impact assessments on territorial development showing that EU structural funds investments have not succeeded in raise in productivity neither raise in regional capacity. Latest EU discussions includes question on the most effective policy development initiatives to reduce regional disparities and the place-based approach is consider as one of the options to use in the planning and implementation of regional development policy. This has been discussed by Boldrin, Bachtler, Barca and other experts.

The previous research work in regional development and studies on place-based approach underscores following factors which play the most important role in successful implementation of the place-based approach:

- 1) clearly stated regional development policy targets;
- 2) clearly defined role of the place in regional development policy;
- 3) strong and adaptable local, regional and national level institutions;
- 4) flexible support instruments;
- 5) policy evaluation tools.

Smooth implementation of regional development policy tackling the mentioned factors requires strong involvement of many stakeholders to be able to identify the existing territorial resources, territorial potential and to decide on the instruments to be used in achieving the set regional development policy targets. The use of the most appropriate support instruments, including the availability of resources, the most appropriate governance model and the policy implementation assessment are issues to consider in the context of territorial cohesion. These issues are constantly studied by Italian professors having strong involvement also in ESPON (Capello R., Camagni E., Chizzolini B., Fratesi U, 2009).<sup>15</sup>

The use of the place-based approach promotes increased role of the regions therefore it is essential to do analyses on the socioeconomic development of EU

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<sup>15</sup> ESPON – European Cohesion and Territorial Observation Network [www.espon.eu](http://www.espon.eu)

regions, which later accompanied by deeper studies on available territorial resources, existing territorial potential and the instruments needed to use existing potential in the most efficient way towards raising welfare of EU inhabitants.

## Key institutions in regional development policy of Latvia

The place-based approach require strengthened local and regional institutions that are able to assess and develop local economic assets in ways that amount to more than tailoring national policies. However there are several uncertainties towards clear governance model in Latvia, especially relating to the ensuring territorial cohesion.

The Ministry of Environmental Protection and Regional Development<sup>16</sup> is the main institution being responsible for regional development in Latvia. This responsibility includes also implementation of territorial cohesion and ensuring coordination between other policies towards achieving balanced territorial development and promotes competitiveness of the territory.

There are several institutions involved in regional development planning and implementation process and the role of regional level authorities is ensured by five planning regions. They are governmental institutions, but however it has to be envisaged that their role has been not clear since the first moment of their establishment. And it is the reason for their insufficient administrative capacity. Also the report on Development of Regions 2010 states that “Currently, the planning regions continue to operate as coordination and cooperation institutions.”

Besides that they act as partners in various territorial cooperation projects to attract additional financial resources to maintain their administrative capacity. The competence of planning regions is set by Law on Regional Development<sup>17</sup> and their responsibility covers setting of long term development principles, goals and priorities, as well as elaboration of regional development planning documents, ensuring cooperation between local and national level institutions and elaboration on regional development projects. Since 2010 their competence was enlarged and the coordination of public transportation and implementation of cultural policy was handed over.

However there is mismatch between government declaration of 2010 and decision of Parliament of Latvia on the future role of planning regions in Latvia. As government declaration foreseen wind up the planning regions as institutions to reduce the levels of administration and to share their responsibilities between institutions of local and national level. However Parliament of Latvia in early 2011 took decision to continue regional reform and use the bases of planning regions to decentralize public administration of Latvia.

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<sup>16</sup> From January 2011 Ministry of Environment was merged with Ministry of Regional Development and Local Governments establishing Ministry of Environmental Protection and Regional Development Ministry of Regional Development and Local Governments was operating from 2003-2011.

<sup>17</sup> Law on Regional Development. Latvijas Vēstnesis. Available at [www.likumi.lv](http://www.likumi.lv)

Authors during the study of mentioned decision making processes and the existing and planned documents on regional development issues state that there is no common agreement on the regional development goals and the instruments needed for their achievement as well on the role on regional level administration. Authors see this as potential risk to have delayed involvement in setting development priorities and responsibilities within the next planning period.

The analyses of the EU current initiatives towards future cohesion policy and the existing practices in EU Member States proves the need for setting integrated strategy for development of planning regions as well as creation of stronger regional level administration and closer collaboration between different stakeholders at regional level. It calls for the need to ensure the optimization of current territorial structures.

## The use of place-based approach in Latvia

Taking into account the efforts of the last years to strengthen regional development policy as horizontal and the attempts to define new instruments in solving regional development issues, the place-based approach has been considered as potential solution in more efficient use of existing territorial potential of the regions of Latvia.

Authors see several regional development initiatives in Latvia promoting use of the place-based approach in Latvia:

- implementation of administrative territorial reform;
- development of national long term development strategy;
- the acquired experience in absorbing EU Funds;
- creation of functional territories.

These initiatives have been pointed out by several Authors (Pūķis, Vaidere, Vilka). Attempts to improve regional development planning and implementation in Latvia provide certain aspects potentially promoting the use of the place-based approach in regional development of Latvia. For instance, the implementation of territorial administrative reform aiming to create stronger local governments, elaborated long term development strategy and the acquired knowledge on implementation of EU funds.

However the territorial administrative reform did not result in local governments of the comparable administrative and financial capacity as well area covered and number of inhabitants. There are 39 local governments out of 119 with less than 5000 inhabitants, 37 local governments with 5000-10000 inhabitants. Only 3 cities have 50 000 – 100 000 inhabitants, only one city has 100 000 – 150 000 inhabitants, and only capital city Riga has more then 700 000 inhabitants and is having stronger focus on international competitiveness.

The weaker points concerns the insufficient capacity of the planning regions, insufficient coordination of line policies, and the lack of overall understanding of the place-based approach and the potential impact on the regional development in Latvia.

The regional growth priorities have to be based on the national priorities, local priorities and available resources. In case of Latvia the use of the place-based approach in territorial planning and the planning of the EU support would provide wider opportunity to implement the development programmes elaborated by regional and local authorities.

It has been envisaged by Ministry of Environmental Protection and Regional Governments that there is need for more targeted approach in allocation of EU funds. One of this kind incentives is to focus on coastal and border areas and to develop their territorial potential that is considered as insufficiently used. There is need to invest in fishery, fish processing industry, improve operation of ports and well widen and improve services to attract more local and foreign tourists to this area. This would require investments in infrastructure as well as improvement of service sector. The wide differences between the counties in terms of are creates uneven coastal line.

Another area of specific development potential foreseen is border area of Latvia. In terms of economic performance the most of the counties along the border area are having lower socioeconomic indicators in comparison with other counties. In the Sustainable Development Strategy of Latvia "Latvia 2030" this area has been defined as targeted territory within the regional development of Latvia.

Previous investigations of both Authors show that the place-based approach can promote more efficient use of territorial resources and increase the economic activities in the regions. In this way the territorial competitiveness of the regions could be promoted, including timely assessment of threats and the need to strengthen the capacity of regional and local actors.

## Conclusions

The latest regional development policy planning initiatives at EU and Latvia as EU Member States level acknowledges the need for new approaches in regional development planning towards achieving goals set by Europe 2020 and towards achieving EU territorial cohesion.

The place-based approach has been seen as a tool to deliver better targeted and sustainable regional development across EU and to promote more efficient use of territorial resources and exploring territorial potential. There are many documents produced at EU and national level dealing with cohesion policy, however not always coordinated and successive.

However the analyses regional development theories and background studies at EU and national level stresses several factors which are part of the successful implementation of the place-based approach:

- 1) clearly stated regional development policy targets;
- 2) clearly defined role of the place in regional development policy;
- 3) strong and adaptable local, regional and national level institutions;
- 4) flexible support instruments;
- 5) policy evaluation tools.

The socioeconomic performance of the regions of Latvia, the uncertain role of the planning regions of Latvia and the lack of horizontal coordination between line ministries shows the need for precise elaboration on all mentioned factors, starting from coherent set and understanding of regional policy goals to be achieved, clear acknowledgement of the role of place, moving towards clear governance model and responsibilities as well as more targeted support instruments. Latest regional development initiatives in Latvia are in line with EU developments however lack of the clear focus on national priorities is missing.

Authors are suggesting following steps for successful implementation of the place-based approach in regional development of Latvia:

- 1) decision on the main support priorities;
- 2) changes in regional administration level;
- 3) start of changes in this planning period;
- 4) development of functional regions.

Place-based approach serving as strategic and integrated approach deals with specificities of certain place, considers the available resources and promotes strategic long term planning. Therefore this approach could be useful for improving regional development policy planning and implementation system by putting emphases on territorial analyses, institutional improvements and the efficient use of territorial resources by applying concrete support instruments.

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**Santa Beneza<sup>1</sup>**  
**Jānis Balodis<sup>2</sup>**

## **THE LIFESTYLE AND SOCIOECONOMICAL SITUATION OF THE ZVĀRDE FORMER MILITARY AREA: AN EXAMPLE OF SUSTAINABLE DEVELOPMENT**

### **Abstract**

Before the Second World War, 3,117 residents lived in Zvārde. They had two churches, three schools and libraries, the five post offices, and seven mills with grain. During Stalin's deportations, the Zvārdes people have been expelled three times from the native home.<sup>3</sup> Now Zvārde is one of problematic former military areas not only in Latvia but also in Europe. In our research we recognized five problems or crucial points: 1) negative changes of land use, 2) high unemployment, 3) labour migration, 4) problems with new workplaces and 5) problems of economical development strategy. Now Zvārde is in Saldus county and Kurzeme Planning region. The main aim of this research is to recognize how lifestyle and socioeconomic facilities have changed. This comparison will range from the time between the Soviet era and today's situation.

### **Introduction**

The largest landfill in Latvia was the Zvārde landfill from 1940 to 1955, located in the Saldus district. At the time, it took up 24 500 ha of fertile land. At the time Defense Ministry's information Zvārde site, 200 unexploded aviation bombs and other explosive items were located. The total contaminated area covers 20,521 ha, all of which is municipal property. Since 1993, the territory has been partially restored its economic activity (specifically forest and agriculture). The landfill site has not been cleaned since the Second World War, it contains a high pollution density from the Second World War due to the Ammunition, and the 1 Soviet aviation ordnance. The

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<sup>3</sup> Upmalis, I. (2006) *Latvija – PSRS karabāze 1939.- 1998.* Rīga: Zelta grauds, 360. lpp.

area is contaminated with cluster, practical and chemical ammunition (incendiary, smoke munitions - primarily red and white phosphorus, which is toxic), as well as scrap metal. Pollution in some places even reaches 17 meters deep. As a result, a development project has been initiated, but it does not include a full-fledged plan to treat complex explosive objects.

When implementing EU regional policy, Latvia and the European Union (EU) Member States use EU financial assistance in economic and social development. The major financial instruments, under which Latvia has received financial assistance of EU funds: European Regional Development Fund (ERDF), European Social Fund (ESF) and Cohesion Fund (CF), which provides management of the Latvian Ministry of Finance.

The Research and Technology Board (RTB), an integrated NATO body responsible for defence research and technological development, provides advice and assistance to the Military Committee. The board coordinates research and technology policies in different NATO bodies and is supported by a specialized NATO Research and Technology Agency (RTA)<sup>4</sup>.

## Materials and methods

For development and population research in the Zvārde former landfill site data from the Central Statistical Bureau (CSB) was used. Data included: 1) The published data and information about the population of parishes, towns and villages (based on 1935 census data), 2) CSB census material of (2000) the population of parishes, towns, 3) statistical data stocks - the number of inhabitants (1959, 1970, 1979, 2000).

Undergraduate work, and Latvian State Archives such as published reports, decisions, orders, subpoenas), and unpublished archives from 1941 were used. Moreover, information about the For the March 25<sup>th</sup> deportations, as well as scientific publications (research), and periodicals, Saldus District Municipal Development Plan, and the Saldus Development Programme 2009– 2015 were consulted. .

Land-use change research and analysis were used for the 1936 and 1938 data. Published statistics on the number of farms and land-use types, Corine Land Cover 2000 - European land cover survey on the situation in the 2000th year, the Natura 2000 nature reserve individual protection and use were consulted.

## 1. Military landfills in Latvia

Military landfills cover approximately 1.68% of the Latvian territory. In these areas, works in the Latvian Armed Forces and the general public is closed or restricted.

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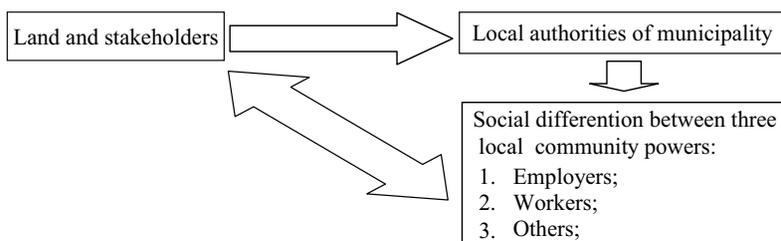
<sup>4</sup> INTERREG North. (2011) Model agreement between lead partners and partners of an INTERREG IIIC operation (Cooperation agreement). No 162, pp. 8–19.

Landfill sites have been used for several decades by the Soviet army for intense military action<sup>5</sup>.

Since World War II, when Latvia was occupied by the Germans and Soviets, foreign military presence exacerbated the environmental problems. Most notable were areas of direct troop locations, and military bases. Soviet military units and a network of Latvian units were very wide. They contained large quantities of hazardous substances, and defective unexploded ordnance, mines and drop bomb, as well as a variety of releases to soil and water pollution. These remain rather prevalent in the Latvian countryside.

The EU's project of former military sites reintegration suggests the possibility of change in regional development (ReMiDo). The project was realized in 2.5 years, and was attended by 17 partners from six countries. They include: Latvia, Lithuania, Estonia, Germany, Poland and Sweden. Its aim was to identify and characterize all Latvian military territory, which is currently municipal property. The study found that Latvian is 42 former Soviet army, which to organize and manage the investment required.

## 2. Economical cooperation between society and local authorities in Zvārde



*Figure 1. Relationships between society and local authorities in military region (made by Jānis Balodis)*

In the Zvārde territory economic activity is critically dependent on the environment's provision of natural resources and ecosystems. Nevertheless, economic decision makers often have a limited ability to appreciate the significance of the ecological interdependencies upon which many economic processes draw. This is largely because many of the benefits provided by natural resources are not marketed and, therefore, do not command a market price. The frequent separation, both in time and its ecological implications is another important contributing factor. To this end, the concept of "ecosystem services" has emerged over the last decade as a powerful mechanism for helping one understand the contribution of ecosystems to human welfare.

<sup>5</sup> Kuldīgas apriņķa Zvārdes pagasta zemes vienību kopplāns M 1: 15 000. Latvijas Valsts arhīvs, 504. f., 8.apr., 14.l.

### 3. Physiogeographical character of area



Figure 2. Changes of administrative borders in the Zvārde parish (made by Ineta Grīne)

Zvārde former military landfill is located in the Saldus region, it is located in the southwestern part of Latvia Republic and bordering with Auce and Brocēnu counties. County area extends mainly in the central highlands of Eastern and south-western part is mostly flat plains corrugated moraine (Ulmaņkalns - 153 m above sea level), the eastward shift moraine, but the westward fall Ventas-Usmas Deep. Vadakste plain formed the bedrock of Eastern elevation south slopes, characterized by flat wavy surface. Bedrock consists primarily of top midperm Naujoji Akmenes suite of limestone, dolomite and sandstone. Most Vadakste Plain is made up of Southern drumlin field, leading to site-specific landscape<sup>6</sup>.

### 4. Socioeconomic lifestyle character of Zvārde

Time and space in Zvārde have experienced important transformations and restructuring over the last few days. The entrance of new communications technologies

<sup>6</sup> Strautnieks I., (1994), Austrumkursas augstiene.- Enciklopēdija „Latvijas daba”, 1.sēj.- Rīga, Latvijas enciklopēdija.- 95- 96.lpp.

into everyday life, inclusion into global information networks and the international arena – these have created a new geography of communications. Nowadays Zvārde has changed. Social scientist Athony Giddens said: “Place” is best conceptualized by means of the idea of locale, which refers to the physical settings of social activity as situated geographically. Zvārde military identity represents attachment to particular place, event, symbol and history. Place of Zvārde and people of Zvārde is quite related in military sphere. People of Zvārde socialize and interact in their local environment – village. They establish social networks with others in the area<sup>7</sup>.

### 5. Sustainability new aspects of Zvārde area policy makers and human capital

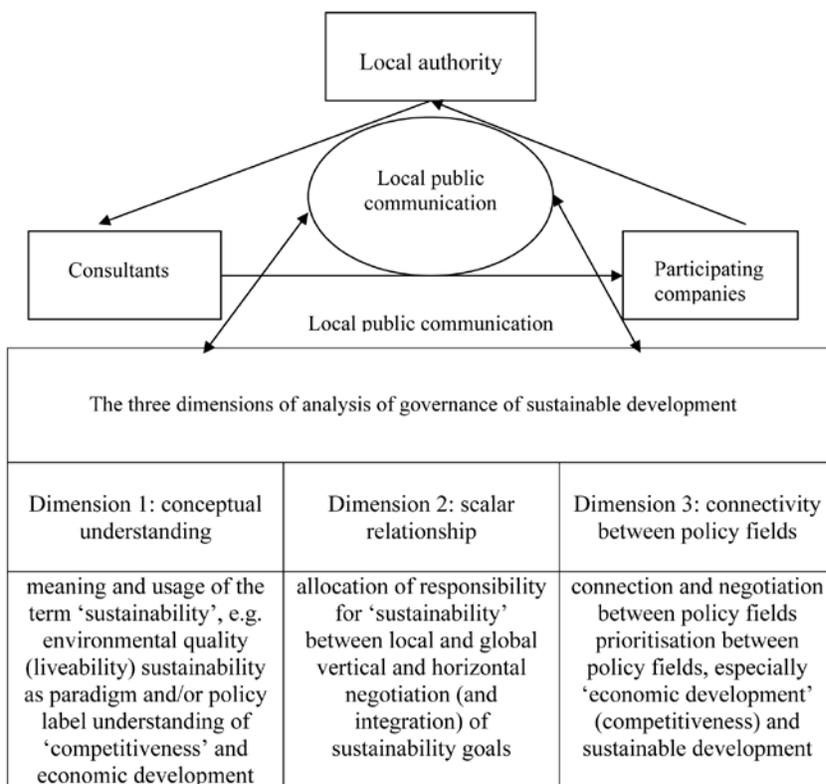


Figure 3. Scheme of three dimensions<sup>8</sup>

<sup>7</sup> Kleinberga, S. (2001), Zvārdes pagasts arī turpmāk grib būt patstāvīgs. Saldus Zeme. 24. novembris

<sup>8</sup> Herrschel, T. (2011), ‘Greening economic development – New cloak or new substance for urban governance?’ *Quarterly magazine of the Regional Studies Association*. No 282, pp. 23 – 24.

The intersection between these three variables circumscribes much of the framework in a location– local, regional and national – for formulating contents, mode and effectiveness of implementation and general prioritisation of sustainability as leading paradigm for, and legitimation of policymaking. This, then may serve as an analytical framework for investigating the meanings behind the use of the term ‘sustainable development’ in a locality, the connections (degree of integration)<sup>9</sup> of such local formulations of ‘sustainability’ to the wider horizontal and vertical framework of governance, and the integration of ‘sustainability’ with other policy fields<sup>10</sup>.

Human capital is therefore highly specific to the economic activities in which it is used, and cannot simply be costlessly deployed to other activities. The fact that human capital built up in one job is completely.

## 6. Administrative division of Zvārde parish and connection between other communities and land use

The Zvārde site was built in the Saldus District Zvārde parish, by Kursiši, Blidene, countrymen, Jaunauce Parish, Brocēnu urban and rural areas Auces Lielaucis county district forest. The work takes a closer look Zvārde parish, in the landfill area occupies most of the rural areas, but adjacent counties, it took only a small part of most forests and agricultural land.

Following the closure of the landfill it partially restored economic activity, which is more associated with logging. Approximately 71% of the rural areas is covered by forests, 12% - scrubs and swamps, and only 17% of agricultural land (Saldus district, 2010). Soviet military landfill closing and the restoration of historic Zvārde parishes have resumed economic life. Local residents returning to their native home, little by little “depending on” the site within the affected areas, which are overgrown with trees and bushes, and trying to restore the former parish Zvārde economic activity<sup>11</sup>.

Zvārde parish is connected between other local communities by:

- 1) physical networks – roads;
- 2) social networks – education;
- 3) economical and financial networks – local companies around in demilitarization area;

<sup>9</sup> Brikše, I; Zelče, V. (2005), Reconfiguration of Place and Space: A Case Study Related to Coverage of Regional Reforms in Latvia. *Proceedings of International Conference – Expanding borders: Communities and identities*. Rīga, November 9 – 12, 2005. pp. 77 – 92.

<sup>10</sup> Gibbs, D. (2005), ‘Exploring local capacities for sustainable development’ (editorial), *Geoforum* Vol. 36, No. 4, pp. 407 – 409.

<sup>11</sup> Kuldīgas apriņķa Zvārdes pagasta zemes vienību kopplāns M 1: 15 000. Latvijas Valsts arhīvs, 504. f., 8.apr., 14.l.



Figure 4. Zvārde area (administrative borders) (made by Santa Beneža) SCALE: 1:50000

Today, natural scientists have observed that military and conservation interests are closely related and can successfully thrive together. Of course, this does not apply to war zones, but only the landfill and the useable area. Most European Union countries' armed forces are included in the territory of the European Union's interest in network of protected areas "Natura 2000"<sup>12</sup>. The pan-European military site is a place where there remains one of the greatest biodiversities of rare and protected plants and animals. A vivid example is Belgium, where non-military landfill sites is not actually that would not be used for economic purposes, and dense populated, people lack space for leisure time in nature<sup>13</sup>.

<sup>12</sup> Lintz, G. (2011), 'Spatial proximity supports sustainable development: the local environmental management approach ecoprofit.' *Quarterly magazine of the Regional Studies Association*. No 282, pp. 20 – 22.

<sup>13</sup> Eden, S. (2000), 'Environmental Issues – Sustainable Progress?,' *Progress in Human Geography*, Vol.24, no. 1, pp. 111 – 118

## 7. Populated places in Zvārde area

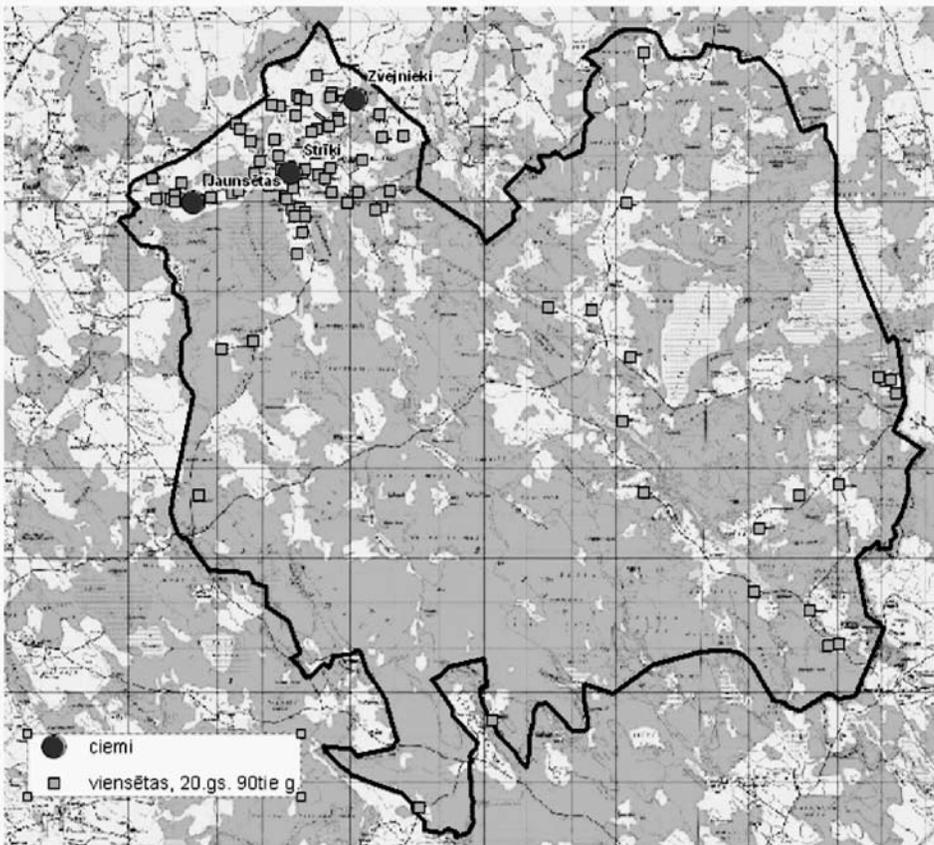


Figure 5. Populated places in Zvārde parish in 20th century 90 years (made by Santa Beneža) Scale: 1: 100000

Comparing the age structure of the Zvārde parish it can be concluded that all of Zvārde local residents 66.1% are of working age, which is different from the age structure of the country as a whole. Zvārde parish has a greater proportion of population under working age - 18.6%, which is the Parish of human potential and the potential workforce in the future as the national average before the working age is 15.4% (CSB, 2011). After working age population ratio Zvārde parish is less than the country as a whole (national average 21.8%) - 15.3% (CSB, 2011), it shows a favorable age structure<sup>14</sup>.

<sup>14</sup> Kūle, L., Rasa, K. (2001), Apdzīvojuma struktūras attīstība: nozares pārskats rajona plānojuma izstrādāšanai. R., Jumava, 58.- 60. lpp.

Analyzing Zvārde Parish sex structure, it can be concluded that the parish of working age are more boys, from 73 to working age population is 43 boys and 30 girls. The analysis of working-age population, more men are, respectively: 133 men and 125 women. Different results show the working age population sex structure: of the 60 residents who were born before the 1945th year, 26 are male and 34 female (CSB, 2011), these results show the averages of the Latvian population sex structure.

## 10. Conclusions

Identifying, evaluating and managing the military objectives, it is possible to develop rural tourism, thereby contributing to the area of sustainable development, protecting nature and biodiversity.

Zvārde landfill settlement and land-use structure is heavily influenced by various political and historical processes (World War II, Kurzeme boiler time, the Soviet occupation and deportations). The fastest change was World War II and Courland pot life: population during 1935 and 1946 fell by more than half. The parish was divided and attached to the newly established collective farms, which determined the future of land-use district.

Agricultural land declined from 57.5% 1935th to 14% in 1954.

Zvārde aviation site in the course of secondary succession leading to an increase forest, bush and pārpurvotās areas, there developed a peculiar habitat complex, which includes rare and protected plant and bird species and their habitats.

Following the closure of the landfill air in most areas are still unexploded ordnance and explosive items, so that the parish has limited economic activity, and the district chief source of income due to logging.

Zvārde parish working age population is 18.6%, which is higher than the national average, above the working age population ratio is lower than the country as a whole - 15.3%, so that the parish has a favorable age structure and human resource potential in the future.

Zvārde parish has a significant predominance of male population. Agricultural land has increased from 14% in 1954 per year to ~ 17% in 2000, Forest areas have increased from 60% in 1954 year to 71% in 2000. With scrub and the area occupied territories pārpurvotām has fallen from 26% 1954 per year to ~ 12% in 2000. The result has increased agricultural land and forest areas, which improve the economic situation of the parish.

In view of the European countries' experience in identifying, evaluating and managing the former Zvārde Aviation landfill sites, it is possible to develop rural tourism, thereby contributing to the area of sustainable development, protecting nature and biodiversity.

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**Girts Burgmanis<sup>1</sup>**

## **ADOLESCENTS WITHIN URBAN PUBLIC SPACE: THE CASE OF RIGA, LATVIA**

### **Abstract**

Adolescence is the part of childhood when children most frequently experience difficulties constructed by spatial issues. Physiological and socio-psychological features of the age span intensify adolescents' needs for autonomous spaces, providing opportunities for socialization and acquiring social skills, construction of self-identity and development of spatial cognition. The public space of the city most often provides this sense of autonomy for adolescents.

This study analyzes adolescents' public space usage in Riga, considering the importance of the residential neighborhood and city centre in young people's lives. The study also shows the everyday experiences and usage of public space of adolescents living in a post-socialist city transformed after the collapse of the Soviet Union. The data used for the study was obtained from a questionnaire survey from adolescents aged 12 to 17 and five sessions of focus discussion groups in three randomly sampled urban schools.

The results show that the experiences of adolescents and usage of public space in a post-socialist city differ by seasonality and age. The increase of unstructured leisure time in summer significantly stimulates an increase in the quantity of adolescents within local neighborhoods and the frequency of their usage as the main social domain. Due to spatial restrictions established by parents, 'unwrapping tactics' used by parents in summer holidays and the institutionalization of daily lives younger adolescents use the public space of the city centre more rarely than older children. In this case I hypothesize along with Matthews and Limb (1999), that universal childhood does not exist and that the experiences of adolescents also should be differentiated. The adolescents of both age and gender groups use the public space of a city centre mostly for activities which are not accessible in local neighborhoods.

**Keywords:** adolescents, public space, city centre, local neighborhood, Riga

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## Introduction

Baltic and other post-socialist cities have undergone dramatic political, socio-economic changes and structural transformations since the end of the Soviet era in the early 1990s. These changes, such as the transition to a market economy, privatization, newly established real estate market and rapid automobilization in Riga – as in other former socialist cities – initiated transformations of the urban environment, leading to a reduction of public space. The convergence of various local and global processes in the last two decades restructured a spatial structure of a city and inhabitants' spatial lives making them to become more complex and restricted. Evidence from Western countries show that cities in Western Europe and North America experienced similar transformations of public space – in particular, cases called 'streets' (Francis, M. 1987, p. 23) in the past. Francis (1987, p. 24) indicate that the privatization of public space in cities which previously were considered as the terrain of social encounters and political protest, sites of domination and resistance, places of pleasure and anxiety denied people the basic rights of access, use and enjoyment. Places and spaces where everyone can participate in public life and experience spontaneous social contacts were partially lost. Important parts of urban public life take place indoors such as homes, bars, cafés, restaurants, clubs, supermarkets and shopping centres.

These changes affect various social groups in diverse ways. Many studies emphasize that most influenced by these developments are children and young people for whom public space and 'street' are the only realm to 'play out their social lives' (Matthews, H., Limb, M., Taylor M., 2000 p. 76) and perform activities associated with daily routine. For example, Sibley (1995, p. 34) considers adolescence as the most spatially oppressed life span of childhood, where adolescents are denied access to the adults' world, but at the same time, they are avoiding the space occupied by younger children. These circumstances force adolescents to search for places where they can fulfill their needs, as prescribed by biologic and psycho-social development. This is mostly expressed as various activities stimulating self- discovery, acquisition of social skills, construction of identity, improvement of competences such as responsibility, communication and interaction with others (Bjarnadottir 2004). Children's geography which is formed and was significantly stimulated by the definition of 'a new paradigm of childhood' proposed by sociologists (Brannen and O'Brien 1995, James, Jenks and Prout 1998, Prout and James 1998) explored the spatial lives and behaviour of young people in the context of 'North'<sup>2</sup> in the last twenty years and shows how adolescents cope with transformations of public space within cities (see, for example, Lieberg, 1995; Matthews, Limb and Percy-Smith, 1998; Matthews et al., 2000). Most of these studies discuss the way of perceiving and using local neighborhoods and city centres by young people through which they experience public life and conclude that adolescents perceive and use urban environments differently from adults (Matthews and Limb, 1999).

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<sup>2</sup> Valentine, G. (2003), "Boundary Crossings: Transitions from Childhood to Adulthood," *Children's Geographies* 1 p. 38.

Previously described general findings and lack of studies exploring spatial dimension of post-socialist young people form the aim of this study. This research, using results obtained from questionnaires and focus group discussions, analyzes the usage of public space by adolescents in Riga's residential neighbourhoods and city centre. In this research, Riga (Latvia) is used as a case with characteristic features of an urban environment and spatial physical and functional structure of a former socialist city. The contribution of this study is to show the experiences of adolescents from a post-socialist city challenging the notions of 'a unitary public child'<sup>3</sup> or 'universal childhood'<sup>4</sup> of North and expand the exposure of evidence on the spatial experiences of young people within urban environment in general.

Considering the frequency, duration and mode of public space usage, the results of the study show that adolescents of various ages and genders experience the spatial domain of a city differently. The daily lives of younger adolescents are more institutionalized and spatially restricted, providing that most independent spatial activities are performed within the local neighborhood. An exploration of boys and girls shows that local neighborhoods and city centres are not gendered environments, and both genders use them with similar frequency, but in different ways. Experiences of adolescents from a post-socialist city suggest that the use of public space significantly depends on and differs by seasonality. As unstructured leisure time increases in summer, the importance of local neighborhood in young people's lives also increases in summer.

## Adolescents and urban public space: previous research

In order to describe the public space in general several authors use various metaphors to characterize its nature. Matthews and his colleagues (2000, p. 63) use the definition 'street' for all public outdoor places used by children of various age groups, such as roads, cul-de-sacs, alleyways, walkways, shopping areas, car parks, vacant plots and derelict sites. These places are a 'fuzzy zone' which offers children the space and opportunity for a while to escape from the constraints of childhood. Malone (2002, p. 163) considers a public space or 'street' as a 'stage for performance' where young people can construct a social identity in relation to peers and other members of urban life. Many of these identities are contradictory and oppositional to the dominant culture (messy, dirty, loud, smoking, and sexual); others have an easy fit (clean, neat, and polite, in school uniform). Expressions of these identities provoke conflicts with adults. Several studies discussing these clashes indicate that young people, and in particular, adolescents, are seen on 'street' as undesirable because they challenge adults' ownership over public space (Sibley, D., 1995 p. 35).

<sup>3</sup> O'Brien, M., et al. (2000), "Children's Independent Spatial Mobility in the Urban Public Realm," *Childhood* 7 p. 257.

<sup>4</sup> Matthews, H., Limb, M. (1999), "Defining an agenda for the geography of children: review and prospect," *Progress in Human Geography* 23 p. 67.

Although the transformation of urban public life leads to an institutionalization of younger children's lives and draws youth indoor where they perform different daily activities such as watching television, listening music and playing computer games, the outdoor environment still plays a significant role. According to Lieberg (1995 p. 721), public space and outdoor environment are important and in most cases it is the only place where underage youth can meet friends, observe other people, experience various situations and make sense of the existence of different values, because they are not able to control private property.

Young people's experiences in public spaces are not universal and in most cases should be differentiated and examined separately. Differences by young people's gender and age more frequently are discussed as constraining factors to freely use public space. Historically and traditionally public space is considered to be a gendered environment where boys spend most of leisure time and express their masculinity through risky behavior (Hall and Jefferson, 1976). Some studies represent girls within the context of their role in household where they are regarded as helpers in household chores or vulnerability in public space suggesting that these conditions determine restricted use of space and spatial freedom of girls (Matthews, 1987). A contrary viewpoint is shown by Matthews, Limb and Taylor (2000, p. 76) who claim that the 'street' is the key domain for many young girls, which they use slightly differently than boys. The public space for girls is a meeting, chatting and shopping place.

Younger adolescents are considered too incompetent and immature to independently use the public space of a city. Parents' concerns about 'stranger danger' (Valentine, G., 1997, p. 74). and traffic safety stimulate them to restrict children's spatial and temporal freedom through institutionalizing their lives and establishing curfews. As children grow older, the spatial freedom and territory outside their home is increasingly explored autonomously and regularly used by children (Matthews, 1992). O'Brien et al. (2000, p. 264) suggests that the age-related differences disappear at the age of 14 when spatial restrictions proposed by parents decrease and mobility which takes place without presence of adult (called also 'independent mobility') within public realm of a city increases.

Studies on young people's use of public space in cities of Western Europe and North America most frequently discuss two major spatial domains in the lives of youth: local neighborhood (Matthews, Limb and Taylor, 2000; Lieberg, 1995) and city centre (Travlou, 2004). The local neighborhood is reflected as the main spatial realm with the most indispensable physical and social attributes for daily activities, interactions and cognitive development. This spatial domain should be considered as the 'inclusory environment' where every adolescent without reference to ethnicity, economic conditions, sub-culture, gender and age can acquire knowledge about other people and places, feel independence and autonomy, construct identity and test boundaries within the 'adults' world'. In every environment adolescents a search for appropriate open places where they can perform unstructured informal activities. Travlou (2004) suggests that young people evaluate places according to the spatial autonomy these places provide them, and the lack of adult control over particular spaces is the main criterion for the eligibility of a place. They use these places as sites where they can meet friends and live their social lives. If there are no such places,

they overwhelm street corners, supermarkets, recreation centres, urban green areas, and beaches, and recreate them giving a new meaning and content. For example, a study of Matthews *et al.* (2000) from the UK East Midlands showed that the local shopping-mall had acquired various significant functions: it was a place for hanging out, a place for identity constructing and also a boundary zone of cultures, or a hybrid space where an adolescent is not a child anymore, but still not an adult. Places in residential areas overgrow into territories where young people feel secure and have a sense of belonging, then transferring these senses within daily life and in relationships with peers (Lieberg, 1995). Matthews, Limb and Percy-Smith (1998, p. 198) indicate that there exist four kinds of places used by young people in the public space of local neighbourhoods: places away from authority, places to be with friends, places for adventure and places for solitude.

After the economical and social transformations of urban environments initiated by historical changes, the city centres in Western Europe and North America is the last universally accessible public space where diverse social groups can meet each other and find their own domain for activities. The public space of a city centre plays a significant role in adolescents' lives, symbolizing the modern and exciting: meeting with strangers, anonymity in relation to home and school, and contact with international youth cultures (Lieberg, 1995). Several studies indicate that in the era of late modernity the significance of a city centre and similar places with a high vitality of public life as sites for creation of identities and lifestyles in routine of adolescents is increased (Featherston, 1991). Through activities such as shopping, going to movies, observing tourists, adults and youth with various backgrounds of subcultures, meeting and hanging out with peers, meeting youth from other parts of the city and making spontaneous contacts adolescents acquire spatial experience, increase self-confidence and independence, supplement social network of peers, construct and reconstruct their social identity. In many cases, the city centre provides young people similar amenities as the local realm, but with more opportunities to perform a wider range of activities. For example, less informal control – which is characteristic of the central part of the city – allows young people to express themselves more freely and successfully challenge adults for usage of particular places (Lieberg, 1995, Travlou, 2004).

The city centre is not only a place where everyone can enjoy urban public life, but also a site where one might feel insecure. Autonomy, independence and lack of control provided by particular parts of public space blended with unstructured activities of older children can overgrow in anti-social behavior and favour delinquent activities. Several studies provide evidences which show that the central part of the city has a dual nature and approve that the city centre is a place where a significant concentration of crimes and acts of vandalism committed by youth are observed (Ceccato and Oberwittler, 2008). Juvenile delinquency in most occasions generates fear intensified also by the media (Cohen 1972) enforcing a number of control mechanisms which decline opportunities for young people to experience public space and life within the city centre. Young people's public lives and activities in city centres are controlled by CCTV cameras and established curfews (Collins and Kearns, 2001) which shape conditions for dissolving young people from public space and declining

opportunities for autonomy and reducing the number of places where they have rights to perform activities.

## Materials and methods

### *Case study area*

Riga is the capital city of Latvia, and according to the data from the Municipality of Riga 2010, the total area of Riga is 307 km<sup>2</sup> and it has 709,140 total inhabitants (31,8% of the total population of the country). The number of young people of school age (7 - 18) decreased to 88,000 in 2010 (12,5% of the total population of Riga) due to dramatic negative population growth.

The urban environment of Riga developed with the historical growth of the city. It is possible to distinguish three significant stages of urban and public space transformations in Riga. First, the expansion of the city in the pre-Soviet period shaped territories which nowadays correspond to the central part of the city and some peripheral neighborhoods where areas of detached houses and parks were developed. Second, the Soviet period intensified development of the poli-centric structure of Riga, which initiated construction of new neighborhoods that began to grow both sides of the river Daugava. Each of the newly-built neighborhoods were planned as residential areas with easy accessibility to most indispensable services. The majority of young people – similarly as other inhabitants of the city in modern days – live in these neighborhoods where the dominant type of building is multi-story houses.

Third, after regaining independence in the early 1990s when the commercialization of the city centre outbid all other activities from the central zone, residential functions were pushed to more peripheral locations (Stanilov, 2007) and the newly established real estate market initiated the de-concentration of the population and the construction of infill within residential areas. Despite the mentioned significant historical transformations, the spatial structure of the city of Riga – similarly to other post-socialist cities – is still highly mono-centric. This feature determines that with various amenities the city centre functions as the centre of work places, leisure, recreation and consumerism, attracting a large part of inhabitants and particularly young people.

The research was undertaken in three study areas which are situated in Riga and located in different parts of the city. The areas were chosen so that each of them represents various specific types of urban environment found in Riga. This approach was applied to assess not only the effect of the sociodemographic background of adolescents on frequency and type of local neighborhood and city centre usage, but also associations between the functional variety, physical and social quality of residential neighborhood and significance of it in young people's daily routine. Each of the three areas consists of two or more neighborhoods with more or less similar physical and social settings.

The first area (Area 1) is located within the central part of the city and includes the two neighborhoods of Skanste and Brasa. The territory is approximately 6,5 km<sup>2</sup>

large and has around 15,000 inhabitants in total (Riga City Council, 2010). This area can be characterized as an extension to the city and a territory with a medium densely-built environment and mixed-use development. The majority of houses which are mostly five-story buildings were built in the beginning of the 20<sup>th</sup> century. Although the diversity of places for various activities and intensity of public life pace are higher within Area 1 than in residential areas or suburbs, it is much more restricted than within the city centre.

The second area (Area 2) is located on the outer edge of the city on the right bank of the Daugava, and comprises three neighborhoods with a homogeneous physical structure of urban environment: Purvciems, Dreilini and Plavnieki. Area 2 has about 85,000 inhabitants and covers 13 km<sup>2</sup> (Riga City Council, 2010). The urban environment of Area 2 is typical and similar to the residential areas of other post-socialist cities, where wide, large-scale housing estates rarely interchange with extremely small areas of green space, and the functionally diverse territories making the physical and functional structure of area markedly oppressive and homogenous.

The third area (Area 3), located in the western part of Riga on the left bank of the Daugava (called 'Pardaugava'), represents a mixed-built and mixed land-use urban environment. Area 3 includes three neighborhoods with a total area of about 12 km<sup>2</sup> and 30,000 inhabitants: Zolitude, Pleskodale and Sampeteris. The eastern part of the area mostly consists of an industrial zone and a small residential zone where historical wooden one-story houses from the beginning of the 20<sup>th</sup> century co-exist with houses no higher than three-stories built in the Soviet period. The more homogeneous part of Area 3 is situated in the south, and is dominated by single-family houses, which interchange with green areas of various sizes. A typical residential zone of Riga constructed in the Soviet period is located in the northern part of Area 3. The types of public places accessible for adolescents in the territory are parks, streets, street corners, courtyards between multi-story houses and sport-fields.

### *Questionnaire*

The purpose of the questionnaire was to understand the significance of local and city centre public space in adolescents' everyday lives and explore the mode and frequency of usage, examining the influence of various independent variables such as gender, age and residential neighborhood. Questionnaires were distributed in three secondary schools in Riga in spring 2010, to 942 students aged 12 to 17 in three previously described study areas. The answers of young people who lived outside of the defined areas were eliminated from the further analysis. It determined that 468 (50%) questionnaires were used for further analysis from which 75% were accurately filled by respondents and considered as valid. This approach was used to assess also associations between physical quality, functional richness of residential neighborhood and frequency of local neighborhood usage and attending city centre. The final sample size of study involved 352 individuals where 165 of them were 12–14 years old and 143 were 15–17 years old. A teacher delivered and collected the questionnaires, which were designed to be completed within 40 minutes.

The survey consisted of two parts which examined the use of public space and asked respondents for general personal and demographic information (age, gender, education etc.). The questionnaire results dealing with demographic data, local neighborhood and city centre use intensities and features were coded and analyzed using PASW Statistics 18 statistical software.

### *Focus group discussions*

The scope of using focus group discussions in this study presented more detailed information about how young people use local neighborhood and city centre in Riga. Twenty-nine adolescents participated in five discussion groups from three Riga secondary schools (the same schools where the survey was carried out) which were undertaken in total, differing by the participants' age. Three age groups were selected; 12 - 13 (when most of young people experience significant spatial restrictions established by parents), 14 - 15 (the 'hardest point' of adolescence when young people are not children anymore, but still not adults) and 16 - 17 (the age at which young people have acquired partial spatial autonomy and may experience urban space more freely). The groups were also split by gender following the suggestion that groups containing both sexes often become distracted due to their discomfort and involvement with individuals of the opposite gender. Further, due to the exploratory nature of the study and the desire to hear as much as possible from each participant, a maximum of six participants were invited to take part in each group. However, in one case this number was reduced to five (parent concerns). Such small groups made for particularly intimate and focused discussions, providing rich and detailed information about each participant.

## **Results**

### *Adolescents' local neighbourhood and city centre usage frequencies*

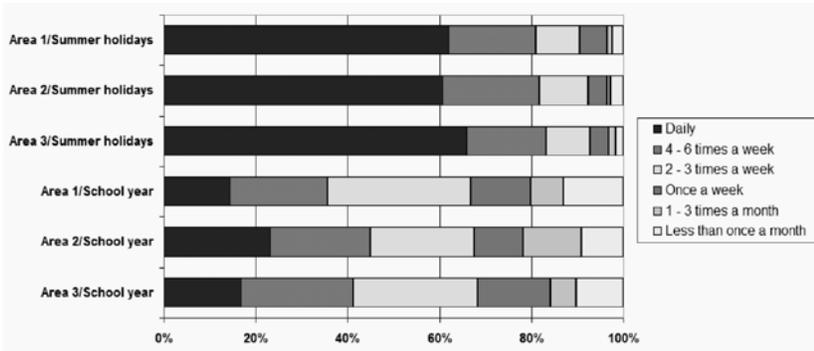
The data gathered from respondents show that without reference on study area significant differences between local area usage in school year and summer holidays are observable (Figure 1). Seasonality is a very important factor which determines both the usage frequency of local neighborhood, and intensity in young people's daily lives. The reduction of structured and formal out-of-school activities in summer holidays increase the amount of unstructured leisure time for adolescents favouring an opportunity to spend it outdoor near to the place of residence. 63% of respondents mentioned that every day in summer they spend their leisure time within local neighborhood, comparatively 19% in a school year.

Figure 1 shows that the quality of public space of the local neighborhood is not a determinant factor to use this area or not. It is not possible to identify any considerable differences in the usage frequency of three selected study areas in both summer and school year. Although adolescents who spend their leisure time daily within Area 2 are more than in others, these differences disappear when the number of young people's responses in all study areas who use local neighbourhood at least 2 days in a week are compared.

The focus group discussions reveal the reasons for daily usage of residential neighborhood among both gender and age groups. Most often it is associated with daily routine, duties and family habits. Several adolescents indicated that they spent at least one hour a day of their leisure time outdoor because they have to take a dog out or go to shop. An encouraging factor to spend leisure time outdoor within public space of local neighborhood or not is weather.

The seasonality usage of the city centre by adolescents without reference on their residential neighborhood is affected only slightly. Despite the fact that in summer holidays the amount of unstructured leisure time increases, the number of young people from Area 1 and Area 3 who visit the city centre every day decreases (Figure 2). Growing differences and more frequent use of Riga centre in summer are observable only considering and comparing those respondents who mentioned that they use the central part of the city at least 2 days a week.

*Figure 1. Comparison of local neighborhood use frequencies by seasonality and residential area. (N=352)*



The reason for this paradoxical situation is explained by several participants from focus group discussions. Both boys and girls of various age pointed out that they spend a large part of summer in sport and youth camps or with grandparents in country houses outside Riga. Children to be sent to country houses is a traditional parenting model for summer time in post-socialist countries and is an opportunity for parents to be sure that children will be in safety and in grandparents gaze. The combination of large amount of unstructured leisure time and opportunities offered by the city to children in summer holidays make parents powerless and concerned leaving them with the only option to 'unwrap' their children out of the city if they have the country house.

Figure 2 shows that adolescents who have a place of residence within the study Area 1 more regularly visit the city centre. These results suggest that the distance and accessibility are significant factors which affect the frequency of the city centre usage among young people. During the school year when resources of leisure time are restricted the easy accessibility from Area 1 to the city centre (on foot) plays a significant role and determines that 64% of respondents from this territory visit

the central part of the city at least 2 times a week (respectively Area 2 - 39%; Area 3 - 41%). These differences equalize in summer when the impact of accessibility of visiting Riga centre decreases in all three study areas.

Figure 2. Comparison of city centre usage frequencies by seasonality and residential area. (N=352)

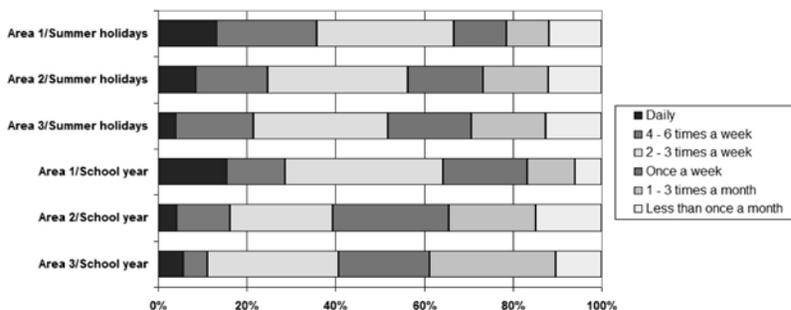
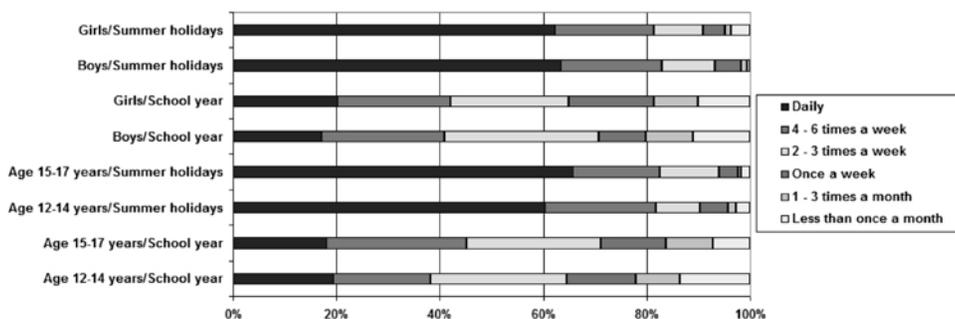


Figure 3 shows that seasonal variation of local neighborhood usage was quite similar between both age and gender groups. Boys (71%) who use the local neighborhood for various activities are more than girls (66%). Considering only those adolescents who daily use public space of the territory near to the place of residence, it is obvious that the situation is opposite and the number of girls is higher than boys.

Although both gender groups use local neighborhood with similar frequency, Figure 3 reveals that younger adolescents have more spatial restrictions and marked institutionalization of daily lives than older adolescents during a school year. The respondents from 12 - 14 age (14%) who mentioned that they spend their leisure time less than once a month are two times more than in 15 - 17 age group (7%).

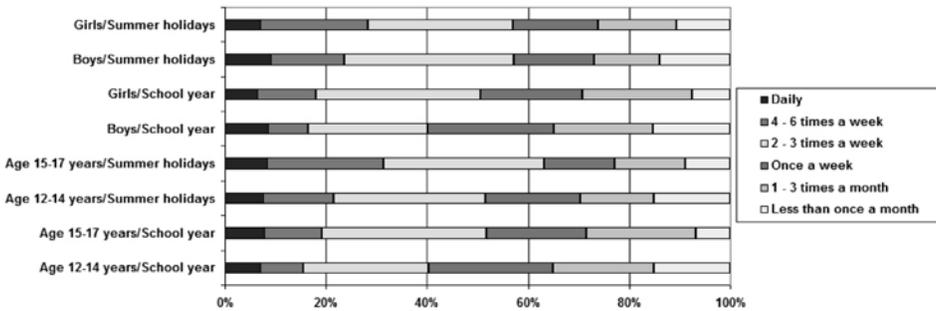
Figure 3. Comparison of local neighborhood usage frequencies by gender and age. (N=352)



When examining frequency of visiting the city centre (Figure 4) among both gender groups it is possible to challenge the stereotypical opinion that boys are more mobile than girls and more regularly visit places outside the local neighborhood.

Girls (51% at least two times a week) use the central part of the city more frequently than boys (40%) during a school year. It is also approved by the results that the number of boys who visit the city centre and use public space only few times during a school year is higher than girls (15%). Only 8% of girls visit Riga centre less than once a month.

Figure 4. Comparison of city centre usage frequencies by gender and age. (N=352)



These distinctions which disappear in summer could be explained by the differences of the city centre usage mode among gender groups. Riga centre offers wider indoor opportunities where girls meet their friends. Unlike residential areas, in the central part of the city a large number of cafes and other indoor meeting places are located. Figure 7 also shows that girls more than boys attend formal out-of-school activities within the city centre. In this case it is necessary to consider the kind of formal out-of-school activities and distribution of their venues within the city. The venues of formal sports activities are located mostly in the periphery of the city but activities associated with culture and art - within Riga centre. Only 28% of the girls comparing to 59% of the boys responded that they attend formal sports activities after school. On contrary 11% of the boys comparing with 33% of the girls attend art, singing, dancing activities which mostly occur 2 - 3 times per week. Although structured activities could not be regarded as leisure time, the focus group discussions showed that adolescents mostly have free time before and after formal out-of-school activities which they spend in various places within the city centre.

Older adolescents more frequently spend their leisure time within the city centre than younger children. The 15% of all aged 12 - 14 visit the city centre less than once a month and it is two times more than respondents from an older age group (7%) in both seasons. It is possible to identify two previously mentioned factors which stimulate these age related differences of the city centre usage: existence of spatial restrictions for younger adolescents throughout the year and „unwrapping tactics” used by parents in summer holidays.

*Adolescents' activities within urban public space*

The local neighborhood serves for adolescents as a significant social venue where they can meet, hang-out and chat with friends as well as observe adults and other young people. Unlike to the city centre where appropriate places for physical activities can be rarely found, the residential areas within Riga provide young people with opportunities to do sports. This feature of study areas is also shown in Figure 5 and Figure 6. Boys (19%) more often than girls (10%) do sports near to the place of residence. This trend was also represented by focus group discussions where boys of all ages more frequently than girls emphasized that in local neighborhood there exist adequate places (school stadiums, parks and public green areas) which are possible to be used for physical activities such as football, jogging, roller-skating, skateboarding and cycling.

Although none of the study areas provides young people with valuable shopping opportunities the data from questionnaires and information gathered in focus group discussions show that some adolescents use the local neighborhood as a place where to buy most of necessary food products and household goods for daily use. Figure 5 and Figure 6 approve that adolescents strive to avoid from parents gaze and mostly live their social lives without presence of adults. Without reference on gender and age group less than 2% of all respondents mentioned that they use local area for various activities mostly together with parents.

Figure 5. Most frequently performed activities in residential neighborhood by gender

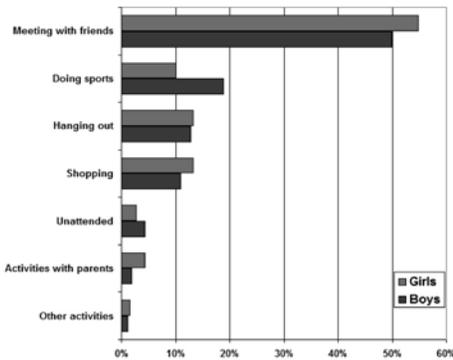
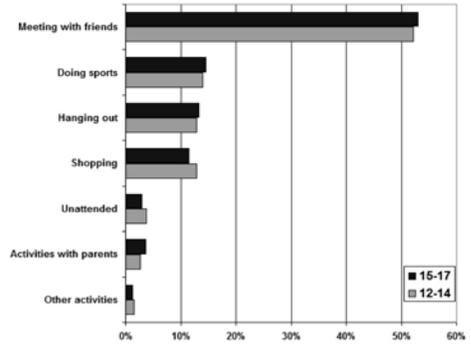
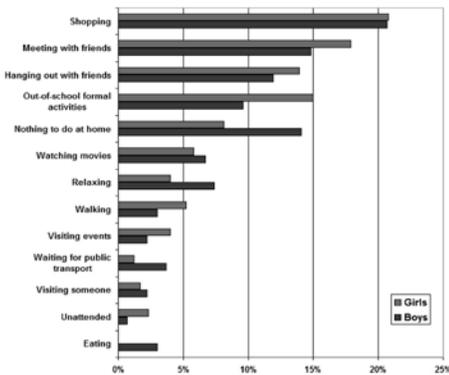


Figure 6. Most frequently performed activities in residential neighborhood by age

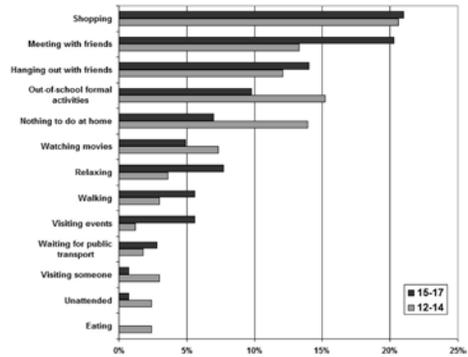


The public space of the city centre is used more extensively by both age and gender groups than the local neighborhood (Figure 7 and Figure 8). Activities without appropriate places of quantity and quality in residential neighborhood most frequently are performed in the city centre. Despite the deconcentration of shopping and recreation places, residential zones of Riga lack shops with a broad choice of goods as well as cafes and cinemas.

*Figure 7. Most frequently performed activities in the city centre by gender*



*Figure 8. Most frequently performed activities in the city centre by age*



Both figures (Figure 7 and Figure 8) show that the reasons which favor different age groups of young people to use the city centre reflect similar patterns in general with gender groups. More than 20% of respondents indicated that they use public space of Riga centre for shopping. The city centre serves also as a significant meeting place with peers, place where to hang out with friends and domain for formal out-of-school activities for young people.

Although meeting with friends is possible within the local neighborhood the wider indoor and outdoor opportunities for hanging out together with peers as well as less informal control in the city centre allows young people to use this environment in more various ways and easily acquire autonomy over particular part of public space such as parks, squares and some indoor places (shopping malls and train stations). The city centre also provides adolescents an opportunity to express themselves anonymously in relation to local area.

Younger children are more involved in activities which characterize deficiency of autonomy such as structured and formal out-of-school activities, visiting grandparents or parents' work place as well as going to cinema (Figure 8). Adolescents aged 12 - 14 and particularly boys more often visit the city centre because there are no recreational opportunities in the local neighborhood. Insufficient leisure opportunities encourage younger adolescents and particularly boys to visit the city centre more often for experiencing high intensity and pace of urban public life and meet strangers attaching sense of adventure and new emotions to those trips. Older adolescents are more experienced and have less spatial restrictions established by parents making them more mobile and competent within urban environment subtracting this sense of adventure. Older adolescents more frequently have a motivated visit to the city centre and use this environment to perform unstructured activities: meeting and relaxing with friends.

## Conclusions and discussion

Employing twofold methodology based on a questionnaire and focus group discussion this study considers the use and importance of local neighborhood and city centre in adolescents' daily lives from a post-socialist city. The results of the study challenge a postmodernism claim that the importance of local neighborhood declines in young people's lives. This study similarly researches on Western cities (Lieberg, 1995; Matthews, Limb and Taylor, 2000) indicated that the public space of local neighborhood is a significant social venue where young people of various age and gender can 'play out their social lives' through meeting friends. A focus group discussion showed the usage of local neighborhood in more detail revealing that the residential area is also a typical habitual realm where adolescents experience routine of daily lives through school trips, walking with a dog or shopping. Public space of residential neighborhood also provides significant opportunities for physical activities particularly for boys who use sport fields fitting near to local schools or courtyards in-between blocks of apartment houses.

The importance of the city centre in micro geographies of adolescents is not only associated with a monocentric spatial structure of Riga determining that most of leisure, recreational and other opportunities are located within the city centre, but also with the feature that the city centre is an environment providing adolescents with sufficient spatial autonomy and anonymity due to less formal control. Consistently with Lieberg (1995) I conclude that young people seek in the city centre for alternatives and contrasts which are not found in their residential neighborhood such as meeting with friends indoor, going to movies, cafes and shopping. For younger adolescents the city centre more often provides diverse opportunities for formal structured out-of-school activities, environment where to improve spatial competences meeting with strangers and other young people and experience versatile urban public life. The distance from residential neighborhood to the city centre is the basic constraining factor along with parental restrictions and significance in daily routine affecting opportunities to visit and use the central part of Riga.

Older adolescents use public space of Riga more frequently than younger children and in a more autonomous way. They are more frequently involved in kind of activities which are characterized by higher level of independence and lack of parents and adults' control. These findings are consistent with previous researches of O'Brien *et al.* (2000) and Valentine (1997) suggesting that younger adolescents have more spatial and temporal restrictions made by parents who consider them as incompetent to explore public space alone.

This study also makes a contribution to exposure of studies on the seasonality effect on public domain usage frequencies and regularity among young people. The increasing amount of unstructured leisure time in summer holidays encourages the more frequent use of the local neighborhood and the city centre. Domination of residential area over the city centre as the main public realm for various activities in summer significantly increases. The explicit concourse within both areas starts with the beginning of warm weather and ends with cold. This study also draws attention

that the increase of unstructured leisure time in summer not only encourages the use of the urban environment, but also depending on family resources and parenting tactics can constrain young people's spatial lives.

Summarizing the findings of this study I hypothesize along the lines of Matthews and Limb (1999) that the concept of 'universal childhood' does not exist and adolescents' experiences should be differentiated at least by age, gender and place of residence. In the case of a post-socialist city the experiences of adolescents should be differentiated also by parental practices based on accessible family options or supply of structured activities in summer significantly affecting young people's spatial lives within urban environment.

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## **MONITORING AS A TOOL FOR COLLABORATIVE PLANNING IN THE RIGA REGION**

### **Abstract**

Elaboration and use of development policy monitoring instruments promotes communication process for strengthening the decision making and implementation. Specific study analyzes theoretical aspects of different development monitoring approaches and factors that impact its quality. Development policy evaluation mainly express as monitoring of general development processes and overall approach of development monitoring in Latvia is oriented on evaluation of planning documents.

Development monitoring, its role in collaborative planning and further monitoring procedure optimization analysis in the Riga Region is the aim of this paper. Monitoring is analyzed as a tool for collaborative planning. The Riga Region and its local municipalities experience serve as basic empirical material for preparation of the paper.

The Riga Region experience in practical examples explain analyses of comprehensive development tendencies and policy evaluation as well as impact on further decision making and policy implementation. The research is focused on new approaches applying communicative development monitoring instruments for elaboration of socially and politically sensitive policy and development planning.

**Keywords:** monitoring, collaborative planning, implementation

### **Introduction**

For more than 15 years Latvia has defined regional development policy as a national responsibility. It marks primary development goals and objectives of the country and part of its territory. Until 2004, regional policy was closely linked to accession process to the European Union (EU) and dealt with cohesion issues. After joining the EU, regional policy remained tasks of the internal areas development

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difference equalization, but in practice mainly focused on the EU's financial support of regional development funds. Throughout the period, regional policy was dual - the existence of the stated objectives, while its implementation means were weak and funding support has been directed towards the medium term or even operational priorities, without contributing of realistic regional policy objectives.

In relation to the EU's accession, planning regions were established in Latvia. It was intended that the regions as territorial organisation structures will play an essential role in implementation of regional policy. However, its administrative and functional capacity was not strengthened. Regional tasks mainly connected to a coordinating role in the planning process between national and local levels. 2008 clearly marks a new addition to the region responsibility for spatial planning process, to a large extent taking over the monitoring of local municipalities development planning. Consequently, it naturally became necessary to monitor the development process. The regions became major agents of development monitoring in national territories. Wherewith, the need arose to build a development monitoring system.

In the Latvian case, this meant establishment of planning regional development monitoring to assess changes in processes, at the same time – without the administrative and financial instruments to allow direct affect on changes.

During the elaboration process of the Riga Region monitoring system, communicative and consultation procedure based on monitoring practice was established. Current monitoring approach serves as a tool for collaborative planning.

The aim of the paper is to study development policy monitoring, its role in collaborative planning process and further monitoring optimization analysis in the Riga Region.

Main objectives of this paper are to: analyze legal basis in the field of development planning in the context of theoretical aspects of policy monitoring and evaluation; study development monitoring approaches in different administrative levels, focusing on collaborative planning approach in the Riga Region; defining further monitoring optimization options and identifying themes necessary for more detailed research.

The research method and empirical data for preparation of the article are based on the experience of the Riga Region development monitoring approach analysis. The Latvian and Riga Region development monitoring is analyzed contextually, as a policy and its implementation practices from the management point of view when evaluating the decision making and consultation process results. Monitoring performance's evaluation is based mostly on territory development comparative analysis using the methods of statistical analysis by assessing the change in territory development indicators dynamics during 5-10 years period.

## **Collaborative planning and monitoring**

Development monitoring is a part of the qualitative planning process as there is a wide interest in the question of how to make planning more interactive and accessible for stakeholders. In the field of planning theory typical approaches for

addressing this need are spatial development planning, public-private partnerships and collaborative planning (Van Rij, 2007). Healey (1997) launched the concept of collaborative planning in an attempt to break out of traditional hierarchical and bureaucratic processes, to involve new groups, networks and partnerships. Planning in this light is as a process by which societies and social groups interactively manage their collective affairs. Such a collaborative planning process should be as inclusive as possible (Healey, 2003).

Monitoring is an essential tool for achieving environmental, social and economic goals and is used as a tool for collaborative planning. Collaborative multiparty monitoring builds trust and facilitates adaptive management by providing a process for systematically tracking changes in conditions and learning from the results (Albrechts, 2004). However, in many cases, monitoring is not integrated into planning and decision making, decreasing the ability to learn from and use monitoring results in further planning.

Regional development monitoring exists in many different forms, depending on each country's legal and functional organization and policy implementation mechanism (Cziraky, Sambt, Rován, Puljiz 2006, Nared, Ravbar 2003, Khan 2001, Spencer, Gomez C. 2004). Monitoring on its complete procedure includes fixing of changes, evaluation, decision making and its implementation control. At the same time, there is a broad spectrum of the various thematic or challenge analyses monitoring systems oriented towards sustainable development, population mobility, environmental impact, business and competitiveness evaluation etc. (Dowell 1987, Gudmunsson 2003, Leeuw 2003, Mott 2004, Boronenko 2006).

Monitoring aim is the key in monitoring system design and implementation. However, its type is determined by social context, political and economical practices which determine development policy. Main attention of current studies is concentrating on monitoring indicators, mostly within thematic monitoring.

Determination and choice of development indicators are important issues for development of already existing monitoring systems. Many attempts exist to create operational and representative indicators, which help to identify causal of processes and applicable indicators for changing circumstances, as well as the indicators, which could be used for different aims, including quantitative methods of calculation (Locāne, Vanags 2002, Krastiņš, Vanags, Locāne 2008, Krastiņš, Locāne 2009).

## **Diverse situations at different planning levels**

At different levels of policy development levels there exist varied approaches on elaboration, implementation and monitoring of specific policy. In the case of Latvia, policy monitoring activities with different success are expressed at state, regional and local levels. Development planning system laws and regulations prescribe necessity of monitoring and evaluation of development policies at all administrative levels. Policy monitoring approach is determined by aim of specific policy on each administrative level.

At the state level, main national policies are elaborated by The State Chancellery and branch ministries. The Ministry of Environmental Protection and Regional Development (former Ministry of Regional Development and Local Government) is the leading institution for the development and implementation of state regional policy. The Cabinet of Ministers provides the operation of development planning system and its monitoring among them elaboration, implementation monitoring and coordination of state level development planning documents Sustainable Development Strategy of Latvia (Latvia 2030) and National Development Plan. Latvia 2030 is the first united long term development vision of the state. The strategy updates and expands the main idea of the conceptual document – „Model for long term Growth of Latvia: Human Being in the First Place” approved by the Saeima of the Republic of Latvia on October 2005. Latvia 2030 includes implementation monitoring mechanisms, based mostly on evaluation of specific indicators linked to Strategy priorities (Sustainable Development Strategy of Latvia, 2010). The recently elaborated action plan for implementation and monitoring of Latvia 2030 prescribe mostly monitoring procedures, but not essential problem – implementation of the document.

Formally the main instrument for implementation of Strategy of the state is the National Development Plan, which determines the priorities for the development of sectors and territories in medium term or in time period up to seven years (Latvian National Development Plan, 2006). In practice the Latvian National Development Plan’s lack of implementation instruments and document implements via different sectoral development policies and territorial development documents (regions and local municipalities), also by planning investment programmes of the state and local governments and financial instruments of EU policies. The implementation of Latvia 2030 and the National Development Plan within the existing development planning system and indefinite support measures is a challenge in the immediate future. The present development planning system is poorly connected with the budget planning and medium term and long term assessment of fiscal effect of action policy is not practiced.

Within the existing development planning system regional roles are mostly expressed as coordination and transition supports from state to local level. Planning regions within the scope of their competence shall ensure the planning and coordination of regional development, and cooperation between local government and other State administrative institutions (Regional development Law, 2002). Laws and regulations prescribe procedures and order how to perform territory development planning documents implementation monitoring in regional and local level. It mostly concerns development programmes – medium term policy planning document, which set out the development priorities of the relevant territory and contains a set of specific measures. Order prescribes periodicity of monitoring measures and form. Regular monitoring report is defined as a monitoring form within the understanding of laws and regulations.

The Ministry of Regional Development and Local Government (at present Ministry of Environmental Protection and Regional Development) has worked out

unified methodology for elaboration of development programmes for regional and local level. Methodology has permissive status and it includes recommendations on process of elaboration and structure of development documents as well as implementation and monitoring order (Methodological recommendations on elaboration of development programmes on regional and local level, 2010). Methodology explains aims and tasks of the specific monitoring system – elaboration of framework, which provides possibility to evaluate progress of territory development and achieved goals during implementation of the development programme. This approach ensures monitoring of general development processes of specific territory and monitoring of specific policy aims.

As concerns to monitoring of spatial plans, there are no concrete indicators how to evaluate documents implementation, it is expressed as conformity between regional and local level spatial plans. Planning regional evaluation and providing opinions regarding the mutual coordination of regional and local level development planning documents and the conformity thereof to the requirements of regulatory enactments (Regional development Law, 2002).

In local municipality's development policy monitoring is mostly expressed as specific policy aims – evaluation of implementation of development plans. The city of Riga's municipality experience is presently the most advanced within other municipalities in Latvia. Monitoring approach is oriented on municipality's development policy efficiency analysis. To provide successful monitoring of the city of Riga development policy Strategy Monitoring System has been established. The system includes monitoring and evaluation of two development planning documents: Riga Development Strategy until 2025 and Riga Development Programme 2006 – 2012 (Strategy Monitoring System, 2011). Monitoring promotes implementation of strategic planning documents by attaching it importance and provides with options to examine and evaluate how city advance in reaching strategic aims.

Within the city of Riga's monitoring system, regularly and systematically necessary data and information are collected and aggregated. Quantitative and qualitative information is analyzed on the situation in the city. This approach is a precondition for a successful, results-oriented development evaluation at both regional and local levels (Uusikyla, 2008). Monitoring system functions are to evaluate and monitor the strategic aims and objectives and to prepare regular monitoring reports on the implementation of the strategy – progress and effectiveness analysis.

The city of Riga's approach solves problems connected with data availability on smaller territorial subdivisions. Subdivisions explain the concept of neighbourhood as a suitable size for the home environment, which have own maintenance, identity and character arising out of the building type, the physical boundaries of the landscape and population sense of community. This solution helps on systematic monitoring of city internal processes and on further decision making of development of specific territory.

Other local municipalities in Latvia, except those who have approved new development planning documents are in a relatively early stage of elaboration and use of development planning monitoring mechanisms. Overall approach of development

policy monitoring is oriented on evaluation of planning documents as indicated in ministry's methodology for elaboration of development programmes.

In general main problems concerning implementation of development policy is due to insufficient support measures and implementation instruments. In connection with policy monitoring, one of the main obstacles is the availability of necessary data. State statistical institutions increasingly decrease the amount of accessible data for development planning needs, especially in local level, what is essential for monitoring of development processes and implementation of specific policies. For planning of local municipalities even more detailed statistical units are necessary – due to results of administrative reform in year 2009, noticeable number of large scale local municipalities has been established. Considering the fact that process of elaboration of new development programmes for the next planning period (2014-2020) has been started, this problem needs immediate solution. This challenge is in the competence of the state level, local initiatives by creating smaller statistical units for specific aims should be encouraged, but this is not an overall solution for problems of data availability. As mentioned above, the city of Riga example (smaller subdivisions approach) solves problems connected with data availability on smaller territorial units.

During the past five years appropriate monitoring systems with data analysis component for use on all administrative levels (state, regional, local) being developed, but unfortunately elaboration still has not been completed. Currently work continues on the elaboration of the new system w – Territory development planning information system (TAPIS – in Latvian). The question of how this system will be compatible with an existing monitoring systems and will it provide with necessary data on smaller territorial subdivisions than in existing statistics (local municipality level) is significant.

In general, at different planning levels there is a rather diverse situation in the field of development planning and monitoring. Sectoral planning and operational character of state administration, insufficient succession and determination in adoption of decisions are main obstacles in implementation of development documents.

Inclusiveness during the planning process is principally formal and rarely gets a different way as prescribed laws and regulations. Regional and local levels are examples of monitoring approaches that are based on the consultation process, taking into account various opinions of stakeholders. Such an approach is natural at the regional level considering region's role in the planning system, as well as functions, which are largely related to the cooperation and coordination issues.

## **Monitoring as a tool for collaborative planning – The Riga Region experience**

The Riga Planning Region is a regional authority, which performs functions in accordance with Regional development Law, among them ensure local government cooperation and the cooperation of the planning region with national level institutions

for the implementation of regional development support measures. Within the law, development questions are not clearly defined and express as implementation monitoring of planning documents – development programme and spatial plan. There are interpretations of understandings about monitoring concept on different administrative levels and institutions wherewith regional and local experiences reveal different approaches on development policy monitoring.

The Riga Region practices development monitoring for almost five years – since 2007. The aim of the Riga Region monitoring is to provide informational and analytical basis for the implementation of regional planning documents and to ensure planning continuity. Main tasks of regions development monitoring are to regularly and systematically collect, compile and analyze quantitative and qualitative information on the demographic, social, economic situation and development tendencies in region territories; identify positive and negative changes and causes of social, economic and spatial situation in the region and its local municipalities; regularly and systematically evaluate region planning documents implementation progress and results; provide this information publicly available, in order to promote a unified and comprehensive awareness of the region development.

Studies have shown that the Riga Region development monitoring aims and components are as follows:

- region's development monitoring – observation (based on statistics and thematic research);
- planning documents implementation monitoring – efficiency analysis (based on evaluation indicators and result indices);
- region's functions implementation assessment – functional monitoring (based on work plan reports and result indices).

Currently, development monitoring form is an annual monitoring report. As territory development monitoring form it achieved appreciation also on national level – this approach was implemented in ministry's methodology for elaboration of development programmes for regional and local level. An additional element of the Riga Region's monitoring is annual thematic studies relating to current development challenges in the region. Three monitoring reports have been elaborated till now and each focuses on specific actual development issues. As an example, one of them focuses on the Riga Region's economic profile development, coastal development issues and public transport analysis.

Annual monitoring report as monitoring form is used in different countries despite various administrative structures and planning system as a whole. A similar approach with observation and efficiency analysis components is used in various European countries and the U.S. The aim of elaboration of such a monitoring report is to facilitate a dialogue between state and regional leaders about regional progress, challenges, and outcomes, and between regional and local partners about the state of their municipalities (California Regional Progress Report, 2010).

The Riga planning region monitoring report also includes an action plan for the next year, based on analyzed experience and development needs of previous years. The action plan also contains measures for a 3threeyearbudget planning period and is

linked to a region's formal functions. Also prospective functions are identified, which could be transferred to the region and is logical according to a region's planning and coordination role. The Action plan should be linked with decision making and budget planning, but due to uncertain region's role and insufficient policy implementation instruments it currently has an advisory character. Economical crisis is the right time for evaluation on how reasonable budget is created and how long term priorities are considered. Such situations usually lead to critical evaluation of the decisions taken in previous years (Jakobsons, 2009).

## **Further monitoring optimization options**

With existent regional roles in governance and regional policy development and implementation in practice, further development should be advanced by strengthening its thematic component. At present, availability of statistical information that would enable to analyze development processes of the region is limited, both from operational and also from the area / place attraction perspective. This can be compensated by the annual thematic research at the current development process, issues to be addressed and the decision making purposes. Permanently on the monitoring agenda of the Riga Region are issues such of community development, social and economic activity and mobility, environmental quality, urban system and infrastructure planning, public transport, school network planning and others which are very important for policy and planning solutions.

With administrative territorial reform in 2009 and the merging of local municipalities the information available on smaller geographical units has reduced. Since 2009 clearly marked the need to create extra regional statistical territories network, to match population placement, movement of people and economic activity spatial structure. Similar as in Riga city, in Riga Region is being developed proposition for territorial data system (statistical units), which should be created also in whole country. One of the challenges is to create simply manageable and operational network of territorial units, which would allow maintaining necessary data for constant monitoring and planning e.g. population and age group distribution, the changes in employment and the breakdown of the number.

The Riga Region's monitoring system as a whole and especially the spatial structure establishment should be much more purposeful if it covers an area of Riga functional region. Monitoring development should therefore be integrated and coordinated between several Latvian regions. This provides an important complement to Riga as a metropolis and Latvian city planning and polycentric development policy implementation processes.

The monitoring approach based on consultation procedures should be developed in the nearest future with a focus on identified areas for research. It would be necessary to search for solutions, which help to take into account consultation monitoring results for decision making and further planning activities.

## Conclusions

In general, at different planning levels there is a rather diverse situation in the field of development planning and monitoring. Sectoral planning and operational character of state administration, insufficient succession and determination in adoption of decisions are main obstacles in implementation of development documents.

In the Latvian case monitoring systems are still in a developing process. Coinciding with elaboration of new regional policy, territorial administration reform, the Riga Region development monitoring practice is considered as successful, or as one of the best possible. Until now and within the near future regional development monitoring realization based on statistics, thematic studies, efficiency analysis and functional monitoring are expected. It is integrated into the consultation process by cooperation with local governments, public authorities and result in an annual monitoring report, which includes the provision of guidelines for development planning, coordinate cross territorial activities and support decision making process on local and national levels. Consultative type of monitoring allows saving flexible decision making and implementation of monitoring practices in a rapidly changing economic and policy conditions. Such Riga Region development monitoring approach serves as a tool for collaborative planning.

Functional and full-cycle monitoring system in the region are essential preconditions necessary for performance of regional and local government functions, to uptake financial resources and promote effective decision making at the same time. This would allow monitoring to serve as an effective planning tool. Link between development priorities and budget planning is a principally essential precondition for implementation of development policies at all administrative levels.

Further research issues of regional development monitoring system improvement are connected with elaboration of operational indicators structure (including territorial) and the creation of flexible thematic indicators system, which enables effective, targeted research.

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**Arturs Gaveika<sup>1</sup>**

## **TENDENCIES AND TOPICALITY OF IMPLEMENTATION OF SCHENGEN BORDERS CODE PROVISIONS**

### **Abstract**

Latvia has become a full member of the European Union (EU) and the Schengen Convention. Thus, the eastern border of the Republic of Latvia (the border with the Russian Federation and the Republic of Belarus) has become the external border of the European Union. As a result, it creates a significant necessity to fulfill new functions and undertake new responsibilities, in order to the guarantee security of Latvia and the (EU). The external borders of the (EU) are an essential element of freedom, security, and justice. Consequently, the primary responsibility of the State Border Guard is to guard the EU's external borders according to the requirements of the Schengen Agreement. The author's research was carried out between years 2006 to 2011. The goal of the research is to explore issues and problems concerning the implementation of the Schengen Borders Code, and national legislation. Furthermore, the goal of this work is to identify the problems in legislation and put forward proposals for the development and improvement of legislation in the future. The author of this work suggests harmonizing national legislation, terminology used in national legislation and Schengen Borders Code, match the content of national legislation to Schengen *acquis* provisions and international agreements with neighbouring countries, continue the abolition of border checks at internal borders, develop a compensatory mechanism to implement and apply legislation according to the national geo-political peculiarities.

**Keywords:** border control, external and internal border, border surveillance, compensatory activities, Schengen *acquis*, Schengen Borders Code

On December 2, 2009, a new law on the State Border of the Republic of Latvia came into force. This law included a number of Schengen *acquis* provisions (the Schengen *acquis*), including the Schengen Borders Code<sup>2</sup>, setting standards, concepts, and terms. The coming into force of the new law, meant more than 50 regulations of

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<sup>2</sup> European Parliament and the Council of 15 March 2006 Regulation (EC) Nr.562/2006 establishing a Community Code on the rules governing the movement of persons across borders.

the Cabinet of Ministers of the Republic of Latvia lost force, which were issued under the law of 1994. Instead of previous 50 regulations, 12 new Cabinet regulations came into action force. In terms of the amount, the shift from 50 regulations to 12 would be enough to ensure the implementation of a new law. Most legislation, previously set by the Cabinet of Ministers of the Republic of Latvia, was rearranged and consolidated in combination with the legislation of the European Union. The consolidation process simplified the comprehension and application of legislation.

In Section 1 of the law on the State Border of the Republic of Latvia, the term “border” is divided into external and internal borders. External borders are defined as follows “*external borders are the borders and crossing points (according to the European Parliament and Council Regulation Nr.562/2006 March 15, 2006, by establishing a Community Code on the rules governing the persons across borders (Schengen Borders Code).*” According to the Schengen Borders Code, Latvia’s external borders are the border with the Russian Federation, the border with the Republic of Belarus, maritime borders, as well as airports and seaports. Whereas the internal border of Latvia is the border with the Republic of Lithuania and the Republic of Estonia.

The border crossing procedures in the Law on the State border of the Republic of Latvia were set according to the Schengen Convention and the Schengen Borders Code. This law includes internal and external border crossings with Third countries, such as the Russian Federation and the Republic of Belarus, as well as other requirements for internal borders within the Republic of Latvia. The terminology used was partially adapted to the Schengen Borders Code. For example, there still exists the concept of “border control”, which was previously understood to be “*the checking of persons and vehicles at border control points (BCPs)*”. However, according to the Schengen Borders Code, the term “border control” covers the entire operation of the Border Guard on border crossing points, and the green border. The green border, according to Latvian legislation, is defined as the “*state border and the border area between the border control points, which are located directly on the border (e.g. Latvian road and railway border control points).*”

In accordance with the Schengen Borders Code, the term “border control” is divided into “border checks<sup>3</sup>” and “border surveillance<sup>4</sup>”. “Border checks” are carried out at border crossing points, but the “border surveillance” is defined as “*the surveillance of green borders*”. Thus, the term “border control,” included in previous Law on the State border, had to be amended. However, even after amendment to the law on States borders does not include the concepts of “border control” or “border surveillance”.

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Official Journal of the European Communities. Available at <http://www.rs.gov.lv/?sadal=699-44k>. [accessed on 2010, 8.june].

<sup>3</sup> „10) ‘Border checks’ are the checks carried out at border crossing points, to ensure that persons, their means of transport and the objects in their possession may be authorized to enter or leave the territory of Schengen States.

<sup>4</sup> „11) ‘Border surveillance’ is the surveillance of borders between border crossing points and the surveillance of border crossing points outside their fixed opening hours, in order to prevent persons from circumventing border checks.

Instead of the term “*border checks*”, the term “*checks*”<sup>5</sup> is used in the new law. The new law defines the term checks as a set of activities allowed by regulations in order to detect the possibility of external border crossing. This definition has a similar, but identical definition, stated in the Schengen Borders Code. According to Schengen Borders Code, “*border checks*” are checks carried out at border crossing points to ensure that persons, including their vehicles and belongings, may be authorized to enter or leave the territory.

In section 22 of the Law on State Border of the Republic of Latvia, the term “*border checks*” is used as a term for checks performed by officers of the State Border Guard. The term “*checks*” was formulated in the following way “*checks are performed by State Border Guard officials*,” which is contrary to the Schengen Borders Code. According to the Schengen Borders Code, the possibility of detection while crossing external borders includes other controls such as veterinary, phytosanitary, food safety, food product safety, quality and classification control performed by the Food and Veterinary Service officials, as well as radiometric control performed by public administration officials.

In the Schengen Borders Code, the term “*border surveillance*” and its content is clearly defined. Its definition includes the main purpose for border surveillance, preventing unauthorized border crossings, countering cross-border crime and taking action against those who crossed the border illegally<sup>6</sup>. From this definition we can conclude that the surveillance of borders does not only apply to external, but also to internal borders.

The term “*border surveillance*” has, unfortunately, not been defined among other terms described in Section 1 of the Law on the State border of the Republic of Latvia. However, it is being used without any reference to Section 8 of the same law, where this term is defined as “*a part of border control*”. Furthermore, it is being used as well as the 14<sup>th</sup> and 15<sup>th</sup> Articles in the context of state border regime and the border zone regime security.

Amendments have also been made to the regulations concerning the checking of aircraft at the border. In Article 1 of the Schengen Borders Code and article 2; paragraph 3; the need arose to separate internal from external flights. It was necessary to define and determine how to perform checks on internal and external flights. It was decided that checks on internal flights could be performed by any airport or airfield, but any other flights, those coming from third countries, i.e. of a non-Schengen Member States, could be conducted only on airfields designed for international flights. As a result, airports must have border control points, more specifically an official border crossing point. According to the regulations of Latvian Cabinet of Ministers, official border crossing points, for air traffic, were established in Riga, Daugavpils, Liepaja, Ventspils, and Tukums<sup>7</sup>.

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<sup>5</sup> „checks — according to provisions of the Law on the State Border mean a set of actions in order to determine the liability to cross the external border.

<sup>6</sup> Schengen Borders Code Article 12.

<sup>7</sup> law on the State Border of the Republic of Latvia, 2009.

In regards to maritime borders, the sea border is fundamentally different because it is an external border and border crossing is only permitted in designated locations<sup>8</sup>. In accordance with the Schengen Borders Code, provisional changes to the regular ferry services had to be introduced. Thus, procedures on how to divert vessels, which were not subject to border checks at other ports, were developed. It was also became necessary to change the coastal fishing and pleasure boating regulations, in order to meet the requirements of the Schengen Borders Code, laid down in Annex VI, 3.2.5., 3.2.6., and 3.2.8.. However, these provisions were not included in the new law. The Schengen Borders Code also provided some exceptions to the sea border control, particularly in the context of ones obligation to cross external borders only at specified border crossing points during the fixed opening hours<sup>9</sup>.

In accordance with the Schengen Borders Code, particularly Article 23, the Member States of the Schengen agreement are entitled to establish a temporary border control along internal borders. If there is a serious threat to public policy or internal security, the Member State, in accordance with the procedures outlined in article 24 or 25, may reintroduce border controls along internal borders for a period not exceeding 30 days. In case of serious risk border controls may be reintroduced for a period longer than 30 days. According to Schengen Borders Code, the temporary reintroduction of border controls shall not exceed in scope and duration what is strictly necessary to respond to a serious threat.<sup>10</sup> If a Member State, in accordance with Article 23 paragraph 1, reintroduces border controls along internal borders, it is obliged to notify the other Member States and the Commission as soon as possible. After the Commission has received notification of the Member States reintroduction of border controls, the Commission has the right to make a statement on the reintroduction of border controls. The Member State concerned has to consult other Member States, the Council, and the Commission, wherever necessary, to organize cooperation and examine whether the measures are proportionate to the events forcing the reintroduction of border controls. An analysis must also be done to determine if the threats to public policy or internal security are sufficient enough to result in the reintroduction of border controls. These consultations are to take place at least fifteen days prior to the date planned for the reintroduction of the border controls.

The author analysed cases on the temporary reintroduction of border controls. In order to avoid threats to the North Atlantic Treaty Organization's (NATO's) Parliamentary Assembly's spring 2010 session in Riga, temporary border controls were reintroduced, from May 24, 2010 until June 1, 2010, to guarantee internal security and public order, under Latvian State Border Law, paragraph 28. The results of this

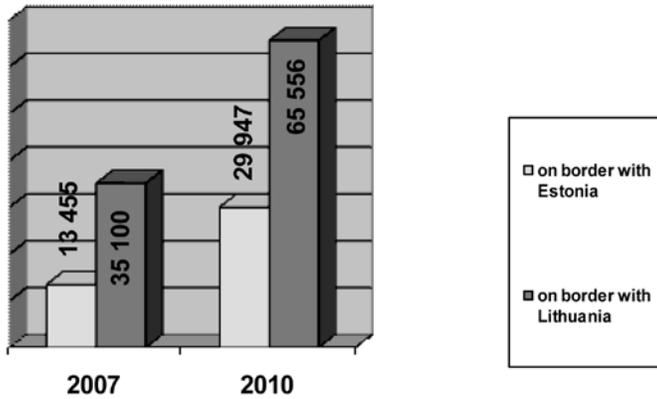
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<sup>8</sup> Law on the State Border of the Republic of Latvia, article 11.

<sup>9</sup> Schengen Borders Code Article 4

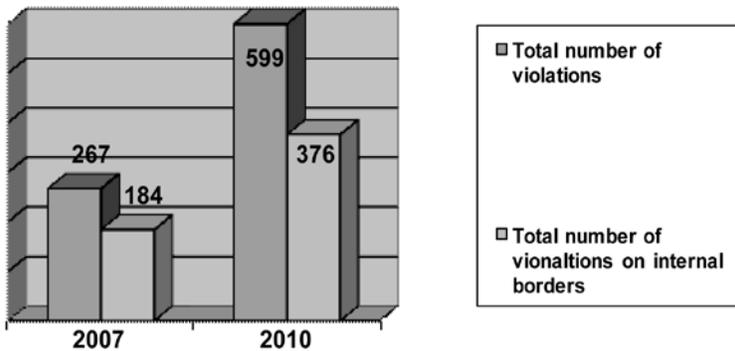
<sup>10</sup> REGULATION (EC) No 562/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code): available at <http://europa.eu.int/eur-lex/lex. Article 23>.

activity, in comparison to the temporary reintroduction of border control between the 2007 and 2010, are shown in the following figures.



*Figure 1* The number of border crossing where persons were checked at the internal borders with Estonia and Lithuania, during the temporary reintroduction of border control between 2007 and 2010.

The next figure shows the results of the temporary reintroduction of border control. The author emphasizes that this reintroduction was carried out strictly and consistently within the requirements of the Schengen Convention and the Schengen Borders Code.<sup>11</sup>



*Figure 2* The number of violations detected during the temporary reintroduction of border controls on external and internal borders of Latvia, including sea borders.

<sup>11</sup> Order of 12th May 2010. (prot. Nr.22 24.§) by the Cabinet of Ministers Nr.254 On temporary reintroduction of border control on internal borders <http://www.vestnesis.lv/index.php?menu=doc&id=209831>  
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According to Section 15 of the Latvian State Border law, accepted in 1994, it was stated that in the event of spreading infectious diseases through the Republic of Latvia or neighbouring areas, the State Border Guard of Latvia, in accordance with the decision of the Cabinet, could temporarily restrict or suspend services across state borders to threatened areas. However, the new Law on the State border, accepted in 2009, does not provide any provision regarding the aforementioned threat. Instead it includes only a provision for temporary reintroduction of border controls on internal borders under the Schengen Borders Code requirements. In contrast, the legislation of the Russian Federation, regarding national security, at the request of neighbouring countries, makes it possible to close the border and determine the time needed to stop the movement of people.<sup>12</sup> A similar provision is also included in the legislation of the Republic of Belarus.<sup>13</sup>

Changes in legislation have also influenced immigration policies. Institutions responsible for immigration policy controls in the Republic of Latvia are subordinated to the Ministry of Interior. The institutions that implement tasks regarding immigration issues are the State Border Guard and the Office of Citizenship and Migration Affairs. New Immigration law was worked out in order to fully harmonize the Latvian immigration policy with the European Union and the Schengen acquis requirements. The new immigration law came in to effect on 1 May 2003. This law laid down procedures for the entry, stay, transit, exit, detention, and return of foreigners from the Republic of Latvia. These activities had to be based on appropriate international laws and implemented according to the immigration policies and interests of the Republic of Latvia<sup>14</sup>. Currently, new amendments to the Immigration law are being made, according to the Schengen Borders Code provisions.

The author emphasizes the fact that that immigration law was accepted prior to joining the EU. It is essential to mention that in the period from 2003 until 2011, the law was amended fifteen times. Furthermore, 27 regulations were worked out by the Cabinet of Minister's, in order to implement the provisions of the immigration law. The author discovered that the most important amendments were made according to the Schengen Borders Code. The amendments concerned serious issues, such as: entry and exit conditions, employment conditions and possibilities, visa granting, processing and cancellation, refusals of entry, carriers' liability, formalities and processes regarding residence permits, voluntary and forced expulsion as well as amendments regarding the list of *persona non grata*.

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<sup>12</sup> „In order to ensure security of the Russian Federation, and at the request of foreign governments decision of the Government of the Russian Federation crossing the state border in separate sections may be temporarily restricted or terminated with notice of the authorities of the States concerned.” Law of the Russian Federation from April 1, 1993 N 4730-I “On the State Border of the Russian Federation” (as amended on August 10, 1994, 29 November 1996, July 19, 1997, 24, 31 July 1998, 31 May 1999, August 5, Nov. 7, 2000 March 24, December 30, 2001) Article 9.

<sup>13</sup> .Article 5. Powers of the Council of Ministers of the Republic of Belarus in the sphere of state border policy: “... decides on temporary restriction or closure of crossing the state border in separate sections ...” On the State Border of the Republic of Belarus. Law of the Republic of Belarus of July 21, 2008 № 419-W Available at: <http://www.newsby.org/news/2008/07/21/text11760.htm>.

<sup>14</sup> *Immigration law, Article 2*

In the author's opinion, the most significant amendments to immigration law were made in 2011, when the terminology was updated according to the Schengen acquis. The specific amendments made involved issues of expulsion and the protection of rights of foreign minors'. It is essential to mention that the Schengen Borders Code does not include any exceptions regarding the entry and residence of foreign minors without accompaniment. Thus, the final version of the immigration law had to have a formulation and standard regarding the entry and residency of foreign minors without accompaniment, according to EU requirements. However, such formulation was not included in immigration law but in other regulations made by the Cabinet of Ministers.

The author has detected three specific issues of concern regarding the internal borders, which have been included in the report of the European Commission on the implementation of the Schengen Borders Code:

- 1) Difficulties in relation to potential and regular checks carried out in some internal border areas;
- 2) Obstacles guaranteeing the undisturbed flow of traffic at road crossing points along internal borders;
- 3) The delayed announcement of planned reintroduction of border control along internal borders.

The EU Commissioner for Home Affairs, Cecilia Malmström, said "*An area without internal frontiers in which people can move freely is one of the greatest achievements of European cooperation and a real benefit to citizens. It is a pity that this may not always be met, as demonstrated in this report*".<sup>15</sup> The Commission suggests that Member States must remove all obstacles in order to facilitate the undisturbed flow of traffic, in particular speed limits have to be based on ensuring road safety. . In the author's point of view, such statements are rather general and declaratory. The author concludes that a specific and unequivocally clear border control criterion, near the border, has not been defined for law enforcement institutions. The Schengen Borders Code provisions determine that the abolition of border controls along internal borders shall not affect the police powers or activities assigned to them by the competent national authorities. This provision also applies to border areas. The author suggests that police powers should not be considered equivalent to those who conduct checks at the border as far as:

- Police powers are not targeted for border control;
- Police powers are based on general police information, regarding possible threats to public security and cross-border crime;
- Police powers are designed and executed in a manner clearly distinct from those who check people passing through external borders;
- Checks are made on a random basis<sup>16</sup>.

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<sup>15</sup> European Commission Representation in Latvian Press and Information Division of the European Commission: The Schengen Borders Code, «Published in: Journal of the Latvian» 15/10/2010 164 (4356)> Information> European <http://www.vestnesis.lv/index.php?menu=doc&id=219625>.

<sup>16</sup> Schengen Borders Code Article 21

The author concludes that the previously mentioned statement by the European Commission was rather vague. This proves that the Schengen Borders Code and related legislation must be thoroughly and carefully developed. The author suggests thoroughly analysing and keeping in mind the peculiarities of each Member State, previously concluded international treaties, and any factors having impact on national border security. For this reason the author suggests; harmonizing national legislation, improving the terminology used in national legislation and the Schengen Borders Code, matching the content of national legislation to the Schengen acquis provisions, international agreements, and neighbouring countries legislation, developing compensatory mechanism, and implementing legislation according to the national geo-political peculiarities.

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## CLUBS WITHIN CLUBS: THE COUNCIL OF THE BALTIC SEA STATES (CBSS) AND THE BENELUX AS MACRO-REGIONS WITHIN THE EU

### Abstract

This paper deals with two examples of macro-regions in the EU: the Benelux and the Council of the Baltic Sea States (CBSS). Building on the distinction between “old” and “new” regionalism, it discusses some characteristics of regions in general, and of sub-integration schemes within the EU in particular. These characteristics are applied to the two regions at hand. From this application it follows that the CBSS can be regarded as a “new” region, whereas the Benelux is an “old” region with some elements from new regionalism.

The paper subsequently discusses some explanations for the emergence of macro-regions in the EU as well as the implications of this phenomenon for research on European integration.

**Keywords:** flexible integration, macro-regions, European integration theory, Benelux, CBSS

### 1. Introduction

As argued elsewhere (Groenendijk 2007, 2011), contrary to common belief, EU member states have always and substantially been involved in alternative integration schemes, outside the EU, as well as in differentiated integration, within the EU. The classic community method of uniform integration throughout the EU is increasingly becoming a myth, as –within the enlarged EU- member states get more and more engaged in flexible integration schemes which do not involve all 27 member states and/or involve nation states from outside the EU.

This paper deals with the implications of this development for the EU as such as well as for European integration theory. It focuses on two cases of regional integration (or: macro-regions) within the EU: the Council of the Baltic Sea States (CBSS) and the Benelux. While the Benelux is the oldest of the two (dating from 1948 and thus

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preceding the European Communities), the CBSS is larger and involves non-EU partners.

This paper is structured as follows. First, when comparing macro-regions in the EU, it is important to have some models or archetypes at hand. In section 2 two types of models are discussed. First, we use some insights from the literature on regionalism, especially the distinction that has been made between “old” and “new” regionalism. Secondly, we will use some literature on differentiated integration within the EU. Consequently, in section 3, we will apply these frameworks to the two EU macro-regions at hand (Benelux and CBSS). In section 4 some implications of the existence and increasing importance of macro-regions in the EU for European integration theory will be dealt with. Section 5 concludes.

## 2. Regionalism(s) and differentiated integration

The Benelux is a relatively old region (as a customs union dating from 1948, but established during the Second World War). It has been a macro-region within the EU ever since the European Communities started. The CBSS is relatively young (officially founded in 1992). In all likelihood this difference in genesis will have an impact on the characteristics of the Benelux and CBSS. Wallis (2000/2009) has contrasted “old” regionalism (which according to him has been the dominant school of thought of practice in regionalisation from the 1880s to the 1980s) and “new” regionalism by looking at six characteristics. In Table 1, these characteristics are listed and briefly discussed (following but different from Wallis, 2000/2009 and Williams, 2005).

*Table 1. Old versus new regionalism*

<i>“Old” regionalism</i>	<i>“New” regionalism</i>
Government: top-down establishment of new layers in the hierarchy of governments, with nation states as main actors	Governance: bottom-up, goals-oriented, networks-based, with involvement and shared responsibility of various public and private actors
Structure-oriented: focus on formation of new regional structures (public entities), procedures as the pathway through these structures	Process-oriented: process is central to creating vision, resolving conflict and building consensus.
Closedness: focus on defining boundaries and jurisdictions. Delimitation and membership are crucial to the definition of the region	Openness: boundaries are open, fuzzy or elastic. The region is defined by the issues at hand
Coordination: hierarchical redistribution of resources through governments	Collaboration/cooperation: voluntary agreements among equals
Accountability & responsibility: fixed responsibilities and little flexibility	Trust: as a binding element among regional interests. Responsibilities are flexibly shared
Concentration of power: sovereignty of the state	Diffusion of power, aimed at empowerment of actors

As Wallis does, it is important to stress that the new regionalism is not necessarily superior to old regionalism. The old regionalism continues to offer important solutions to significant problems. Rather, the new regionalism is most centrally a response to

a new set of problems that the old regionalism was either not aware of, or was not designed to address.

Although Wallis' typology is primarily meant for application to regions within (federal or unitary) states, the typology of "old" versus "new" regions can be applied to the EU as a whole (i.e. as a region on a global scale). It is clear that the EU itself is a product of "old" regionalism.

When discussing macro-regions in the EU and more generally the issue of flexible integration, we also have to consider the relation between the larger integration on the one hand and the macro-regional integration on the other hand. The yardstick here is *uniform integration* (or: monolithic integration) as the default mode of EU integration: integration that is uniform in time and matter for all members of the integration scheme. According to Groenendijk (2007, 2011), partly based on Su (2005), *sub-integration* refers to an instance of integration that takes place among some but not all members of an already existing (larger) integration, and it can take different shapes. The first distinctive feature is whether sub-integration takes place within the EU institutional framework or not. The second feature refers to the policies that are involved. Sub-integration can deal with policies that are within or outside of the EU policy domain (as marked out by the relevant EU Treaties). If sub-integration uses another institutional framework than the EU framework it can either be labelled new integration or alternative integration. *New integration* refers to sub-integration outside the EU institutional framework dealing with policy areas that are not part of the EU policy domain. Sub-integration outside the EU institutional framework, concerned with policy areas that are within the EU domain, is called *alternative integration*. In both cases it is possible to cooperate either among EU Member States only or with outsiders as well (third countries).

If sub-integration occurs within the EU institutional framework, there are again two possibilities. One may call *odd integration* sub-integration that employs EU institutions but deals with policies outside the EU domain. The term *differentiated integration* is used to denote sub-integration taking place both within the institutional framework and within the policy domain of the EU. Formally such differentiated integration is made possible within the EU through the mechanism of enhanced cooperation. Differentiated integration has been discussed in the literature under a large number of different terms (core Europe, vanguard groups, multi-speed Europe, *afgestufte Integration*, concentric circles, variable geometry et cetera; see for a detailed discussion of these concepts Groenendijk 2007, 2011). Table 2 lists the various forms of sub-integration.

*Table 2. Types of sub-integration*

Differentiated integration	Within the EU framework, dealing with policies within the EU domain
Odd integration	Within the EU framework, dealing with policies outside of the EU domain
Alternative integration	Outside the EU framework, dealing with policies within the EU domain
New integration	Outside the EU framework, dealing with policies outside of the EU domain

### 3. Macro-regions within the EU: Benelux and CBSS

#### 3.1 A brief overview of the Benelux Union

##### *Origins*

The so-called Low Countries are the historical lands around the low-lying delta of the Rhine, Scheldt, and Meuse rivers, and include the modern countries of Belgium, the Netherlands, Luxembourg and parts of Northern France and Western Germany. The term originates from the Late Middle Ages. For centuries, the Low Countries have been united, separated and re-united. As from 1430 the Low Countries were under the rule of the Dukes of Burgundy, followed by Habsburg rule. In 1512 Charles V established the so-called Burgundian Circle as one of the imperial circles of the Holy Roman Empire. In 1549 (after the *Diet of Augsburg* of 1548) he declared the 17 provinces of the Circle inseparable. Nevertheless, 30 years later, in 1579, separation did take place, as the seven protestant northern provinces, during the Eighty Years' War, formed the Union of Utrecht, with the ten catholic southern provinces remaining under Spanish rule. This situation, which lasted for more than two centuries (i.e. the Republic of the United Netherlands, later called the Batavian Republic), ended with the accession, in 1806, of Louis Bonaparte (Napoleon's brother) to the throne of the newly established "puppet" Kingdom of Holland, placing all the Low Countries under French rule. After Napoleon was driven out of the Low Countries in 1813 (followed by his defeat at Waterloo in 1815), William VI of Orange (aka William I of the Netherlands) became king of the Dutch and Belgian Netherlands (the latter having been under Spanish, Austrian and French rule consecutively) and became Grand Duke of Luxembourg. This reunification lasted for only 15 years as Belgium separated itself from the Kingdom in 1830, with Luxembourg temporarily being brought under Belgian rule, until it also became fully independent in 1839.

In the second part of the 19<sup>th</sup> century and the first decades of the 20<sup>th</sup> century the three independent nation states flourished economically, through increased trade, the development of a strong agricultural sector and the establishment of new manufacturing industries. Relations between the states normalized rapidly. In 1846 a treaty on trade was conducted between the three states. After Luxembourg, for political reasons, retreated from the German *Zollverein* (in 1919), a treaty was conducted in 1921, which laid the foundations for an economic union, i.e. a common Benelux market. Economic decline in the *interbellum* led to an initial delay in the implementation of these plans, but the 1932 Treat of Ouchy provided for a decrease in import duties and abolished protectionist measures. A number of treaties conducted in 1943 and 1944 led to the birth of the Benelux customs union, on January 1, 1948, which eventually was to progress into a full-fledged internal market. On November 1, 1960, the –consolidated– Treaty on Benelux Economic Union (BEU, conducted in 1958) came into force, effectively creating such a common market. In June 2008 the Treaty was renewed.

### *Policy domains*

The main policy area that the Benelux has been involved in is market integration (including integration in the field of intellectual property rights). This is still the core of the Benelux activities, even though these activities have largely been become part of the mainstream common market policies of the EU. In addition the Benelux has been involved in specific issues of cross-border cooperation.

Recently, with the renewal of the Benelux treaty, the Benelux has identified a couple of new policy areas it has or will be engaged in: innovation, sustainable development and justice and home affairs.

### *Institutional set-up*

The Benelux is an intergovernmental organization. Decisions are taken unanimously. They only become legally valid after they have been incorporated into national legislation.

The Committee of Ministers is the main decision-making body of the Benelux and is made up of the ministers of the three countries. The Committee has a different composition depending on the issues at hand, and has a rotating presidency. In EU terms the Committee is the Council of Ministers. The Benelux Council consists of high-level civil servants of the three member states. It is in charge of preparation of Committee decisions (in EU terms: Coreper). The Secretariat-General is in charge of implementation of decisions and resembles the EU Commission. The Benelux parliament is not chosen directly, but is made up of national parliamentarians. In that sense it resembles the “old” European Parliament, before EP became a directly elected body in 1977. As with the EU the Benelux also has a court, similar inset-up to the EU Court of Justice.

### *Competencies & budget*

The legal instruments of the Benelux again are very similar to the EU: regulations, directives and recommendations can be issued by the Committee of Ministers.

The Benelux budget is set for a period of five years. This multi-annual budget is funded by the member states based on their national income. Within this multi-annual framework the Committee of Ministers sets annual budgets.

## **3.2 A brief overview of the Council of the Baltic Sea States (CBSS)**

### *Origins*

As with the Low Countries, the countries of the Baltic Sea rim have a complicated history of political unions, separations and conflicts. Roughly, according to Tassinari (2004), the Baltic Sea region comprises the German *Länder* of Schleswig-Holstein, Hamburg and Mecklenburg-Vorpommern, Northern Poland, Lithuania, Latvia, Estonia, the Leningrad and Kaliningrad *oblasti* (regions) and the St. Petersburg Municipality, Finland, Sweden and Denmark.

The CBSS was officially founded in 1992, but as Tassinari (2004) and Williams (2005) argue, the region-building period started already in 1988, as the initial ideas of region-building in the Baltic Sea region arose parallel to the main changes that took place in the late 1980s in Europe in general and the specific geopolitical changes in the Baltic states. During this period of region-building references were made to various earlier regional cooperation schemes in this area, including the Hansa cooperation, which stretched from the 14<sup>th</sup> to the 16<sup>th</sup> century.

### *Policy domains*

The CBSS deals with five policy domains/priorities: environment/sustainable development, economic development, energy, education and culture, civil security and the human dimension.

### *Institutional set-up*

The CBSS is an overall political forum for regional inter-governmental cooperation. The Members of the Council are the eleven states of the Baltic Sea Region (Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Poland, Russia, Sweden) as well as the European Commission. The Council consists of the Ministers for Foreign Affairs from each Member State and a member of the European Commission. The Presidency of the Council rotates among the Member States on an annual basis. The role of the Council is to serve as a forum for guidance and overall coordination among the participating states. The foreign minister of the presiding country is responsible for coordinating the Council's activities and is assisted in this work by the Committee of Senior Officials (CSO). The Committee of Senior Officials (CSO) consists of high-ranking representatives of the Ministries of Foreign Affairs of the Member States as well as of the European Commission. The CSO serves as the main discussion forum and decision-making body for matters related to the work of the Council between Ministerial Sessions. The CSO monitors, facilitates and aims to coordinate the work of all CBSS structures. The Permanent International Secretariat of the CBSS, which was established in 1998, services the CSO and its Expert Groups. The mandate of the Secretariat is to provide technical and organisational support to the Chairman of the CBSS and the structures and working bodies of the Council; to ensure continuity and enhanced coordination of CBSS activities; to implement the CBSS Information and Communication Strategy; to maintain the CBSS archives and information database; to maintain contacts with other organisations operating in and around the Baltic Sea region, the national authorities of Member States and the media.

### *Competencies & budget*

As the CBSS focuses on specific cooperation projects, it does not require specific legislative competencies. It does not have a general budget or project fund. Members are responsible for funding common activities and/or for seeking and coordinating

financing from other sources. Since 1998, the CBSS Member States have financed jointly the Permanent International Secretariat of the CBSS.

### 3.3 Benelux and CBSS: application of the analytical framework

When applying the characteristics of old and new regionalism, it is clear that the Benelux is very much an “old” region whereas the CBSS is a “new” one.

The Benelux is an intergovernmental organization in which the nation states dominate. Although private actors may be involved in specific policy areas, the Benelux is governmental in nature. It is perfectly embedded, like a Russian doll, in the layer structure of the EU and its member states. The Benelux is also clearly oriented towards structures, given the close attention that is paid to the institutional set-up (which served as a role model for and is very much similar to the set-up of the European communities). The Benelux is also a closed entity with a clear geographical delimitation of membership. It uses hierarchical coordination, through its own legislative order (once again: perfectly embedded in the EU and national orders) to promote its main objective of a common market. Responsibilities and accountability are well defined and linked up to its institutional structure (which includes a parliament and a conflict-settling court). It has a general budget and power is clearly concentrated with the Committee of Ministers in which the nation states rule (unanimously).

However, recently, as part of its re-focus within the framework of the treaty renewal (a rebirth, according to some), the Benelux has incorporated some features of a “new” region. It has recently engaged in cooperation with the German *Land* of Nordrhein-Westfalen (see Andringa, 2010, for a detailed discussion). It has moved away from its single focus on market integration through harmonization of legislation and is more oriented towards cooperation through projects in the policy fields it has newly embraced. Within its member states the institutional set-up (especially the role of the Benelux parliament) is increasingly discussed.

By contrast the CBSS is about governance rather than governments. The CBSS has developed bottom-up and it heavily involves private actors and non-state actors as the European Commission. It is process and result oriented. Its boundaries are fuzzy and membership is open, as the inclusion of Norway and Iceland, as well as the large group of observer states, demonstrates. Mutual cooperation through projects is central to the activities of the CBSS, with the institutional set-up (responsibilities, division of tasks) varying greatly across these projects and policy areas. Power is diffused.

It should be pointed out, however, that the CBSS is a result of a political process in which ideas from “old” regionalism did play a part. As Williams (2005) shows, the initial ideas of Schleswig-Holstein’s Prime Minister Engholm for a truly non-governmental Baltic Sea Forum or New Hanse, supported by Sweden’s minister (and later ambassador to Germany) Hellström, were slightly weakened by interventions from the German Foreign Minister Genscher and his Danish counterpart Elleman-Jensen, who insisted on a significant role for the nation states in the CBSS.

Turning to the second part of our analytical framework, the Benelux cooperation seems to be a mix of alternative and differentiated integration. On the one hand, it is dealing with issues that are clearly within the EU policy domain, but through a separate institutional framework. On the other hand, one could argue that, because of the similarities in institutional structure between the EU and the Benelux, the Benelux is an example of differentiated integration within the larger EU framework, as it is perfectly embedded in the larger structure.

The CBSS is harder to pin down in terms of type of integration. It has elements of new integration, alternative integration and differentiated integration combined. Still, basically the CBSS is an alternation scheme. Even though most of its member states are member states of the EU, the CBSS itself is not fully part of the EU institutional framework (as the “member” role of the European Commission clearly shows). Furthermore, it deals with policy issues that are also –partly- covered by the EU.

#### **4. Regionalism, flexible integration and EU integration theory**

Within the EU we have witnessed the relatively recent emergence of several other macro-regions (as exponents of alternative and/or differentiated integration), not just the CBSS. Similar constructs can be seen in the Danube Region, the North Sea-English Channel region, the Visegrad cooperation, the Black Sea cooperation and the Union for the Mediterranean, just to name a few cooperation schemes (which admittedly vary considerably in nature). From a different perspective, we can also witness the emergence of the use of the formal EU differentiated integration mechanism, enhanced cooperation, in the field of divorce law and in the field of patents. These cooperation schemes are probably just the proverbial tip of the iceberg, as enhanced cooperation schemes are now discussed in several other policy fields as well.

The question, to which we now turn, is how we can explain the emergence and existence of macro-regions and differentiated integration within the EU. Standard EU integration theory has three types of arguments available: functionalist arguments, liberal-intergovernmentalist arguments and constructivist arguments.

As far as the Benelux is concerned, its emergence, in the 1940s, can be explained by a mix of all these arguments (as can the emergence of the European Communities). The Benelux was constructed (by the governments of the Netherlands, Belgium and Luxembourg, in exile in London during the Second World War) as a common project, with the three nation states conclusively at the helm, to reap economic benefits from free trade. Its continued existence (even through periods in which voices were raised to abolish the Benelux) can however hardly be explained by constructivist arguments. There is no clear Benelux identity (and one can nowadays even doubt the existence of a common identity in one of its member states, Belgium). Functional ‘spillovers’ however have played a part (as in the wider field of European integration) in deepening the Benelux common market and in its recent involvement in sustainable

development and justice and home affairs. Finally, the role of the Benelux states in the intergovernmental bargaining scheme, especially within the enlarged EU-27, in terms of increased relative bargaining power through cooperation, has presumably played an important part in the continued existence of the Benelux.

Tassinari (2004) shows the emergence of the CBSS can readily be understood from a constructivist perspective. Liberal-intergovernmentalist arguments referring to in-EU bargaining power presumably are not that important to the CBSS, but, as Williams (2005) shows, the CBSS has been important to regions within CBSS member states, especially to the German *Länder* involved, in the German federal power play, in which the Northern *Länder* have to compete with the southern *Länder*, especially Bayern. Given the policy issues the CBSS addresses and its composition (involving non-EU partners) functional arguments are probably important as well for explaining its emergence and role.

Still, these standard explanations for regional cooperation are far from satisfying as they do not deal with the fact that these macro-regions are not stand-alone entities but are somehow alternative to the larger European integration scheme. The explanation thus –at least partly– has to be found in deficiencies of that larger scheme. As Fratianni (2003) and Su (2005) have argued the need for flexibility has arisen due to the enlargement of the EU. In the 1990s and the early 2000s the EU has pursued a double-track policy with two objectives, enlargement and deepening, which have increasingly have become in conflict with each other. Given large and heterogeneous membership, deep integration in certain policy fields and/or geographic areas is attractive (in terms of costs and benefits) only to a limited number of member states. This argument does not necessarily hold for the core of European integration, the common market, but it is highly relevant to all other policy fields, including the monetary union. By necessity and by nature, flexible integration follows an *ad hoc* approach, which is process and result oriented rather than about building new institutions. In that sense, flexible integration and “new” regionalism fit together quite well.

## 5. Conclusions

What does this mean for European integration theory and for the larger field of European studies? First, we should broaden our focus when studying the European integration process, by not looking at the single EU integration scheme only, but rather at the multitude of integration schemes within Europe. Secondly, rather than constantly keeping explaining ongoing EU integration by focusing on its merits (in functional, constructivist or liberal-intergovernmental terms), the demerits of EU integration (in terms of failing institutions, policies and governance) should be addressed more adequately. Finally, comparative research into alternative and differentiated integration schemes should be intensified.

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## EUROPEAN UNION REGIONAL POLICY AND THE REDUCTION OF THE REGIONAL ECONOMIC AND SOCIAL DISPARITIES BETWEEN FRIULI-VENEZIA GIULIA AND PUGLIA

Italy is considered as a country where the regional economic and social disparities are still the widest in the EU, even though Italy is the third largest beneficiary of the EU's regional policy after Poland and Spain. Hence, this paper aims to give deeper insight into the impact and the effectiveness of the EU regional policy in the reduction of economic and social disparities between Italian regions for the period of 2000-2006. The scope of the research is limited to two Italian regions Friuli-Venezia Giulia and Puglia considering that the EU's contribution through the Structural Funds has been significantly high, especially during the last decades. In order to explain the regional gap between these regions, this thesis aims at providing an answer to the following research question: *Which actors/factors are influential in the reduction of the regional economic and social disparities between Friuli-Venezia Giulia and Puglia?*

**Keywords:** EU regional policy, multi-level governance, regional disparities, economic growth, social development

### 1. Introduction

#### 1.1 The research problem

This thesis focuses on the impact of the European Union (EU) regional policy in the reduction of the regional economic and social disparities between regions. Indeed, the EU's regional policy has been transformed from a relatively minor policy area (before the 1988 reform)<sup>2</sup> to one of the most prominent policies within the Union by covering a range of programs under Structural Funds in order to enhance regional integration and convergence both at the EU and national level. But, in this study, the convergence between regions will be not observed at the EU level where differences among regions are in fact accentuating, but at the national level. The scope of the

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<sup>2</sup> On the February 1988, European Council doubled the funding allocated to the Structural Funds and increased the emphasis on the poorer regions as part of a significant review of the EC budget

research is limited to two Italian regions: Friuli-Venezia Giulia (northern region) and Puglia (southern region), where the EU contribution through the Structural Funds has been significantly high, especially during the last decades. Indeed, as Gary Marks (1996, p. 406-17) argues, the role of the EU is related to its relative financial role. Hence, the greater the amount of financial distributions to domestic competent authorities over the years, the greater the political influence of the EU will be. Indeed, Italy is the third largest beneficiary of the EU's regional policy after Poland and Spain, by receiving a total of Euro 29, 656 million for the period of 2000-2006, compared to Euro 22, 475 million received for the period of 1994-1999. However, Italy is considered as a country where the regional disparities are still the widest in the EU.

## 1.2 Methodology

Recently, the importance of the 'region' and 'regional authorities' as decentralized units of governance has widely increased, meaning that 'regions' constitute a new economic and social development factor. Indeed, the region refers to 'a territorial body of the public law established at the level immediately below that of the State and endowed with political self-government' (Assembly of European Regions, 2010, 48). Instead, regional government refers to 'a set of legislative and executive institutions responsible for authoritative decision-making' (Arjan H. Schakel, 2009, p. 24). According to Schakel (2009) in general there is more than one level of regional government in a country. Hence, Italy as a highly decentralized regional state has two tiers of regional governance: a lower tier of provinces (*provincia*) and a higher tier of regions (*regioni*) (Schakel, 2009, p. 145). But, in this study we will focus only on the highest tier of the regional governance: regions. Indeed, Italy has 20 regions (NUTS II), over 100 provinces (NUTS III)<sup>3</sup>, and over 8 000 municipalities (EU Phare Twinning Program, 2006, p. 3). However, the Italian regions that constitute mostly our object of analysis (regional disparities) are Friuli-Venezia Giulia (Objective 2 region) and Puglia (Objective 1 region).

In order to explain the regional gap between two regions, this thesis aims at providing an answer to the following research question: *Which actors/factors are influential in the reduction of the regional economic and social disparities between Friuli-Venezia Giulia and Puglia?* Definitely, this study (through its theoretical framework) will try to investigate which are the main influential factors and actors in the reduction of regional disparities between Friuli-V. Giulia and Puglia. The research question will be addressed by testing one research hypothesis, which bases are briefly described below:

**Hypothesis 1:** The EU regional policy is an influential factor in the reduction of regional economic and social disparities

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<sup>3</sup> NUTS—Nomenclature of Territorial Units for Statistics—are the standard regions used in the EU regulations and by the Commission. Most of the regions are based on administrative criteria (% of the national population) rather than functional or analytical criteria such as economic and social characteristics.

The stated research question and objectives will be analyzed by means of a case study. This case study aims to measure the impact and effectiveness of the EU regional policy in the reduction of the regional economic and social disparities between Friuli-V. Giulia (Objective 2 region) and Puglia (Objective 1 region). This case study will be divided in three main parts. The first part, introduces the theoretical framework (Multi-Level Governance) in order to achieve the stated research question and to prove or not the stated hypothesis. The second part, introduces the EU regional policy impact (dependent variable) on the regional economic and social disparities (independent variable) between Friuli-V. Giulia and Puglia. Indeed, the economic and social development and the degree of success of the EU regional policy will be measured respectively by the reduction of regional differences in GDP per head (and GDP growth), and by the reduction of unemployment rate. The GDP measures the level of output within a country or region, instead the GDP per head measures the level of output per inhabitant (DG Regional Policy, 2008). In this study the GDP per head is measured using Purchasing Power Standards system: PPS (Italy=100). The relevant data are provided from EUROSTAT, ISTAT and SVIMEZ (*Sviluppo Mezzogiorno*). Instead, social disparities between two regions will be measured on the reduction of the unemployment rates over the years. The respective regional social data are provided from EUROSTAT, ISTAT and SVIMEZ. Finally, the third part, introduces the contribution of the theoretical framework (multi-level governance) to this study and some concluding remarks.

## 2. Theoretical Framework

The study of the implementation of the EU regional policy has so far been dominated by the MLG model developed by Gary Marks and Liesbet Hooghe. Gary Marks and others (particularly Liesbet Hooghe, Kermit Blank) established the term of 'multi-level governance' to explain the evolution of the EU regional policy as one of the most discussed policy areas. According to Marks 'European Integration is a polity creating process in which authority and policy making influence are shared across multiple levels of government sub-national, national and super-national rather than monopolized by state executives' (Marks, Hooghe and Blank, 1996, p. 346). In other words, not only supranational institutions such as European Commission, but also sub-national actors such as regional authority, can exert independent influence over the EU or national decision making processes. Hence, one can distinguish here two dimensions of the MLG approach: vertical and horizontal interactions. Indeed, the MLG approach tends to provide tools in order to analyse links among different types of governmental units, between levels of governments and between governments and interest groups at all stages of the policy process, including implementation (Bache, 1998, p. 28). In order to measure whether interdependence (vertical and horizontal) is strong or weak it is necessary to identify the influence of actors on shaping policy outcomes by focusing on decision-making routines and the distribution of the power concerning the implementation of the regional policy funds.

*Figure 1. Strong and weak multi-level governance*

	<i>Vertical Interdependence</i>		<i>Horizontal Interdependence</i>
Strong multilevel governance	High	And	High
Weak multilevel governance	Medium-high	And	Low-medium
		<b>OR</b>	
	Low-medium	And	Medium-high

*Source:* Bache, 2008: 164

From Figure 1, we can summarize that strong multi-level governance has both high vertical and horizontal interdependences among actors, while weak multi-level governance may have high interdependence on one dimension (vertical or horizontal), but should have at least medium interdependence along both dimensions. Therefore, this model may contribute in a better understanding of the applicability (development) of multi-level governance in the case of Italian regions, where strong multi-level governance is characterized by a higher degree of dispersal of influence among actors over policy outcomes. Hence, this theoretical framework help specifying the most influential actors or factors in the implementation of the EU regional policy funds (structural funds) and in shaping policy outcomes i.e. the reduction the regional economic and social disparities in Friuli-Venezia Giulia and Puglia.

### 3. EU regional policy and the reduction of regional economic and social disparities

Since the late 1980s the importance and popularity of the EU regional policy (now more commonly known as 'Cohesion policy') has been increased. From being a mere adjunct to *national* regional policies, the EU regional policy now accounts over a third of the EU budget (Euro 213 billion for the period of 2000-06, and 347 billion for the period of 2007-13), in order to promote economic and social cohesion by reducing regional disparities within the Union as a whole, and its lagging behind regions in particular. For fifty years through the ERDF, ESF, EAGGF, and FIFG, otherwise known as the Structural Funds, the EU contributes in financing thousand of projects across all of the Community regions. Indeed, Italy is the third largest beneficiary of the European Union's Regional Policy after Poland and Spain. Hence, during the 2000-2006 programming period, Italy received a total of almost Euro 195 billion under the Objective 1 (including Puglia) Objective 2 - to induce employment growth (including Friuli-Venezia Giulia) and Objective 3 regions - to support the

adjustment and modernization of educational, training and employment policies and systems.

In order to offer a better understanding of the implementation effectiveness of the Structural Funds in both Italian regions, this section first of all, tries to explain the decision-making process and distribution mechanisms in the EU regional policy, and secondly tries to analyze the Structural Funds' overall impact on the reduction of economic and social disparities between regions.

### 3.1 Decision-making process and distribution mechanisms in the EU regional policy

The decision making within EU is well established as an 'iron-triangle', where national governments in the Council, main executive actors in the Commission and regional authorities are involved in ongoing dialogue and governing encompassing what is termed "multi-level governance". However, the influence of national and regional authorities is due to the national legal system.

The Structural Funds budget (allocation of the funds) and the regulatory framework are adopted by the Council and the European Parliament based on proposals from the EC. The Commission, after consultation with the Member States, draws up the *Community Strategic Guidelines on Cohesion* which consists of broad guidelines for the use of the Funds (European Union Committee, 2008, p. 22). Each of the Member States (national and regional authorities), over a course of continuous dialogue with the Commission draws up an "operational program", management and control "operational program", and a Single Programming Document (SPD). Later, after the Commission has validated and taken a decision over the OPs and SPDs, the Member States and its regional authorities have then the task of implementing the programs, i.e. selecting thousands of projects, monitoring and assessing them.

Indeed, as Martin Ferry (2007, p. 9) argues the domestic policy-makers have considerable discretion concerning the way the Structural Funds are administered. In Italy, for example, relevant responsibilities are devolved to the regional authorities. Indeed, the amendment of the Italian Constitution in 2001 led to a growing role of the regions and provinces, but during implementation, rather than formulation stage. The Italian regions, including Friuli and Puglia, only recently do actively participate in the process of the national preparation at the EU level. Indeed, it is established a State-Regions Permanent Conference, as a mechanism for further cooperation between national and sub-national administrative, but their opinions have no binding result for the national government. Indeed, the amendment of the Italian Constitution in 2001 led to a growing role for the regions and provinces, but during implementation, rather than formulation stage (Steunenbergh & Voermans, 2006, p. 191). However, the regional authorities have the competences of verification, certification and submission to the Commission and the State of an annual report concerning the total expenditure. Instead, the Commission has a greater role in the delivery, implementation and regulation of the EU regional policy funds. Hence, the Structural Funds could no longer be used directly by the Member States, because the

total spending certificate requires the Commission approval. However, the Structural Funds budget and the regulatory framework are allocated and adopted by the Council and the European Parliament based on proposals from the Commission. Hence, we can conclude that the *vertical interdependence* among multiple levels of governance (sub-national, national and supranational) is medium-high, due to the fact that regional authorities, unlike national and supranational authorities, are more involved in implementation, monitoring, and evaluation stages of the EU Structural Funds, rather than in decision-making process. Indeed, the central government and Council generally remained key actors, by playing the main roles in negotiating process of the EU regional policy, and by determining the territorial distribution of the power.

However, all projects that receive EU financial assistance have also to be co-financed from another source, both from the public or private sector. Economic and social partners (such as trade unions, farmer's organizations, employer's organizations) as well as civil society organizations participate in the programming and management of the Ops and SPDs. Organizations that are active in social and economic life the task to propose projects and to apply in order to receive support from the Structural Funds. Regarding the involvement of the local and social-economic parties, the Regional Authorities, in compliance with the Council Regulation 1260/1999, Article 8, establishes the

Regional Committee for Consultation which is called to join the different representatives from Local Authorities and non-governmental actors. However, non-governmental actors (economic and social partners or interest organizations) have no bidding opinions, but they have only consultative task. They cannot vote, but they can express their opinion in order to facilitate and to approach the implementation and evaluation of the structural programs towards their goals and preferences. However, these non-state actors have no bidding opinions. Hence, we can conclude that the *horizontal interdependence* is low-medium, because non-governmental actors have consultative task concerning the preparing, financing, monitoring and evaluation of the Structural Funds, but they do not have any binding task. Hence, one can assume here that non-state actors are more interconnected rather than interdependent.

In conclusion, we can summarize that both Italian regions provide an example of weak governance (see Figure 1), where the *vertical interdependence* among actors is medium-high, and the *horizontal interdependence* is low-medium. Therefore, weak governance might be an explanatory factor of the slow process of the reduction of regional economic and social disparities between Friuli-Venezia Giulia and Puglia.

### ***Structural funds and Economic Growth***

During the period of 2000-06, Italy received around EUR 30 billion from European Structural Fund, and benefited under Objective 1 from seven multi-regional programs and seven regional programs, as well as under fourteen Objective 2 regional programs.

Indeed, Puglia, one of the regions lagging behind the EU average, is characterized by high unemployment rate and a valuable but fragile natural environment. However, thanks to the opportunities offered by EU Structural Funds, Puglia has initiated and

implemented numerous initiatives in order to support the development of the regional economy, and to induce the territory to play a leading role in the international economy. The European Commission has actively been participating even in the development of the Southern regions (*Mezzogiorno*) by co-financing the ROP under Objective 1 Program for the period of 2000-2006 in the region of Puglia. The core goal of the Objective 1 program was the achievement of a significantly higher economic growth rate in these regions and the reduction of unemployment and social inability, by the end of 2006 (European Commission, 2007, p. 2). But, the Structural Funds only supplement national or regional financing, meaning that no regional program is ever totally covered by the EU budget, and that there is always national co-financing from either the public or the private sector (see also Council Regulation 1256/1999, Article 11/1). Moreover, the contribution of the Structural Funds under Objective 1 should be a maximum of 75% of the total eligible cost and, at least 50% of eligible public expenditure. In fact, the ROP under Objective 1, amounted a total of Euro 5, 281 537 million, of which Euro 2, 946 million (55, 7%) was paid by the Structural Funds and an amount of Euro 1, 603 million (30, 3%) was paid by the State funds. In addition, the region and other private actors involved in the implementation of the program have shared an amount of approximately Euro 5, 861 million (11%). Moreover, these public expenditures have enhanced private investments over Euro 22, 642 million (0,4%). The program revolved six priority areas and technical assistance. The main priority areas for the *Mezzogiorno* (including here Puglia) consisted of: natural resources, cultural resources, human resources, local development systems, towns, communication networks and security (European Commission, 2007, p. 2). The ROP Puglia 2000-2006 has been organized into 58 specific measures of intervention among six priorities and technical assistance, identified through detailed analysis of the social-economic performance of the region.

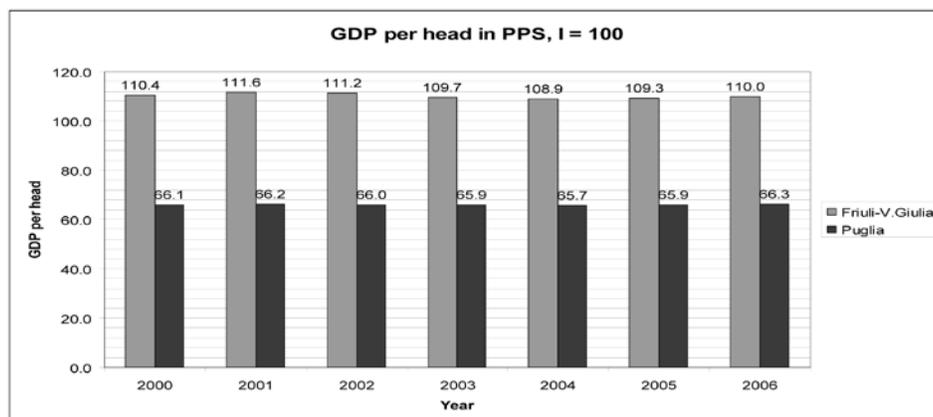
The EU has been participating actively in the development of the autonomous region of Friuli-V. Giulia, by partly financing SPD under the Objective 2 program for the period of 2000-2006. The SPD has been made up of priority themes and measures. Indeed, these elements all together constituted the development strategy to be implemented throughout the pre-established limits of the regional program. But, as we mentioned above, the Structural Funds only supplement national or regional financing. Moreover, the contribution of the Structural Funds in areas covered by Objective 2 should be a maximum of 50% of the total eligible cost, and at least 25% of eligible public expenditure (Council Regulation 1260/1999, Article 29/3). Indeed, the SPD under Objective 2, amounted a total of Euro 322, 612 million, of which 96, 542 million (30%) was paid by the Structural Funds and an amount of Euro 157, 7 million (almost 49%) was paid by the State funds. In addition, the region and other beneficial public agencies that are involved in the implementation of the program shared an amount of approximately Euro 67, 6 million (almost 21%). Moreover, these public expenditures have enhanced public and private investments over Euro 512 million. The program's main objectives consisted of supporting the restructuring process of the region, fostering economic growth, employment and supporting the development of the natural, environmental and cultural resources operating through five priorities. In conclusion, it can be assumed that Objective 1 program is targeted

by relatively large Structural Funds packages; hence, the influence of the program on domestic regional development should be considered particularly strong. On the other hand, regarding the Objective 2 program, the financing provided by Structural Funds is smaller and program is focused more on reinforcing domestic initiatives.

After the analysis of the ROP and SPD priorities, in this subsection, we are going to analyze the impact of the Structural Funds in strengthening the economic and social cohesion in Friuli-V. Giulia and Puglia. Also, we will review whether there is any reduction of the regional disparities between two regions after the implementation of the Structural Funds.

From the Figure 2 we can observe, that the GDP per head in 2000 in Puglia was 66,1% (Italy=100), which is far below compared to the Friuli-V. Giulia 110,4%. Also, from the Figure 2 we can observe that the GDP per head in 2006 in Puglia was still very low 66,3%, compared to the Friuli-V. Giulia (110%). However, the gap between two regions regarding the GDP per head, was slightly reduced from 44, 5% point in 2000 to 43,7% point in 2006, indeed only 0.8% point. In monetary terms, the difference of GDP per head in 2006 between the two regions, was more than 11 000 Euro, indicating that there was a persistent gap between regions and profound differences in resource availability and the ability to use inputs in order to foster economic growth (SVIMEZ, 2007, p. 3).

Figure 2. GDP per head in PPS, I =100



\*GDP per head is calculated in PPS (Italy=100)

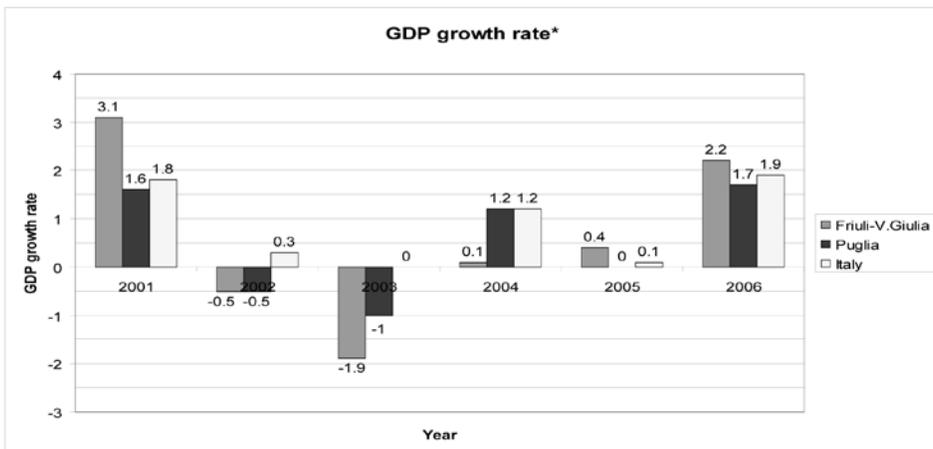
Source: EUROSTAT 2010, and SVIMEZ 2007

But, there was a slight decrease of the GDP per head over the years in both regions, thus providing further research over the way of implementing the Structural Funds from the competent authorities. Indeed, in the Fourth report on economic and social cohesion, it is reported that the regions with the lowest level of GDP per head receive the highest level of financial support from the Structural Funds (European Commission, 2007, p. 168). Hence, the amount of structural funds allocated in the

region of Puglia under Objective 1 regional program was 55,7% (Euro 2,946 million) of the total EC contributions, against 30% (Euro 2,414 million) of the structural funds allocated in the region of Friuli-V. Giulia. Even though, the financial assistance from the Structural Funds represented a much larger share in Puglia-prosperous southern region, than in Friuli-V. Giulia-northern region, the GDP per head in Puglia was still in low level and far below from the Friuli-V. Giulia and national average. In order, to offer a better understanding of the Structural Funds impact on the reduction of the regional disparities, we will also analyze the growth rate of the GDP in the period of 2000-2006.

From the Figure 3, we can see that the growth rate of the GDP in Puglia slightly increased from 1,6% in 2001 to 1,7% in 2006, which is considered above the Mezzogiorno growth rate (1,5%), but below the national growth rate (1,9%). Instead, the growth rate of GDP in Friuli-V. Giulia rapidly decreased from 3% in 2001 to 2,2% in 2006. However, this average (2,2%) is considered above the Nord East growth rate (2,1%), and above the national growth rate (1,9%)<sup>4</sup>.

Figure 3. GDP growth rate



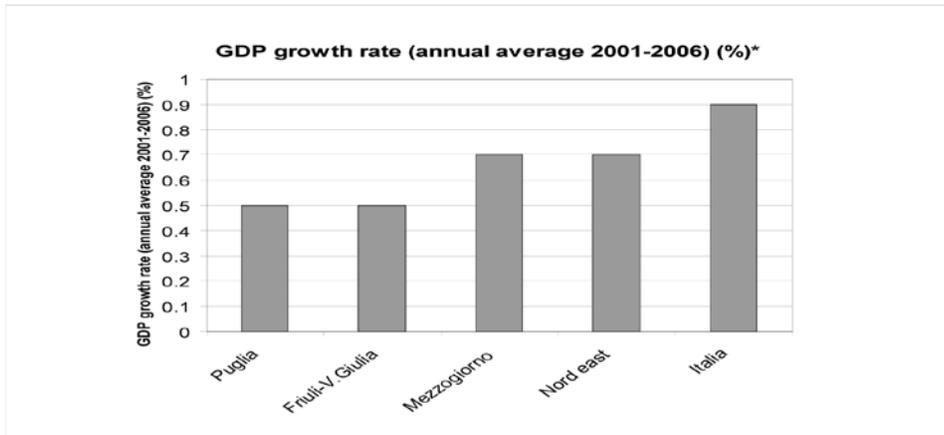
\*GDP growth refers to the regional GDP over years

Source: ISTAT and SVIMEZ, 2007

Hence, we can argue that the gap between two regions concerning the region GDP growth was reduced from 2,5% point in 2001 to 0,5% point in 2006, indeed 2% point. Therefore, we can assume that the influence of the Structural Funds in the GDP growth in Puglia over the years is stronger than in Friuli-V. Giulia. Moreover, from the Figure 4, we can observe that the annual average (2001-2006) of the GDP growth is 0,5% in both regions, but it is considered below the Italian average (0,9%) and far below the EU25 average (2,27%).

<sup>4</sup> See also SVIMEZ Report, 2007, p. 8.

Figure 4. GDP growth rate (annual average 2001-2006) (%)



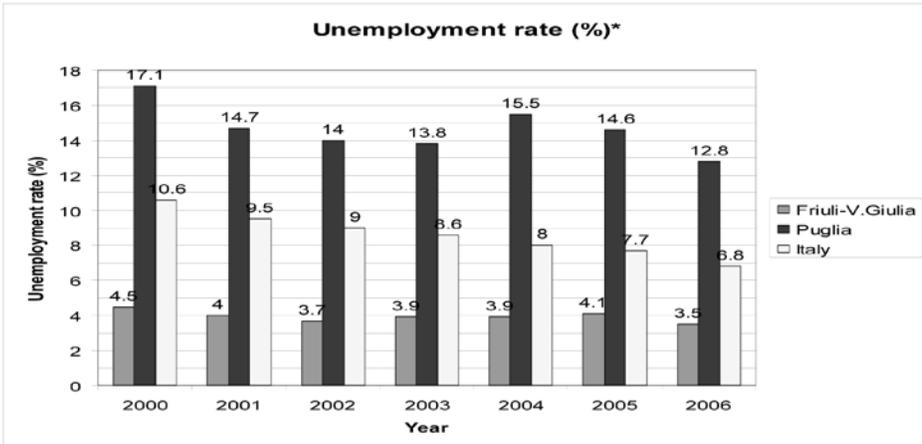
Source: ISTAT and SVIMEZ, 2007

### *Structural fund and social development*

In this subsection, we will also analyze the Structural Funds impact in the labor market, more especially in the unemployment rate, in order to offer a better understanding of the Structural Funds impact on social cohesion. Indeed, the unemployment rate in Friuli-V. Giulia region is considered as one of the five lowest in Italy. For example in 2002, the unemployment rate was equal to 3.7% (see Figure 5), compared to a Nord East average of 4.4% and a national average of 9.0%. Moreover, the unemployment rate was significantly decreased from 4.5% in 2000 to 3.5% in 2006, which is considered far below from the national average (6.8%). Hence, we can argue that there is a particularly strong impact of the Structural Funds regarding the reduction of the unemployment rate over the years. Instead, as a region which development is below the European average (EU25=75%), Puglia is characterized in particular by a high level of unemployment over the years, even though the amount of Structural Funds allocated to this regions was 55.7% of the total Funds that are allocated for Italian regions. Puglia in 2000 had an unemployment rate of 17.1%, which is considered lower than the average of Mezzogiorno (20%), but higher than the national average (6.8%). Although the unemployment rate is substantially higher than the national average, it remains lower than the average figure for southern Italy, Mezzogiorno<sup>5</sup>.

<sup>5</sup> See also SVIMEZ, 2007, p. 21

Figure 5. Unemployment rate



\* Unemployment is calculated on basis of gender (female/male) and age (15 years old and over)

Source: EUROSTAT 2010, and SVIMEZ 2007

The unemployment rate in Puglia has significantly decreased from 17,1% in 2000 to 12,8% in 2006, but it was far below the national average (6,8%). Moreover, Figure 5 shows that the gap of unemployment rate between Friuli-V. Giulia and Puglia was narrowed from 12,6% point in 2000 to 9,3% point in 2006, indeed 3,3% point. Hence, we can argue that the Structural Funds have had a particularly considerable impact concerning the reduction of the unemployment disparities between regions, even though the unemployment rate in Puglia was still very high and far below the national average.

In conclusion, regarding the overall impact of the implementation of the Structural Funds in the reduction of the economic and social disparities, we can summarize that there was a persistent gap regarding the GDP per head between these two regions. Nevertheless, there was a positive impact of the Structural Funds on the GDP growth rate. Indeed, the gap between two regions concerning the GDP growth was reduced from 2,5% point in 2001 to 0,5% point in 2006. Instead, regarding the social development, we can assume that there was a particularly strong impact of the Structural Funds regarding the reduction of the unemployment rate over the years in both regions. In additional, the gap of unemployment rate between Friuli-V. Giulia and Puglia was narrowed from 12,6% point in 2000 to 9,3% point in 2006. Hence, we can argue that the structural programs have had a particular considerable impact concerning the reduction of the unemployment disparities between regions, even though the unemployment rate in Puglia was still very high and far below the national. In conclusion, we can summarize that Hypothesis is accepted for the GDP growth and unemployment rate indicators, but it is partially accepted for the GDP per head indicator. Indeed, the EU regional policy is an influential factor in the

reduction of economic and social disparities between Friuli-V. Giulia and Puglia, but we also should accept that the process has been slow.

## 4. Conclusions

The theoretical approach (MLG) introduced in the second section facilitates the identification of the most influential actors in the EU regional policy process, by analyzing the applicability of the multi-level governance in the case of the Italian regions. The multi-level governance offered generic explanatory tools for the research question. Indeed, the theoretical framework contributed to offer a better understanding of the interactions among multiple actors in EU regional policy process, and showed that both Italian regions provide an example of weak governance (see Figure 1), where the *vertical interdependence* among actors is medium-high, and the *horizontal interdependence* is low-medium. Therefore, weak governance might be an explanatory factor of the slow process of the reduction of regional economic and social disparities between Friuli-V. Giulia and Puglia.

Following the research question, one Hypothesis has been tested in this paper. In the third section, the analysis of the impact of the EU regional policy on the reduction of regional disparities between Friuli-V. Giulia and Puglia (through Structural Funds), showed that the overall impact of the implementation of the structural programmes in the reduction of the economic and social disparities between these regions was significantly strong. Indeed, the established Hypothesis in this section is accepted for GDP growth and unemployment rate, but it is partially accepted for the GDP per head. However, we can assume that the EU regional policy is an influential factor in the reduction of economic and social disparities between Friuli - V. Giulia and Puglia. But, we also should accept that the process has been slow.

In conclusion, we can summarize that the EU regional policy is an influential factors in strengthening the economic and social cohesion of Friuli-V. Giulia and Puglia. However, we also have to assume that the empirical findings in this study are relevant only to the pre-established economic and social indicators.

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Maija Usca<sup>2</sup>

## LOCAL COMMUNICATION PATTERNS OF THE COMMUNITY: THE CASE OF POST-SOVIET SUBURBAN NEIGHBOURHOODS NEAR RIGA

### Abstract

The great political, economical, and social changes that have taken place in the last 20 years in the Post-soviet space have created a wide range of suburban territories, which may be described as built but unfinished / uncertain environment with weak infrastructure or so called 'meadow villages' (Latvian „pļavu ciemati”). In order to solve the problems regarding unfinished infrastructure, to manage / maintain large semi-public spaces and make the living environment more enjoyable, the residents have to communicate to each other, to come to a consensus and to find or create the best ways by working together. Consequently, the aim of this research is to identify existing patterns (levels, modes, and volumes) of community communication and to define potential ones in the Post-soviet suburban space. To achieve this goal, a case study of two villages, Rāmava and Katlakalns, in Riga's neighbouring municipality of Ķekava will be investigated. Research methods include area surveys, mapping of communication places and in-depth interviews with local inhabitants and authorities. This research identifies distinct tendencies in the formation of communities as well as existing and potential communication nodes in the place-based suburban communities in Riga.

**Keywords:** Post-soviet suburbs, communication patterns, community level, spatial distribution of social ties

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# 1. Introduction

## 1.1. Formation processes of territorial communities (communication as a prerequisite)

In general, the idea of urban communities is used as a fixed category that refers to one of two features: a geographically or administratively united group of people; and common characteristics (e.g., interests, identities, etc.) that individuals use to unite into a social group - community (Vromen, 2003). It is possible to distinguish three characteristics that refer to territorial communities: location, common ties (shared interests, identity, etc.), and social interaction (eg, Hillery, 1995, Olson, 1982, Lyon, 1999).

Factors that influence the formation processes of territorial communities can be many and different, including common views, relationships, conditions, (Chaskin, 1997), interests, ethnicity, occupation and/or territory (Peterman, 2000). This is because – as humanistic geographer A. Buttimer has admitted – communities do not exist in vacuum, for they have a certain location (Buttimer, 1976).

Community can be approached as a value. As such, it may be used to bring together a number of elements: for example, solidarity, commitment, mutuality, trust (Frazer 2000) reciprocity, and tolerance (Putnam, 1995). People construct a community symbolically, making it a resource and repository of meaning, when referring to their identity (Cohen, 1985).

The essence of humanity is in the community, especially the relations between one person and another. A fundamental description of the existence of a human being cannot be based on a separate individual, on his or her feelings, or universality as such. A separate individual becomes a fact of existential reality only to the extent that he or she forms relations with another person. These community relations make up the distinctiveness between the human community and the natural world, and what happens within these relationships is not possible in the natural world. Relations are the origin (Buber, 1923).

Stability, identity, values, and self-perception are all created in their relations. Therefore, disregarding the extent to which our world can be altered, the dimensions of unity and stability are created not outside dialogue and relations with one another but rather within them. Dialogue is very significant in our pluralistic reality (Küle, 2002).

Human interaction builds human community. Communication in a sociological sense is more than a movement; it is more than the existence of the media of interaction. It is an exchange of ideas between people. To communicate is to interact mentally with another person. It may be by a physical gesture, such as a wink or a smile, a frown, or the raising of a hand. It may also be verbal gestures. Furthermore, these gestures must be meaningful to both parties. The opposite of communication is isolation (Sanders, 1966).

Communication is vital to the processes of self- and place-representation and the acts of planning or decision-making. Communication has both meaning and transmits

meaning. In the utterance of communication, we are confronted with the actors' own theorizing, interpretations, and articulations of the self and the other (Hillier, 1999). As Patsy Healey notices, actors communicate for a specific purpose. They give information, demand information, make claims for policy attention, make proposals or even threats, build knowledge, and exchange power (Healey, 1997). However, actors from different cultural worlds, using different discourses, may talk *past* or *at* each other, rather than with each other. Many actors can become intimidated and their voices disempowered. Planners, in particular, with some of classic tasks of prediction future contingencies, developing and implementing strategies to respond to them, use planning as an integral activity. As part of planning, they may use incomprehensible jargon (planner speak), failing to recognize that their own professional terms and definitions deny themselves, as well as other participants, the opportunity to ensure that their stories are respectfully understood (Hillier, 1999).

## 1.2. Communicative planning

The concept of communicative action (developed from Habermas, 1984 and 1987 theory of communicative action) offers a methodology by which, policy can be made through people reaching a position of mutual understanding by inner subjective reasoning and discussion. A communicatively active process enables actors to negotiate decisions, whereby everyone is allowed to have a voice and that voice is listened to with respect for its opinion. Thus, actors begin to understand the interests, perceptions, and constraints on their co-negotiators, and may begin to revise their opinions and expectations accordingly. If professional experts and citizens attempt to understand the discourses, meanings and words of the other 'side', a creative form of decision-making could evolve, in which areas of common ground or overlapping agreement emerge. One of the advantages of decision-making through communicative action is that no decision should be forced upon the participants. Agreements should be voluntary, based on reasoning, and good arguments. Thus, the legitimacy of the final agreement increases as all sides would have contributed to the outcome and own a share in its success. Collective decisions tend to be accepted more easily and opposed less than unilateral judgements. A further advantage of communicative action should be that planning becomes open and transparent (Hillier, 1999).

## 1.3. Suburbs and communities in Post-soviet cities

Post-Soviet cities and their suburbs are characterized by specific processes that differ from Western ones. The transformations of the last 20 years in Europe have left a new influence on the social as well as spatial structures of cities. Some especially significant changes have taken place in Eastern Europe, alongside political and economic transformations, great changes have affected communities spatial structuring, which is expressed with new forms of spatial organization. After the fall of socialism, people had the opportunity to own their property, to find their own home, which was unimaginable during the decades of Soviet control. The speculation surrounding this fundamental notion triggered rapid transformation and

the substitution of agricultural land with residential patterns in the outskirts of cities. In this period, residential units were developed much faster than the infrastructure they required.

The Soviet years were characterized by the “compact” city - a dense concentration of population in urban areas. Most of the housing consisted of state-owned apartments and private property was very limited. This had a lasting influence on future urban development tendencies. After the collapse of the Soviet Union, a rapid privatization of property began. The population, at this time, was characterized by growing claims on the living standards - an opportunity to acquire a new apartment or private house appeared. To people who often had been living in very crowded communal apartments with parents, grandparents, or strangers, this opportunity was very important. Thus, a limited personal life in the Soviet period and new economic development opportunities following the collapse of the Soviet Union created the grounds for obtaining new territory within the suburbs.

Land privatization opportunities in the suburbs created a huge interest from landowners and real estate investors, who wanted to develop these properties. In order to do this, the laws related to urban planning, development, and real estate needed to be changed. As a result, in the 1990s legislation was passed, which, compared to Western countries (e.g., the Netherlands, Germany, Switzerland), allowed for the relatively easy change in the permitted use of land, (Stanilov, 2007) from agricultural use to low-rise / high rise buildings. Consequently, large areas around the cities developed as suburban residential areas, which were often characterized by single-family residential buildings. However, this development was largely chaotic, because in Latvia, as in most Post-Soviet countries, there were not a lot of national-level urban development policies and programs (Stanilov, 2007), that would help establish coordinated urban and suburban development. For example, the calculation on the planned construction sites near Riga was done, where each individual municipality had planned its development, but their plans were not mutually assigned. As a result, all newly developed territories of the former Riga district are able to accommodate more than 1 million people. The Central Statistical Bureau data shows, that in 2009 there were 173 000 residents in the Riga district, which means that from a suburbanization potential, that is used in municipal land plans, only one sixth of the population is living in the former district of Riga (Trukšāns, 2010).

The lack of focus, in urban and suburban development policies and programs in the post-Soviet states has promoted “ the realization of the individualized political ambition” that “formed and maintained an unregulated, politicized, corrupt and unstable model of” wild “urban development practices” (Sykora, 1999).

## 2. Materials and methods

### 2.1. Research methods

This research investigates, as a case study, two villages, Rāmava and Katlakalns, in Rīga's neighbouring municipality of Ķekava. The research methods include area surveys; mapping of the communication places (official and unofficial ones); semi structured in - depth interviews with local inhabitants of both villages and authorities of Ķekava municipality; and a questionnaire among residents about community and territory development processes, which was spread in three ways (1) printed version was placed in local public places; (2) an electronic version was sent to local inhabitants through social networks; and (3) directly conducting an opinion poll among the inhabitants of the research territory. The research was carried out from March 2011 until May 2011.

### 2.2. The research territory

For this case study, the administrative areas of Rāmava (total area 2.2 km<sup>2</sup>; 640 declared inhabitants) and Katlakalns (total area 6.3 km<sup>2</sup>; 2800 declared inhabitants), villages in the Kekava municipality were chosen as a lucid reflection of the modern suburbs/outskirts of Rīga (Pierīga). Nowadays, Ķekava municipality, as neighbouring municipality of Riga, is among one of the few in Latvia whose population is still increasing.

Historical evidence, in the Pļavniekkalna ancient burial site or the Depkina manor house, shows that the contemporary area of Rāmava and Katlakalns, the island and shoreline space of the Daugava, has been populated *since ancient times*. Of course, this is one of the most rapidly developing areas since World War II (Figure 1). During the Soviet era, development of suburban settlements was strictly typified, regulated, and compact. In the first decade of Latvian independence, settlements growth was localized as logical extensions of the already established settlements, but over the last decade, due to the above-mentioned suburbanization reasons/motives, previously agricultural land was planned, developed, and built-up rapidly with scattered, low-density, leapfrog development units. Valid territorial (land use) plan provides that 2/3 of the total area of Katakals and Rāmava villages may be developed for residential purposes.

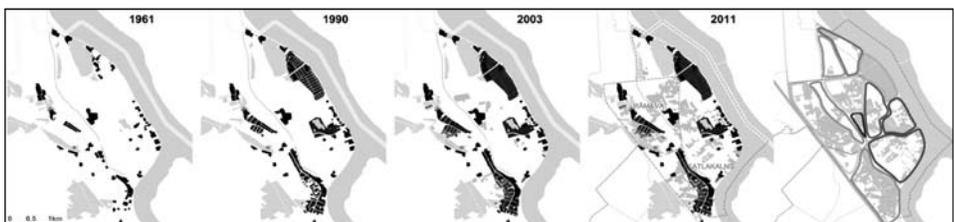


Figure 1. Development of built-up structure in area of Rāmava and Katlakalns villages from 1961 till 2011 and today's pattern of the neighbourhoods.

Today the spatial fabric of Rāmava and Katlakalns is patterned by several neighbourhoods. The boundaries between neighbourhoods are defined by natural barriers like a river and/or artificial barriers, such as the change in building structure. Some *new* neighbourhoods (post-1991) or ‘meadow villages’ are still developing and are uncertain in their spatial structure. Whereas, other *old* neighbourhoods (pre-1991) have a more reasonable spatial structure and already may illustrate their identity with toponyms or/and landmarks.

### 3. Results and discussion

#### 3.1. Territorial communities’ in Katlakalns and Rāmava villages

From the social and building structural point of view, the research area is very diverse. Building structure in Rāmava and Katlakalns can be divided into (1) the old/core areas – built until 1991 – village centres, characterized by compact housing; (2) new villages, which are characterized by single family houses, very were often built in the green areas at the expense; (3) garden cooperative “Ziedonis”, the aim of which at the beginning was to provide an allotment area, but was later transformed into a residential area. Currently, the year-round population is approximately 35 percent of all the cooperative citizens. Consequently, these areas are characterized not only by different building and planning areas, but also - different lifestyles and daily rhythms of the residents, that directly affect the community formation process.

In the old building sites, most of the services are available. The residents living in these areas are also more closely related to their neighbourhoods, as they feel a sense of belonging to that place.

The new single family house areas are often characterized by structures that do not respect the existing ones. These small villages are often scheduled on their own without taking into consideration the detail plans of the neighbouring territories. As a result of this and other factors, huge infrastructure problems have developed in the area – before the land sales and construction of communications (e.g., water supply, sewerage etc.) have not been supplied. The implementation of them is a problem for the residents living there. In these areas, there are no public spaces, as the whole land, including streets, tends to be in the hands of private owners. Thus – all the responsibility for street maintenance and improvements is in the hands of private owners. These problems are closely related to interpersonal communication – the ability to negotiate, to come to an agreement, to find the best solution for improvements, and financial expenditures. Nevertheless, it has to be mentioned that very often it is impossible to come to an agreement. Residents in these territories are economically active, working in Riga, and perform various other activities, such as shopping, entertainment, and sports in Riga. Often these people are less related to their village centre than to Riga because all of their life takes place in Riga; Katlakalns or Rāmava is seen as a place for an overnight stay.

One of the respondents who has been living and working in Katlakalns for more than 20 years, admitted that: “*There are local natives to whom this place is a priority.*”

*People, maybe a little bit strange, but have expressed pride in their place. Then there are new entrants, which eventually bind to the site, and feel this place has a value. And there are the newly perplexed, which have built their house here, but still have to incur*". This quotation reflects very well various residents' interest and attitude towards the territory, in one administrative unit – the village. This perception is due to the above mentioned number of years lived in this area and the diverse needs of this territory.

The community development processes are very well depicted through initiatives and involvement processes in public and social life. Even if there are many initiatives concerning spatial planning, they tend to be thwarted due to neighbours who are unable to agree on the best development options or costs that would be acceptable to all. There have also been cases when the local council has been unable to meet and implement residents' initiatives. In general, these initiatives are related to local infrastructure, they are at street level. At the same time, the authors found one case where one local resident has assumed leadership in the street and has managed to agree with the rest of the residents, because "*these people (neighbours) are such that I don't have to go there five times and to tell them again and again, why this is necessary. They just see it as it is, and they understand very well that, if we, ourselves, do nothing there, then... This is a great example of people living in a way they want to!*"

In some places of the new settlements, initiatives related to common enterprises appear. These initiatives are at street-level or nearest neighbour-scale; they can be regarded as local communities. Of course, in order to form them, an initiator or leader, who assumes the organization, is required. These local communities tend to have celebrations together, e.g., "*on Halloween celebration one family goes around to the neighbours they know nearby*". This is the first year of these traditions, in an area where residents have been living there for less than five years. In order to build up such traditions, there has to be someone who initiates them; therefore, the formation of local communities is highly dependent on the people who live in the area, meaning whether it is possible for these people to agree among themselves, whether there is an initiator for territorial development and for common celebrations. Such initiatives indicate a necessity for the socialization at the local level.

Social life situations, such as sewer and road maintenance, as well as the outbreak of thefts, united residents because of a common search for possible solutions to these problems. Friendly neighbourly relations are formed in this area. One resident states, "*there is no way that 100% of all [residents] I know, but I, for example, have a list of phone numbers [of neighbours]*". Going about their informal activities in the neighbourhood, the resident note that "*except for children christening and joint birthday celebrations*" we are having common joint works to cleanup a small recreation area by the Olekte river. Upon the agreement that the children are being looked after and one private „*informal kindergarten*" is organized, where a small group of children are looked after by one of the mothers. There is a local hairdresser, manicure master, notary, lawyer, and coal man, which covers all the neighbours with garden picnics needed coal, in the neighbourhood.

The local council also plays a role in involving people in the social and territorial activities. The role of the municipality appears on a different scale than in regard

to the aforementioned activities, i.e., the local council is not so significant in local, street-level community creation. The municipality's role is to conduct public activities in the village and, more broadly, at county area level. However, village-wide activities, which are mostly related to culture (culture house), are targeted to certain groups in society - children, mothers with young children and pensioners, groups, who spend every day in the village, and do not commute to Riga. Of course, through the children who are involved in the cultural life of various hobby groups there is an effort to involve the child's parents, relatives, and neighbour's children in cultural life. The Director of Katlakalns Culture Centre acknowledged that the involvement of children and their relatives is "*Such sustained, complex work, but (...) I (as a culture centre employee) have to succeed in gradually involving newcomers in cultural life*".

### 3.2. Local communication patterns and praxes in Post-soviet suburbs

**Residents' involvement in public and social life.** Interpersonal communication both between the population, local council, and citizens plays a very important role in civil involvement. In the areas of both villages, area poster poles are located, where the county council and the Katlakalns Culture House hang posters advertising their activities. However, the official poster poles are just a part of the ones used by residents. In the surveyed area, there are several unofficial poster poles which have formed naturally and function successfully as they are in a prime location for residents (Figure 2 and 3).



Figure 2. Spontaneous notice/advertisement places and physically hard accessible official notice board.

The director of Culture House pointed out the significance of an oral message in the promotion of Culture House activities. She values this type of communication the most, "*Because nowadays what is advertising? Advertising is at a very low level. Those who drive cars, pass us. Those who come to the store, they do not have the time, they ignore us. Only some residents have access to the internet, and those who do, work in offices.*" This assessment appears to be well-grounded, because, in fact, most people use private cars. They do not go to the local shops, as they shop in Riga, while the county council website is used only by those who have a special interest.

Details of the council and Culture House activities are also communicated through the local newspaper. This newspaper is published monthly and in theory is

delivered to all residents. In reality nobody knows for sure how many people receive the newspaper and even less - how many people really read it.

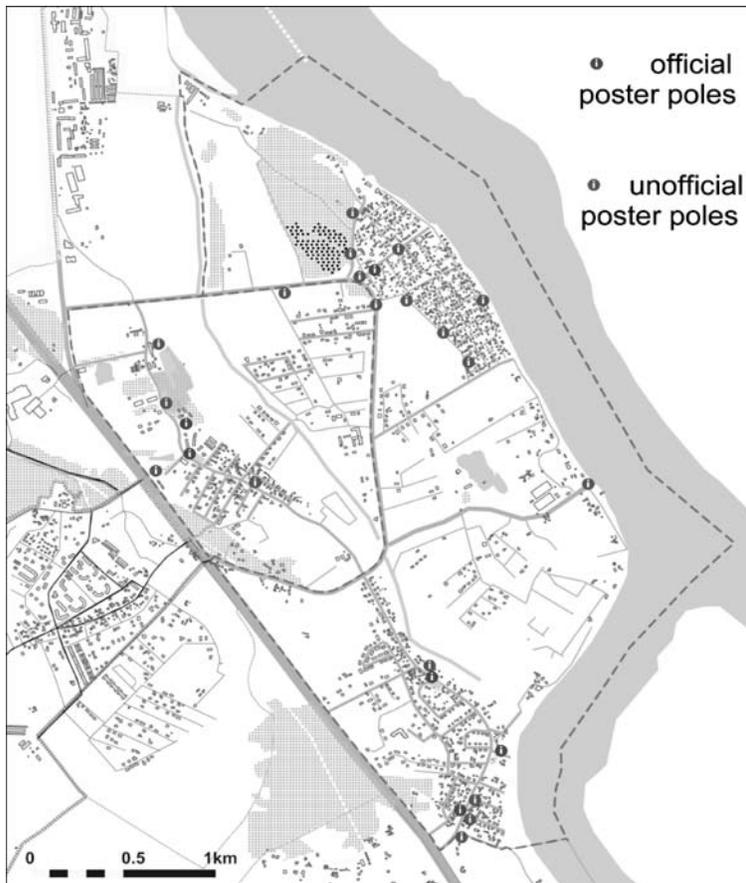


Figure 3. Official and unofficial poster poles in Katlakalns and Rāmava villages. Mapped by the authors, March, 2011.

During the study, the special involvement of government-initiated activities was not mentioned by new residents. Perhaps this is due to the fact that, as already mentioned, the new residents meet all their needs in Riga (next to work/study) besides cultural life “*The rapprochement of the municipality, I somehow have not noticed it. To be honest, I think they don’t care how we feel here, because they don’t think about it*” said the respondent, who has been living in a new settlement in Katlakalns for some years. At the same time, taking into account all the problems described above, a respondent admitted that “*I have a sense of belonging, in the five years I have never had an idea that, oh, it’s completely bad here, or that we are deceived here.*”

Public consultations about the municipality plan amendment. A research questionnaire pointed out residents concerns about one of the main problems with the Rīga outskirts - the quality of roads and streets. The recent public discussion about amendments to the territorial plan with objectives to categorise existing and planned roads and streets and to establish building lines, Ķekava parish municipality was promoting information by using: (1) local newspaper, (2) internet portal and (3) poster poles. The meeting dedicated to Rāmava village area was attended by only 12 inhabitants (or 1,9 percent of the total 640 declared inhabitants) and the meeting dedicated to Katlakalns village area was attended by 73 inhabitants (or 2,6 percent of the total 2800 declared inhabitants). Even though some individuals introduced themselves as delegates from a certain street, inhabitants groups, such a small number of participants should be considered an extremely low attendance and general reasons for that may be seen in (1) spatially disrupted layout of poster poles; (2) inconstancy in delivery of the local newspaper; (3) internet accessibility; and (4) overall sophistication of language and information in official notice. For example, Rothenbuhler points out - people are more likely to read community newspapers if they are (1) more settled in the community (e.g. have lived there long, own their home; (2) more active in the community (e.g., work, shop, send their children to the school, attend other organizational meetings within the local area); and (3) feel more attached to, or more identify with the local area. Finally, (4) these feelings of attachment produce interests in types of news that emphasize local events, gossip, and integration over conflict (unless it is conflict with an outside agency) (Rothenbuhler et al., 1996). In the case of Katlakalns and Rāmava villages, residents are pretty interested in local municipal newspaper as an appropriate source of local information, but the main problem is that due to uncoordinated postal actions, newspaper issues are not delivered to inhabitants regularly and some time gaps are longer than 3 months, what of course corrupts not only the exchange of the information, but the overall beliefs and opinions of local inhabitants. This results in citizens understanding of ongoing development processes, in citizens awareness of their actual responsibility and possibility to participate in and/or steer the local changes.

**Garden cooperatives and community organizing.** Garden cooperatives in the outskirts of Riga are unique areas with their own special features in the formation of the local community. In the case of garden cooperative, Ziedonis (which nowadays formally belongs to Katlakalns village) cooperation spirit is eroding because of the complicated economic situation and a large number of new entrants. This is clearly felt by the cooperative board, which alongside prime maintenance duties of cohabitation like electricity and water supply, always tried to promote, develop, and strengthen local social life. For example, the former manager in recalling the recent past admits: *“I have tried in such a way that all correspondence, all the mailboxes were placed at one wall over there. (...) When they [inhabitants of Ziedonis] went to pick up the mail they could meet everyone, talk and so on. Also we experienced some cases of stealing, so we decided to gather in small groups - five to six men for some kind of neighbourhood watch. (...) Also that small cooperative office building is a place where people were always coming and anyone can come to talk if he needs to tell something, to have a heart-to heart talk. Office place is like a church or a bar, well known for local people as place where they can*

*come over.*” This quotation vividly reveals the different efforts of the former manager of the cooperative to organize social life of the inhabitants by creating suitable places and interaction, so that inhabitants could begin to communicate. The Manager’s own perception of his duty contributed to successful communication and therefore, established trust between the administration of the territory and population. Today many initiatives decreased, but some traditions like spring clean-up, general meeting of cooperative members, and Ligo festivity remain popular.

In general, communication which relates to land use planning and development issues can be divided into two groups; according to those who give and receive messages i.e. message spreading between the people and message transfer from the authorities to local residents. Intercommunication of the local people appears mainly self-initiated by local people. In some cases (garden cooperative Ziedonis) communication is consciously constructed by producing appropriate situations and places. Of course intercommunication of the local inhabitants depends on the needs of individuals to communicate and socialize at the local level. One essential factor that determines the communication between people is a common problem in a specific area related to infrastructure. Communication between the authorities and the people is happening mostly in one direction – the authorities transfer information to the inhabitants of a specific area through three main channels: the internet website of the municipality; the monthly newspaper of the parish; and poster pillars. The aforementioned communication channels do work, but they have some important limitations; (1) the newspaper is not delivered regularly and/or to all residents, and (2) there are few official poster poles in comparison with actual number used by local inhabitants. To provide equal access to the information for local inhabitants is important and a key challenge for the municipality. The evaluation of the existing local processes of communication revealed a drastic lack of feedback from the local inhabitants i.e., authority messages are passed to the local people, but there is an uncertain procedure of feedback giving as well as the volume of feedback is known only to the local municipality. Of course, these may be explained by personal interests, involvement, and passivity of the inhabitants, but the study showed many different civic initiatives and attempts to engage in the development of the surrounding environment. The needs to listen to, to hear and to talk to the local inhabitants - these are the main tasks that the local municipality should implement.

## 4. Conclusion

This study focused on the formation of communities and its potential in two suburban villages of Riga city - Katlakalns and Rāmava. The study identified distinct tendencies in the formation of communities in areas, which differs in building time periods. The inhabitants of different areas are marked by different rhythms of life, problems, interests, which are directly related to the formation of the community. Despite the fact that existing social ties and local initiatives vary from one place to another, all kinds of social interaction between inhabitants are based mainly on

the need for a solution to common everyday issues and/or aspirations for friendly socialization on the local i.e. street, neighbourhood level.

Community development and involvement in development of the territory/place (communicative planning) are based on communication. The communication in the research area can be divided in two groups of information giver and recipient - the message spread from one inhabitant to another and message spread from the municipality to inhabitants. The third group is still missing - inhabitant's constant interaction with the local government. It is rooted in the passivity of both sides; non-cooperation of expression of views, opinions and involvement, as in the case of public discussion of changes to the territorial plan. The activism of inhabitants can be achieved and inspired by stories of success, like the promotion of and support for local initiatives, and information exchange about progress and accomplishments, which may focus on and lead to improvements, solutions, and eventually, a better quality of life of all stakeholders.

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**Guntis Solks<sup>1</sup>**

## **THE CHANGES OF URBAN STRUCTURES IN FORMER WORKING-CLASS NEIGHBORHOODS IN RIGA**

### **Abstract**

Working-class neighborhoods are an integral part of the historical urban structure in Riga. These areas were situated on the outskirts of the city initially, but currently they are located in the centre of the city and that makes them potentially attractive for investment. Some transformation of these neighborhoods have occurred recently, which is reflected in various ways – transformation of the land use patterns, changes of the spatial and social structures of the neighborhoods. However, these processes of transformation are not enough to turn these neighborhoods into an integral part of the city centre, because several obstacles can be observed for further development. Those include disadvantaged social environment and insufficient infrastructure that precludes inflow of investment and new residents. Urban regeneration is an important tool to increase the attractiveness of the working-class neighbourhoods in order to promote their further development including various aspects of sustainability.

**Keywords:** Riga, urban regeneration, working-class neighborhoods

### **Introduction**

Working-class neighborhoods in Riga are very specific urban areas due to high potential of development and current status of deprived areas. Geographical location of the working-class neighborhoods is very favourable and it may also boost their development in the future. Most of the working-class neighborhoods in Riga have become part of the central area as a result of urbanization process during the 20th century and these areas are generally perceived as the city centre by local residents. In some cases there are no real marked frontiers between the city centre and the historical working-class neighborhood that may determine their amalgamation into single unity.

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Deprived status of the historical working-class neighborhoods in Riga is mostly associated with the uncomfortable housing conditions and specific social structures that are significant obstacles for their further development. Urban regeneration may be important tool to overcome these problems by upgrade or redevelopment of the urban structures in these areas.

Despite the status of deprived areas, historical working-class neighborhoods are considered cultural heritage in Riga, because they have retained their historical urban environment with some minor changes. These areas were not largely affected by the construction boom during the economic growth in the early 2000s, which makes them unique as an urban planning related cultural heritage.

Although Riga's city centre has experienced a lot of urban transformation processes after the collapse of the Soviet Union, on the contrary, historical working-class neighborhoods were mainly excluded from these processes of urban change (olks, 2011b, p. 237). Compared to the other neighborhoods in Riga, this determined different course of urban transformation in these areas. The main transformations of the urban structures of the historical working-class neighborhoods in Riga generally include the change of land use patterns, while the transformation of the spatial and social structures of particular neighborhoods are less expressed.

The goal of this research is to characterize the changes of urban structures in the former working-class neighborhoods in Riga. In order to characterize the conceptions of the working-class neighborhoods and their characteristic features as well as urban regeneration and its implications, comprehensive review of international literature concerning these issues was conducted. The author has collected data through visual observation of the working-class neighborhoods and personal interviews with local residents. Field studies in several former working-class neighborhoods in Riga were carried out in order to identify and evaluate the transformation processes of the urban structures in these urban areas. Interviews carried out by the author with local residents provided insight in the various social issues and overall image of their perceptions concerning the working-class neighborhoods.

## 1. The working-class neighborhoods in transformation

The working-class neighborhoods are usually integral part of both industrial and post-industrial cities. The traditional concept of the working-class neighborhood refers to the urban areas or particular city districts that are often called slums or disorganized areas (Topalov, 2003, p. 212), although this interpretation has recently been replaced by an idea that common features of these areas are social segregation, urban poverty and street crime (Wacquant, 2008, p. 200). This concept itself contains a combination of the economic, social and cultural aspects of everyday life of local residents that are reflected in the surrounding urban environment (Ward *et al.*, 2007, p. 313).

The term "low-income neighborhoods" (Frenette *et al.*, 2004, p. 500) is also used as an equivalent to the working-class neighborhood concept. Thus both these

terms characterise the main features of the particular neighborhoods what are mostly connected with the social issues – the presence and dominant role of low-income working-class residents in the neighborhood (Rawlings *et al.*, 2007, p. 6).

Most of the industrial cities have experienced various transformation processes (Gospodini, 2009, p. 6) that were initiated by deindustrialization. Emergence of various brownfield sites is one of the most observable effects of deindustrialization process what is clearly indicated by Lorimer (2008, p. 2044) who concludes that ‘brownfield land in cities is largely located in areas that have experienced deindustrialisation’<sup>2</sup>. Former working-class neighborhoods usually have larger proportion of brownfields if compared to other parts of the city because of the concentration of industrial sites what were affected by deindustrialization processes. Urban brownfields in working-class neighborhoods mostly are abandoned or ineffectively used industrial sites and run down residential buildings. These sites usually have negative impact on visual quality of the surrounding urban environment what affects the social and economic structures negatively as well.

Urban brownfield redevelopment is widely acknowledged as one of the major tools to achieve development of compact and sustainable cities and sustainable built environment cannot be achieved without reintegrating brownfield land into the property markets and shifting development back to the central urban locations (Grimski and Ferber, 2001, p. 143). Urban brownfield redevelopment is part of the urban regeneration process, what in general is based on the idea of creating desirable urban spaces (Guzey, 2009, p. 27).

In the case of the former working-class neighborhoods regeneration or redevelopment activities are or at least may be considered as appropriate course of further development for these areas (Power, 2008; Guzey, 2009; McDonald *et al.*, 2009). Urban regeneration is not only the physical processes of the transformation of urban space, it also includes transformation of social, economic and environmental spheres (Guzey, 2009, p. 29) what will also contribute to the further development of these areas by demonstrating that the neighbourhood is worth investing in (Power, 2008, p. 4495).

The most observable aspect of urban regeneration is the physical transformation of the urban environment. It becomes apparent as renovation of the existing housing stock or building of new structures, as well as demolition of the deteriorated buildings is done. However, demolition is particularly considered as a difficult tool in urban regeneration (Power, 2008, p. 4494). Besides, it may determine the situation when urban regeneration activities lead to the wholesale destruction of popular neighborhoods and the uniqueness of the working-class neighborhoods are discovered ‘at the very time they are about to vanish’ (Topalov, 2003, p. 212)<sup>3</sup> what may lead to the partial loss of cultural heritage. Accordingly, refurbishment is considered to be

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<sup>2</sup> Lorimer, J. (2008), “Living roofs and brownfield wildlife: towards a fluid biogeography of UK nature conservation,” *Environment and Planning A* 40: 2042-2060.

<sup>3</sup> Topalov, C. (2003), “Traditional working-class neighborhoods”: an inquiry into the emergence of a sociological model in the 1950s and 1960s,” *Osiris* 18: 212-233.

less damaging to the local environment than demolition and new build (Power, 2008, p. 4495) and such approach can provide balance among modern urban development and preservation of cultural heritage.

Sometimes preservation of the cultural heritage is found problematic by private investors and developers so involvement of local municipal authorities is required in order to secure refurbishment of the existing structures by providing additional funding for these activities. Furthermore, local municipal authorities are considered as 'the lead agents in implementing urban regeneration programmes' (Otsuka and Reeve, 2007, p. 236)<sup>4</sup> as they are able to secure significant financial support.

Gentrification of the former working-class neighborhoods usually occurs as attraction of high income residents by development of new housing development projects. Thus gentrification becomes a part of the urban regeneration process what is reflected onto urban space through various housing and other urban utility projects (Guzey, 2009, p. 28). Regenerated former working-class neighborhoods attract higher classes migrating back into the city, thus also contributing to the gentrification (Wacquant, 2008, p. 200).

Gentrification can occur when the preferences of high-status households change, or when the income disparity between high and low status households increases (Vigdor, 2002, p. 167). Observation of mixed-income neighborhoods could reflect the fact that these neighborhoods are in the process of transitioning, for example from a lower-income to a higher-income neighborhood, and therefore more high-income arrivals can be expected (Krupka, 2008, p. 10).

The process of gentrification is often described as one of the negative aspects of urban regeneration process, because it is feared that gentrification may bring alienation of the low-income resident groups what have lived in the area before the arrival of more affluent residents (Guzey, 2009, p. 28). Gentrification is also considered as the process that often leads to the displacement the lower income residents (Barber, 2007, p. 764) who have lived in particular neighborhood before.

However, gentrification is often considered as a beneficial process what stimulates development of particular neighborhoods in various ways. Positive displays of gentrification are supported by McKinnish *et al.* (2010, p. 182) who point out that gentrification itself may provide amenities that are valued by existing residents. Freeman (2005, p. 471) regards gentrification as a potential sign of cultural and economic improvement of particular neighborhoods. Vigdor (2002, p. 143), accordingly, specifies that gentrification process might bring new proximity to job opportunities, a larger tax base, better public services, improved retail environment and other changes in neighborhood quality such as reductions in crime. Finally, the upgrading and socioeconomic integration of revitalizing neighborhoods might make them better places to live (Vigdor 2002, p. 167).

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<sup>4</sup> Otsuka, N. and Reeve, A. (2007), "The contribution and potential of town centre management for regeneration. Shifting its focus from "management" to "regeneration", " *Town Planning Review* 78 (2): 225 – 250.

However, despite the aspects mentioned above, former working-class neighborhoods are seemingly absent from many accounts of urban change or regeneration. The effects of urban transformation often have been less pronounced in low-income or working-class neighbourhoods (Ward *et al.*, 2007, p. 312) what makes the issue of redevelopment of these areas a real challenge for local municipal authorities, policy makers, urban planners and developers.

## 2. The working-class neighborhoods in Riga

### 2.1. Characteristics

In the case of Riga the concept "historical working-class neighborhood" is referred to the neighborhoods that emerged and developed parallelly with the industrialization in the turn of the 19th and 20th centuries in order to accommodate the workers employed mostly in the surrounding industrial enterprises (Šolks, 2011b, p. 237). These urban structures are part of the cultural heritage of Riga what still represent the urban environment of the largest socioeconomic group of the city at that time.

Although urban environment of the historical working-class neighborhoods in Riga is often understood as significant cultural heritage, this concept itself contains negative associations because of unfavourable social structure and low quality housing. Another aspect concerning this concept is the way how local residents perceive the residential buildings built during the Soviet occupation period, because these housing estates were developed as working-class neighborhoods as well. These structures are mostly understood as residential buildings currently as they are more comfortable than historical working-class dwellings and the concept "working-class" has lost its traditional meaning in the case of Riga as a result of deindustrialization processes.

The historical working-class neighborhoods that emerged before World War I, were located around the central part of the city (Grīziņkalns and Pētersala) or within a little distance (Āgenskalns, Torņakalns, Ilģuciems, Sarkandaugava, Čiekurkalns) that was considered as an urban fringe then (Šolks, 2011a, p. 199). The little distance from the city centre is the main advantage of these neighborhoods that may determine their future development as a part of the city centre.

The characteristic building structure of these neighborhoods is the mix of wooden and masonry residential buildings what differ in size and height (Šolks, 2011a, p. 198) and old industrial complexes. This diversity forms the specific spatial structure of the neighborhood what has high cultural importance as a complex of various buildings (Šolks, 2011b, p. 238).

### 2.2. The processes of transformation and changes of urban structures

The first transformation processes that significantly impacted the historical working-class neighborhoods in Riga were related to the deindustrialization processes and the following loss of industries after the collapse of the Soviet Union. This determined dramatic change of land use patterns and these neighborhoods lost their

industrial character. As the result of the closure of industrial enterprises several urban brownfields emerged. According to the planning documents of Riga, territories are classified as brownfields, if there were performed any kind of activities in the past, but at present time they are not in use or are used ineffectively (Grupa 93, 2004, p. 9). Location of brownfields in Riga correspond to the main phases of evolution of the city and reflects the change of its economic development models (Trusins *et al.*, 2005, p. 3) thus representing the effects of deindustrialization in Riga in this case. The brownfields in the former working-class neighborhoods are abandoned or ineffectively used former manufacturing areas and uninhabited residential buildings in poor physical condition (Trusins *et al.*, 2005, p. 3) and abandoned construction sites what occurred recently when economy went into recession.

However, historical working-class neighborhoods have retained the industry as the land use pattern, although it has shrunked significantly. Despite the deindustrialization processes in Riga, several industrial enterprises located in the historical working-class neighborhoods have adapted to the new economic conditions and continue to function successfully. Part of deindustrialized areas were occupied by other enterprises specialized in services and small scale manufacturing or used as storage facilities.

Industrial enterprises usually were not relocated outside the central part of the city during the construction boom in Riga, what could have been done to provide transformation of these areas for residential and commercial use (Šolks, 2011a, p. 201). There was low demand for premises in these areas what resulted in the low interest from potential developers what, accordingly, reduced possibility to sell the properties for higher price.

Construction boom has determined some changes of the spatial structure in particular areas of Riga (Šolks, 2010b, p. 14), however, only some development and redevelopment projects were implemented in the former working-class neighborhoods. This demonstrates, that spatial structure of these areas have experience only minor transformation and effects of urban transformation have been less pronounced in these areas (Ward *et al.*, 2007, 312).

The transformation of the spatial structure of the historical working-class neighborhoods occurred mostly as urban regeneration was reflected onto urban space as refurbishment of various buildings and demolition of deteriorated houses and building of new structures. Urban regeneration and brownfield redevelopment can be considered as identical processes of transformation of the spatial structure of these neighborhoods, because the results are the same – redeveloped properties for commercial or residential use.

The most preferable approach for urban regeneration is renovation or reconstruction of the existing housing stock, allowing selective demolition of buildings in critical physical condition (Power, 2008, p. 4497), because it allows to retain the existing urban space and to provide premises with modern utilities. This presumption can be well illustrated by some particular urban regeneration projects that were carried out in the historical working-class neighborhoods in Riga - regeneration of wooden buildings in Kalnciems street in Āgenskalns and regeneration of the Mūrnieku street complex in Grīziņkalns (Šolks, 2010a, p. 161). These redevelopment projects were

implemented as public–private partnership among private owners and municipality, thus displaying the role of the social capital and municipal authorities as the lead agents in successful urban regeneration practice (Otsuka and Reeve, 2007, p. 236).

Urban regeneration in historical working-class neighborhoods may often determine the progress of gentrification processes as redevelopment activities provide premises located close to the central areas of the city that meet modern standards. However, gentrification is not typical for historical working-class neighborhoods in Riga as urban regeneration projects were not very common. Gentrification in these areas occurred only in local scale what is limited to the implemented housing development projects or private initiatives and it did not affect overall social structure of the neighborhood (Šolks, 2011a, p. 201), besides, there is still comparatively low demand for dwellings in the regenerated properties because of comparatively high price. Overall unfavourable social structure of the neighborhood is considered as a disadvantage by potential buyers who better chose to avoid moving into this area.

The historical working-class neighborhoods in Riga have not experienced large scale transformation of the urban structures until now, especially those areas that are located more distant from the city centre what have experienced mainly the change of land use patterns. Neighborhoods located closer to the city centre – Āgenskalns, Pētersala and Grīziņkalns - have experienced more positive transformations as some urban regeneration projects were implemented, however, in smaller scale, if compared to the city centre. Implementation of proposed large scale development projects, probably, will contribute positively to the development of Torņakalns and Pētersala neighborhoods as brownfield redevelopment and urban regeneration activities.

## Conclusions

The working-class neighborhoods are part of the city which were formed parallel to the development of large manufacturing complexes to accommodate the workers and their families. The concept "working-class neighborhood" has more symbolic meaning in Riga as these areas had lost their industrial image due to the economic changes and deindustrialization in the early 1990s. This concept is referred to the historical neighborhoods that emerged and developed before the World War I during the rapid industrialization processes in Riga and it is still used to indicate these neighborhoods, however, it contains some negative senses as well.

The historical working-class neighborhoods in Riga are particular urban areas that can be mostly characterised as low-income neighborhoods, besides, other frequently observed associations concerning these areas are related to low quality housing, unfavourable social structure and higher crime rates if compared to other neighborhoods in Riga.

Despite the overall negative characteristics concerning the social issues, the single urban space of historical working-class neighborhoods is often understood as a significant cultural heritage. It provides evidence of the development of Riga as an industrial city, and has remained almost unchanged since its emergence. This fact

determines the necessity of preservation of these areas, however, the balance between preservation of cultural heritage and the forms of the modern usage has to be found.

The location of these areas has changed its status from urban fringe to inner city because of the urbanization processes. These areas are sometimes perceived as part of the city centre and the idea of shifting development back into the central areas of Riga may determine the spatial expansion of the present central area thus neighboring former working-class neighborhoods will be the main areas for this expansion. These aspects may determine the further development of these areas, however, historical working-class neighborhoods in Riga have not experienced wide development or regeneration activities until now.

The transformations of the urban structures that have happened in the historical working-class neighborhoods in Riga can be divided into three groups – the changes in the land use patterns, the changes of the spatial structure and the changes of the social structure.

The changes in the land use patterns in historical working-class neighborhoods occurred due to the deindustrialization process when these areas lost part of the industries. These neighborhoods have retained their residential function almost unchanged, although the proportion of urban brownfield sites grew significantly. Spatial structure of the historical working-class neighborhoods have experienced only little change, however, these few implemented development projects demonstrant signs of reurbanization process. Transformation of the social structure in low-income neighborhoods is associated with the gentrification processes, however, social structure of the historical working-class neighborhoods in Riga has experienced only minor change and gentrification has happened in small scale as it was expressed by only few arrivals of the higher income resident groups without alienation of residents with lower incomes.

The historical working-class neighborhoods in Riga have not experienced large urban transformation processes because of low demand for these areas in the real estate sector. However, lately proposed large scale redevelopment and regeneration projects may change this situation and turn these neighborhoods into full value areas of the city centre.

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## Part VI

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# RESEARCH, INNOVATION AND COMPETITIVENESS

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## NEW APPROACHES TO HUMAN CAPITAL DEVELOPMENT IN PUBLIC ADMINISTRATION IN LATVIA

### Abstract

The main resource of state administration as intellectual organizations is their personnel or human capital, the knowledge, skills, and attitudes as well as motivation and loyalty of which are a critical factor for efficient operation of the state administration.

Over the last twenty years new factors like globalization, information technologies, and innovation have changed our idea of the state administration, the role of government, and the work of the public sector institutions. Both developed and developing countries have introduced large-scale reforms, some successful, others not.

The aim of this article is to provide arguments, based on research and literature reviews, and to support the importance of human capital development in public administration in Latvia.

**Keywords:** human capital, competence approach

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## Introduction

Personnel management as a system in state administration is currently faced with certain difficulties. It is in these circumstances that the state administration personnel management paradigm is shifting. The personnel management system objectives are changing along with the interaction between the management subject and object, which is becoming more complex. The processes taking place in the state administration personnel management system require a more specific definition of its functions and analysis.

The specifics of state administration set a lot of requirements for its employees. Neutrality, objectivity, strong discipline, and loyalty, are demanded from the employees. An administration official's work is regulated by the legislation. This determines the character of the personnel management system in the state administration.

There is a big problem – insufficient level of qualification among the state administration employees in Latvia.

The officials are frequently incapable of solving the issues raised by the society, especially in the conditions of the state administration system being reformed. This is related to lack of professional education, skills, proficiencies; computer and foreign language skill levels are low. Professionals are leaking into the private sector.

The subject of the research refers to the human capital development in public administration in Latvia.

The methodological basis for the article is made up of the regulations, guidelines of the EU and the Republic of the Latvia as well as works of foreign authors.

The listing of literature provides references to works of foreign authors, and sources of publicly available information.

## 1. Human capital in public administration and administrative reforms

The concept of human capital is used in the state administration in line with the understanding that the accessibility (quantity) of services provided by the state is considerably influenced by the financial capital, which constitutes short-term resources, while the quality of services is largely influenced by the personnel, which is a constant value and is therefore called the human capital (State Chancellery review of 2003).

Since planned career development in the state civil service organizations is limited, the chances of getting a promotion are low and remote, so it is important to look for other ways to use the growing capacities of the personnel. The personnel development opportunities in joint operation and teamwork are expanded by emergence of new economic relations, the trend of linear and linear-functional management structures to transgress into distribution structures, and a focus on ready-made problem solutions. The work organization in teams is a synthesis of the small business advantages and programmed, dedicated management within the framework of the state civil service.

This is the fourth approach – development of joint operation (State Chancellery review of 2003)

It is difficult to ensure solution of the personnel development issues that are important for various reasons, as this objective requires clarifying a personality's potential for doing more and doing it better, which is necessary to perform the current work, and ways must be found to implement these possibilities. Personnel development is not a self-sufficient goal. There is no point in developing personnel if the employees have no opportunities to realize their growing skills. One must remember that skills will obviously be applied in practice only when there are respective real opportunities. Every human resource development programme in the state civil service, including skill development programmes and changes in activities and needs, must be oriented towards a measurable improvement in the organization's specific operation indicators. Changes cannot be applied if it is not clear whether they will bring about improvement, a breakthrough increasing the efficiency and purposefulness of operation as well as satisfaction of the parties involved.

The last twenty years have been very trying on the functioning of the state civil service. Too many reforms were implemented that gave little effect, there was too much rhetoric and the leaders lacked the savvy (Bourgon, 2010). Unfortunately, not all reforms gave positive results.

Some successful reforms were Over the last 20 years, new forces such as globalization, information technologies,:

- The construction and expansion of the European Union is one of the greatest
- Creation and expansion of the European Union is one of the greatest modern-day achievements in system management and is based on progressive economic integration, principles of democracy, and people's solidarity;
- The transition from an apartheid regime to a democratic society that guarantees
- Transition from apartheid regime to a democratic society granting equal rights to all citizens of the Republic of South Africa gave hope that there would be many ambitious reforms;
- The successful transition from centrally- planned economies to market economies
- Successful transition from the centralized planned economy to a market economy in countries such as Latvia, Lithuania, Estonia, Slovakia, Hungary, Poland, Czech Republic.

On the background of these changes, the question of increasing the quality of services rendered by and human capital development in the state sector has gained particular topicality in the state administration sector.

Work training in the form it was practiced in the past is only productive if the content of the work is predictable and repeating. Whereas learning is a central factor in the organizational innovation introduction capacity and will be the key solution in securing the future of the state civil service (Public Administration in the Economic

Union, 2002). On a practical level this means preparing a highly competent employee with qualified knowledge and additional qualities as individuals, learning and being innovative businesspeople. If an innovation fails in the private sector, it can harm the firm's reputation or affect the shareholders' profit. In the public sector such failures have impact on all the citizens. Successful innovation in the public sector is almost invisible, while a visible failure can destroy an up to then brilliant career. Ensuring innovation in the public sector is a complicated problem. On the one hand, it is a big challenge to create public and political support for innovation: tolerance of failure and even reasonable risks is low. The current public service administration systems do not encourage innovation, and support predictability in a particular scope of activities instead. On the other hand, the inability to transform the official organizations into 'intelligent' 'learning' organizations capable of researching and finding new better ways to fulfil their mission could signal their decreasing significance in the future. There can be no innovation without certain tolerance to failure and taking reasonable risks. The way in which the state civil service will adapt to the 'knowledge and innovation imperatives' determines the context of human resource management reforms in the future. There will be keen competition for talents among the countries and in between the private and public sector. People will choose to work for the state civil service if they are given the chance to change something essential and the opportunities to apply their skills to realize their potential. A state civil service the role of which is limited to repeated predictable tasks will attract a different kind of workforce. The old 'deal' – lower remuneration than in the private sector but bigger social guarantees – is no longer realistic. Reasonable salaries, new skills and life-long education are the essential factors for personal security and competitiveness on the job market. One has to be learning their entire life these days in order to retain competitiveness.

The performance of the government in each of the above phases depends strongly on the knowledge, skills, and personal attributes of the people actually involved in the implementation of the phases. For this reason the policy that increases the potential of the human capital in the public sector is very important. This policy has to be clearly formulated and focused on recognition of the role of personnel in the public field and improvement of the personnel's knowledge and skills (competencies). In the past, many reform attempts, sometimes called the 'New public administration', have had questionable success because they overly focused on structures, procedures, systems, and the administrative value of efficiency. Presently, there is increasing unanimity on the idea that the public sector capacity increase should focus on the people. This means that reforms should focus on activating and developing the intellectual, moral, and civic capital in the public sector employees that have undertaken fulfilment of public objectives.

A study carried out by the Organization for Economic Cooperation and Development (OECD) on Trends in Human Resource Management Policies in OECD Countries, and results of the analysis of the OECD's review of the strategic human resource management indicate the potential of development for other state administration employees.

In recent years, training and mobility have been considered essential management instruments in reacting to the growing need for knowledge acquisition. In some highly individualized, official post-oriented systems training is increasingly used as a means to form a common culture and opportunities to communicate and discuss professional issues within the framework of civil service.

The most important cause for that is lack of coordinated strategy in the field of human resource management. Mostly the aim of human resource management is not just 'improving employee quality and work results' but also to increase the efficiency and productivity, to save resources, and to serve certain political interests.

Most reform projects in human resource management are legal, economic, and political reforms, which ignore psychological aspects, even though there is abundant evidence that an individual's behaviour is significantly affected by their emotions and feelings.

The member countries have shown their reform priorities and the less important reform aspects. As it can be seen from Table 1, which depicts the various reform priorities in the EU member countries, in Latvia training is the lowest priority.

*Table 1. Differing reform priorities in the EU member countries (Demmke, Moilanen,2010, p.114) (1= very important, 5= unimportant)*

	Quality management	Leadership	Work performance management	Training	Competence management	Human resource department reform	Human resource competence decentralization
Slovenia	1	1	1	1	1	3	2
Hungary	1	2	2	1	2	2	2
Bulgaria	1	2	2	1	1	2	2
Portugal	1	1	1	2	1	3	3
Austria	1	1	1	1	2	3	2
Latvia	1	2	1	3	1	1	2
Denmark	1	1	1	1	2	1	3
Italy	1	2	2	2	2	2	2
Lithuania	1	1	1	2	1	2	2
Spain	1	2	1	2	2	3	2
Malta	2	1	2	2	2	2	2
Belgium	1	1	2	2	1	2	3
the United Kingdom	1	1	1	2	1	3	5
Czech Republic	2	2	1	2	2	2	2
Poland	2	2	2	1	3	1	2
Greece	3	2	2	2	2	2	3
France	3	2	2	3	2	3	2

	Quality management	Leadership	Work performance management	Training	Competence management	Human resource department reform	Human resource competence decentralization
Estonia	2	2	2	2	2	3	3
Ireland	2	2	2	2	2	2	3
Finland	3	1	2	2	2	3	2
Germany	2	2	2	2	2	3	3
the Netherlands	3	2	3	3	3	3	3
Cyprus	1	2	2	2	2	2	3
Rumania	2	2	2	3	3	3	3
Slovakia	3	3	2	2	2	3	4
Luxemburg	2	3	2	1	2	3	4
Sweden	3	2	2	3	2	3	4

Presently, civil service officials in all member countries are increasingly well educated professionals at the frontline of their specialty. However, several civil servants work in fields where they are responsible for forming the policies. There is no rotation in Latvia for sensitive jobs.

At the beginning of the 20<sup>th</sup> century almost all European countries were under the conviction that a bureaucratic civil service is the consequence of a theory in accordance with which ethical behaviour is influenced by work organization and organizational structure. According to this concept, the conditions of employment and human resource systems in the state and private sector are very different (Sloten,2002). Civil servants were looked upon as the servants of monarchs and they had very different working conditions. Since around 1989 development of the bureaucratic organizations created a complex and specific organizational system where civil servants had a special status (Table 2).

*Table 2. Human resource policy in the new state civil service in 21<sup>th</sup> century (Demmke, Moilanen, 2010, p. 202-203).*

Civil service principles and procedures	General development
Categories with the status of public rights	Yes, but limited to only some categories, nominated for and sworn into only these categories.
Private rights status	A large part of the state civil service employees, working conditions and status further adapted for the private sector
Administrative principles and ethical standards	Classic values (legality, objectivity) preserved as a tendency in the motion toward more ethical regulations, control and responsibility mechanisms, and more ethical officialdom

Civil service principles and procedures	General development
Trends in public employment	Generally small downsizing, need for additional recruitment in certain sectors and several countries, the downsizing trend stopped in many countries.
Social guarantees of employment	The importance of social guarantees of employment is recognized but life-time 'ownership of positions' is reduced. An official can be fired for other than disciplinary reasons as well.
Official career and post-bureaucratic systems	No trends toward a 'best practice' model, retreating from the 'clean forms', bigger variety of the different systems, general tendency toward the post-bureaucratic models
Hierarchy principle	This principle is still important but there is also a trend toward better communication, participation and new organizational structures
Responsibility decentralization	Trend toward greater decentralization, growing understanding that more consistency and unity is needed in the aspect of standards, work conditions and human resources
Mobility between the state and private sector	Growing, but in some countries hindered by the complicated competition situation in the state sector
Leadership	The importance of leadership will keep growing with the tendency toward decentralized responsibility and work characteristic changes. However, there is an increasing mismatch between the leadership hopes and leadership 'reality'.
Career growth	Bigger emphasis on individual growth plans, competency management, lifelong education, elderly employee management issues are gaining importance, but promotion policy remains a challenge
Work performance management and staff assessment	Greater challenges, bigger emphasis on communication and loyalty, better leadership needed in this area of policy
Working conditions	Pressure on salary system in some countries, need for unification of the private and professional work life, worsening working conditions in some countries; need for improvement of working condition attractiveness in some Eastern European countries
Working hours	Flexible hours, in some countries – increased number of weekly working hours
Official dialogue and competency distribution in human resource management	Further decentralization and fragmentation, local differentiation, informal standard definition on EU level
Human resource management and the role of human resources department	Decentralized human resource management department, need for greater consistency in human resource management
Training	Current trend toward investment, lifelong education, greater emphasis on training for elderly officials

Regardless of all the changes, new evidence, scientific research, numerous publications, new developments and reforms, there is still surprisingly little information

on the relationship between the organizational structure, personality and individual's behaviour. Until presently, most experts have offered several explanations of why the civil servants' behaviour and performance differ from those of other employees, for instance, that there are too many rules, too little delegation and decentralization, too much political influence, too little motivation, insufficient performance increase stimuli, no individualized development strategies or instruments, the decision-making procedures are too slow.

In spite of these abundant reforms there is surprisingly little information on the effects of the organizational and human resource management reforms. One of the reasons is obvious and relatively banal. At the beginning of the 21<sup>st</sup> century only some state organizations have carried out the state civil service and human resource assessments. An even bigger exception is the organization's performance assessment (Demmke, 2010, p. 202-203).

Since national, economic, institutional, social and political differences prevail, identification of common achievement, examples worth imitating, and best practices in the field of 'successful human resource management' is still a big theoretical and practical challenge. Thus, analysis of the positive and negative outcomes of the reforms in the state civil service of the EU member countries is one of the biggest problems and difficulties in law, political, and administration research science.

Currently almost all state administrations have integrated such concepts as participation, communication, transparency, change management, performance management, human resource responsibility decentralization, knowledge management, lifelong education, joint quality management, performance-related payment (PRP). Apart from that, many civil services introduced decentralization trends, the organizational structure and requirement procedures have been changed, budgets have been reduced, the models of working hours have been modified, performance management systems have been reformed, and generally speaking – the trend has continued to reach for coordination between the state and private sector. Civil servants are becoming more skilful within the framework of civil service as well, and they require more responsibility, work control, work duty autonomy, transparency, pluralism, flexibility, responsibility decentralization, and involvement in decision-making.

## **2. Competency approach for human capital development in Latvia**

At present, the state administration system reform in Latvia has reached a new stage of development. Essential preconditions have been created for introduction of a unified approach to the human resource management issues in the state administration institutions:

- strategic planning system introduction begun; and
- introduction of a unified state sector employee payment system begun.

When successfully implemented, these reforms will ensure improvement in the state administration legal capacity, but the currently available experience indicates that changes are needed in the existing human resource management processes, so that the reforms would actually take place and their results would match the expectations.

Difficulty to attract, retain, motivate, and respectively educate the employees can be observed in most of the state institutions, including those where payment is higher than in state administration on average. Legislation establishes the framework under which the processes should be implemented, but the rest is up to the managers and personnel specialists. The skills, traditions, and knowledge of the management in the field of human resource management, the communication practice, formulation of the institution's values and mission – all these aspects affect the efficiency of the institution in achieving its goals and vary across institutions; the approach to human resource management instrument application varies as well.

Since Latvia entered the EU, one of the most important instruments in human resource development is the European Union structural funds, as the financing available for the planning period of 2007–2013 for implementation of the activity “Strengthening of human resource capacity” is EUR 12,848,702. As part of the programme, not only the public power enforcement institution human resource capacity will be improved, but also that of the social partners and non-governmental organizations, thus encouraging preparation of fitting human resources for work in public administration institutions and improving the state administration human resource management system, as well as the cooperation between non-governmental organizations, social partners, and public administration institutions.

Consequently, it is necessary to expand the employees' knowledge about the European Union legislation and institutional system. The competency of the state administration employees involved in the European Union fund administration can be raised via the resources of the European Union funds. Also, a system should be created in good time to ensure development of the skills and knowledge that will be necessary for successful presidency of Latvia in the EU in 2015.

In 2005, while implementing the cooperation project “Competence Assessment for the EU Structural Fund management employees” of the State Chancellery, Ministry of Finance, and UN Development Programme, the specific competencies were described that are essential to the EU structural fund management officials.

All in all, three specific competencies were established:

- 1) understanding of the EU structural funds and the basic principles of their activities;
- 2) formation and management of inter-institutional relationships; and
- 3) management of project cycles.

In contrast to the traditional personnel management, the competency approach raises a person's abilities, skills, actions, behaviours, and professional knowledge – all that is used for successful or excellent performance – above the formally defined work duties reflected in work descriptions. The traditional personnel management is based upon systematic work organization and detailed work descriptions, but provide no insight into the expected results and work efficiency indicators. This is the reason

why in the changeable dynamic working environment of the present day the work- or position-oriented approach fails to ensure achievement of the necessary results. The competence approach, in turn, allows discovering, thanks to development and application of competency models, what action by the employee ensures successful or excellent performance, while focusing in human resource management on development of the qualities, skills, and knowledge that fosters the respective action. This approach helps stimulate the productivity and use people's talents, it recognizes the differences between the individual skills that ensure achievement of work results.

## Summary

The personnel development issue must be solved on a professional level. While the organization managers do not realize their personnel knowledge needs, they will keep facing both the economic and psychological problems and frequently causing these problems.

According to expert opinions, the training, requalification, and qualification raising system existing in the state administration in Latvia not only does not encourage change in the state administration, it also often impedes the development of the human capital. The state administration employee training system must be modernized.

The current practice of personnel management in the Latvian state administration can generally be considered as the traditional personnel management with separate ill-coordinated competence approach elements.

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## **THE HUMAN RECOURCES IN BALTIC SEA MACRO-REGION: FACTS, TRENDS AND POTENTIAL RISKS TO FULFILLING THE ‘STRATEGY 2020’ TARGETS**

### **Abstract**

This research into the intense integration of the Baltic States, as a macro-region, into the European and global socio-economic and technological spaces makes use of a conceptual model that is based on the representation of the Baltic region as an environment in which open innovative systems direct their ‘knowledge triangle’ and socio-economic structures towards sustainable development. In view of the priorities of the strategic framework for European cooperation in education and training (Europe 2020), the trends and problems of human resources due to increased mobility, the emergence of new conditions of migration processes, and increasing the total requirements for competence, will be studied.

Specifically, a comparative analysis of the transformation processes taking place in the educational structures of Latvia, Lithuania and Estonia was carried out. It is shown that the traditional structure of higher education is effective in conditions of high mobility in a global society, but it does not correspond to the requirements laid down by the Europe 2020 strategy. One of these contradictions, which need to be resolved, is unevenness and continuity in the provision of educational services. For this purpose, the authors propose a new concept of the educational structure, based on the specification of abstractions of a concept “cloud”, to be applied to the structures of higher education.

**Keywords:** Baltic Sea macro-region, EU policies and strategies, human resource competitiveness, Strategy Europe 2020

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## 1. Introduction

In the rapidly changing economic situation the common problems and challenges that the Baltic region is faced with should be tackled on a regional level – within the European Union according to the ‘EU Strategy for the Baltic Sea Region’. This program of cooperation is an instrument which assists further integration and enhancing of competitiveness of the Baltic States in the European Economic Area. The primary strategic goal of the program is defined as the building of a stable, competitive, and territorially integrated region within the European Union (Ozolins, Reinholde & Rostoks, 2010).

The strategy of the Baltic Sea region is estimated to yield results up to 2013 and is part of the overall strategy of the European Commission, ‘Europe 2020: A strategy for smart, sustainable and inclusive growth’ (COM (2010)2020). The success in achieving the goals of this strategy largely depend on the decisions made in the 27 European states as well as in the states of the Baltic region (COM (2011)17 final). One of the major tasks of integration of the Baltic States into the European Community is overcoming the differences existing within the region and implementation of regional integration of economics, politics and social sphere while preserving national identity.

In this work, *the conceptual model of macro-region* is applied to study the processes of transformation of social and political space in the Baltic Sea region into a unified whole. The first chapter outlines the conceptual principles of our model: formulation of the model itself and the main geopolitical and geo-economic aspects of the Baltic Sea macro-region. The next chapter examines the different social and economic spheres within the limits of the model, and in the conclusion, plans for further research are formulated.

For the description of the model the concepts and approaches by the following authors have been used – Bassel, 1999; Haken, 2006; Melnikas, 2010; Mirwaldt, McMaster & Bachtler, 2010; Auers, 2010. Methods applied in this research involve logical abstraction, and analysis of the concepts and methods published in scientific literature.

## 2. Conceptual model of macro-region

As researchers from the University of Strathclyde have recently stated:

Historically, ‘macro-region’ has mainly been used as a descriptive term applied to a geopolitical subdivision that encompasses several traditionally or politically defined regions. However, the evolution of thinking about regional economic development, the emergence of new policy concepts and approaches, and lessons drawn from existing cooperation programmes, mean that this previously somewhat ‘abstract’ term is increasingly being operationalised as a basis for policymaking. In the EU context, a number of factors are driving this approach. (Mirwaldt, McMaster & Bachtler, 2010, p. 2)

Authors of this paper approach the countries of the Baltic Sea macro-region as an open and nonlinear system. Openness stands for availability of sources and exchange stocks of matter and energy and/or information with the environment in which the system is running (Kirch, Nezerenko & Mezentsev, 2011). Openness and nonlinear structure of the system presuppose the variety of options for further development at certain stages of evolution. Such a choice becomes available when the initial condition of the system is destroyed and differentiations arise between parts of the system or the environment and the system. The differentiation starts with the self-organization processes, which stabilize the system under new conditions or to its destruction (Haken, 2006).

The authors accept that the social system evolves in a direction of sustainable development. The trajectory of this system development has been affected by two groups of forces. One of these groups involves the forces which deflect the development from the sustainable trajectory. The other group represents the forces, which push the development towards the sustainable trajectory. Extreme depletion of resources is a factor in limiting development. When depletion increases, the rate of consumption of resources is reduced, and society begins to increase investments to renew the resources, as can be seen on the example of transport policies of the European Commission (COM(2007) 32 final).

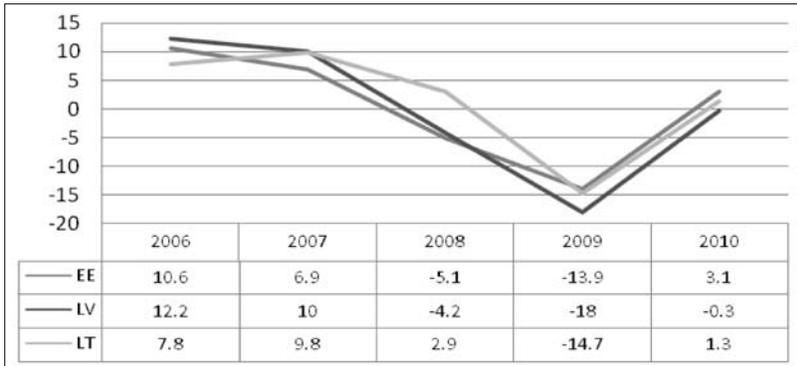
In compliance with the coevolutional approach (Norgaard, 1994), sustainable development is a meta-system which contains the balanced components – human, economic and natural resources. The same can be said about the macro-region.

Macro-regional cooperation is a young field in EU policy-making. It is still in the experimental stage and there remain more questions than answers about the various aspects of the policy. Questions have been raised, for example, about the lack of focus in the policy agenda and about whether macro-regional cooperation is really as ‘bottom-up’ as it seems. However, the most intense debates are related to the place of macro-regional cooperation in the context of other forms of cooperation, funding, and institutional choice, as the UK experts Mirwaldt, McMaster and Bachtler (2010, p. 13) argue.

According to the model discussed here, the European Union and the Russian Federation have adopted the role of “attractors”, under the influence of which the transformational processes has occurred in the Baltic States – Estonia, Latvia and Lithuania. The European Union lies at the core of the model that defines the rules and allocates the resources within the system. The Russian Federation is the major regional power, which is one of the leading suppliers of energy transit, goods, and services in the world.

Despite the fact that in the past 20 years the Baltic States have shifted into the impact zone of one of the attractors – Europe –, the concept of ‘the transformation of social systems’ has been used here. This is due to the fact that the transformation process has not been completed. It can be assumed that the current position of the Baltic States depends on the varying degrees of transformation and integration of these structures into the space of their social and economical systems – thus, into the Baltic Sea macro-region.

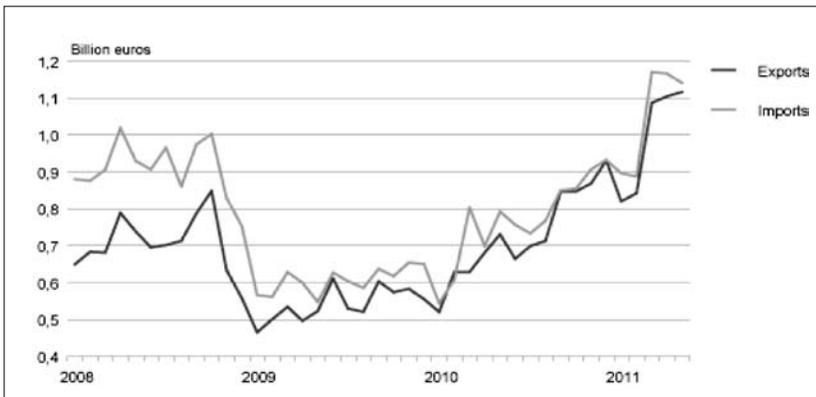
Joining the European Union in 2004 provided the Baltic States with consistent economic development. Figure 1 indicates from the moment of accession to the EU, the GDP in all the three states shows growth tendencies up to 2007, after which the growth rates slow down due to the global economic crisis in 2008. This behaviour of GDP can be interpreted as an indication that the Baltic States membership in the European Union, despite possible crisis situations, provides sustainable economic development.



Source: Eurostat, 2010

Figure 1. Growth rate of GDP volume in Estonia, Latvia and Lithuania – change in percentage in the previous year (2006–2010)

In 2009, the majority of Europe’s post-communist countries, including the Baltic States, could consider themselves modern capitalist societies (Kirch & Inotai, 2009, p. 5). At this time, Estonia was the only one among the Baltic States to join the European Economic Area for which the country had equated their financial showings with the European standards and this financial integration with the European Union became final with Estonia’s joining the eurozone in January 2011.



Source: Statistics Estonia, 2011

Figure 2. Estonia’s trade by months, 2008–2011(Jan–May)

The Estonian economy is once again booming – the annual GDP growth rate may exceed the five per cent threshold this year (i.e. in 2011). According to Statistics Estonia, a new trade record was set in April and in May 2011. The growth in trade was significantly influenced by heavy machinery and equipment and mineral products. In the same year (as seen in Fig. 2), the exports of goods from Estonia amounted to 1.140 billion euros and imports to Estonia to 1.116 billion euros at current prices (in May 2011). The first place among destination countries of exports was held by Finland (14% of Estonia's total exports), followed by Sweden (14%) and USA (10%). The largest amounts of goods were imported from Finland (12% of Estonia's total imports), followed by Germany and Latvia (11% and 10%, respectively). (see Statistics Estonia, 2011).

### 3. Migration process as 'the transit to open society' and Estonian university reform

The transformational processes in Estonia, Latvia, and Lithuania develop in the direction of sustainable development. The development of a society requires the availability of renewable resources. For sustainable development, the renewal of resources should be at least in unrelenting quantity and permanent adequate quality (Daly, 1991).

One of the natural and renewable resources of the Baltic region is transit, which exists because of the unique geographical location of these states. Here, the states of the Baltic region (Latvia, Lithuania, Estonia) and the transit that flows through it, is defined as a system through which the flow of energy, under the influence of which the internal structure, disappears or alters so that the system itself takes on new properties or functions and moves to a new level of interaction with the environment (Haken, 2006). Here, under the energy flow, transit is understood as any movement of goods, ideas, and human resources across the field. (Kirch, Nezerenko & Mezentsev, 2011)

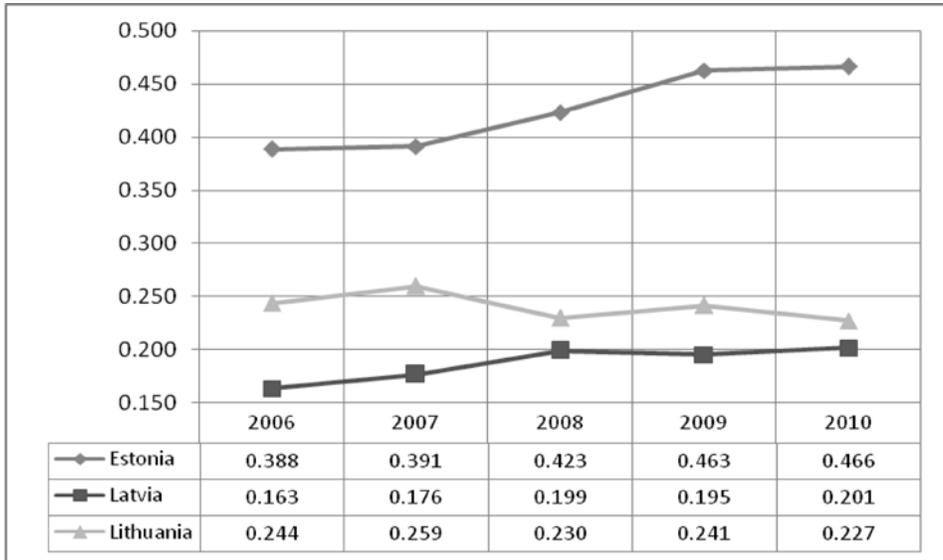
The development of an innovative economy is named as one of the main objectives of the joint efforts of the Baltic States. Figure 3 presents a comparison of innovation opportunities in Estonia, Latvia, and Lithuania with a Summary Innovation Index by ProInno Europe, calculated for the EU-27.

In compliance with this index the states of EU-27 are divided into the following categories:

- 1) Innovation leaders. Denmark, Finland and Sweden all show a performance well above that of the EU-27;
- 2) Innovation followers. Estonia shows a performance close to that of the EU-27;
- 3) Modest innovators. Latvia and Lithuania are well below that of the EU-27.

As can be seen in Figure 3, Estonia is in a good position for the development of an innovation economy. Such a development is greatly focused on education and social services.

Estonia has a tolerant tax policy, good fiscal policy, and electronic environment developed to the maximum. Also, Estonia has good potential for establishing the transit to “open society” for highly qualified resources from Russia for further education, research, and innovation activities.



Source: ProInno Europe

Figure 3. Estonia, Latvia and Lithuania: Normalized Summary Innovation Index calculated over a five-year period (2006–2010)

Within the boundaries of our model, the migration process may be seen as a flow, which originates in the emergence of differences in the socio-economic potential between two regions – the state of origin and the state of choice (see Beine, Docquier & Rapoport, 2001; Čekanavičius & Kasnauskienė, 2008).

Research results show that Lithuanian and Latvian migration is starting to change from a short-term economic migration to a long-term one, because of the family reunion process and the rapidly developing social network (Ireland, the United Kingdom and Spain are the main destinations of Lithuanian emigration). In Lithuania, the emigration flow increased in 2010 about five times compared to 2009, while in Latvia the emigration flow increased in 2010 about three times compared to 2009. According to certain estimations, approximately 12 to 15% of adult Lithuanian citizens have left to work abroad (Gaidys, 2010, p. 29).

In Estonia, migration flows (immigration and emigration) have stabilized over the last few years: in the period from 2005 to 2010, net migration was 13,000 persons and in 2010 – 2500 persons. Estonian migration to Finland today is part of a long-term economical migration. In 2010, about 29,000 Estonian citizens lived in Finland, forming the largest ethnic minority there.

Due to the quality of emigrants, Lithuania and Latvia will be losing investment in human capital in the future, because almost one half of all the emigrants are representatives of the qualified labour force (Daugeliene, 2008; Sedziuviene & Vveinhardt, 2009). Evidently, attracting of knowledge workers in the high tech sector and consequences in the form of accumulation of human capital is the topical issue for Latvia and Lithuania.

The migration processes of highly skilled personnel and side-effects of this process on the development of an innovative economy must be examined. The comparative analysis of transformation processes taking place in the educational structures of Latvia, Lithuania, and Estonia indicates that the traditional structures of higher education are effective in conditions of high mobility in a global society, but do not correspond to the requirements of the Strategy Europe 2020 as a European innovation strategy.

The reasons for these migration processes lay in the globalization processes of the world economy, increasing the mobility of population and enhancing the freedom of self-realization. For the countries participating in the migration process it exerts both a positive and negative impact. The international migration of highly educated people can be regarded as a mechanism of diffusion of knowledge and rotation of scientific personnel, which promotes research and development of educational systems in the recipient countries.

For the state of origin, the migration of highly qualified personnel towards a more comfortable social system means losses in productivity and financial resources of the educational system. The reason for such losses is the migration of teachers, qualified researchers and students, and as a consequence, the impossibility to return the money invested to maintain and develop the educational system which has lost its productivity.

The negative consequences of the migration process could be the following: 1) exhaustion of human resources that lead to lower productivity and underdevelopment; 2) reducing the tax base and reducing investments in education; 3) increasing the poverty and inequality in the country.

According to Estonian researchers, the traditional structures of higher education in Estonia are ineffective, especially in the condition of high competitiveness in a global and European society, which is demanded of such structures in the EU strategy for 2020. One of these contradictions is unevenness and continuity in the provision of educational services. To resolve these contradictions in Estonia, some authors (from universities and the Ministry of Education and Science), in the last months, have proposed a new financial concept of the educational structure for Estonian universities on the grounds of a state-commissioned study (Aaviksoo, 2011).

There are 68,000 students in Estonian universities today and more than half of them (54 per cent) pay tuition fees. Students are accepted to both flows: the basic state-commissioned student places and the places not paid from the state budget. Over the years the proportion of students studying at state-financed student places and at those available for a tuition fee has changed significantly.

The Estonian state contributes a relatively small share to the sphere of higher education and the present situation in training highly qualified specialists is not satisfactory: on the one hand, students very often drop out from tertiary education institutions before graduation; on the other hand, the share of postgraduate students compared to the share of students with bachelor's degrees is very small.

Estonia has lost its position among the innovative EU states. The country's expenditure to higher education sector (index of expenditure per full time equivalent student compared to GDP per capita in 2006) was 60 per cent of the average level of the EU. Compared to Estonia's neighbours Latvia (86 per cent) and Lithuania (84 per cent), this is the lowest share, not to mention Finland (108 per cent) or Sweden (135 per cent), as Eurostat (2009) data shows.

Estonian backwardness in training specialists with doctoral degrees has become one of the most problematic tasks in fulfilling the Europe 2020 Strategy objectives. For example, in Estonia, five times less students graduate the university with doctoral degrees than in Portugal (doctoral students per 1,000 population, aged 20–29; (Eurostat, 2009, p. 72).

Now could be an opportune moment to change this proportion to a fully state-commissioned study; Estonian universities are preparing for a major reforming process in the next 4 to 5 years. In Estonia, modernization of the universities and cooperation with universities in Scandinavia is a key element in enhancing their competitiveness.

Recently, the Finnish researchers Kaivo-oja and Stenvall (2011) proposed a project which is based on the specification of abstractions of the concept "cloud" that could be applied to structures of higher education. The authors agree that the concept of a European "cloud university" is a novel idea to make European universities more competitive in the global setting and provide a broad set of educational services to global customers and citizens of Europe. European universities and research institutes are vitally important in this context. The development of these European institutions primarily requires action within the national and regional systems for higher education, science, and research, in order to provide adequate funding and favourable framework conditions (Kaivo-oja & Stenvall, 2011). This study-platform could be beneficial for all students, doctoral and other, in Estonia. Interestingly, from March to June in 2011 the project 'Educational Strategy for 2012–2020' (with the original title '*Eesti hariduse viis väljakutset, Eesti haridusstrateegia 2012–2020 projekt*') was launched in Estonia. This project enlists five challenges, including a very useful sub-strategy of developing a digital platform for students.

## 4. Conclusions

The strategy of the Baltic Sea region is part of the overall strategy of the European Commission 'Europe 2020: A strategy for smart, sustainable, and inclusive growth' (COM (2010)2020). Success in achieving the goals of this strategy largely depends on the decisions made by the 27 European states as well as the states of the Baltic macro-region.

In order to examine the integration processes in the Baltic Sea region, a conceptual model of an environment consisting of open nonlinear systems was proposed. In the model there are processes of transformation, and the transforming socio-political and economic structures are seen as the processes of sustainable development of macro-region.

One of the major tasks of the continuing integration of the Baltic States into the European Union is to overcome the differences existing within the region and implementation of regional integration of economics, politics and social sphere, while preserving national identity.

Evidently, in Estonia and in the other Baltic countries, an important role is played by the 'knowledge triangle' which is concerned with creating new economic mechanisms (specific business solutions in universities) and creating a new structure (rearrangement) of institutions to carry out a new comprehensive and dynamic innovation model (Kirch, 2010).

The paper introduced the possibilities of the practical implementation of the new educational structure in Estonia to satisfy the priorities of the Strategy Europe 2020. According to the authors, this structure can be created on the basis of existing educational resources in the region, with its centre in Estonia, to support initiatives for larger-scale cross-border cooperation with knowledge-building institutions in the Baltic Sea macro-region.

It was shown that the traditional structures of higher education are ineffective in condition of high mobility in a global society, and they do not correspond to the requirements established in Strategy Europe 2020.

Attracting knowledge workers in the high tech sector and its consequences in the form of accumulation of human capital is a topical issue for the countries which are going through processes of transforming their systems. The migration of highly skilled labour force has been identified as a flow, which has an impact on the economic potential.

Future research on this topic should focus on the problem of migration of knowledge workers in the context of the transit process. External re-migration to the Baltic States should be regarded as a positive factor that influences the development of higher education, research and development.

The research problems for the future could be the following:

- 1) Analysis of processes in the sphere of education and migration of knowledge workers of the Baltic countries in the context of free moving of capital assets, goods, services, people and knowledge;
- 2) Analysis of tendencies of the migration of knowledge workers in Northern Europe and the Baltic countries, and the connected institutional and behavioural mechanisms of adjustment;
- 3) Identification and analysis of the reasons leading to "brain drain" in the context of innovative processes of science and education.
- 4) Estimation of positive and negative aspects of re-migration of knowledge workers of the countries of Baltic Sea within the model of macro-regional cooperation;

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**Tatjana Kulikova<sup>1</sup>**

## **PECULIARITIES OF TRADE ENTERPRISE MANAGEMENT BY USE OF QUALITY MANAGEMENT APPROACH**

### **Abstract**

Each modern trade enterprise is aiming to reach competitiveness. Today, the trade organization is able to favour buyer-supplier collaboration, achieve a strong market position and increase the competitiveness if the management of the company is familiar with the basic ideas of quality management approach and applying these guiding ideas in real business processes. The use of quality management theory helps to choose the effective management tools and becomes necessary supplementation for modern executive to enhance the competitiveness of trade enterprise. Perfect knowledge and use of quality management theory in day to day business processes help executives assess customer requirements and deliver customer satisfaction with the aim of developing a competitive trade company.

**Keywords:** Total Quality Management, management tools, trade enterprise management, competitiveness

### **Introduction**

The rapid growth of the economy in the beginning of the XXI century and expansion of globalization has created greater development possibilities for Latvian trade companies. To keep and develop the position of an organization on the consumer market today, it is very important for the trade companies to develop competitiveness. Competitiveness is the ability of an organization to compete successfully with its commercial rivals. Use of competitive tactics (tactics that strongly positions a company against competitors and gives that company the strongest possible strategic advantage<sup>2</sup>) an enterprise has a possibility to keep and enlarge the current market share. Most of the companies developing the competitive strategy face the problems of implementation of new models of management due to the

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<sup>2</sup> Law, J. 2006; A Dictionary of Business and Management. Oxford University Press. Available at Oxford Reference Online

lack of expert consulting and knowledge about modern management strategies. To involve the suitable management model, it is essential for the management of the company to choose and implement the appropriate tools to help optimize and create efficient business processes in the enterprise. Tactical management, knowledge of the internal environment and efficient use of internal resources can ensure the successful management of business processes in organisation. Today, trade enterprise is carrying out its management strategy based on the classic methods of management and marketing theory. Marketing basics is focused on buyer's satisfaction and the creation of customer, (buyer) value. (Kotler, 1994)

Tactical planning requires assessing the buyer's need and preferences. The question of choice of a best management tool lies besides the most crucial for the modern manager. The market situation requires from the management to develop the competences of tactical planning and proficiency in tactics implementation. Quality management is a proven management tool that helps the management of organization to improve the competitiveness. There are many examples of successful use of quality management techniques in manufacturing industries, however rarely we can find in scientific literature an advice for the managers of an effective way for use of quality management tool as supportive tool that influences the increase of competitiveness of trade enterprise.

## The essence of quality management

Before the concepts and ideas of Total Quality Management (TQM) were formalised, much work had taken place over the centuries to reach this stage. Already in the 1920's statistical theory began to be applied effectively to quality control, and in 1924 Shewhart made the first sketch of a modern control chart (Shewhart, 1931). His work was later developed by Deming and the early work of Shewhart, Deming, Dodge and Romig constitutes much of what today composes the theory of statistical process control. However, there was little use of these techniques in manufacturing companies until the late 1940's. Dr. W. Edwards Deming was the first American quality expert moved to teach Japanese managers methodically about quality. Today the leading Japanese companies successfully implement the quality management principals in everyday management. The approach was farther developed by 'guru of quality' managements like Philip B. Crosby who presented the concept of zero defects; Kaoru Ishikawa, known as "Father of Quality Cycles; and Armand V. Feigenbaum who developed the Total Quality Control principals. There is a general agreement in the literature that the implementation of a TQM system in a company is beneficial for its management and leads to improved performance (Martinez-Costa & Jimenez-Jimenez, 2009). Whether people take one or another type of approach, the major part of the frequently discussed TQM literature provides a common set of principles and concepts, which are considered to be essential elements in TQM. The following key issues are a result of a literature study where the aim was to identify the main principals and concepts in a TQM approach and to determine the recent trend

(Bergman & Klefsjo, 1994) (Dahlgard, Kristensen, & Kanji, 1998) (Deming, 1986) (Juran, 1995) (Kondo, 1993):

1. strong management commitment, leadership, strategically based;
2. continual improvement as a result of a focus on quality;
3. focus on customers, customer-driven organization;
4. total involvement, total commitment, total responsibility;
5. focus on processes, making processes so it works better;
6. actions based on facts, use of SPC and statistical tools, performance measurements;
7. focus on employees, teamwork, motivation, empowerment;
8. learning, training and education;
9. building a TQM culture, organizational change;
10. partnership with suppliers, customers and society;
11. total approach, holistic approach;
12. scientific approach.

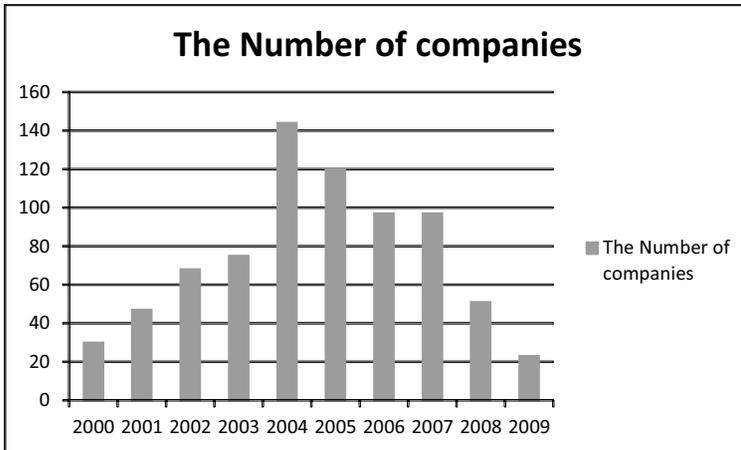
Organizations often look for ways to improve their competitive advantage within their respective industries. Many organizations are unsuccessful at accomplishing this goal without the use of a systematic approach to improve their organizational performance as it relates to quality products or services. Systematic approaches to quality improvement can be achieved with TQM methodologies. Organizational quality objectives, type of industry, and culture often influence the effectiveness on the quality management program (Lee & Lee, 2001). Each of the mentioned aspects is addressed within the frameworks of TQM. Quality management is an approach to establishing a fundamental business strategy (Cheng, 2007). In an effort to provide quality products and services in globally competitive environments, many organizations have invested great amounts of time and resources to establish and maintain quality management programs such as TQM. Some of the successful organizations include; AT&T, IBM, Hitachi, Sony, and Johnson& Johnson (Matthews, 2006).

Although quality management has been well established in manufacturing sectors, it has grown in popularity with non-manufacturing sectors such as retail industry. Quality management has been an integration of achieving and maintaining quality excellence through continual process improvements and prevention of defects throughout an organization to meet customer expectations (Flynn & Schroeder, 1995). Many organizations strive for quality improvements and cost cutting measures through continual improvement activities. These efforts often fail due to poorly structured and lack of leadership support (O'Rourke, 2005). Companies should identify their strengths and weaknesses before carrying out an improvement methodology aimed to improve productivity, product or service quality, and efficiencies (Deros, 2006). Researchers show that more importance should be emphasized with an organization to integrate a comprehensive quality management tactics rather than carrying out individual improvement methodologies. Still there is a lack of practices of implementation of TQM principals in trade organizations.

## Meta-standard in Quality

ISO 9000 was the first and the most popular quality oriented meta-standard, which applies to different industries. In its early development, ISO 9000 was more commonly adopted in the manufacturing industries. ISO 9000 is the most popular meta-standard in management. By the end of 2005, the standard had been adapted by 776,608 companies or business divisions in 161 countries. ISO 9000 is now “a passport to the global business” and a basic requirement for many governments tenders. The number of ISO 9000 certified firms has been increasing dramatically since its introduction 20 years ago (Chris, 2007).

The popularity of Quality Management approach and implementation of ISO 9000 standards had a rapid growth of interest within the middle of the first decade of XXI century also in Baltic States. According to data of Latvian association for quality the number of companies certified until the year 2010 reached 768.



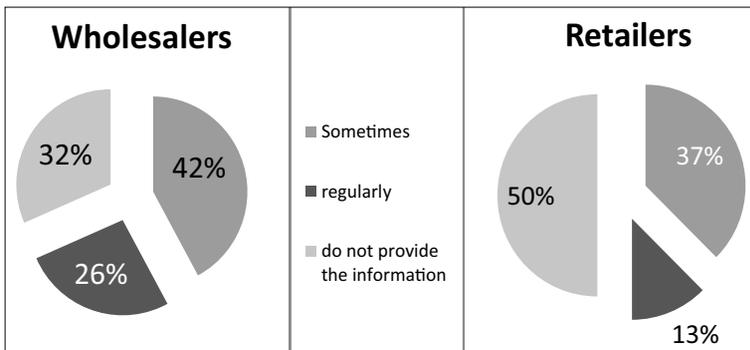
*Chart 1.* Number of companies certified according to quality management standards, chart prepared by author by use of data, published by Latvian association of quality.

The peak of the interest to get the ISO certification was most obvious in 2004 when almost 150 new companies received certification. The loss of interest after the year 2007 can be explained by the economic crises when most of the companies aiming to cut the costs made a decision not to continue a certification. Only 65 companies or 8.5% of the certified companies are occupied in trade industry. Only four of them are dealing with FMCG retail. According to the Latvian association for quality data as well as to the data given by the representatives of the company Maxima Latvia is the only retail chain not only in Latvia but in whole Baltic Countries that was certified according to the ISO 9 000 quality standard. It is obvious that 65 certified companies between about 20 000 companies that are operating in Latvian trade industry count for less than half percent and are dramatically insignificant.

## Quality management in trade organization

Unfortunately while most of the producers are planning or got the quality certification most of the retailers and wholesalers either do not think that the quality processes control is necessary for the business development or is not primary at the current moment. During the research held by the author in the year 2010-2011, the 65% of respondents consider that during the purchasing process they are interested to get quality products proved by certificate, while the other 35% prefer to have the lowest price and do not care about the quality. At the same time the readiness to provide the buyer with information about the quality is less significant and differs among wholesalers and retailers.

Figure 1 shows the significant difference among the readiness of wholesalers and retailers to share the information about the quality with the buyers. While 26% of wholesale companies regularly share the information, only 13% of retail companies do this and 50% of respondents from retail companies never share the information about quality processes and statistics data with the buyer.



*Figure 1.* Information by the respondents in author made research on question “Do you share the information about you quality control processes and statistical data regularly with you customers.”

The small number of retail companies also can be explained by number of problems the management of retail company should solve to reach the desired result. The major part of personnel of retail company is sales force. Most of people have not higher than average education. While the first rule of TQM, strong management commitment is common for every organization’s management and similar in organizations operating in different industries, the second rule of continual improvement as a result of focus on quality is much more difficult to implement in retail organization. On one hand the retail company is the most important in chain of delivery the final quality to the customer. On the other hand the delivery of quality in most of the cases insure not qualified personnel. Learning, training and education of personnel can help in this process. However in order to succeed it is essential to follow with excellent accuracy

the other TQM principal – focus on process and making process work better. In cases when final quality is delivered by not well qualified sales force it is crucial to have the processes perfectly defined to give the sales force precise instruction of action. So the implementation of TQM principals is especially important within retail companies.

Some advice regarding the implementation of a Quality Management approach can be found in James L. Heskett *et al.* publications. In their work on the service profit chain (Heskett, Lessons in the service sector, 1987); (Heskett & Sasser, The service profit chain., 1997); (Heskett, Jones, Loveman, & Sasser, 1994) use the terms “external service quality” and “external service value” as ways to describe how customers access service operations. Regardless of what term they used to designate the concept, they give many far-reaching examples to illustrate the notion. For instance, at Southwest Airlines customers appreciate frequent departures, on-time service and friendly employees besides the low prices they receive (1997). Progressive insurance customers value quick-response damage assessment and claims processing (1994). With each example, while the precise criteria of what makes good “service quality” or “service value” may change, some common categories continuously re-occur. Some of the typical customer demands include: rapid service, knowledgeable and friendly employees, high quality products, convenient service and aesthetically pleasing surroundings. These demands are comprehensive and extend far beyond traditional customer assessment scales found within service management literature (e.g. “service” quality). As such a new assessment tool will be needed.

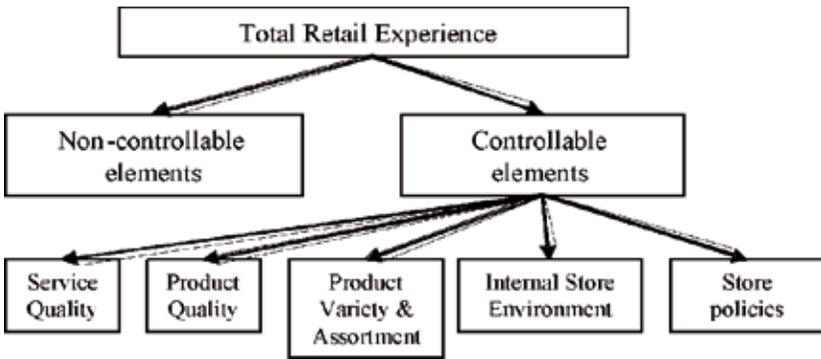


Figure 2. Terblanche and Boshoffs (2001) total retail experience schema

One emerging research construct that closely resembles all the concepts found within Heskett (Heskett, Jones, Loveman, & Sasser, 1994) notion of external service quality is total retail experience. There is a definition of total retail experience as “all the elements that encourage or inhibit consumers during their contact with the retailer”. The examples they include in their theoretical work closely resemble those used by Heskett *et al.* in their work on the service profit chain: superior customer service, knowledgeable and friendly employees, etc (Berman, 1998). Further structure for assessing the dimensions of total retail experience was provided by Terblanche &

Boshoff (Terblanche, *Measuring customer satisfaction with some of the controllable elements of the total retail experience: An exploratory study.*, 2001). Their framework breaks total retail experience into controllable and non-controllable elements. Figure 2 illustrates their structural schema.

Thus in retail organization it is not enough simply to follow and declare about implementation of TQM principals. It is necessary to line the TQM principals with Total Retail Experience Controllable elements.

## Difficulties during implementation stage

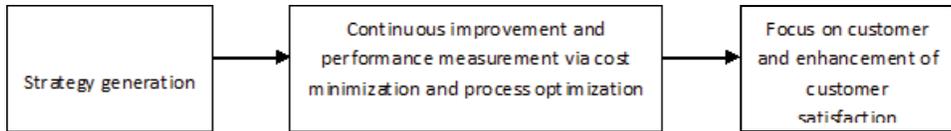
Still some companies not always are satisfied with use and implementations of TQM principals. According to Bain & Company survey the TQM was ranked below the mean within other management tools (Rigby & Darell, 2009). Weaknesses and faults the company faces carrying out the TQM does not appear due to the ineffectiveness of the concept, but because the manager often lacks a clear understanding of where and how to apply the approach. Although most organizations want to improve quality and cut costs, the deployment and implementation of continual improvement methodologies are commonly viewed as a daunting undertaking. Many organizations fail to structure properly or support continual improvement initiatives which ultimately doom them to failure (O'Rourke, 2005). This failure has led to many misconceptions about the results of carrying out improvement methodologies (Arnheiter, 2005).

TQM is a philosophy, not a separate tool. TQM is quality management methodology which provides significant benefits to the organization's financial bottom line. Although documented cases of successful implementation exist, there are documented failures associated with unsuccessful attempts of implementation (Anderson & Eriksson, 2006). These misguided TQM implementation efforts of many organizations led to scepticism of the improvement approach (Tiwari & Turner, 2007). Harari cites ten reasons for TQM program failures including (Harari, 1993):

- (a) focus on internal processes rather than external processes;
- (b) focus on minimum standards;
- (c) development of bureaucracy;
- (d) delegation of quality experts excluding others in the organization;
- (e) lack of organizational change;
- (f) no changes in management compensation;
- (g) no demand for new external partners;
- (h) focus on quick fixes;
- (i) draining innovation;
- (j) utilizing an analytically detached mechanical method.

TQM concept should be a primary guide for the creation of management policy of trade enterprise. Companies often make the mistake using every quality tool and techniques, as a completely separate, isolated quality management tool. The manager

should choose the most successful combination and sequence of selected management tools following the TQM concepts. Following the TQM principals the management process could be combined into three main sequenced management stages:



*Figure 3. Management stages following the TQM principles, author prepared figure*

Organizational success on quality improvement practices requires a strong connection among managerial dimensions and a results-based approach. In general, quality management is identified within seven categories: top-level management, tactical management, customer and market focused management, information management, human resource management, process management, and results-based management. Successful and sustainable quality management should be incorporated through satisfying key aspects of quality improvement. The holistic process of quality management should be conducted in a systematic feedback loop because quality dimensions are mutually influenced by one another in terms of achieving expected results (Holzer, Charbonneau, & Kim, 2009).

## Conclusions

The executives of trade enterprises have a possibility to choose from a variety of different management tools aiming to increase the competitiveness of the managed business unit. Quality management approach is a proven management tool that helps the management of the organization effectively increase the competitiveness of organization. It is already proven that implementation of a TQM system in a company is beneficial for its management and leads to improved performance. TQM principles serve as effective instruments of management in the manufacturing industry. At the same time it is not easy to find examples of implementation of TQM in trade organizations.

ISO 9000 is used as a meta-standard in Quality already in more than 160 countries. However in the beginning of XXI century only several trade organizations in Latvia have got ISO certification. Lack of interest for quality management principles is especially particular for retail organizations. According to the research hold by the author about 50% of retail organizations do not share any information about quality processes and statistical data with their clients. Due to peculiarities of retail industry it is not enough to implement TQM principles but it is necessary to align TQM principles with Total Retail Experience Controllable elements – service and product quality, assortment of goods, internal store environment and store policies.

TQM is not a separate management tool it is a general philosophy. Total Quality Management concepts formulate trade enterprise management policy, choose the appropriate management tools which in combination with Total Quality Management principles help executive to create and follow enterprise general tactics, perform growth and enhance performance due to process optimization, cost minimization and achieving customer satisfaction.

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**Daiva Labanauskaite<sup>1</sup>**

## **STRENGTHENING A COUNTRY'S TOURISTIC ATTRACTIVENESS ON THE GLOBAL TOURISM MARKET**

### **Abstract**

The global tourism market witnesses the increasingly intensifying processes of altering competition and customer needs. There emerges a consumer tendency to choose exotic routes (Asia, America, Pacific Ocean region); therefore, European states must endeavor to increase touristic attractiveness and secure firmer competitive positions in the world tourism market. Another trend typical of contemporary tourism is the evolution of consumer characteristics. As the conditions of global economy customers of the tourism system become more informed and sophisticated, which enhances their ability to put pressure on tourism service enterprises. Competition is taking place not only among tourism service providers, but also among other participants in the leisure services market – entertainment business organizations, trade and leisure centres.

Within the European tourism system the highest potential to increase the market share currently belongs to the Central and Eastern European states, which include Lithuania as well. Seeking to make use of these opportunities, it is indispensable not only to create tourism infrastructure, but also to search for other ways of representing unique tourism services. A person's determination to travel is a complicated process influenced by various factors, which may be analyzed in the social, economic and psychological aspects. World Tourism Organization experts carried out a number of surveys, the goal of which was to determine the aims and presumptions of a touristic travel. It was established that even in the presence of changing leisure and holiday habits and fashions, one of the most important factors for choosing a target travel destination remains the touristic attractiveness of places of interest.

**Keywords:** global tourism market, touristic attractiveness, tourism flows

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## Introduction

According to the scientific literature, the touristic attractiveness of places of interest is frequently associated or even identified with the international image of the country. D. Bernstein (1996) explains the country's image in the international tourism market in terms of the peculiarities of a tourist's behaviour: the way a person behaves with respect to the country, the way he / she perceives the country – as a close or as a distant, closed or open, acceptable or unacceptable; how much a person trusts the information about the country and at what extent he / she is ready to travel to that country. D. Bernstein also found that tourists mainly associate the country's touristic attractiveness with the distance to the country, geographical location, climate, disposed natural or cultural resources, local culture and political situation.

It was also found that the touristic attractiveness assessment of places of interest is largely determined by the personal traits of a tourist and the nature of travel, but in particular by the compatibility of both of these elements. The following personal traits play a significant role in the assessment of touristic attractiveness of places of interest: age, education, and financial situation, belonging to a particular social layer, profession and the position held. In turn, the assessment of the touristic attractiveness of places of interest is also influenced by the travel destination, travel duration, travel motivation, the preferred entertainments, the typology of tourist flows in the target travel destination, the travel type (individual or group), and the size of the travelling group (S. Berardi, 2002).

*The object of the research* – the touristic attractiveness of a country.

*The objective of the research* – to determine the factors strengthening the touristic attractiveness of a country.

*The tasks of the research:*

- To determine the tourism development trends in the international market and the changes in the global tourism market altering the attractiveness of a country; and
- To define the environmental factors strengthening the country's touristic attractiveness

*The problem of the research* is associated with the tourists' changing travelling habits and priorities, which leads to the alterations in the popularity of countries on the international tourism market.

*Methods of the research:* The article is prepared by structuring and generalizing the content of studies carried out by different authors and scholars, and analyzing the tourism development forecasts. Based on the theoretical concept of a country's touristic attractiveness, the analysis of the factors enhancing the country's touristic attractiveness was carried out by applying the methods of systematic, logical and critical analysis, and relating theories with the trends of international tourism development policy.

## Tourism development trends in the global market

When determining the priorities of international tourism development and modeling the future scenario, the analysis of the results of the global economic crisis was deliberately avoided. Firstly, because the economic recession affects all the sectors of the economy and determines the overall economic slowdown, including tourism. Obviously, tourism is particularly sensitive to economic fluctuations – travelling is among the first purchases which are refused during the period of economic recession; on the other hand, travelling has become an integral part of social life, therefore, tourists continue travelling once the economy starts recovering (Berger 2004). It should be noted that the economic slowdown does not reduce the desire to travel. However, on the assumption that travelling increases once the economy starts to recover, it must be acknowledged that the contemporary international tourism industry is facing other much bigger problems – the fear of international terrorism and global epidemics. It emerges that even a single terrorist act reduces the overall number of international travels, and the major terrorist attacks or global epidemics significantly influence the annual indicators of the global tourism business, frequently affecting the results of the next few years. If it was previously maintained that the international tourism business is very quick in responding to both the economic recession and the economic growth, it was observed that after the terrorist attacks and pandemics, tourism recovery is very slowly.

According to A. Vasiliev (2002), after the terrorist attacks in the USA, which led to a reduction in the flows of tourists and travellers, some talks about the global tourism crisis could have been heard. However, despite these pessimistic predictions, the tourism business is becoming more and more important to the social and economic development of many countries. It is this branch of business, which is developing most rapidly, penetrating the outermost regions of the world, even the ones that are rich in natural resources needed for the development of industry. The fact that the tourism business exists in general and is expanding is the indicator of human well being and the growth of cultural level.

According to V. Zinkevičiūtė (2010), under the current conditions, the changes in the tourism business environment are significantly influenced by the concept of sustainable development, which is based on the compromise between the environmental, economic and socio-cultural goals of society. The tourism business must not only respond to these changes, but also has to ground its activity on the concept of sustainable development, thus contributing to the tendentious development of these changes in the global context.

It also has to be admitted that these factors are beyond the control of modern society; thus the only way out is a rapid and efficient response – mostly by the involvement of governmental organisations. Therefore, it can be assumed that the global economic crisis has had less of an influence on the development of the international tourism business, and in particular on the determination of future trends, in comparison to the newly emerging H1N1 pandemic virus in Mexico and the USA. It resulted in a huge impact on tourism, because it originated in North

America, the region, where the scope of tourism slowdown was the most obvious over the last few years. For many years, the United States of America was leading in the world's tourism business, and the number of outgoing tourists was the highest in the world. Recently, however, the relatively still good performance was backed up only by short-term trips – mainly to the Central America. It goes without saying that due to the H1N1 epidemic the total number of travellers in the world declined: it was not simply confined to North or Central America (Malinauskaitė, V. 2009), but also to other far away countries. However, this only secures the positions of the regions less affected by the virus – Asia and Europe, especially Asia, where the number of travellers is steadily increasing. It is safe to say that the host regions are bound to adjust to a maximum to the needs of the incoming tourists so as to maintain at least a minimum number of tourists, sometimes even sacrificing their national identity.

Returning back to the assessment of the outcomes of the global economic crisis and future trends, it can be assumed that China's tourism business should suffer the least in comparison to Europe or America – both in the Old Continent and the USA the middle-income earners were the main travellers. Thus, in the context of the economic recession, the middle-class in particular refuses to engage in unnecessary expenses, including travelling. On the other hand, statistics shows that in China 4 percent of the richest population are travelling. Moreover, considering the newest forecasts of the global GDP growth, China's economic development trends are fairly optimistic.

Europe still remains a big tourist region with a wide differentiation of tourism objects and products. In Europe, an average tourism sector input to GDP is 5 percent. It is forecasted that in 2011 this number will increase up to 6.7 percent (World Tourism Organisation's Vision for 2020, 2010). It is also predicted that in the same year the input to the GDP will considerably increase in India (up to 8.8 percent), and in China (approximately 2 times) (World Tourism Organisation's Vision for 2020, 2010).

However, despite the initial attractiveness of future opportunities, it is necessary to admit that radical social changes in the Asian societies and their impact on the European tourism market have not yet been scientifically researched. Though the significance of the growing number of Asian travellers, newly opening niches and emerging social groups to the future tourism business is recognised as the success guarantee for the future business, there is not much information about the needs of these tourists, their satisfaction and inevitable cultural integration. There is a lack of coherent and systematic approaches to the impact of tourism on cultural levelling; a newly occurring group of tourists from Asia, a culturally very different region, determine the need for scientific research and a respective regional state policy-making (Malinauskaitė, V. 2009). The social tourism functions have been deliberately remembered – as already mentioned, tourism may become the victim of its own success, if it does not develop sustainably. Economic, social and ecological sustainability are the key factors of competitiveness in the territory, welfare of their local people and job creation, preservation and enhancement of natural and cultural sites.

According to the data of the World Tourism Organization (WTO) (2011), international tourism strongly recovered in 2010. The number of arriving foreign tourists in 2009 dropped from 7 percent to 4 percent – this was namely the result of the global economic crisis. Positive indicators of the new places of interest visited by tourists still do not compensate for the damage caused by the crisis (Tourism Highlights 2010, 2010). The recovery in this sphere, as expected, is more obvious in the economically developing countries.

Influenced by the improved economic conditions around the world, international tourism has recovered faster than expected. By the end of 2009, all the regions of the world faced the increase in the number of incoming foreign tourists by up to 6.7 percent (Tourism Highlights 2010, 2010). At the peak of the crisis in 2008, the number of incoming tourists amounted to 913 million, in 2009 this number dropped to 877 million, and in 2010 it has already reached 935 million. This is 22 million more, in comparison to the year 2008 (Tourism Highlights 2010, 2010).

Based on the changes in the global tourism market and the forecast and vision of the World Tourism Organization, by the year 2020 (World Tourism Organization, 2009), the share of the European tourism market should shrink by 10 percent (from 58 percent to 47 percent); therefore, the European states should seek for new measures to enhance attractiveness in order to avoid stagnation in the tourism sector.

The main structural trends of forecasts cannot change significantly. Experience shows that over a short period of time the faster economic growth periods (1995, 1996, 2000) slowed down the economic growth in 2001-2003. Though the growth rate by the year 2000 actually exceeded the vision of forecast of the World Tourism Organization for the year 2020, it is expected that current medium and long-term economic slowdown will meet these forecasts.

Predictably, in 2020, the three most visited regions will include: Europe (717 million tourists), Southeast Asia and the Pacific Ocean (397 million) and North and South America, followed by other regions, such as Africa, the Near East and South Asia. The East Asia and Pacific Ocean, Near East and Africa predict a rapid growth rate, which will amount to around 5 percent compared to the world average of 4.1 percent. Supposedly, in Europe and America, the growth rate will be slower in 2020 (World Tourism Organisation's Vision for 2020, 2010).

In many Eastern European regions, when creating the strategies for social and economic development related to the regional or Euro-regional development, tourism is given a special emphasis. Tourism and related activities are perceived as the panacea when performing regional development actions, which are important for enhancing the impact of tourism on social, economic and cultural cohesion. The tourism industry's impact on regional development justified the expectations of many states, and in the future the tourism sector will remain one of the most rapidly growing economic sectors in the global word economy (Spiriajev, E. 2004).

## Environmental factors strengthening the country's touristic attractiveness

When analysing the determining factors of the country's touristic attractiveness, it is appropriate to overview the scientific conceptions of assessment of tourism environment attractiveness, the experience of other countries and the research results in this area, as well as to determine the newest factors highlighted in the global tourism market, which determine the choice of the city or country as the tourist destination.

When strengthening the touristic attractiveness of the visited sites, the two-way link to the surrounding environment elements is observable: creating and introducing the tourism product to the market, high requirements raised for the tourism environment, while the tourism environment elements in turn affect tourism product production opportunities and develop the tourism product itself. Based on the general methodological concept of the economic environment introduced by Z. Lydeka (2001), the environment affecting the touristic attractiveness of visited sites is described as a set of long-term and short-term outcomes of natural processes, as well as specific actions taken by the market entities and institutions regulating their activities, where the internal and external elements of environment can be distinguished.

The internal environment, or microenvironment, is described as a personified phenomenon, assuming that all participants of business form their own microenvironments (Labanauskaite, 2008). The external environment is a result of the direct actions of the institutions regulating the market players' activity, as well as due to the natural processes (Labanauskaite, 2008). The microenvironment is a non-personified phenomenon.

The elements of the external environment influencing the touristic attractiveness of places of interest can be divided into positive – extensive and intensive – and negative. The positive extensive elements include: the number of employees, the increase in the turnover of material resources, and the construction of new tourism facilities meeting the previous technical level (Labanauskaite, 2008). The positive intensive elements include: upgrading of staff qualifications, formation of new quality infrastructure, effective utilisation of available material resources, objects, and routs (Mikus, 1994). The negative elements include: economic crises, militarization of the economy, growth in foreign debt, political instability, price increase in consumer commodities, unemployment, strikes, criminogenic situation, financial instability, decrease in the individual consumption, unfavourable economic situation, strengthening of tourism formalities, and reduction of foreign exchange quota (Mikus, 1994).

The abundance of negative factors affecting the strengthening of the touristic attractiveness of places of interest highlight the fact that tourism is a very sensitive phenomenon for the environmental impact. Though in recent decades the overall flow of visitors has been steadily increasing worldwide, the intensity of visits to different regions and different countries is changing. Even minor turmoil in the target travel country or another manifestation of negative external environmental factors may discourage the tourist travelling internationally from travelling to this country.

Instead, this traveller might choose a different country that offers a similar economic product of incoming tourism.

The elements of the external tourism environment affecting the touristic attractiveness of places of interest are also divided into static and dynamic (Kiefl, 1994). Static elements include a combination of natural and geographic elements and largely cultural and historic elements. Dynamic elements include socio-cultural, economic, competitiveness, technological and political elements (Labanauskaite, 2008). Dynamic elements have a greater impact on the process of development of the touristic attractiveness of the places of interest, because when changing, they open new opportunities of tourism product modeling. Therefore, namely this group of elements is the object of analysis of this article.

The impact of all these elements on the touristic attractiveness of places of interest is analysed in two directions: in respect to the tourists sending and tourists hosting country.

It was observed that within the international tourism system, in the economically weaker countries the incoming tourism outnumbers the outgoing tourism, and the revenue generated from tourism accounts for a significant part of the national revenue. Therefore, many of the aforementioned countries have to develop and maintain an attractive image in the tourism market. This work has been consistently performed over the years.

According to Bernstein, D. (2001) the substantive impact on the assessment of the touristic attractiveness of the country and its separate regions is based on the following:

- 1) *Distance to the place of interest.* This assessment element of the attractiveness of the place of interest is important for the older tourists and persons who are travelling with small children or in cases where travel time is quite limited.
- 2) *Time.* This assessment element of the attractiveness of the place of interest is especially important for busy people who need to leave and return on a set date.
- 3) *Travel price.* This assessment element of the attractiveness of the place of interest is important for the low-income earners or in cases where the deteriorated economic situation or related rumours enhance the travellers' propensity to save.
- 4) *Destination.* This assessment element of the attractiveness of the place of interest is especially important for those who associate a certain travel to very specific expectations, and when selecting a travel, offered entertainment, the contingent of other guests, etc. are taken into consideration.
- 5) *Reputation of the travel destination among the travellers and the travel agents.* This assessment element of the attractiveness of the place of interest is especially important for all travellers, but it was noticed that the perception of information about the country differs considerably depending on the person's education, age and social status.
- 6) *Safety.* This assessment element of the attractiveness of the place of interest is especially important for older tourists, young girls, and travellers with small

children. It is associated with the crime rate in the place of interest and the chosen form of travel and entertainment.

- 7) *Culture*. This assessment element of the attractiveness of the place of interest is especially important for all travellers; however, certain assessment differences are determined by the differentiation of the tourist age as well as the travel aim and duration.

The liberalization of the political-legal environment, which opened the opportunities for citizens of many countries to travel freely around the world, altered the characteristics of the place of interest related to both the touristic attractiveness and the priorities for tourist travels. When competitiveness in the tourism market gained the global nature, the regional changes reflecting the tourist priorities emerged. The main trends of tourist travels are associated with Europe, covering around 57.8 percent of the global international incoming tourism market, and America (18.5 percent). Europe is unique in the differentiation of its tourism objects and products, and the cultural and historical uniqueness of each state (Tourism Development Strategy of Lithuania until 2015, 2002). One of the fastest growing global tourism markets still remains the East Asian and Pacific Ocean region, occupying 16 percent of the international tourism market. According to the forecast and vision of the World Tourism Organization for 2020 (World Tourism Organisation, 2006), the share of the European tourism market should shrink by nearly 10 percent (from 58 percent to 47 percent). Thus, the European states need to seek for new sources to enhance their attractiveness and uniqueness as well as institute image-building measures in order to avoid stagnation in the tourism sector.

## Changes in the global tourism market altering the attractiveness of countries

Having analysed the data provided by the World Tourism Organization and the international tourism conferences in 2004 and 2005 (Conference in Prague in 2004 “Travel Fashions”, rapporteur L. Cabrini), publications issued by the WTO and the European Travel Commission (Tourism Highlights 2006, 2006, Tourism Trends for Europe 2006, 2006), it can be broadly concluded that factors influencing the tourism growth rate in the world and the changes in the global tourism market:

### Ø *Raises living standards and economic growth of countries;*

Travelling is no longer a luxury for many people; therefore, “last minute” travels are becoming more popular. The popularity of the mass tourism industry is declining; a stronger focus is placed on the ratio of quality and price, and at the same time, everyone is looking for a travel destination that meets their hobbies and needs. The supply of luxury tourist routes is developing as well as the demand for special tourism niches. It should be noted that the increasing income of young people determined the fact that the youth constitute 20 percent of the tourist flow scope.

### Ø *Raises fuel prices;*

Ø *Manifestations of terrorism;*

Ø *Safety during the travel;*

Ø *Increases environmental concerns*

The eco-tourism and rural tourism are gaining increasing popularity.

Ø *Globalisation*, which makes it possible to change the place of residence in another state.

Globalisation also influences the “temporary migration” – first and foremost, foreign students are distinguishable, whose number has reached 600.000, and this number is annually increasing by around 5 percent. People who have friends or relatives abroad travel to visit them and this is especially true for the new European Union states.

Ø *Development of new technologies and the increasing number of Internet users.*

This factor leads to an increase in the competitiveness of tourism enterprises and changes the selection criteria for tourist routes. People refer to a travel agency having already acquired a lot of information about the destination, prices, feedback, and therefore pose higher requirements for the travel agent. Individual travel is becoming more popular (in comparison to travel offered by travel agencies), a person finds and orders online accommodation services, travel tours, transportation. Tourists use the Internet not only when preparing for travel and ordering services, but also after having already reached the destination. Nevertheless, the WTO research shows that tourism enterprises allocate only 3 percent of the total advertising budget to the online marketing measures.

Ø *Changes in the amount of free time and perception.*

This is one of the reasons why the popularity of various electronic services, including tourism booking and payment online has enhanced, and this tendency will only increase in the future. In Europe there is a tendency that people travel more frequently but for shorter periods, therefore, visits various festivals, exhibitions and weekend travels to European cities are becoming more popular.

Ø *Supply of low-cost flights.*

Considering the fact that competition in the global tourism market is getting more intense, and the supply of tourism products is increasingly becoming similar, many countries that are giving priority to the development of tourism are seeking to strengthen their tourist attractiveness through the establishment of identity and image in the global tourism market through event marketing measures.

During an event a potential tourist receives a sent message about the identity of the place of interest – the values which are focused on. The perceived identity is an image, representing the client’s attitude to the product. The identity is understood as the represented values, attitudes, and ideas. The identity and image is distinguished by the source of origin – the identity is created by the consciousness of the sender (enterprise), while the image is formed by the consciousness of the recipient (consumer) (Keller, 1999). The image expresses the perception of separate groups

about the product or brand, i.e. the way the aforementioned groups “decode” the signals, which are sent by a business organisation via the communication channels. The purpose of identity is to define the value, aim and image of the brand within the enterprise.

The consumer perception differs depending on the conditions of the location and time as well as other factors. According to Behrer and Larsson (1998), the main image-building factors include: communication; physical environment; products and services; ethics; social responsibility; relationship with the local community; behaviour of the representatives of the organisation.

A proper positioning of the place of interest on the global tourism market is associated with the ability to distinguish between the brands and strengthens the position in the market and on the consumer’s consciousness for a particular product. The essence of it is to promote the awareness of the brand, which in the ideal case would form a long-term consumer loyalty to the tourism products of a specific locality (Farquhar, 1990).

In order to seek for a more competitive position on the global tourism market, Hoyle (2002) recommends applying three methods of differentiation of tourist attractiveness factors:

- General perspective: a higher value for the same price, reliable products for an affordable price;
- Product perspective: a better/newer/cheaper/unique product; and
- Consumer perspective: a better awareness of the customer, a faster and more flexible response to their needs.

The third method of differentiation is associated with the co-operation relations between the consumer and the organisation. According to Öqvist (1999), the product differentiation strategy should include more cultural elements, which need to be included in the events.

Over a certain period of time the relationship between the consumer and the product may evolve to the loyalty to a brand. The loyalty is characterised by a positive attitude towards the brand through repetitive purchases. Each place of interest seeks maximum customer loyalty, because this ensures stability and an opportunity to occupy a bigger market share and earn more profit. In order to assess if positioning was done correctly, the method of direct sales results is most commonly used.

## Conclusions

1. Summarizing the assessment criteria enumerated in the assessment models for the touristic attractiveness of places of interest, it is possible to state that the influence of the touristic attractiveness of places of interest on the qualitative evolution of a particular territory and tourism development therein primarily manifests itself by the realization of social functions, whereof the main ones are bringing material and non-material goods to the consumption level; servicing of the consumption process; creation of conditions for alternating activity types

and for leisure; ensuring health security and formation of the general educative and cultural-technical level of the population.

2. Based on the changes of the global tourism market and forecasts and vision of the World Tourism Organisation for 2020 (World Tourism Organisation, 2006), the share of the European tourism market should shrink by nearly 10 percent (from 58 percent to 47 percent); therefore, the European states need to seek for new sources enhancing attractiveness and uniqueness as well as partake in image-building measures in order to avoid the stagnation in the tourism sector.

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## SCIENCE, TECHNOLOGY AND INNOVATION POLICY GOVERNANCE IN THE BALTIC SEA REGION

### Abstract

This paper will discuss the governance of science, technology and innovation (STI) policy in the Baltic Sea Region (BSR). With the publication and implementation of the EU Strategy for the Baltic Sea Region<sup>2</sup>, the governance of this macro region should be discussed. STI policy is implemented on local, regional, national and transnational (EU) level and now the new macro region is emerging. The multi-level governance of STI policy in the BSR has not been studied widely. However, there is a need for this kind of analysis. Two parallel governance levels require coordination, but when national and transnational levels are complemented by local/regional policies, the coordination becomes even more relevant. It is important to understand the coordination process and functioning of multi-level policy system. The paper will first analyze the governance of the BSR from the conceptual perspective by summing up the discussions in the literature. To understand the macro region governance level development in STI policy, national strategic policy planning documents available in the ERAWATCH database will also be analyzed. The results of the STI policy documents analysis show that the role of the BSR in the STI policy planning is very limited and in terms of multi-level governance analysis, BSR should be considered as a part of national or supra - national policy making and not as distinct policy level.

**Keywords:** science, technology and innovation policy, Baltic Sea Region, macro region, multi – level policy making, governance

### Introduction

Science, technology and innovation (STI) policy in the Baltic Sea Region (BSR) is characterized by its implementation at several government levels. The policy implementation is understood as activities that public authorities perform in order to reach the specific policy goals in the specific policy field. In some countries the

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<sup>2</sup> European Commission Communication concerning the EU strategy for the Baltic Sea Region. 2009. Available at: <http://www.ec.europa.eu>. Last accessed on 08.06.2011.

number of involved government levels is smaller; for example, in the Baltic States this policy is not implemented by local level authorities, but in Scandinavian countries the local level is more important. However, the understanding of this multi-level policy making and implementation system and its impact on policy results is limited. One part of the limited understanding is related to the actual number of policy levels that should be analyzed. Therefore, it is important to have a clear understanding of the role of the BSR in the existing STI policy mix.<sup>3</sup> The main objective of this paper is to deepen understanding of the STI policy governance in the BSR and the role of the macro region in this policy field. In the context of the paper policy governance is understood as all of the activities that governments and also non – governmental actors perform in order to reach the policy goals. Policy governance is a broader term than the policy implementation and in the context of this paper policy governance is understood as the governance of the policies of STI that are implemented at different government levels in the BSR to reach aims that are specific to the BSR cooperation. The main focus of the paper is the governance of the Baltic Sea Region with emphasis on STI policy.

Why should BSR countries cooperate? What institutional mechanisms can be used for the management of this cooperation? Should BSR cooperation and governance be included in the analysis of STI policy mix? These questions are going to be answered in the paper. The paper has two main goals. First, the desk research of the BSR governance and STI policy initiatives was performed. The desk research helped to find indicators for the existence of governance level and identify the characteristics of BSR governance. To perform desk research, literature that has discussed the governance issues of BSR, was analyzed. Second, based on the conclusions made in the first part, STI policy documents are analyzed. Policy planning documents is a good source of the information and official statements related to specific topics. Of course, the policy planning documents alone cannot completely explain the role of the BSR in the field of STI. The results of the analysis of policy planning documents relevant to the field are described and this analysis helps to understand how the BSR is positioned in the context of STI development. The scope of the study is not all BSR countries, but the following ones: Latvia, Lithuania, Estonia, Finland, Sweden, and Denmark. These countries are unitary and share a common characteristic – a small economy.

## Governance of the Baltic Sea Region – in the development process

In the first part of the paper governance of the Baltic Sea Region is analyzed. In the multi-level science, technology and innovation policy system it is important

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<sup>3</sup> This concept stresses the complexity of policy and analyzes the relations between various policies and implementation levels. The most recent and detailed discussion of the concept can be found in this article - Flanagan, Kieron, Uyarra, Elvira, Laranja, Manuel. *Reconceptualising the „policy mix” for innovation*. IN: Research Policy, 2011. Article in Press.

to understand the role of the activities implemented or referred to in the Baltic Sea Region: what kind of governance structure can be used, and can it be characterized as a governance level? If not, what is it, how it can be governed or managed and what is the role of this region in the whole system? The aim of this analysis is to understand if the BSR and its governance can be included in the analysis when the concept of policy mix is used. The concept of policy mix was first used in the economic policy analysis, however, over the time its use has widened especially to the analysis of environmental policy and lately also of science, technology and innovation policy (e.g. Flanagan, 2011, P.2). The expansion to these fields is logical, because the mentioned policy fields are very rich in policies coming from different levels and initially different policy fields. The concept of policy mix says that the interactions of different policies or different policy levels that target the same problems influence the results of this policy (Flanagan, 2011, P.2).

The concept of policy mix helps to explain the relationships between policies implemented at various levels of government. This concept is newer than the concept of multi – level governance and is less developed (Laranja, 2008, Pp. 823. – 835). The concept says that at different government levels different organizations implement policies that target the same problem/-s. The concept offers a model of policy coordination to mobilise the resources for the achievement of goals (Sandu, 2003). In the table below it is illustrated that policy dimensions create policy mixes, interaction forms and potential sources of conflict.

**Table 1. Conceptualizing policy mix interactions: dimensions, types and potential sources of tension**

Interaction dimensions	Interaction forms
Policy space	Between different instruments with the same target group
Governance level	Between different instruments with different target groups which are involved in one process
Geographical space	Between different instruments with different target groups in a wider system
Time	Between similar instruments (in different dimensions)
Potential tensions between policies	
Conflicting rationales	
Conflicting aims	
Conflicting implementation approaches	

Source: Flanagan, Kieron, Uyerra, Elvira, Laranja, Manuel. *Reconceptualising the „policy mix” for innovation*. IN: Research Policy, 2011. Article in Press.

The considerations in this part of the paper are based on the literature review about governance mechanisms at transnational level. Only a few authors have considered in

detail the governance of the BSR.<sup>4</sup> Ideas of these authors will be discussed here. Iveta Reinholde has considered the governance of the Baltic Sea Region Strategy which was adopted in 2009. One of the scenarios Reinholde is describing is creation of a central, responsible EU body. This governance option would be predictable in its activities, but it could also develop into an even larger bureaucratic organization (Reinholde, 2010). James Wesley Scott has concluded that EU and national levels are those who dominate in the BSR when governance guiding principles are defined (Scott, 2003, P. 148.). So far no new administrative bodies for the BSR governance are created. However, this scenario cannot be excluded, because there have been claims to save the money for the implementation of BSR Strategy in the new planning period 2014 – 2020. Whether this scenario will come true on a great scale depends on the success of results of the current activities. Some of the cooperation initiatives in the BSR so far have resulted in institutionalization; for example, the creation of Nordic Council of Ministers. On the other hand, there can also be objections to this scenario, because new institutions would create risk of overlapping and duplication of activities (Schymik, 2009, P. 11.). So far no new governing or administrative institutions for BSR Strategy governance are created which means that from the perspective of policy mix concept all of the activities and initiatives related to the region should be analyzed as part of the national, EU or local policy analysis. Separate science, technology and innovation policy at the BSR level cannot be identified, because it lacks several features. For example, its own budget and governing body to name just the important ones. However, there have been claims to save a budget for the BSR activities<sup>5</sup> and if this is done, new governing institutions may be needed.

The second scenario that Reinholde proposes is implementation and governance of the BSR Strategy with the help of policy networks. According to the author these networks are made of already existing organizations, government institutions, NGOs and other actors that cooperate and interact in various ways to reach goals that are related to the BSR. The Strategy would work as a framework for cooperation. In this case the success of governance of BSR will depend on the strength and capacities of the individual actors that are involved in these networks (Reinholde, 2010). The third scenario is governing of the implementation of BSR Strategy in the scope of multi-level governance. This would mean that the governance is organized as a negotiation between various levels of government (Reinholde, 2010). As it was concluded that there is no separate BSR STI policy, the multi – level governance scenario seems to

<sup>4</sup> For examples see the following articles: Reinholde, Iveta. *How to Govern the Strategy? Whether to Govern at all...* IN: Ozoliņa, Žaneta, Reinholde, Iveta, Rostoks, Toms. *EU Strategy for the Baltic Sea Region: A Year After and Beyond*.

Zinātne, 2010.; Anderson, James, O'Dowd, Liam, Wilson, Thomas. *New Borders for a Changing Europe: Cross-border Cooperation and Governance*. Frank Cass Publishers, 2003.; Kapaciauskaite, Ieva. *Environmental governance in the Baltic Sea Region and the role of non – governmental actors*. *Procedia Social and Behavioral Sciences*, 14, 2011.

<sup>5</sup> Baltic Development Forum. *BDF advocates Strategy Funding before Members of European Parliament*. Available at: [\\_http://www.bdforum.org/show/english/news/funding\\_eu\\_bsr\\_strategy.aspx](http://www.bdforum.org/show/english/news/funding_eu_bsr_strategy.aspx)

be the most appropriate one to describe the BSR governance. This governance model has already been used to describe the current situation (Kapaciauskaite, 2011, P.92.). Fourth scenario that Reinholde proposes is the project management approach to the BSR Strategy. From the perspective of project management approach the Strategy should be analyzed with the help of SMART methodology (Reinholde, 2010, P. 51.).

When analyzing Baltic Sea Region from the perspective of environmental policy, Kristine Kern and Tina Laffelsend distinguish several governance regimes besides the nation state – intergovernmental cooperation, governance by transnational policy networks, transnational networks and supranational institutions. Authors label the governance by international regimes and intergovernmental cooperation as traditional form of governance beyond the nation state, but the governance by transnational policy networks is a newer form of governance and has emerged in recent years. The next form of governance – governance by transnational networks – is different from the others two so far mentioned, because it doesn't include national government actors and is also called a self-governance. These transnational networks implement their strategies by internal network governance. With governance by supranational institutions authors mean the European Union and adding of this supranational element creates a multi-level governance system that was also mentioned by Reinholde. Authors emphasize that EU has become a very important player in the BSR governance. This again indicates that BSR issues are just a part of transnational policy making. What is important is that authors conclude that most of the various actors in the Baltic Sea Region “orient themselves towards Brussels” (Kern, 2008, Pp. 117. – 132.). This indicates that the transnational level is dominant in the BSR governance and the governance of the BSR could be seen as a part of EU activities. However, the national governments and executives still have their say in the activities around the BSR, therefore it would be more precise to describe the governance of the BSR as multi-level governance where the transnational level is dominant and coordinates the activities.

Joas, Jahn and Kern state that at least in the field of environmental policy in BSR nation states are under pressure in terms of governance responsibilities, because other political agents are raising their power (Joas, 2008, P. 1.). The same cannot be said ultimately about all the other policy fields, however, it's clear that this trend is prevalent in specific policy fields, including, science, technology and innovation policy. Both policy fields – environment and STI policy – are two corner stones of the BSR cooperation and Strategy. And the BSR cooperation, although involving national states, is one of the aspects that decrease the role of national level in the whole governance system.

Also Bengtsson has identified several governance challenges related to the Baltic Sea Region and its Strategy. Those are absence of specific budget, two-tier construction of coordination, some countries more involved than others and monitoring of implementation (Bengtsson, 2009, Pp. 6.-7.). The unclear status of BSR governance is dangerous, because coordination between various policy levels and activities related to the BSR development is not completely clear (Bengtsson, 2009, P. 9.). BSR and

its governance is still in the development phase, however, before further activities are implemented, it is necessary to have a better understanding of who does what.

The uneven economic development, investments in science and technologies and governance capacities in the BSR complicate the governance issue still further. At the same time it has to be taken into account that BSR in general is considered as a “pioneer in the introduction of new modes of governance” (Joas, 2008, P.6.) and as outlined in the Strategy for the Baltic Sea Region, there are many reasons to strengthen the BSR cooperation.

## **Governance of the science, technology and innovation policy in the Baltic Sea Region**

Environment and innovation can be defined as one of the cornerstones of the BSR cooperation and it mirrors also in the BSR Strategy. BSR very often is described as innovative, high knowledge potential region. On the one hand there are no official bodies that are responsible only for the policy at the BSR level; on the other hand, several initiatives that promote STI in the BSR exist on national and EU level. According to the ERAWATCH database there are several hundreds of organizations that are involved in the STI policy making in BSR. So far, only environmental policy in the BSR has been analyzed in detail, because inter-governmental cooperation has concentrated on this topic. However, no or very limited attention has been paid to the STI policy. Therefore, in the second part of this paper the STI policy in the context of BSR is going to be analyzed. To better understand the vision of STI policy at the BSR level, policy documents of 6 BSR countries were analyzed. The analysis concentrates on what the national STI policy planning documents say about the BSR level – is it mentioned in the policy documents at all, is it relevant, in what context is it mentioned, what is the foreseen role of the BSR in the STI policy perspective. The results of policy documents analysis are described in each country and at the end common features and differences are analyzed.

To understand the development of macro region governance level in STI policy, national strategic documents available in the ERAWATCH database were analyzed. The search criteria for policy planning documents in the data base were as follows: national profiles of Latvia, Lithuania, Estonia, Denmark, Sweden and Finland; all research policy priorities that are listed in the data base; official government documents (white papers) and discussion/strategy documents. Based on these search criteria the data base selected 4 policy documents for Denmark and Estonia, 13 policy documents for Finland, 6 policy documents for Latvia, 2 policy documents for Lithuania and 5 policy documents for Sweden.

### **STI policy planning documents analysis for Sweden**

For Sweden the following policy documents were analyzed - Innovative Sweden - A strategy for growth through renewal; Government bill: Research for a Better

Life; New World - New University; VINNFORSK - VINNOVA's proposal to improved commercialization and increased returns in growth of research investments at universities; Sweden's reform programme for growth and employment.

Baltic Sea Region is mentioned in the strategy for growth and renewal – Innovative Sweden which was prepared by the Ministry of Industry, Employment and Communications under the Ministry of Education in 2004. Baltic Sea Region is described as an option for new opportunities, because of the enlargement of EU. It is also stressed that Sweden has to focus on dynamic markets and again the BSR is mentioned as such.<sup>6</sup> In the document “VINNFORSK – VINNOVA's proposal to improved commercialization and increased returns in growth of research investments at universities” it is stressed that Sweden should cooperate with Denmark and other Scandinavian countries in specific issues, but other BSR countries are not mentioned.<sup>7</sup> Scandinavian countries are referred to also in the “Sweden's reform programme for growth and employment” where these countries are mentioned as an example in reforms that rest of the Europe agreed on in the Lisbon agenda.<sup>8</sup> At the same time it should be mentioned that VINNOVA which is a Sweden innovation agency is deeply involved in the BSR cooperation in the field of innovation – it has initiated the creation of a common BSR innovation support programme BSR Stars and is a leading partner in the project StarDust which is a part of the BSR Stars programme.<sup>9</sup>

## STI policy planning documents analysis for Denmark

For Denmark the following policy documents were analyzed - Denmark's National Reform Programme; Denmark's National Reform Programme (Progress Report); Progress, Innovation and Cohesion - Strategy for Denmark in the Global Economy; Action plan of the Danish Council for Strategic Research - Research that counts.

In the section devoted to the public research in the “Denmark's National Reform Programme” Norway, Sweden and Germany are referred to as examples for creation of new instruments and measurement for scientific work quality evaluation. Transnational programmes around the Baltic Sea are mentioned in the documents, but not related to specific goals or activities.<sup>10</sup> Other Nordic countries are also mentioned

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<sup>6</sup> *Innovative Sweden - A strategy for growth through renewal*. Ministry of Industry, Employment and Communications under the Ministry of Education. 2006. P. 9. – 24.

<sup>7</sup> VINNOVA. *VINNFORSK – VINNOVA's proposal to improved commercialization and increased returns in growth of research investments at universities*. P. 116. Summary available at: [www.vinnova.se/upload/EPiStorePDF/vfi-03-01.pdf](http://www.vinnova.se/upload/EPiStorePDF/vfi-03-01.pdf)

<sup>8</sup> Government of Sweden. *Sweden's reform programme for growth and employment*. P.7. Available at: <http://www.regeringen.se/content/1/c6/05/97/82/093d55f9.pdf>

<sup>9</sup> VINNOVA. *EU Strategy for the Baltic Sea Region*. Available at: <http://www.vinnova.se/en/EU-international-co-operation/EU-strategy-for-the-Baltic-Sea-region/>

<sup>10</sup> Danish Government. Denmark's National Reform Programme. Available at: <http://uk.fm.dk/Publications/2008/1642-Denmarks%20National%20Reform%20Programme/-/>

in the progress report for National Reform Programme stressing that they show better results in the number of research grants awarded to the researchers.<sup>11</sup> The same as in Sweden, in Denmark Nordic cooperation in STI is more pronounced than BSR cooperation. Danish Agency for Science, Technology and Innovation in the context of international cooperation distinguishes European Cooperation, Global cooperation and Nordic cooperation and not BSR cooperation.<sup>12</sup>

## STI policy planning documents analysis for Estonia

For Estonia the following policy documents were analyzed - Action Plan for Growth and Jobs 2005- 2007 for implementation of the Lisbon Strategy; Knowledge - based Estonia: Estonian Strategy for Research and Development 2002-2006; National Strategic Reference Framework 2007-2013 and Operational Programmes; Estonian Strategy for Competitiveness 2009-2011; Estonian National Development Plan for the Implementation of the EU Structural Funds. Single Programming Document 2004-2006; Progress Report on the Action Plan for Growth and Jobs 2005-2007. For implementation of the Lisbon Strategy; Knowledge-Based Estonia. Estonian Research and Development and Innovation Strategy 2007-2013; Estonian Action Plan for Growth and Jobs 2008-2011 For implementation of the Lisbon Strategy .

In the section for international cooperation of the document “Knowledge-based Estonia. Estonian Strategy for Research and Development 2002. – 2006.” it is stressed that geographical tie with Baltic Sea Region should be taken into account to develop international cooperation.<sup>13</sup> In the “National Strategic Reference Framework 2007-2013 and Operational Programmes” it is stressed that Estonia has opportunities to develop cooperation and relations between Baltic Sea States, but Scandinavian countries are stressed especially. It’s also highlighted that BSR is a fast developing and perspective region where competitive countries are based. In the same document it is also stressed that priorities of Estonian territorial cooperation are related to internal borders (Latvia, Finland) and it is said that Estonia will participate in transnational cooperation of the Baltic Sea Region.<sup>14</sup> In one of the latest policy planning documents

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media/Publikationer/Imported/2008/1642-Denmarks%20National%20Reform%20Programme/978-87-7856-891-5.pdf.ashx

<sup>11</sup> Danish Government. *Denmark's National Reform Programme*. Available at: <http://uk.fm.dk/Publications/2008/1642-Denmarks%20National%20Reform%20Programme/-/media/Publikationer/Imported/2008/1642-Denmarks%20National%20Reform%20Programme/978-87-7856-891-5.pdf.ashx> P. 12.

<sup>12</sup> Danish Agency for science, technology and innovation. *International*. Available at: <http://en.fi.dk/international>

<sup>13</sup> Secretariat of Research and Development Council. *Knowledge-based Estonia. Estonian Strategy for Research and Development*. P. 28.

<sup>14</sup> Estonian Ministry of Finance. *National Strategic Reference Framework 2007 – 2013 and Operational Programmes*.

“Knowledge-Based Estonia. Estonian Research and Development and Innovation Strategy 2007-2013” more specific activities related to the BSR are mentioned, for example it is written that when creating a network of Estonian core laboratories, the needs of the Baltic Sea Region will be considered especially. However, still comparisons are made with Scandinavian countries that are leaders in Europe in research and innovation.<sup>15</sup> In the ERAWATCH country report for Estonia in 2009 it is concluded that at least in the case of research infrastructures no progress can be identified in establishment of shared research infrastructures in the Baltic Sea Region.<sup>16</sup>

## STI policy planning documents analysis for Finland

For Finland the following policy documents were analyzed - Education and Research 2003-2008: Development Plan; Education and Research 2007-2012: Development Plan; Evaluation of the Finnish National Innovation System; Government Programme of Prime Minister Matti Vanhanen's second Cabinet; Government Resolution on the Structural Development of the Public Research System; Government statement on Innovation Policy; Government Strategy Document 2007; Knowledge, innovation and internationalization; Review 2008; Strategy for the internationalization of Finnish higher education institutions; The Lisbon Strategy for Growth and Jobs - The Finnish National Reform Programme 2005-2008; The Lisbon strategy for growth and jobs 2008-2010 - The Finnish National Reform Programme; The Lisbon Strategy for Growth and Jobs - The Finnish National Reform Programme 2005 - 2008: Annual Progress Report (2006).

In the “Education and Research 2003 – 2008 Development Plan” it is stated that Nordic cooperation will have a growing role as education and research internationalize.<sup>17</sup> In the same document for 2007 – 2012 Nordic activities are extended to the BSR stating that research cooperation will become an integral part of BSR, because there are common interests.<sup>18</sup> In the “Government Resolution on the Structural Development of the Public Research System” it is stated that cooperation in the BSR has intensified and this needs particular attention in the context of

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Available at: [http://www.strukturifondid.ee/public/inglisekeelsed\\_dokumendid/Estonian\\_NSRF\\_21June07\\_ENG.pdf](http://www.strukturifondid.ee/public/inglisekeelsed_dokumendid/Estonian_NSRF_21June07_ENG.pdf)

<sup>15</sup> Ministry of Education and Research; Ministry of Economic Affairs and Communications. *Knowledge-Based Estonia. Estonian Research and Development and Innovation Strategy 2007-2013* Pp. 3. - 27. Available at: <http://www.hm.ee/index.php?0&popup=download&id=5961>

<sup>16</sup> ERAWATCH. *Country report 2009: analysis of policy mixes to foster R&D investment and to contribute to the ERA: Estonia*. P.42.

<sup>17</sup> Finland's Ministry of Education. *Education and Research 2003 – 2008 Development Plan*. P. 13. Available at: [http://www.minedu.fi/OPM/Julkaisut/2004/koulutuksen\\_ja\\_tutkimuksen\\_kehittamissuunnitelma\\_2003-2008?lang=en](http://www.minedu.fi/OPM/Julkaisut/2004/koulutuksen_ja_tutkimuksen_kehittamissuunnitelma_2003-2008?lang=en)

<sup>18</sup> Finland's Ministry of Education. *Education and Research 2007 – 2012 Development Plan*. P. 45. Available at: <http://www.minedu.fi/export/sites/default/OPM/Julkaisut/2008/liitteet/opm11.pdf?lang=f>

international science and technology cooperation.<sup>19</sup> In the “Government Strategy Document 2007” it is stated that Finland’s government advocates strengthening of the role and importance of the Baltic Sea Region within EU.<sup>20</sup>

## STI policy planning documents analysis for Latvia

For Latvia the following policy documents were analyzed - Guidelines for Development of Science and Technology for 2009–2013; Latvian National Development Plan for 2007–2013; Law on Research Activity; National Lisbon Programme of Latvia for 2005–2008; National Strategic Reference Framework of Latvia 2007–2013; Programme for Promotion of Business Competitiveness and Innovation for 2007–2013; Report on Progress in Implementation of the National Lisbon Programme of Latvia for 2005–2008.

In the middle term planning document “National Development Plan 2007 – 2013” it is stated that Baltic Sea Region is economically active, but also related to security risks due to its location.<sup>21</sup> Despite that, it is stressed in this document that Latvia should facilitate deeper integration of the Baltic Sea Region.<sup>22</sup> Differently from other countries that position themselves in the BSR, in Latvia it’s not only the whole country that is positioned, but specifically the capital city Riga that is identified as a metropolis in the BSR.<sup>23</sup> Another difference from other countries is that in the policy planning document BSR is positioned not only in terms of economic and science cooperation, but also as a region with common identity.<sup>24</sup>

## STI policy planning documents analysis for Lithuania

In case of Lithuania the following policy documents were analyzed – Long-term development strategy of the state; Long – term economic development strategy of Lithuania until 2015; Lithuanian innovation strategy for the year 2010 – 2020.

<sup>19</sup> Government of Prime Minister Matti Vanhanen. Government Resolution on the Structural Development of the Public Research System. P. 1. Available at: [http://www.minedu.fi/export/sites/default/OPM/Tiede/tutkimus-\\_ja\\_innovaationeuvosto/TTN/erillisraportit/liitteet/resolution\\_2005.pdf](http://www.minedu.fi/export/sites/default/OPM/Tiede/tutkimus-_ja_innovaationeuvosto/TTN/erillisraportit/liitteet/resolution_2005.pdf)

<sup>20</sup> The 2nd Government of Prime Minister Matti Vanhanen. *Government Strategy Document 2007*. P. 82. – 90. Available at: <http://vnk.fi/julkaisukansio/2007/j18-j19-hallituksen-strategia-asiakirja/pdf/en.pdf> Last accessed on 14.06.2011.

<sup>21</sup> The Ministry of Regional Development and Local Government of Latvia. *National Development Plan 2007 – 2013*. Available at: <http://www.nap.lv/page/332> P. 11. Last accessed on 14.06.2011.

<sup>22</sup> Ibid. P. 31.

<sup>23</sup> Ibid P. 33.

<sup>24</sup> The Ministry of Regional Development and Local Government of Latvia. *National Development Plan 2007 – 2013*. Available at: <http://www.nap.lv/page/332> P. 34. Last accessed on 14.06.2011.

In the document “Long – term development strategy of the state” Baltic Sea Region is more associated with the trade and transport opportunities – it’s an important hub for these activities.<sup>25</sup> In the “Long – term economic development strategy of Lithuania until 2015” Baltic Sea Region is identified as a partner in EU to influence the decision making.<sup>26</sup> In the same document it is also rather ambitiously stated that BSR will be the most progressive part of the EU.<sup>27</sup> In the “Lithuanian innovation strategy for the year 2010 - 2010” it is stated that one of the objectives for innovation development is to participate in the implementation of the Strategy for the Baltic Sea Region.<sup>28</sup> This can be interpreted as a message that in Lithuania BSR and its Strategy is considered as one of the tools in the STI policy.

## What is the role of the Baltic Sea Region in the innovation strategies?

As the analysis of the STI policy planning documents in six BSR countries shows, the role of the BSR in the STI policy is not significant, therefore it can be concluded that it’s not necessary to distinguish the activities related to the BSR in the context of the STI policy mix. However, policy analysts should follow the developments in the BSR in the context of STI policy, because there are several signs that signal more coherent and deeper cooperation and activities at this level.

One of the tendencies that can be identified in the policy planning documents of Sweden, Finland and Denmark, is that more attention is paid to the Nordic cooperation in STI which already has its traditions and roots. Not only STI policy documents signal this, but also the quick analysis of the information available in the home - pages of the various research organizations in these countries. For example, the Academy of Finland<sup>29</sup> identifies Nordic cooperation as one of the international cooperation activities instead of the Baltic Sea Region. Similar conclusions can be made also about the Baltic cooperation, for example, in the format of Baltic Assembly and Baltic Council of Ministers. Both organizations more and more address the STI issues. This again indicates that BSR initiatives should not be specifically distinguished

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<sup>25</sup> Seimas of the Republic of Lithuania. *Long –Term Development Strategy of the State*. P. 8. Available at: [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=219184](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=219184)

<sup>26</sup> Ministry of Economy of the Republic of Lithuania. *Long – Term Economic Development Strategy of Lithuania untill 2015*. P. 17. Available at: [http://www.ukmin.lt/en/strat\\_prog/longtermstrategy/](http://www.ukmin.lt/en/strat_prog/longtermstrategy/)

<sup>27</sup> Ministry of Economy of the Republic of Lithuania. *Long –Term Economic Development Strategy of Lithuania untill 2015*. P. 17. Available at: [http://www.ukmin.lt/en/strat\\_prog/longtermstrategy/](http://www.ukmin.lt/en/strat_prog/longtermstrategy/)

<sup>28</sup> Government of Republic Of Lithuania. *Lithuanian Innovation Strategy for the Year 2010 – 2020*. P. 7. Available at: [http://www.ukmin.lt/en/strat\\_prog/](http://www.ukmin.lt/en/strat_prog/)

<sup>29</sup> Web page of the Academy of Finland. *Nordic Countries*. Available at: <http://www.aka.fi/en-GB/A/Academy-of-Finland/International/Nordic-countries/>

in the analysis of interactions between several government levels. The rather irrelevant role of the BSR in the STI policy planning documents partly may be explained by the diverse science and innovation performance in the region which complicates the potential cooperation.

## Conclusions

Studies of the STI policy governance in the BSR are rare and need to be expanded, because this field is one of the cornerstones of the EU Strategy for the Baltic Sea Region and the development of a macro region foresees challenges related to its governance. Much more detailed valuable literature is available on the environmental policy governance in the BSR, because environment is a central element of the BSR cooperation, but also STI is identified as one of the BSR strong points, therefore studies about governance of this field should be extended. In this article only the analysis of the official STI policy documents was carried out, but there are other options to analyze the governance of the STI policy in the BSR that can be extended.

According to the literature review about the governance of BSR, it's a complicated issue both from the perspective of practice and conceptual analysis. However, the main conclusion is that BSR and activities related to it should be analyzed as a part of national, transnational, local governance or rather as a part of multi – level governance system. The analysis of this region cannot be distinguished and separate policies cannot be identified. Therefore, BSR as a governance level cannot be distinguished in for the analysis of policy mix in the region. The analysis of STI policy planning documents also demonstrates this very well. It can also be concluded that there are various possible BSR governance forms, but in the nearest future centralized and bureaucratized governance structure will not appear. Still, with further development, the role of BSR can grow and in this case the questions addressed in this paper should be reconsidered.

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Zane Zeibote<sup>1</sup>

## EUROPEAN INTEGRATION AND CO-OPERATION FOR COMPETITIVENESS IN THE BALTIC SEA REGION

### Abstract

This paper is focused on the integration of the Baltic Sea Region (BSR) during the 1990s facilitating the European Union (EU) enlargement by including the three Baltic States and Poland in the EU in 2004. The paper will analyze the importance of regional institutions and initiatives created during the 1990s which are still playing a vital role in promoting and coordinating regional cooperation in BSR, and have been further strengthened by the new EU Strategy for the BSR adopted on June 2009. The alignment of broader rules and regulations through the EU accession process proved to be even more critical to facilitate deeper integration of the Baltic Sea Region, as well as to reduce impacts of global economic shocks influencing the integration and competitiveness of the BSR. The Author argues that international competitiveness and integration into regional and global economy of the three Baltic States and Poland is still insufficient and it is well reflected by the recent economic crisis. After the economy will return to a normal state, competitiveness will be even more important for improved economic performance, increased regional integration and minimized exposure to global economic shocks.

**Keywords:** Baltic Sea Region, integration, competitiveness

### Introduction

Since Hanseatic times, countries in the Baltic Sea Region (BSR) have been linked by common cultural, historical, political and economic ties. A network of regional institutions and a regular political dialogue, and practical co-operation have been established and still effectively function between countries of the BSR since the early 1990s. In this paper the Baltic Sea Region is defined to include the Baltic countries (Estonia, Latvia, Lithuania), the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), northern Germany, northern Poland and most parts of Russia's Northwestern regions. This paper will assess the integration of BSR through the institutional networking considering that it includes the European Union

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member states (Finland Sweden, Germany, Denmark, Poland, Latvia, Lithuania, Estonia) countries of the European Economic Area (Norway, Iceland) and Russia. The institutional cooperation in the BSR has been extended by a new EU Baltic Sea Region Strategy, which strives to play an integral role for the regional cooperation. The EU BSR Strategy emphasizes the political support for regional co-operation and is implicitly accepted by many institutions in the BSR.

After the three Baltic States and Poland joined the European Union in 2004, BSR achieved the highest economic growth (from 2004 to 2007) this can be explained by a greater amount of foreign direct investment (FDI), as well as a more easily accessible financing which actually led to 'overheating' in these countries. As a result of the global economic recession and different stages of economic development in different BSR countries some of them are dealing with crisis relatively well while, for example, the Baltic States and Iceland are fighting with more severe problems. The Baltic Sea Region is still considered as one of the most competitive world regions, but now it has new challenges for future co-operation. It should be taken into account that the Baltic Sea Region still has large imbalances in the standard of living, level of prosperity and life expectancy that its inhabitants enjoy. The impact of the recent global economic crisis has emphasized differences of economic performance across the Region creating completely new environment for collaboration across the Baltic Sea Region. The cooperation among the countries of the Baltic Sea Region countries still remains very important, but could be more difficult to pursue in the future. There is a lot of catching up to be done to reduce imbalances in the BSR on the Regional and individual levels. However, in the result of crisis some of previous developments have been reduced and policy focus is now more on the national level. In this respect, analyzing the EU relationship is particularly relevant. The historical experience of the EU suggests that accession into the EU has raised the standard of living of countries after they became full members of the European Union. As the experience shows, mechanisms of the EU have been able to reduce regional disparities and various equalization programs of the EU have been able to produce viable and tangible results. Examples of countries that have prospered dramatically after becoming members of the European Union include: Ireland, Spain, Portugal, and Greece. Today the EU is facing new challenges related to full integration of its youngest member countries, as well as dealing with consequences of the global crisis concerning also its more experienced member states.

The new institutional environment created by the EU enlargement in 2004 has created certain advantages, as well as challenges for regional cooperation. The main challenges identified are innovation, demographics, education, entrepreneurship, and functioning as a single market. Ensuring the competitiveness of energy markets is also a high priority challenge. Priority areas for accessibility and attractiveness are transport linkages focusing on particular on sustainable transport modes. Finally, cross-border crime, safety at the sea, communicable diseases, energy dependency, adaption to effects of extreme weather events on trans-boundary infrastructure, and reduction of the risk of oil spills, are of particular relevance for safety and security (Ketels, 2009, p.104-105).

The focus of the paper is on the regional integration and cooperation taking place in the Baltic Sea Region (BSR) over the last twenty years with particular emphasis on political and economic developments after the EU enlargement in 2004. In the framework of this research the content analysis looking on developments of regional integration and institutional co-operation in BSR countries, as well as comparative analysis based on the competitiveness rankings of these countries and their economic performance have been applied. The research concludes that there is a need for closer BSR cooperation in various fields in order to increase the productivity and competitiveness of the whole region in the future, but it will very much depend on the ability of the BSR member states and institutions to deal with post-crises challenges on individual, regional and international levels.

## **The assessment of the international competitiveness of the Baltic Sea Region**

Besides trade and investment, company strategies are the third medium through which regional cooperation takes place. Already during the 1990s partners in the Baltic Sea region have found several strategies to increase their competitiveness. The first being in: upgrading factories, transferring technology and training management and personnel in a market economy and then integrating the companies into the parent group's international corporate structure, and the second in combining labor-intensive production of the low cost countries with the more advanced industries operating in the home country. The latter approach was notably developed in textile industry. Consequently, higher value-added goods started to be produced with the involvement of Western neighbors; this is also reflected in the composition of exports from those countries to Eastern countries that mainly consist of high-tech goods, transport equipment, electric machinery and textile fabrics (OECD, 2000, p.190).

Before the global economic crisis the BSR has been a leader in terms of business competitiveness which is reflected in its exceptional rating in the Business Competitiveness Index of the World Economic Forum. It continues to rank among the top of other competitiveness rankings, such as the Growth Competitiveness Index and or the Global Competitiveness Index. However, the situation of individual states is very diverse. In the case of Sweden, Finland, Germany, and Norway competitiveness rankings have not significantly changed in the period 2007 and 2009, while it has reduced considerable for Latvia, Lithuania, Estonia, Russia, Iceland and also Denmark. For Latvia, the competitiveness rank has decreased by 25 ranks, while Poland has increased its competitiveness by 12 ranks over the period of four years. (Please, see Table 1 on p.6.).

According to works of Prof. M.Porter of the Harvard Business School (e.g. Porter, 1990, Porter, 1998) competitiveness is defined as the level of productivity that companies can achieve in a given location. Productivity defines the level of prosperity that regions or countries can achieve and the ability of an economy to mobilize its resources, especially its human capital. Competitiveness is particularly concerned

with the microeconomic level, including dimensions of business environment having direct impact on company productivity and innovation capacity (Porter, 1990, Porter, 1998).

The State of the Region Report (Ketels, 2009, p.17) states that, when the BSR entered the crisis a high growth cycle was reaching the end of long cycle. By 2008, unemployment dropped to the 5% aggregate, while inflation had moved up to the 5%. Exports accounted for around 48% of GDP which was higher than for the EU (41%) and the world economy (31%). The current account surplus for the region overall was strongly positive up to around 6% of GDP, and up to 2007 the government budget surplus has been close to 3% of GDP. However, the overall macroeconomic indicators do not reflect large imbalances which some of the BSR countries, such as Latvia and Iceland have been experiencing. This report (Ketels, 2007, p.24.) assesses the competitiveness of the BSR at three levels: 1) performance in terms of prosperity and key prosperity drivers, particularly productivity, world export market shares, FDI attraction or patenting that are both outcomes and drivers of a local competitiveness; 2) factors that drive level of productivity companies can reach. The focus is on microeconomic foundations of the economy, but also concerns overall macroeconomic, legal, political and social context; 3) performance on the wide range of indicators included in the Lisbon Agenda.

*Table 1. Indicators of competitiveness of the BSR countries (2008, 2010)*

Country	Rank 2010-2011	Rank 2009-2010	Rank 2008-2009	Rank 2007-2008	Changes 2007-2011
Sweden	2	4	4	4	<b>2</b>
Denmark	9	5	3	3	<b>(-6)</b>
Finland	7	6	6	6	<b>(-1)</b>
Germany	5	7	7	5	<b>0</b>
Norway	14	14	15	16	<b>2</b>
Iceland	31	26	20	23	<b>(-8)</b>
Estonia	33	35	32	27	<b>(-6)</b>
Poland	39	46	53	51	<b>12</b>
Lithuania	47	53	44	38	<b>(-9)</b>
Latvia	70	68	54	45	<b>(-25)</b>
Russia	63	63	51	58	<b>(-5)</b>

*Source: World Economic Forum, The Global Competitiveness Reports 2010-2011, 2009-2010, 2008-2009, 2007-2008. Available at: <http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm>; Author's own adjustments.*

Since the beginning of the crisis in 2008, economic indicators of all BSR countries have been reduced. The level of prosperity was more significantly reduced

for those BSR countries where individual competitiveness was lower. This includes: Latvia, Lithuania, Estonia, and Russia. Surprisingly enough, this did not influence competitiveness of the overall BSR against the other world regions. All consequences of crises are not known yet and they may show results only after structural reforms are implemented. In the result of crisis, both prosperity and productivity of the BSR countries was hit, but in the case of Latvia and Iceland, employment was an additional factor that has suffered. In 2010, the unemployment rate in Latvia was the highest in the EU (~17%). Moreover, the crisis has even more disposed differences across the BSR which will create challenges for the future of cooperation across the region. As a result, 2008-2009 for the BSR, and 2010 for some countries were years of economic downturn. Surprisingly enough the global crisis did not differentiate the BSR from all its competitors around the world. (Please, see table 2, p.7.). Also, the State of the Region Report (Ketels, 2009) developed for the Baltic Development Forum states that overall the BSR remains one of the most prosperous world regions despite a significant drop in prosperity in the wake of the crisis.

*Table 2. International competitiveness of the Baltic Sea Region*

<b>GDP per Capita (PPP)</b>	<b>Purchasing Power-Factor</b>	<b>Employment Factor</b>	<b>Productivity Factor</b>
OCEANIA (+1)	ASEAN	ASEAN	EU-15
NAFTA (-1)	BRIC	BRIC	B ISLES
B ISLES	EU-8	OCEANIA	NAFTA (+2)
EU-15	CER (+1)	EU-8 (+2)	OCEANIA (-1)
IBERIA	OCEANIA (+3)	BSR	IBERIA (+1)
CER =	B ISLES (+1) x	NAFTA (-2) x	BSR (-2)
BSR	NAFTA (-4)	CER	CER
EU-8	IBERIA (-2)	B ISLES (+1)	EU-8
BRIC	BSR (+1)	IBERIA (-1)	BRIC (+1)
ASEAN	EU-15 (-1)	EU-15	ASEAN (-1)

*OCEANIA – countries of Australia and Oceania region; NAFTA – USA, Canada, Mexico; B ISLES – Great Britain, Ireland and surrounding islands; IBERIA – Spain, Portugal, Andorra, CER – the Closer Economic Relations Agreement between New Zealand and Australia; BRIC - Brazil, Russia, India and China; ASEAN – Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia. Myanmar, Philippines, Singapore, Thailand, Vietnam.*

Source: Ketels C., 2009, "Boosting the Top of Europe", State of Region Report, Baltic Development Forum, 2009, page 55.

Prof. Ketels in the State of the Region Report (Ketels, 2010, p.13) concludes that BSR has been hit disproportionately hard by the global crisis and its current speed of recovery is high but fragile. Also, the fall in demand has led to marked reductions in both labour productivity and mobilization, signalling a significant degree of flexibility in BSR's labour markets and the dramatic fall in exports has been accompanied by a worrying loss of market share. One of the most worrying conclusions is that the crisis might have accelerated structural trends in the global economy working against the Region. But fundamentals of competitiveness remain strong and the solid fiscal position of governments creates opportunities to pull ahead of some international peers and the level of regional collaboration remains strong, with innovation and environment frequent themes and the EU Baltic Sea Region strategy an important reference. The crisis has increased the heterogeneity in economic conditions across the Region. Whether this will also increase the gap in competitiveness depends more on the political choices made in response to the crisis than on the different fiscal assets available across the Region. Finally, the governance structure for more effective collaboration across the Region is still emerging, with further political leadership from the Region critical to make real progress (Ketels, 2010, p.13).

The ambitious objective by launching the Lisbon Agenda 2000 was that by 2010 the EU would become the most competitive world's region. The performance of EU respective to the Lisbon Agenda has been widely discussed and a discussion on a necessity to proceed with creating the new Lisbon Agenda has been already started under the Swedish EU Presidency (July – December, 2009). According to the assessment of the European Commission (EC) the BSR EU member countries, particularly the Nordic countries and Estonia generally get good remarks about their national performance indicators. For Poland and Latvia the assessment is less positive with significant areas for improvement.

## **The experience of regional integration and institutional cooperation in the Baltic Sea Region**

The process of regional integration is one of the outcomes of the globalization processes. It allows countries to better withstand forces of growing international competition, as well as to promote, worldwide, a group of geographically close countries with a similar stage of development and similar reform-orientation. Regional integration processes started worldwide more than half a century ago with the creation of different trading blocks, such as the European Union (EU), EFTA (European Free Trade Agreement) and others, including, more recently, NAFTA (North American Free Trade Agreement).

Paul Krugman, the recent Nobel Prize winner in Economy awarded for his analysis of trade patterns and location of economic activity, has activated an academic debate on new trade patterns and significance of location of economic activity. According to the World Development Report (World Bank, 2009) if the benefits of proximity work across all economic activities, this leads to so-called 'core-periphery (or urban-

rural) outcomes'. Some regions will grow and prosper while others fall behind, even if they are initially identical. Initial differences will only speed up this process and determine the larger region as the 'winner' from the outset (World Bank, 2009).

These issues are of a great importance for the BSR, where small regions of eleven individual markets at the periphery of Europe are concentrated. Development and specialization greatly depend on policies conducted. Higher internal integration can overcome some of the disadvantages of small size. In addition, focus on knowledge intensity can reinforce the benefits from proximity. Latest developments in international economics have profoundly changed the way in which economists think about a number of trade policy issues, as well as an impact of geographic proximity on economic development. Reasons for this are evident. Economic integration typically occurs between economies with rather similar economic structures, consequently involving intra- rather than inter-industry trade. The gains we expect to see flowing from integration are gains from increased competition, rationalization of industry and exploitation of economies of scale. Analysis of these issues requires trade theory to take account of industrial organization, as well as comparative advantage (Alho et al, 1996, p.21).

Regional integration, closer co-operation and openness can help countries of the region to attract modern technology more easily and to succeed in a much bigger market. There are also other economic gains from integration, such as the possibility of increased specialization, benefits from exploitation of economies of scale, increase in efficiency and profits, greater mobility, growth of GDP, and others. However, participation in an economic grouping and/or larger integrated market cannot by itself guarantee development and growth. Macroeconomic factors influencing a country's performance are important preconditions to allow a country to explore gains of regional integration. Because the trade dependence of small countries, like the Baltic States, tends to be high, a small state cannot afford to have its main macroeconomic indicators, especially inflation and the interest rate, differ significantly from those of their most important trade partners. The importance of these principles is reflected in the EU Maastricht criteria, as well as within the European Monetary Union (EMU).

The crisis has not changed an importance of regional cooperation, but it has made this cooperation more complicated. There is no way out to co-operate within the BSR to get out of crisis faster than relying on individual structural reforms and policy responses. The experience and lessons of current crisis will not be able to prevent future global shocks and their exposure on the BSR countries. Therefore, learning to cooperate could make it easier to withstand similar shocks in the future. Also, strengthening BSR cooperation is important considering that in the global economy role of Asian economies will be much stronger in the future.

The regional integration in the BSR is important for promoting deeper integration within the Region and the world market. After the EU enlargement, the Baltic States, Poland, Germany, Sweden and Denmark are co-operating in the framework of the EU. Co-operation with Norway and Iceland with the EU member states is based on arrangements within the European Economic Area, and cooperation with Russia on the EU – Russian Federation Partnership Agreement. All BSR countries, except,

Russia, are members of the World Trade Organization (WTO). Russia still is in the process of negotiating WTO membership and should join the organization in the near future. Despite different legal arrangements, clearly the European Union has a central force for promoting integration and co-operation in BSR.

The regional integration and cooperation in the BSR would not be possible without established networks and organizations. The first regional cooperation structure of the BSR - the Council of the Baltic Sea States was created already in March 1992 by the region's Foreign Ministers in Copenhagen in 1992 as a response to the geopolitical changes that took place in the Baltic Sea region with the end of the Cold War. Today, there are over 70 different regional organizations and initiatives in BSR. The most important of these organizations are described in Table 3 (Please, see pages 10 – 12). Regional institutions in the BSR could be structured in the following order: 1) Organizations for cooperation among 11 BCR member states (CBSS, BBAC, UBC, BaltNet, BASTUN, BDF, ScanBalt, BCCA); 2) Organizations for cooperation among the Nordic countries (NC, NCM); 3) Organizations for cooperation among the Baltic countries (BA, BCM); 4) Organizations for cooperation among the Baltic and Nordic countries (NB-6, NB-8).

**Table 3. Organizations for co-operation in the Baltic Sea region**

No	Organization	Description
1.	The Council of the Baltic Sea States (CBSS, <a href="http://www.cbss.org">www.cbss.org</a> ) (Areas of work: environment, economic development, energy, education and culture, and civil security.)	The only intergovernmental regional co-operation body including all the countries of the Baltic Sea region, Iceland and the EU Commission. Established in March 1992 by the region's Foreign Ministers in Copenhagen. Since 1998 the CBSS has been serviced by a permanent international Secretariat that is located in Stockholm, Sweden and funded by the Member States.
2.	The Baltic Business Advisory Council (BBAC)	Works in the framework of CBSS. Established in 1992 to provide advice to the relevant bodies of the CBSS and groups representing business organization in the Baltic Sea region.
3.	NB-6 (Nordic–Baltic Six: Denmark, Finland, Sweden, Latvia, Lithuania and Estonia.)	The NB-6 was established with the accession of Estonia, Latvia and Lithuania to the EU on 1 May 2004, and is a framework for informal meetings at the level of prime ministers and foreign ministers.
4.	NB-8 (Nordic–Baltic Eight: Denmark, Iceland, Norway, Finland, Sweden, Latvia, Lithuania and Estonia.)	Active since 1990s. Under NB-8, regular meetings are held of the Baltic and Nordic countries' prime ministers, foreign ministers, secretaries of state and political directors of Foreign Ministries, and expert consultations.
5.	The Baltic Assembly (BA, <a href="http://www.baltasam.org">http://www.baltasam.org</a> )	Founded in 1991 to promote cooperation between the parliaments between Latvia, Lithuania and Estonia. The BA maintains relations with international organizations, notably the Nordic Council of Ministers and the Benelux Inter-parliamentary Consultative Council.

No	Organization	Description
6.	The Council of Ministers of the Baltic States (BCM)	Initiated by the BA and established in 1994. BCM carries out intergovernmental and regional co-operation between the three Baltic States through its institutions: the Secretariat of the Baltic Council of Ministers and special committees.
7.	The Nordic Council (NC) (involves members of parliament are delegated by the five Nordic countries (Denmark, Iceland, Norway, Finland and Sweden) and three autonomous areas (Aland Islands, Faeroe Islands and Greenland))	Formed in 1952 as an organization for parliamentary co-operation among the Nordic countries. The NC has a permanent secretariat located in Copenhagen. The NC and the Baltic Assembly (BA) agreed on co-operation in 1992. Since 2006, annual meetings of the BA and NC have been held, as well as regular meetings of the heads of foreign affairs commissions of Baltic and Nordic parliaments.
8.	The Nordic Council of Ministers (NCM, <a href="http://www.norden.com">www.norden.com</a> )	Set up in 1971, is an organization dealing with co-operation among the governments of the Nordic countries. The NCM comprises the same member countries as the NC. The NCM has a standing secretariat, located in Copenhagen.
9.	Vision and Strategies around the Baltic Sea (VASAB, <a href="http://www.vasab.org">www.vasab.org</a> )	An intergovernmental network of 11 countries of the Baltic Sea Region promoting cooperation on spatial planning and development in the Baltic Sea Region. Founded in August 1992 at the Conference at Ministerial level in Karlskrona
10.	Baltic Sea States Subregional Cooperation (BSSSC, <a href="http://www.bsssc.org">www.bsssc.org</a> )	A political network for decentralized authorities (subregions) in the Baltic Sea Region. Founded in Stavanger, Norway, 1993.
11.	The Union of Baltic Cities (UBC, <a href="http://www.ubc.net">www.ubc.net</a> ) (13 Working Commissions)	A network of over 100 cities that collaborate on a wide-range of political, economic, social, cultural, and environmental issues.
12.	The Baltic Metropolises Network (BaltMet; <a href="http://www.baltmet.org">www.baltmet.org</a> )	Represents 11 capitals and large metropolitan cities from around the Baltic Sea Region. Since October 2008, the Chairmanship of the Network rests with the City of Stockholm.
13.	The Baltic Sea Trade Union Network (BASTUN; <a href="http://www.bastun.nu">www.bastun.nu</a> )	A network of trade union confederations across the Baltic Sea Region.
14.	Baltic Development Forum (BDF, <a href="http://www.bdforum.org">www.bdforum.org</a> )	Established in November 1998, with former Danish Minister for Foreign Affairs Uffe Ellemann-Jensen as an independent networking organization for businesses, governments, regional organizations, academia, and media to discuss and collaborate on issues of regional importance.
15.	ScanBalt ( <a href="http://www.scanbalt.org">www.scanbalt.org</a> )	A private or public-private organization – one of the best examples of a bottom up Baltic Sea Region network of clusters, companies, research institutions, public authorities and other organizations in a specific field. The organization has worked out the strategy “Innovation on Top of Europe 2008-2011”.

No	Organization	Description
16.	The Baltic Chamber of Commerce Association (BCCA)	An organization of altogether 50 Chambers of Commerce across the Baltic Sea Region. Since 2002 the Presidency and General Secretariat of the BCCA has been with the Chamber of Commerce and Industry of Southern Sweden in Malmö.

Source: Authors own Internet research through <http://www.cbss.org/>

Most of the above mentioned BSR organizations have been created in the beginning of the 1990s, except the Nordic Council (1952) and the Nordic Council of Ministers (1971). Only one organization - NB-6 - was established with the accession of Estonia, Latvia and Lithuania to the EU on 1 May 2004 to exchange views and information between the Nordic and Baltic EU member states on the EU agenda. The NB-6 prime ministers meet four times a year before European Council meetings, but the foreign ministers, for their part, align their gatherings with those of the EU General Affairs Council and EU External Relations Council.

The regional cooperation and established institutional structures proven to be important before the EU enlargement in 2004 and they will remain significant for several reasons. Regional activities undertaken by these institutions, like innovation and environmental sustainability are of equal importance for all countries of the BSR. Previously, all coordination was taking place without any central structure and creation of a new administrative structure is also not foreseen by the new EU BSR Strategy. In addition, structure of regional institutions created in the beginning of the 1990s has remained the same over the last 20 years. A new challenge for regional institutions, as well as region of whole, is to deal with consequences of crisis and imbalances in the BSR.

Economic and trade integration in the BSR builds on geographical and historical factors, and is supported by developments in policies and institutions. Co-operation amongst the Baltic Sea States started from the beginning of transition, in early the 1990s, with the development of technical assistance. Subsequently, trade and investment flows in the BSR intensified. Before joining the EU trade cooperation in the BSR was based on bilateral and multilateral trade agreements. The three Baltic States had concluded free trade agreements with EFTA members - Norway, Sweden and Finland - in 1992 and 1993. These agreements have stimulated early flows of trade and investment between the Baltic States and the Nordic countries. Agreements with Sweden and Finland continued to be effective after these countries joined the EU in 1994 under the provisions of the Baltic – EU free trade agreements which became effective in 1995. After EU enlargement, the EU member states and EFTA countries cooperated under the European Economic Area (EEA) arrangements.

Within the BSR, only the three Baltic States have concluded a trilateral free trade agreement. A Baltic Free Trade Agreement (BAFTA) for industrial products became effective in April 1994. A second agreement, complimentary to BAFTA related to free trade in agricultural products, came into force at the beginning of 1997. Interestingly enough that it is one of very few international agreements that stipulate tariff free movement of agricultural products. It abolished all customs duties, charges and

quantitative restrictions on agricultural products. The BAFTA includes provisions on dumping and export subsidies, and contains provisions regarding application of safeguard measures in the case of balance of payment problems. The increase of trade as a result of signing BAFTA was quite small. This results out of similarities in goods being produced and traded in the Baltic States. Trade in agricultural products increased after the BAFTA in agricultural products became effective (OECD, 2000, p.187).

The accession of the Baltic States and Poland to the EU has provided the same level playing field for trade and investment for the BSR. The EU enlargement helped to remove remaining barriers to trade and investment, as well as to establish standards according to principles of a common market. Nevertheless, regional institutions and governance in the BSR are required to coordinate efforts to enhance the business environment, as well as to promote cross-border integration and development.

## Conclusions

The recent global economic crisis has created a completely new environment for collaboration across the BSR. The cooperation among the countries of the BSR still remains very important, but could be more difficult to pursue in the future. There is a lot of catching up to be done to reduce imbalances on the Regional and individual levels. However, in the result of crisis some of previous developments have been reduced and policy focus is now more on the national level. The new EU BSR Strategy is very timely for strengthening the co-operation in the Baltic Sea area and achieving higher integration between the BSR and the EU, as well as to deal with post-crisis challenges in the BSR area. Differences in the competitiveness ranking should not affect the co-operation between the states of BSR, but to advance the ongoing collaboration to improve the competitiveness and cohesion of the region. Reducing economic imbalances between countries of the region would strengthen the position of the entire region, both in the EU and globally. The crisis has made regional cooperation more important, but also more difficult. However, there is no way out to co-operate within the BSR to deal with consequences of crisis faster than relying on individual structural reforms and policy responses. The experience and lessons of the recent crisis will not be able to prevent future global shocks and their exposure on the BSR countries. Therefore, learning to cooperate could make it easier to withstand similar shocks in the future. Also, strengthening BSR cooperation is important considering that in the global economy role of Asian economies will be much stronger in the future.

Regional cooperation institutions have been important for the regional cooperation before and after the EU enlargement in 2004 and they will remain significant for several reasons. Firstly, regional activities undertaken by these institutions are of equal importance for all countries of the BSR. Secondly, all institutional coordination in the BSR has been efficiently taking place without any central structure without imposing additional costs. Thirdly, the regional integration in the BSR is important for promoting deeper integration within the Region and in the world market. A new

challenge for BSR is to deal with consequences of crisis and economic imbalances in the BSR. The future perspective clearly defines the need for closer BSR regional cooperation in various fields in order to increase the productivity and competitiveness of the whole region. The potential for further integration and cooperation for improving individual and regional competitiveness will greatly depend on the ability of the BSR to deal with post-crises challenges on individual, regional and international levels.

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# CULTURE, ARTS AND EDUCATION

**Inta Buka<sup>1</sup>**

## **STRUCTURAL CHANGES AND MOBILITY OF FOREIGN STUDENTS IN HIGHER EDUCATIONAL INSTITUTIONS OF THE BALTIC COUNTRIES**

### **Abstract**

The aim of this research was to analyse the mobility, ways and methods of foreign students' integration (adaptation) in higher educational institutions of the Baltic countries. As appeared, Baltic higher educational institutions almost do not take into consideration the current problems of foreign students' adaptation. Having analysed the problem, the author gives the idea of the necessity of the special preparatory module, which will include studying state language, history and culture of the host country, as well as Ethno psychology, theory and practice of cross-culture communication.

In order to introduce such preparatory module into study process it is necessary to create quite new competences module for practical adaptation of foreign students to professional activities and social environment of European countries. In European Union this preparatory module may be called, "Euromodule" and can be approximately 12-16 CP (ECTS).

**Keywords:** preparatory module, foreign students, foreign language competence, intercultural communication, short-and medium-term adaptation

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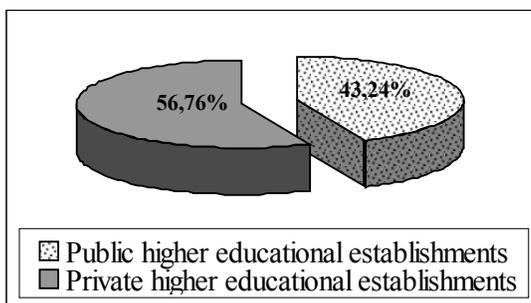
## Introduction

The promotion of mobility and the export of educational services, dictated by the current trends taking place in the society and new strategies of development of educational systems in the European Union (EU), represent a key role in the formation of a unified educational space. This is also mapped in the main program of the European Union for the next 10 years – “Europe 2020” - the European Employment Strategy for providing employment, intelligent, stable and included growth as well as in the Bologna and Copenhagen declarations. The academic mobility and export of educational services directly related to the processes of increase in the higher education in these countries the number of foreign students, inevitably will entail activities aimed at helping them adapt to new conditions as well as changes in the structure and activities of the higher educational establishments themselves in Europe. When you modify educational systems, the EU countries will need to consider these trends by actively using and applying the lessons learned from the previous years in the field of integration based on common principles and approaches involving a substantial internationalization of the higher education systems as related to the student mobility in the European exchange programs and increasing numbers of foreign students entering the higher educational establishments of the European countries, including the Baltic.

## Countries “exporters” and ‘importers” of student resources

According to the Ministry of Education and Science of the Republic of Latvia (LR Izglītības un Zinātnes ministrija, 2002-2010) for the period from 2002 to 2010 inclusive in both the public and private higher educational establishments of the country were studied and continue to learn both using the basic training programs and the academic mobility program ERASMUS 14 911 foreign students, of whom almost 57% (Figure 1) account for private (non-state) universities and colleges. The percentage of the total number of students enrolled during the same period of time in the higher educational establishments of the LR, rated to 4.7%.

*Figure 1.* The percentage of foreign students enrolled in public and private universities and colleges of the Republic of Latvia from the academic year 2002 to 2010.



The comparison of the rates for the years 2002-2010 allows talking about a fairly stable number of foreign students (~ 800-950 people/year) coming in the higher education of the Republic of Latvia, except time period of 2004/2005 and 2010/2011 (LR Izglītības un Zinātnes ministrija, 2004; 2010).

Changes in legislation and a forced withdrawal of the Latvian higher educational establishments from the educational markets in 2005/2006, for many students and graduates has led to negative consequences which later influenced the image of the Latvian higher educational establishments in the respective countries. The recovery of the image required a sufficient effort on the part of the higher educational establishments and it was only attained in the last 2-3 years.

Nowadays, the increase of foreign students (the enrollment of 2010/2011) is related to several factors one of which is the ever-increasing role, the popularity among students and the continued development of programs of international mobility ERASMUS and ERASMUS-placement. The international mobility programs helped to spread throughout Europe positive information about the higher educational establishments and the higher education system of the Republic of Latvia.

This process was bilateral in nature, since the transparency of information was provided both for the Latvian students who traveled within the program for the international mobility to other higher educational establishments of the EU (the number of Latvian students studying in other European countries on the international mobility programs in 2011 rated to 1540 people according to statistics of the Ministry of Education and Science of the Republic of Latvia (LR Izglītības un Zinātnes ministrija, 2010)) and foreign students trained within these programs in the Republic of Latvia and managed in practice to confirm a high level of knowledge, and, correspondingly, the quality of the educational services offered by the higher educational establishments of Latvia. The openness of information contributed to the formation of a positive image of the higher education of the Republic of Latvia.

Among the factors that influenced the large increase in international students in 2010/2011 in the higher educational establishments of Latvia can be noted the following:

1. the first wave of returning to their home countries of foreign students who have completed training in the higher educational establishments of Latvia on the major programs of study (baccalaureate, the master's degree courses) who have received diplomas of the Republic of Latvia as well as in the case of students coming to the programs of the international mobility ERASMUS and ERASMUS-placement, contributed popularity and a more positive view of the higher education of the Republic of Latvia in their country;
2. an active participation of lecturers and researchers from the higher educational establishments of the Baltic countries in international conferences, forums and workshops which made it possible to assess the level of the faculty of professors and lecturers in the country;
3. an enhanced action of representatives of the Latvian higher educational establishments to export the higher education (participation in international

educational exhibitions, finding partners and agents outside of Latvia, etc.), supported by the State institutions of Latvia (the Latvian Investment and Development Agency (LIAA), the Centre for Academic Information of the Republic of Latvia (AIC), the Ministry of Foreign Affairs of the Republic of Latvia, the Ministry of Education and Science of the Republic of Latvia) and international foundations such as the European Social Fond (ESF).

All of the above actions have led to an increase in the number of foreign students who in 2010/2011 have chosen Latvia as a country for acquiring the higher education and for participation in the student mobility within ERASMUS which is one of the priorities of the programs both “Europe 2020” and the strategic plan of the development of Latvia to 2030.

According to the Ministry of Education and Science of the Republic of Latvia (LR Izglītības un Zinātnes ministrija, 2010), in the academic year 2010/2011 in public and private universities and colleges, the enrolment of foreign students rated to 1949.

All these actions significantly expand understanding of the internationalization of the higher education, bringing them far beyond the European Union and attaching them to two groups of countries that are not included in the EU and, in fact, as some EU countries (the UK, Spain, Germany, France) are the major exporters of “student resources” as well as those countries that have for years been importing these resources (the former Soviet Union, Asia, Africa and the Arab countries).

To the first group of countries belong the countries like the U.S. A. and Canada. Despite the fact that the mobility of students from Latvia in these countries is not yet high, it should be noted that on a global scale from the data available by the World Bank and RosBusinessConsulting Mediagroup from 2007 to 2010, the U.S.A. has taken the 1<sup>st</sup> - 2<sup>nd</sup> places, while Canada has the stable 5<sup>th</sup>-6<sup>th</sup> places on the number of migrants (The World Bank, 2010) and the attractiveness of the country of emigration (РБК.Рейтинги, 2007), among 213 countries of the world that is the driving factor for flows in them the foreign students as well.

## **The role of the intercultural communication in the adaptation of foreign students in the higher educational establishments**

In the higher education establishments of the developed countries, active debates are held on the integration of universities themselves directly to processes of internationalization, and, in particular, on “ethics of internationalization.” Canadian and American universities as well as the higher educational establishments of other countries have faced the necessity to receive an adequate reply to the needs of the multicultural and multiracial student community, however, as the complexity of the ethnic composition of their population, the boundaries between the international and national goals and objectives of education have begun to gradually reduce (Jones & Trilokekar, 2007, p.13).

Most countries “importers” as well as the major “exporters” of student resources such as Germany, Britain, Spain, Russia, France, Poland and China, have their official overseas cultural and educational centres. In Canada, unlike other developed countries, there are no such national centres but the country has created with the federal government (by way of Australia), the Canadian Education Centres that are private non-profit organizations.

With problems related to internationalization of the higher education, the Baltic countries have been faced as well. In contrast to Germany and Poland, Latvia, Lithuania and Estonia do not have their national culture-educational centres. At present, the higher educational establishments of the Baltic States (Latvia, Estonia and Lithuania) do not actually take into account the problems of adaptation of foreign students as their number is 1.0 - 1.5% of the total number of students in the higher educational establishments of these countries and, especially, do not see the need for some action aimed at preparing the “local” students to appear in the higher education environment of students from other countries. This leads to a spontaneous formation of relationship between students, i.e., they are formed directly in a specific study group and, at best, with the support of lecturers and managers of the training program. Unfortunately, the lecturers themselves are often not aware of the challenges faced by both the foreign and local students do not even imagine the psychological difficulties that await foreign students in the walls of their higher educational establishment.

Following the priorities laid down in the development program of the European Union “Europe 2020” as well as the development plan of Latvia to 2030, of which occupy an important place processes to increase the student mobility and exports of services (including the educational services) to other countries for the positioning of the European region on a global level, you can talk about emerging trends to increase the flow of foreign students in the higher educational establishments of the Baltic countries. An increased flow of foreign students may lead to a further complication of the situation with the adaptation data of students when the higher educational establishments of Latvia, Lithuania and Estonia begin to use international experience and do not take measures for adaptation of the foreign students by introducing structural changes in the management of the higher educational establishments and training programs of the basic levels.

Of great importance in the process of adaptation is the intercultural communication arisen within groups: lecturers, fellow students, university administration and outside of the higher educational establishment. People often cannot understand what is central to a person of one or another country which can lead not only to misunderstandings but also to serious conflicts.

When dealing with such cultural differences, for the staff of the higher educational establishments and for the foreign students, interesting seems to be the model developed by of Geert Hofstede “5D” (Hofstede, 2003), according to which all the possible cultural characteristics of countries are grouped according to five axes. Each country in each of the axes is assigned to a specific location. Thus, working with the foreign students, you can see where is the country from which the student has arrived and draw conclusions about what to consider when dealing with the representatives

of this nation, how they relate to the enforcement of laws, punctuality, respect for hierarchy of the seniors, etc.

When developing an adaptation of the program, be aware that students coming to study in Latvia in their culture and interpersonal relationships are significantly different from the Latvians. This calls for training the existing differences to lecturers, local students and students who intend to study in the Republic of Latvia. A correct application and implementation in practice of the model developed by Geert Hofstede "5D" can lead to positive developments in addressing such issues as the "culture shock", to ensure knowledge, understanding and respect the cultural characteristics of different countries and facilitate the adaptation process, on the one hand and on the other hand.

### **Problems of the short-and medium-term adaptation: from "tourists" to "laborers"**

When working with foreign students, for employees of the higher educational establishments, apparently, it is also important to distinguish between problems related to their short-and medium-term adaptation. Such a separation is associated with different periods of stay of foreign students at the higher educational establishment. It is important to distinguish between students who came to the program on student mobility for a ½ year or 1 year and, in fact, introducing the country and culture as tourists, even staying in this country for several months and students who come to study in the country for 4-6 years.

98% of foreign students enrolled in higher education institutions of Latvia from 2002 to 2010, have taken the program of the full-time schedule, which suggests staying in the country during the entire period of study.

For those students who come into the country for an extended period of time, except for study and living (temporarily), arise serious problems: the search of work (as in most cases it is required to know the state language at an appropriate level), permanent housing with the creation of their own infrastructure, establishing stable contacts at the higher educational establishments as with managers of the program, the study department, the library and with fellow students, integration into the cultural and ethnic environment, the biological adaptation (taking into account the duration of the period) and problems with food that is different from the usually consumed.

Compared with the classical version of the stay of the foreign students, mainly oriented to training, the advanced students from the Eastern Europe, Asia, Africa and the Arab countries have been largely focused on two priorities: study and work. Moreover, in some cases, the dominant orientation is to work that much distorts the principles of teaching.

In recent years, the Baltic countries are increasingly faced with veiled attempts to export labor to the EU under the guise of coming to study. The main reasons for this change in priorities are as follows: the accession of these countries in the EU and the differences in payment (especially in the period of the years 2005-2007 when there

were significant shortages of labor), a lower adaptive barrier for people coming into the country from the post-Soviet region due to those already mentioned above historical reasons. A significant role in this case is played by uncertainty of these students in the future of their own countries as well as the illusion that there is a real opportunity to get a quality education in the higher educational establishments and the EU to become a holder of the world recognized diploma but also to solve the problem of a professional career in the EU after graduation from the higher educational establishment.

This distortion of priorities arises a more cautious attitude as to the processes of mobility and the export of educational services and the above students in the environment of the higher educational establishments. The analysis of the survey conducted by the International Association of Universities (IAU) has identified the major risks associated with the processes of mobility in the higher education (Knight, 2007, p. 8-10):

1. commercialization of education and commodification of education programs;
2. increase in the number of fake foreign degrees;
3. increase in the number of low-quality providers of educational services;
4. "brain drain".

The representatives of both the developed and developing countries express fears about the first of the above risks.

Among the benefits of internationalization of the higher education, there were mentioned the orientation of the staff and students to a world-class education and a high professional level of lecturers.

Although, in the survey, a lower quality of education has been placed in the last place, the higher educational establishments increasingly have to make an effort and to maintain the quality of education received by foreign students coming to study for a longer period of time and in a timely manner to work with those students for whom the priority is getting a job within the European Union. These processes have an impact on the creation of the image of the higher educational institutions in countries from which foreign students are coming, which also requires a permanent job in this area.

Working with students of the higher educational establishments focused on work and studies, is significantly different from the standard one and, in this case, we can talk about two kinds of educational work: firstly, the early identification of those who come to the country in search of work under the guise of studying, and secondly, the implementation of activities aimed at changing the priority arrival with "pseudo-study" with the possibility to look for jobs under the laws of the host country. If it cannot be done but the actual performance in this case is the current progress and results of the session, you need to decide on the expulsion and revocation of residence permits to these students.

The trend of combining work with study with the prevailing priority for the last 5-7 years can clearly be seen not only among the foreign students but also among the local ones and the negative aspects of this phenomenon for the quality of training are becoming more visible.

Besides the negative impact on the quality of education, it affects what is called the student's life, i.e., on the activity of students in different cultural, sporting and social events, including participation in student self-government –for this there has neither the vigor nor the time.

However, in the Göteborg Declaration of students (March 25, 2001), in the participation of the National Union of Students in Europe (ESIB – the National Unions of Students in Europe) and the Student Association of Austria (ESIB, 2001) and in the Luxembourg declaration of students (March 20, 2005) (ESIB, 2005), it was stated that “the participation of students in the Bologna Process is one of the key steps towards a continued and orderly involvement of students in all decision-making structures and discussion forums on the higher education at the community level”.

Combining work and study entails problems in intercultural communication of students from different countries and, in fact, makes it impossible to create a full-fledged multi-cultural space in the higher educational establishments.

Thus, one of the main components of the Bologna Process - creating the European Higher Education – the student mobility as an element of involvement in the process of enrichment of the space of students from countries outside the EU, has not been fully realized. Problems with the creation of a multicultural space in the higher educational establishments as an integral element of the European space, threaten the very creation of this space, at least, in its multicultural dimension.

## **The foreign language competence as a core competency for foreign students**

Crucial to the process of internationalization of education and adaptation of the foreign students is the presence in the EU a large number of national languages as official languages of the European Union and, in fact, the only first foreign language - English, which causes problems with other “regional” languages - French, Spanish, German or even a non-official language of the EU and less common in Europe - Russian which is chosen as a study language by foreign students. In fact, it is a language of competition in the education market, which is supported by government agencies concerned. For some European countries, including those for the Baltic with the languages less common and less frequently used in the European Union, such a linguistic competition is a sufficiently serious threat to the “survival” of the national language which often leads to the need to peg popularity and use legal restrictions in a number of languages with respect to such languages as Russian (for example, in the Baltic countries).

From the perspective of a multicultural space in the higher educational establishment - this makes it necessary to use as a language of interethnic communication and learning English, and pay more attention to learning the official language of the host country.

Fred van Leeuwen, General Secretary of International Education (2006, p. 4), is also turning his attention to accelerating the processes of the predominance of English as a means of transferring knowledge and understanding of research results.

According to Fred van Leeuwen and his supporters, there should still be maintained the current diversification of national cultures and languages and providing them with the balance of the common language of communication (for example, “English”).

The formation of a multi-cultural space as well as the problems associated with the linguistic competition in the developing process of internationalization of the higher education lead to the need of developing among the foreign students competencies that would enable them not only to adapt quickly to new surroundings but also do so without detriment to their educational process.

As Prudnikova (2009, p. 52-53) writes in her article, one of the key competencies for the international students in terms of studying opportunities in a foreign higher educational establishment as well as the possibility of building relationship inside and outside the higher educational establishment is likely to be the formation of an appropriate foreign language competence which is narrower than the key communicative competence.

In some cases it is ignorance of the language and the inability to fully communicate with fellow students, especially in the 1<sup>st</sup> -2<sup>nd</sup> courses that leads to a partial isolation of foreign students from activities conducted at the higher educational establishment in the State language and directly from the students on the stream where the main language of instruction is the national language. Limitations associated with a lack of knowledge of the majority of the students of the international language (English or Russian) as well as the above-mentioned problems caused by the adaptive processes lead, in our opinion, to the need for a preparatory module which includes learning the state language, history and culture of the country of residence, ethnic psychology, theory and practice of intercultural communication.

## **The preparatory module for foreign students**

According to the survey conducted by the author in 2011 (Buka, 2011) within the European project “Compass for students from third countries - life in Latvia”, among foreign students in the major programs in the top 6 higher educational establishments of Latvia (in the survey attended by 52 foreign students), 77% of the respondents said that the establishment of the preparatory module for the foreign students would considerably improve the situation with students from the third countries in the higher education establishments of Latvia (Figure 2), and 59% of all the respondents would attend sessions of the preparatory module if it were created in their higher educational establishment (Figure 3).

Figure 2. Whether the situation will improve with foreign students at the higher educational establishments of Latvia if the foreign students have a preparatory module?

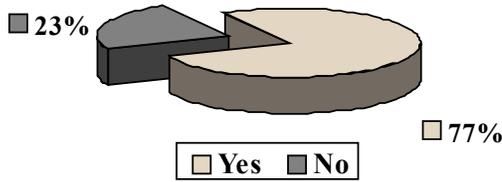
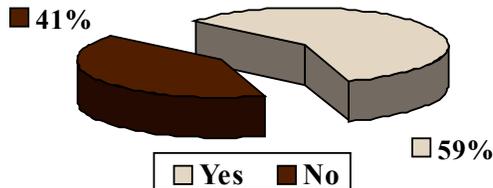


Figure 3. Would you attend a special preparatory module for foreign students at your higher educational establishment (six months, year, 4 weeks, 8 weeks, 12 weeks)?



In developing the preparatory module there is an interesting competence module proposed by Merkulova (2008, p. 174-176) carried out within the framework of the analytical departmental program “Development of the scientific potential of the higher education (2006-2008) for the year 2008.”

The author proposed a model of the formation of the professional competence with essential methodological approaches: the axiological (value), cultural, anthropological, humanistic, synergistic, hermeneutic and acmeologic-based on the foreign language learning.

In this model for the purposes of the proposed preparatory module, of the greatest value is the block of the invariant competencies, considered for each of the methodological approaches, and forms the core professional competences of the future specialist.

Introduction to the learning process of the preparation of the module (it is important to consider the differences when the module is being developed before or during training) is really a creation of a new competence-based module to allow for adaptation of the foreign students for professional careers and social environment. We believe it is important to recognize this competence, firstly, a direct consequence of the Bologna Process in 46 countries (in 2008), and secondly, to introduce such a module as required for the adaptation of the foreign students in the first- year courses in all specialties.

The total volume of the module can be 12-16 CP (ECTS) and take into account the peculiarities of both preparation of the foreign students and cultural and historical

traditions of the country where they start learning (partially using the model of Geert Hofstede "5D").

The lecturers who work with foreign students within the module must be bi- or multilingual or the efficiency of absorption of specific subjects and the entire module will be significantly reduced. As Michailovsky (2008, p. 115-116), marks in his article, working with international students would also require lecturers to solve common pedagogical problems and contradictions and specific ones related to the need to consider in the pedagogical-psychological process of national, religious, socio-demographic and other individual characteristics of students as well as taking into account the specificity of the foreign student contingent during the classes.

### **„Euromodule”: preparatory module for international students in the EU**

The creation of a preparatory module for international students is of interest not only for Latvia and the Baltic countries, but also to higher educational institutions in other European Union member states striving to adapt their international activities and work as regards making the appearing of international students within their higher schools a new reality.

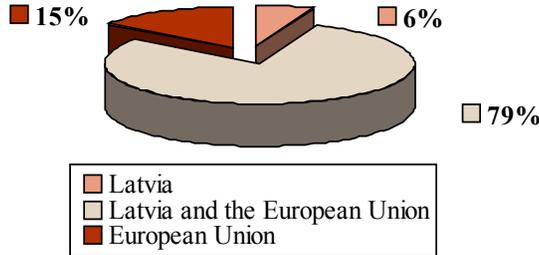
Thus the University of Surrey Centre for Policy and Change in Tertiary Education (Great Britain) notes, that the government has appealed to the higher schools to revise the development of their international activities not just as a means of increasing the number of international students in order to gain extra income, but also as the most important provision for a long-term strengthening of the reputation of British higher education both in Great Britain and abroad. To date 77% of English higher schools include a special section into their strategic development plans, which is devoted to international activity, while others are trying to restructure their respective educational institutions into international level higher schools, which requires not only the development of international activities as such, but also the introduction of a new institutional culture, reckoning with the factor of internationalization (Woodfield, 2007, p.6).

On the ground of the existing body of problems and tasks for the higher educational institutions a regards the internationalization of higher education and the necessity for the adaptation of international students, it is of interest to note the collaboration between the higher schools of the Bologna process signatory states, which include both EU member states and states outside the EU; the collaboration is carried out within the framework of the European grant for the development of both the subjects of the module and the experimental implementation thereof.

The given assumptions are verified by international student surveys, carried out by the author (Buka, 2011) in the largest higher schools of Latvia in 2011. The results of the research show that 79% of all the international student respondents form third countries, who are studying at Latvian higher schools, believe that the subjects of the preparatory module should be oriented not only towards Latvia, but towards

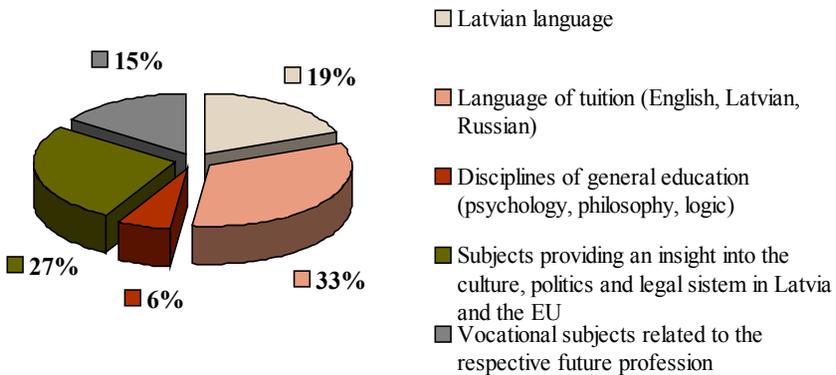
the European Union as a whole (Figure 4). Of this fraction 33% would include the language of tuition (English, Latvian, Russian) into the subjects of the preparatory module, whereas 27% would take subjects that provide an insight into the culture, politics and legal system of both Latvia and the European Union (Figure 5).

Figure 4. The subjects of the preparatory module should be oriented towards:



In our point of view it would be perspective to develop a remote version of the module, which would allow the potential entrants to individually prepare for arrival in the chosen EU country and would significantly ease the problems in the adaptation period. 52% of the international students indicated their interest in an intramural-extramural module form and 10% preferred the extramural study form. According to the students, the duration of the module should be half a year prior to the start of the main study programs in higher schools (34%) or half a year prior to the start of bachelor/master study classes with the possibility to mastering the module simultaneously with the main study programmes (32%).

Figure 5. What subjects do you think should be included into the preparatory module?



The involvement of non-EU countries – which take part in the Bologna process by cooperating in the sphere of international collaboration with the aim of finding solutions regarding the easing of the adaptation processes for international students,

who come to the country – in contributing their proposals and considering the possible solutions for those students leaving their homeland with the aim of obtaining higher education in European Union member states.

The Baltic countries, which have several positive peculiarities in this respect, could become the leading countries in implementing programs for the adaptation of students from the former USSR region into the EU.

## Conclusion

As regards the competency approach of the Bologna process, the proposed preparatory module for international students applies to the point of inter-program level convergence, falls within the general competencies and particularly close to the interpersonal competencies, which include the ability to express feelings and opinions, social skills related to mutual socializing and cooperation, as well as the skills for teamwork, etc.

Within the traditional categories of the Bologna process, the competencies are regarded an instrument for describing the qualification on the level of modules and specific tuition programs. The module proposed by us covers the knowledge and skills necessary for acquiring the chosen qualification as well as the knowledge and skills related to a much broader socio-humanitarian sphere and falling closer to the concept of “psychological integration” (this concept was first introduced in 1976 at the Council of the European Ministries). Later on the meaning of the meaning of this concept transformed into the adopted concept “European Dimension”, which was better for reflecting the objectives and principles of the development of the EU and included the advancement of knowledge about Europe, its history, economy, culture and languages. Today this concept is used in educational, economic and political context in several non-EU countries, which are participants in the Bologna process (e.g., Ukraine, Georgia, Moldova, etc.).

Recent events in several countries in the EU in 2011 show, that it was a mistaken decision, for particularly the success of psychological integration of foreigners have been next to nothing in the European Union.

Therefore, we are of the view that it would be better to identify the aforementioned module as a cross-cultural socio-psychological module, which bears a definite inter-disciplinary and inter-program-related significance and is oriented towards knowledge and skills necessary for learning and professional undertakings as well as generally within the conditions of academic and professional mobility in the EU.

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**Sigita Burvyte<sup>1</sup>**

## **REALISATION OF PERSONAL ADAPTATION POTENTIAL IN CHILDHOOD**

### **Abstract**

The paper deals with the child's experiences of the pre-school period as the factor influencing school adaptation in the first form. Variety and quality of children's experiences are directly related and most of all depend on the family institution, so its impact is the strongest in terms of the development of the child's personality. Childhood is not just a product of human development but also a product of society's educational culture development. This paper aims to disclose how nowadays the family helps the child to develop adaptation instruments which would help to adapt to the society – in a micro-macro environment, to show what helps the child to become a member of a social group, of the society, what adaptation problems arise during the childhood. Problems of school adaptation of the first-formers have not been properly assessed and analysed so far, though they foresee the future. No proper attention has been paid to the development of the harmonious personality during the pre-school period and to the correction of their adaptation during the first-school year.

### **Introduction**

Rapid socio-cultural changes in society have influence on the educational environment of children in the family, which has to be analysed and understood in order to realise its impact on the self-development of the child's personality.

Changes in education require much broader, overall readiness of the pedagogue, especially of the one, who works in the lower steps of public education, which is the basis for the further dispersion and development of the personality. Already J. H. van den Berg (1961) asserted that all psychological problems were the product of socio-historical cultural changes, occurring from the three-directional dialectical interaction, where biological, personal and socio-historical factors interacted. The main task is to concentrate all efforts for fixing of those occurring processes, to understand and express them (Horton, Leslie, Larson, 1988).

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This paper attempts to draw attention to self-development of a harmonious personality during the sensitive periods of development, the experiences of which engrave in the structure of the personality the strongest and are difficult to correct in later stages of development. Trying to find what the best is for the child it is necessary to understand the sensitive stages of development and to pay attention to the environment of realisation.

Already the first cell of the set foetus contains all information about the future body of the human being, its capacities and health, but how they are realised depends on the environment. The inborn talents and deficiencies cannot be changed, but the environment which provides conditions for self-development of the personality, may be amended, depending on personal opportunities. Of great importance for the child is the influence of the environment during the sensitive periods of personal self-development, i.e., from the birth to the junior school age. Because during this period a self-developing personality obtains adaptation instruments and the quality of them depends on the variety of experiences. In this paper the school adaptation of the first-former is understood as the ability of the child to adapt to the conditions and requirements of the school environment, during which disagreement between the personality of the child and the new environment of the school, i.e., interrelationship between the child and the school environment, is coped with. School adaptation of the first former is the adaptation of a child starting the first year at school to the conditions or requirements of the school; during this period the aim is to cope with the disagreement between the child's personality and the conditions of the new environment of the school, a qualitative interrelation between the pupil and the school environment, harmony of relationship, stable inner balance of the child.

Analysing the disadaptation (difficulties of adaptation) from the pedagogical point of view, its essence should be related to breaking of the standard conditions of life and getting used to the new ones, as well as to the difficulties arising during this process.

Looking at disadaptation from the ontogenesis point of view, in terms of investigation of its mechanisms, of special significance are the essential critical moments of human life, especially when "social development" changes suddenly (Выготский, 2005). This causes the necessity to reconstruct the well-established model of adaptive behaviour. The biggest risk arises when a child starts the first school year (the period of the first requirements understanding level and consolidation of one's status among the contemporaries). This period creates a new social situation for the pupil. This is validated by the results of numerous investigations. (Bowlby, 1969; Belsky, 1990; Bierman, Stormshak, 2000; Briers, 2011; Burvytė, 2004 and others).

Thus, in this work the adaptation of the first-formers is understood as positive feelings of the child when adapting to the new school environment, perceiving it as the result of the process, as a state of the child's social balance and fixation of his inner man in this new environment. The experience of coping with difficulties gained during childhood is very important for the further formation of the personality and in gaining abilities to overcome difficulties. The first-formers' adaptation difficulties require new social, psychological and pedagogical investigation, treating them as a specific phenomenon. In the pedagogical investigations cognition of personality

formation, its motivational structure, emotional and intellectual features, and changes of the conditions of life, behaviour disorders, and children's personal problems occurring when they start primary school is of utmost importance.

For the purpose of correction of the first-formers' school adaptation process, the conditions for harmonious formation of the child's personality and of the adaptive behaviour determined by it shall be created. Hence, the significance of the behaviour conditioned by the dominating features of the personality, which is the cause of adaptation difficulties during the first school year, stands out. It lets to define the main direction of the adaptation difficulties correction and to guide the correction process in this direction. Junior school age of the child is full of resources important for his development and education, which have not been disclosed so far. Explicit analysis of adaptation and disadaptation (difficulties of adaptation) of the first –formers in sociological, pedagogical and psychological terms allows saying that the way used by the child for adaptation in the new school environment does not always correspond to the norms of behaviour which are universally accepted.

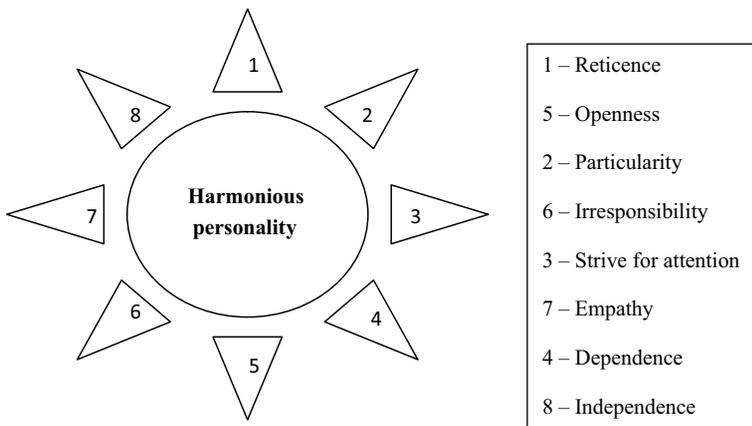
Consequently, adaptation by itself does not show a proper direction for development. So the peculiarities of the child's personality and possibilities of their correction at school become more important solving the problems of adaptation during the first year at school. Behaviour conditioned by the personality features in this work will be specified as the key factor which determines the success of the school adaptation of the first-formers.

Since rapid changes occur in the society, it is impossible to predict what personal features will be needed for a person to adapt to society; therefore the focus should be on the process, aiming to provide conditions for development of features of harmonious personality. The personality, which is able to react in acceptable patterns of behaviour when satisfying own needs in both changing conditions and in the standard environment and feeling well emotionally, is ready for the successful start of life.

## **Successful and undisturbed development of the child during the sensitive periods of development**

Preconditions the development of capacities controlling behaviour in new situations and the ability to react adequately to the occurred situation and to feel inner harmony. All those personal features, developed during the pre-school period, are typical for the first-formers, only the level of domination of them differs (reticence – openness (receptive/sensitive period of development from the birth to the age of 3 years), particularity – irresponsibility (receptive/sensitive period of development from the age of 2 to 4 years), aiming at attention – empathy (receptive/sensitive period of development from the age of 4 to 6 years)an dependence – independence) (receptive/sensitive period of development from the age of 6 to 8 years) (See Fig. 2), i.e., general basic attitudes and behaviour options.

According to E. H. Erikson (2004), the child, who has successfully coped with the tasks set for each period of age, is ready to accept the challenges of the personality development of the next period of age. Harmonious features of the child's personality is the supposed aspiration, the whole of the behaviour variety, reacting to a respective situation by the behaviour norms acceptable for the society, without losing inner balance, the whole or maturity (as much perfection as a particular child may achieve). A child characterised by harmonious features of the personality is able to combine all features of the personality: reticence – openness, particularity – irresponsibility, striving for attention – empathy and dependence – independence, none of them being dominating in respect of other features; such child hereinafter will be referred to as the child with harmonious features of personality.



*Figure 1.* Personality features of a harmonious personality.

During different stages of the child's development parents shall ensure proper conditions for successful solution of different tasks set by the development, the quality of such solutions determines the quality of the gained adaptation instruments. The child's pre-school experiences are directly related and mostly dependant on the primary institution – the family, which is the primary and the strongest institution determining the variety of children's experiences and their quality during the pre-school period. The child's experiences in the family determine his readiness and overall maturity not just when learning at school, but also when successfully adapting to changes experienced during other steps of development.

The analysis of scientific literature showed that, prior to starting school, the child must have a rich as possible experience of the world (must have various experiences); this influences the successful adaptation to different changes of the environment.

A child who is able to evaluate a situation and adequately respond to it with behaviour determined by one of the personal features, without disturbance of the inner balance, has realised their own adaptation potential during the pre-school period and is well prepared to get through the first form (Riemann, 2004). But if

the development of a child has been disturbed and one of the personal features is dominating in the structure of the personality, the child will always respond in the same way, irrespectively of the situation. The earlier it happens, the stronger it is infixed in the structure of the personality, and the more difficult it is to correct.

Based on the investigations performed by T. Helbrugge and J. Hermann von Wimpfen (1998), a human being uses or activates on average only 10 percent of their brain mass. The activation occurs through experiences, contacting the environment. If a baby or a child is isolated, or the possibility to contact the environment is limited, the adaptation abilities are lower, and vice versa – the more chances a baby or a child has to learn the environment, the more versatile it becomes (see Fig.1). Unused adaptation possibilities during infancy and early childhood considerably aggravate and reduce the chances to adapt in other stages of development. At the pre-school age the child has a possibility to take over more than 50 percent of experience necessary for qualitative and successful existence. D. T. Dodge, L. J. Colker, D. G. Koralek (2002) assert that encephalic convolutions experience a positive impact when children are full, feel safe and have stable relations with their fellow-men. There are sensitive periods (sensitive phases) when the brain is the most receptive for accumulation of particular experiences. During the pre-school years children are the most receptive for emotions control skills, relationships with others formation, language learning skills; therefore they need appropriate conditioning.

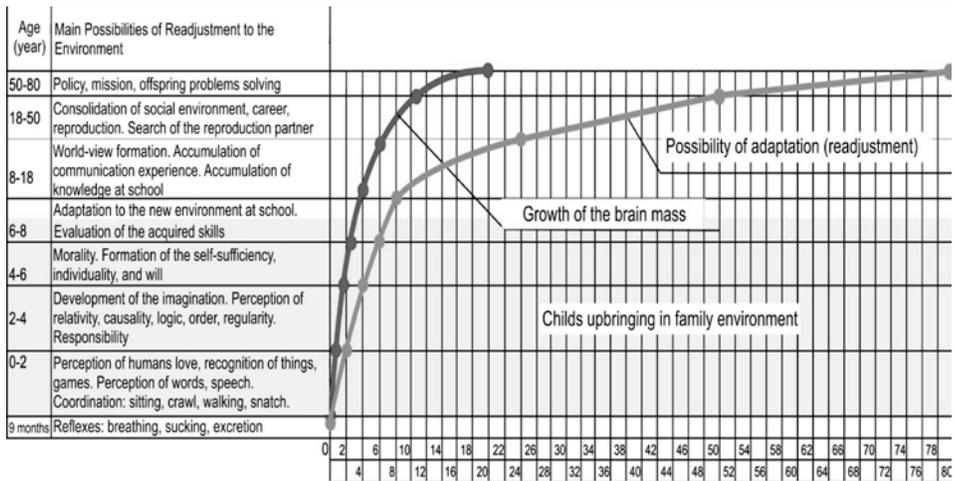


Figure 2. Dependence of the individual adaptation capacities on age and brain activation schedule (adapted by T. Helbrugge and J. Hermann von Wimpfen (1998, p. 24))

We can assert that brain investigations has proved the claims stated by A. Maslow, E. Erikson, K. Horney, J. Piaget, Л. С. Выготский, F. Riemann and other scientists. Having analysed the school adaptation of the first-formers and having summarised the insights of various authors, it is possible to assert that the stages of personality

development, defined by those scientists, investigated in different aspects, is the realisation of adaptation capacities – the result of brain development and the influence of the environment.

Depending on versatile, qualitative and corresponding stages of age experiences, the child, satisfying his/her needs and developing as harmonious personality, realises adaptation capacities during the pre-school period.

In the given scheme we can see that the volume of the brain is most rapidly developing during pre-school age and as a result specific experiences are required for its activation. For example, if a child fails to learn to speak until the age of 4, they often have a greater difficulty to improve linguistic characteristic later in life.

Summarising the above insights we can assert that the quality of the realisation of the child's adaptation capacities plays a great role on the expression of their adaptation in later stages of development. The disturbances of the child's personality self-development (we understand them as failures of the nearest environment i.e., of the family, to provide conditions for a successful self-development of the child) during the sensitive periods and their potential consequences precondition the development of one-sided dominating features of the personality. The earlier they are developed, the stronger they are infixed in the structure of the personality and condition unacceptable behaviour in the society through expressed aggression.

This phenomenon is not adequately assessed in our society – after all, the children's self-development of adaptation instruments through experiences in early stages of development, as well as the obtained patterns of behaviour aiming to satisfy one's needs, predetermine the future.

In both, the pre-school period and at the start of school, the impact of the family is important for the child. Based on the investigations performed by Helbrugge and J.Herman von Wipfen (1998), the smaller the child, the more flexible he/she is in adapting to the changes in the environment; in later stages of development it might require much more efforts. The child's readiness for school adaptation in the beginning of school attendance, as well as in other situations new for the child, depend on the child's experiences during the pre-school age.

According to F. Riemann (2004), personalities of children differ greatly. K. Horney (2004), a psychoanalyst, established that the formation of personality features is determined not so much by biological reasons, but rather by the social-cultural causes. A human being gains those features every day being influenced by different experiences. Such different personality features as escapism or avoidance of close relationships, inability to feel, dependence, continuous striving for attention or pedantic observation of rules and regulations are just the reflection of our culture.

According to R. May (2010), the strangeness of the person avoiding close relationships is his/her defence against hostility; its source is the lack of love and distrust experienced during infancy, therefore such a person is continuously afraid of real love, since "it is a danger for the very existence". Parents themselves are very often helpless and unconscious products of the culture of their period with dominating features of the personality, development of which was pre-determined by the natural environment of the technological-informational age.

Such conditions as avoidance of close relationships, dependence, pedantic observation of rules and regulations or continuous strive for attention, infixed in the personality structures of parents and forming a respective way of life, are transferred to children as well.

Having reviewed the family, as the basic and the most important factor of self-development of children's personality features during the sensitive periods of the personality development, we see that it builds the basis for getting ready to adapt to changes in the environment in the future. Therefore when performing activated ethnographic investigation the impact was made not directly on the child, but individual work was focused on the parents and the teachers.

The analysis of scientific literature showed that the phenomena of adaptation in the first form is underestimated, since the school adaptation in the start of school predicts the future, it gives answers to the question whether they have obtained adaptation instruments to be applied in present and in the future. The earlier they are obtained, the better they are infixed in the structure of the personality. Hence, it is important to notice, recognise and start to correct them. The earlier the correction is started, the better efficiency we can expect, and the later it starts, the more efforts it requires.

## Methods of the research and its organisation

Aiming to establish readiness of pre-school age children for successful adaptation in the new environment (in the first-form), the activated ethnographic method, which lasted for entire academic year, was used. During the investigation the methods of the first-formers observation, of the focus groups and of the individual counselling of parents and teachers were used. The investigation took place in three randomly selected schools in the city of Vilnius.

*Table 1* Distribution of the first-formers

	School			Totally:
	„X“	„Y“	„Z“	
<b>Number of the first-formers</b>	74	72	22	168

In order to understand the difficulties of first-formers adaptation and to identify particular children with adaptation difficulties the expression of first-formers' adaptation in day-to day environment of the class was observed, i.e., what ways of behaviour they use for adaptation purposes.

### Substantiation of the observation method

The observation method was used to identify individual children and to fix the observed problems of their day-to-day behaviour in the first form. It was aimed to fix

the expression of the behaviour difficulties occurring under natural conditions and to see it realistically. It was also aimed to carefully investigate the behaviour of the first-formers, which cause adaptation difficulties in the community of the class by the following criteria:

**Based on the expression of behavioural difficulties of the first-formers in the daily environment of the class, the following criteria for assessment of the first-formers adaptation difficulties were distinguished:**

Assessment criteria of adaptation difficulties of self-contained children – avoidance of relationships: stays alone, abrupt, short-tempered, hurtful behaviour; face behavioural difficulties being with other people; by own behaviour try to demonstrate unwillingness to socialise with anybody.

Assessment criteria of adaptation difficulties of meticulous children - particular observation of rules and regulations: careful well-considered behaviour; difficulties arise when spontaneous action is required; plan everything, because unplanned behaviour disturbs; dislike novelties, changes; experience discomfort when it is not possible to keep their things tidily; not able to work beyond the rules; find it difficult to adjust to chaotic environment; face difficulties when try to enter own rules and give too many instructions to others; not able to work in a mess; unable to be inconsistent, lavish, non-persistent.

Assessment criteria of adaptation difficulties of children striving for attention – try to attract attention of others by own behaviour: unable to stay long in one place and thoroughly complete any job; like changes, in their absence orientate own behaviour towards search of changes; by own behaviour try to get into the centre of attention; avoid rules and regulations and demonstrate impatient behaviour; behave freely and like to take risks; behave so that it is good right here and right now; demonstrate poor patience, unable to wait, find it difficult to stay away from inappropriate actions, unable to be alone, complete individual tasks, hardily do what has been planned.

Assessment criteria of adaptation difficulties of dependent children – lack of self-confidence and gained inability: find it difficult to separate from parents; very often stick to the teacher, look for a close contact; respond to the opinion of others; unable to insist for anything for themselves; fail to be wholesomely aggressive; demonstrate too peaceful, altruistic and compassionate behaviour; fail to protect themselves against sneering of others; do not demonstrate initiative.

Children demonstrating harmonious personality features – able to control behaviour in new situations and adequately react to an occurred situation and to feel inner harmony. The child is characterised by all the above – mentioned features of the personality (reticence, particularity, striving for attention and dependence), four basic attitudes and behaviour possibilities, i.e. the child capable to assess situation and to react to it adequately with the behaviour determined by the four features of the character, without disturbing the inner harmony.

Under consent of teachers and parents the observation was performed during lessons and breaks, in the mornings, when parents take children to school, after school, when they come to pick them up. The behaviour of children was observed during various lessons, both learning and playing during breaks. The observation

lasted for three months, from September to November, every workday, from 8.30 to 14.30. Totally 390 hours were spent for observation. Based on the daily behaviour problems fixed during the observation during lessons and breaks, which the child solved, on the opinion of the teacher regarding the adaptation difficulties experienced by the child during lessons, and on the understanding and experience presented by the parents, children were assigned to a particular group of the personality type: self-contained children, meticulous children, children striving for attention and children demonstrating harmonious personality features.

### **Substantiation of the method of the focus groups**

The purpose of the method is to get the parents interested and to involve them into solution of difficulties of their children's school adaptation during the first year at school. During October – December the teachers called class meetings (parents of all 168 pupils were invited), during which focus discussions between the teachers and the parents were organised. During the focus meetings parents and teachers were provided with the knowledge on the adaptation difficulties conditioned by the dominating features of personality, the expression of such difficulties and their potential critical consequences in later stages of the personality formation. Totally 7 focus meetings were held. The parents were introduced to the children adaptation difficulties occurring in the daily environment of the school (without naming the children) and to the potential future problems as their consequences, unless the conditions for adaptive behaviour development were provided. The parents who wanted to assist their child in development of features of harmonious personality were invited for individual counselling to look for the positive direction of self-development. Many scientists who have the experience of investigation of cooperation with the parent establishment process, admit that involvement of parents into the process of development and education is a complicated process because of individuality and diversity of each family.

### **Substantiation of individual counselling, interviews, conversations**

A. Juodraitis (2004) suggested analysing adaptation problems using individual interviews. Those methods of data collection used in the structure of ethnographic investigation provide additional information about school adaptation of the first-formers. The purpose of this method application was to provide pedagogical assistance to those teachers and parents the children of which had experienced adaptation difficulties during the first school year, as well as to those whose children had had no adaptation difficulties at school, but parents or teachers had questions regarding development of children. Aiming to assist the parents in the adaptation correction of their children, individual conversations with them were carried out, the best ways and alternatives of assistance to their children in the self-development of the structure of harmonious personality were sought for; or to try to get closer to this goal depending on the individual potentials of every child, since the more harmonious is the structure of the child's personality, the easier is adaptation in the new school environment and

in the class community. The plan of individual counselling was made in advance. 48 parents of the first-formers participated in the individual consultations (parents of 5 self-contained children, parents of 8 dependent children, parents of 9 meticulous children, parents of 8 children striving for attention and parents of 18 children demonstrating features of harmonious personality).

## Summary of the investigation results

In order to see how the children had realised their adaptation possibilities during the pre-school age and what adaptation instruments, which helped them to adapt, they had developed, based on the results of the observation data, the expressions of behaviour, as described by the parents and the teachers, the children were divided into five groups by the features of the personality. Different dominating features of the personality determined different behaviour satisfying their own needs. Developed behavioural habits for some of them helped to enter the new, unfamiliar environment of the school and to satisfy own needs, when for the others it was the disturbance and they tried to change the environment first of all (in most cases with the help of aggression), and, after failing to do it, they tried to change themselves. The results are presented in Fig. 3.

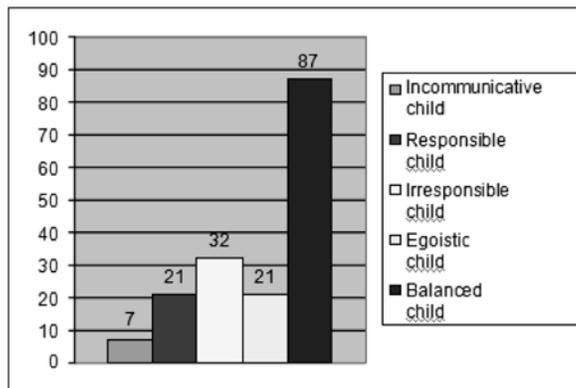


Figure 3. Division of the first-formers by the features of the personality

In the given picture it can be seen that 87 (n= 168) children demonstrated harmonious features of the personality, therefore their behaviour during both, lessons and breaks, did not cause any adaptation difficulties, they had fully realised their adaptation potential during the pre-school period. The other children by the dominating features of the self-developing personality divided in the following way: 7 of them – self-contained (n=168), 21 (n=168)– striving for attention, 21 (n=168) children were meticulous, 32 (n=168)– dependent children. All those children had realised their adaptation potential one-sidedly during the pre-school period.

While analysing the division of the first-formers by the dominating features of the personality it appeared that most of the children (n=32) demonstrated gained inability. Such children feel incapable at school, they look for someone to perform tasks for them; look for a substitute of their mother the role of whom in most cases falls on the teacher or a desk –fellow, and later on they face difficulties in making decisions independently and attempt to transfer the responsibility for own actions on the others.

The number of meticulous children and of children striving for attention is the same (n=21). The problem round for meticulous children consists of the dominating dimension of behaviour to adapt to the environment following the rules and regulations meticulously, when the problem round for the children striving for attention consists of the dominating dimension of behaviour to adapt to the environment trying always and everywhere by all means to draw attention to their personalities.

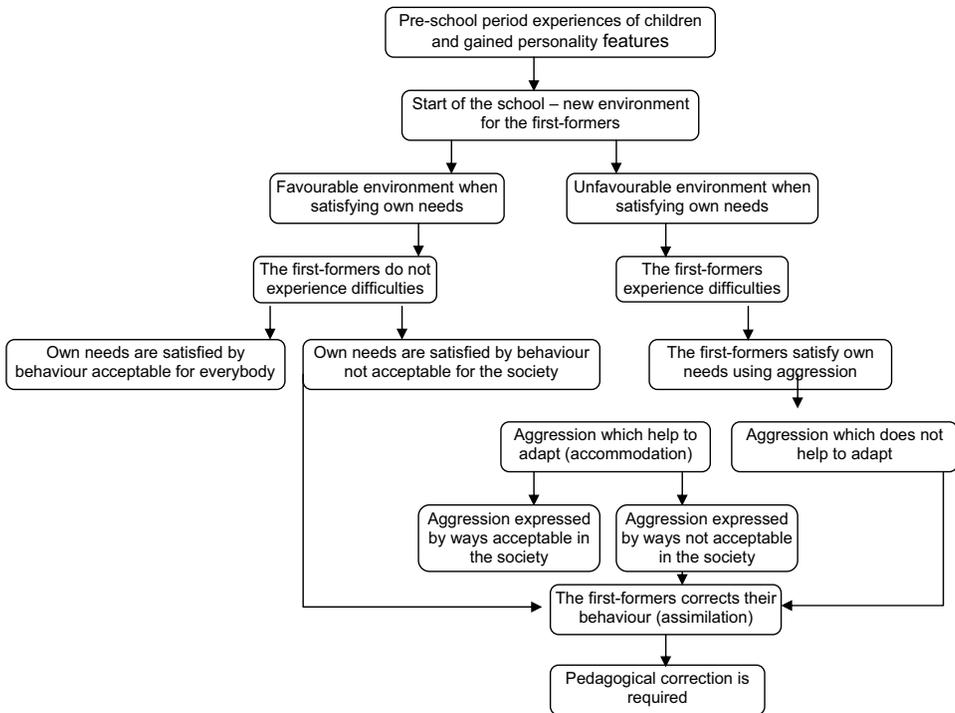
On the basis of both, the results of observation and the problems of the children behaviour specified by the teachers and the parents, self-contained (n=7) children were identified. The problem round for them consists of the dominating dimension of behaviour to adapt to the environment avoiding closer contacts with other children, run away and restrict themselves from other people.

A harmonious personality of the child determines the optimal selection of the behaviour form, the formation of adaptive behaviour model and its observation in different spheres of activity (personal, learning, leisure time and etc.) The children with dominating features of the personality demonstrate one-sided reaction to various life situations and to new circumstances, which might influence both personal and social adaptation problems.

By the activated ethnographic investigation it was aimed to disclose the expression of the first –formers adaptation difficulties and to perform its correction, which was based on the following structure of the school adaptation of the first-formers:

Based on the investigations performed by T. Helbrugge and J. Hermann von Wimpfen (1998), it can be stated that self-contained, meticulous and dependent children during the sensitive periods of development inappropriately realised their adaptation possibilities and failed to gain comprehensive adaptation instruments, which could help them to satisfy own needs by behaviour acceptable for everybody. Depending on overall, qualitative and corresponding to the age experiences, the child, when satisfying own needs and developing a harmonious personality, realises adaptation potentials during the pre-school period. Thus, those children should be provided the development conditions, in which they could develop harmonious features of the personality. A part of the children have successfully adapted in satisfying own needs and feeling personal inner comfort, but other children around them and the teacher assessed their behaviour, which helped them to adapt, not necessarily positively. The reaction of the surrounding people to such behaviour of children caused difficulties for them which they tried to solve by changing the environment in which they could feel safe; after failures to do that, they tried to change their own behaviour. And this is the result of long and consistent work. Another group of children used aggression for successful / unsuccessful adaptation. Some children express aggression in the ways

acceptable for the society and so manage to satisfy their needs, while the others express aggression in the ways unacceptable for the society and need pedagogical correction of adaptation.



*Figure 4.* The structure of the school adaptation process of the first-formers (drawn up according to Frankl, 2006; Маслов 1999; Rogers, Freiberg, 1994; Piaget, 1954; 1999; Riemann, 2004).

The first-former in the new environment of the school, when failing to satisfy his needs by standard behaviour, loses his inner harmony. The expression of the first – formers' adaptation and the point of the correction of adaptation difficulties is shown in the scheme (See Fig. 4). One of the essential determinants (critical factors) of adaptation is behaviour. The personality structure of some of the children is able to modify own behaviour adapting it to the new environment of the school and they face no adaptation difficulties, while the encounter with the new environment of the personality structure of some others cause adaptation difficulties which need to be corrected. The parameters of activity and expedience were diagnosed by assessment of the child's ability (inability) to demonstrate by personal behaviour readiness (unreadiness) for the constructive interaction in the social environment of the class.

Work with the parents of the children demonstrating harmonious features of the personality (those who had not experienced school adaptation difficulties) showed that they understood then-existing problems and foresaw potential problems and tried to prevent them looking for the best direction of development and so to protect their children against the potential future problems. Those parents were the first to come for the individual counselling (on their own initiative) though their children had successfully adapted for school; they had numerous different questions that they were looking the answers for and questioned the problems of their children. Actually, parents of 18 (n=87) of those children wanted to meet and discuss the adaptation of their children in the first form. The parents had various questions relating to the education and daily situations at home, though their children, if compared with the others, had undergone the school adaptation successfully. 29 individual counselling meetings were held with the parents of the children demonstrating harmonious features of the personality. During the work with them a positive example of children's upbringing showed up; they became a kind of the reference-group showing the example of behaviour of the parents whose children had not faced adaptation difficulties. Work with the parents whose children had not faced any school adaptation difficulties allowed to observe a positive example of parents' behaviour with their children, let to understand how parents should treat their children and what had to be developed in the parents whose children had faced school adaptation difficulties.

The results of the work with teachers and parents, whose children had faced school adaptation difficulties during the first school year (n=81) showed that not all parents had been actively interested in the problems of their children at school; the most of the parents had to be additionally motivated (involving the assistance of the form- tutor). Different methods had to be searched for to get them involved into the solution of the difficulties of their children's school adaptation. The investigation showed that the parents whose children had adaptation difficulties did not realise the difficulties their children had been facing and did not have sufficient pedagogical literacy to be able to help their children to correct the school adaptation process.

## Conclusions

1. Although 60 percent of the readiness for life potential is realised prior to the start of school, the analysis of the work done by various authors, the investigation performed and the observation of the first-formers in the schools of the city of Vilnius advances the following conclusion: that the main reason of the difficult adaptation of the first-formers is the dominating attitude of the society that the readiness of the human being for life starts at school.
2. Education of children in both, the family and the school, is based on a wrong attitude. Difficult school adaptation of the child very often is explained by his/her nature rather than by the environment which formed him/her before school. The features of the personality, which influence the behaviour, are not inborn. The system of a human being's education is based not on the development of reasoning skills and comprehensive learning of the environment processes, but on the

transfer of knowledge. If during infancy and early childhood it is failed to provide the possibility for reasoning and to learn the environment comprehensively, it is hardly possible or impossible to gain this capacity later.

3. The brain which is not activated during infancy and early childhood reduces the possibility to master the knowledge provided by the school and to use this knowledge in life. Half of the children coming to school have not realised their adaptation capacities, the further education and development of them is complicated.
4. The family is the basis which provides the feeling of safety to young people, implants the real values, creates the conditions for the children to develop the basis for resistance to social changes in the society and developing various adaptation skills, which are so much needed in modern rapidly changing societies nowadays. Additional attention is required for education of parents and to the responsible parenthood.

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**Kestutis Ralys**<sup>1</sup>

## **SPIRITUAL EDUCATION AND THE CHURCH IN LITHUANIA**

### **Abstract**

Today Lithuanian society, like the majority of post-communist societies, needs social assistance and the appropriate structures to administer such assistance, as a result of rising social issues. Confessional organizations are performing some social work by offering social assistance and educational activities. However, confessional social work is still facing a great number of poorly explored obstacles. Contributing to these obstacles is a lack of understanding regarding the proper and appropriate cooperation and interaction between two influential institutions within society—the State and the Church. The aim of this article is to focus on the essential problems of confessional social activity and the possibilities for cooperation between the State and the Roman Catholic Church of Lithuania (RCCL) in the sphere of social activity and social assistance.

**Keywords:** spiritual active citizenship, church, caritas, Roman Catholic Church, education, Christian community

### **Introduction**

By generalizing from sparse research, this article outlines the predominant problems facing most post-communist countries, by addressing the following: a. the insufficient cooperation between the State, b. the insufficient information on social assistance provided by confessional organizations, c. the search for an identity among socially active confessional organizations, and d. material and organizational problems among confessional organizations providing social assistance, and governmental organisations.

The contemporary Lithuanian state regards itself as a partner in the handling of spiritual and social problems in society. The most vivid instances of this partnership

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are exhibited by their mutual interest in attaining a civic society and the pursuit of the welfare of its citizens.

In encyclicals “*Sollicitudo Rei Socialis*” and “*Centesimus annus*,” Pope; Benedict XVI, and Pope John Paul II formulated the principals of social attitudes towards the modern problems of society, pointing out that such problems may be surmounted through the improvement of social solidarity (Pauli P.P.II 1983). Scientists, who study the cooperation between the State and the Church, also declare that the key social objectives of the modern State and the Church coincide. For example, theologian J. Höffner points out that the contemporary Christian social doctrine supports and strengthens the political ethics of democratic countries as well as sustains a positive attitude to social assistance (Höffner, 1996). Similarly, Theologian D. Stott highlights the contribution of the Church to social assistance as one of the most significant spheres of its activity (Stott, 2001).

## **Thematic of spiritual education for NGO active in Church citizenship in Lithuania**

Modern societies are becoming more aware of the social possibilities of the Church. In many EU countries, interaction and cooperation between the Church and the State have developed by solving problems of social assistance (Oskolnikova, 1995).

Throughout the second half of the 20<sup>th</sup> and beginning of the 21<sup>st</sup> centuries, the Roman Catholic Church has been putting increasing emphasis on the social responsibility of Christians-Catholics. The Second Vatican Council underlines the idea that Christian involvement in the fulfilment of the mission of the Church is urgent and it includes the responsibility for changes in the world (5). Thus, the Christian society actively involves itself in and directly links the daily life and the transcendent sphere, that is, the Church and the State. This connection pursues the attitude of conjoint modification of social structures and this results in concurrent actions of both participants of the process – the State, and the Church.

It is also important to mention that the Second Vatican Council avoids using the conventional concept of “the state”; however, while explaining the same reality, employs the term “political society”, simultaneously emphasizing institutional relations binding the members of the society in pursuance of the same values. The Second Vatican Council also acknowledged that “the freedom of the Church is the basic principle for good relations between the Church and the political power”.

Upon the definition of the major aspects of relations between the Catholic Church and the State, their materialization in specific cases should also be discussed.

In its social doctrine, the Church distinctly pinpoints the principle of cooperation with the state (6). In 1990 Lithuania adopted the Act regarding the restitution of the Catholic Church, which declares the following:

- The State acknowledges the right of the Church to build its own internal life in compliance with the religious legal canons,

- The Republic of Lithuania shall reimburse to the Church all the incurred losses in accordance with the mutually concluded agreements,
- The State shall not restrict confessional activity in the sphere of education and training; the State shall assist the Church's institutions, which propagate Christian culture and are involved in charitable work,
- The State of the Republic of Lithuania and the Church shall cooperate on the basis of parity principles,

The above is regulated by the legal acts of the Republic of Lithuania (7).

Nevertheless, the RCCL finds the objectives in the sphere of social welfare and the principles defined in the aforementioned Act difficult to implement, as it lacks strong social organizations, that can provide society with manifold assistance, and finances allowing for the development of housing for homeless, canteens for the disadvantaged, education institutions, and organization of Caritas activity.

The Catholic Church was obviously deliberately avoiding closer contacts with the political and economic elite of Lithuania, since it did not want to be accused of having become a weapon for economic and political games. At the same time, it should be noted that a productive dialogue with cultural elites has been in process since the start of the restoration of the Lithuanian state. The RCCL was particularly successful in coming to an understanding with musicians, artists and architects, resulting in various festivals and other cultural events taking place in the Catholic churches of Lithuania.

However, it should be pointed out that the relations of the RCCL and the elite of Lithuanian society can be perceived as passive when considering Church activities and thus the RCCL has no significant influence on them and the possibilities for social impact of the RCCL are simultaneously minimized.

At the primary stage of the restoration of the Lithuanian state, enthusiasm and optimism prevailed in estimations of the prospects of the RCCL's development and influence on the social development of society. Similarly, the belief that the destruction of the antagonism towards religion, characteristic of the Soviet regime, and the establishment of suitable social conditions are enough for the renewal processes of society to gain further impetus. The pastoral letter of the hierarchy of the RCCL in 1989, which stated that Lithuanian society is Christian in its essence and that the Decalogue principles suffice to ensure its prosperity, became a symbolic expression of the expressed attitude.

Nevertheless, it soon became evident that the problems of the society are far more complex. The pastoral letter of 1996 thus represents less optimism, but more cohesion with the social reality. It reads as follows: "As never before we comprehend that free life must be accompanied by conscious assumption of obligations to take care of welfare of all people" (8).

The lack of attention by the RCCL to social problems above all is an indication that the RCCL needs those who are competent enough to handle these expressed problems. The RCCL entered into the new post-Soviet period of its activity with only half as many priests as before the establishment of the Soviet system. In 1940,

Lithuania had 1451 priests, whereas in 1989 the number had dropped to 726 (Vardys, 1998).

The implementation of the social attitudes of the RCCL is impeded not only by a relatively small number of priests but also by their insufficient preparedness to act in contemporary society. Restriction of activity of seminaries in the Soviet period prevented normal alternation of generations among the clergy. In the pre-soviet period, various aged priests formed approximately equally sized groups, while the number of young priests dramatically declined in the Soviet period (Cardinal Bačkis, and S.Tamkevičius, 1999-2011). The more mature age of the Lithuanian priests creates not only a physical problem impeding their more active performance in the social sphere but also a psychological problem to accept changes in the RCCL in order to perceive its new possibilities and encourage the activity of Catholic organizations.

At the time of the restoration of Lithuanian independence, there were numerous attempts to re-establish Catholic social structures and other confessional organizations that were operating in the pre-Soviet period, all of which involved more than one million of Lithuanian residents in the pre-Soviet period being among them. The process in question was arduous. Most often the above-mentioned social structures were formed based on the “top-down” principle i.e., instead of considering the specific needs of the modern society, attempts were made to simulate structures and goals agreeable to the society over half a century ago.

**The Lithuanian Catholic Science Academy (LCSA)** is the most prominent educational organization established in Lithuania in 1922 on a professional basis and later re-established in 1990. It comprises persons to whom consolidation of science and religion is significant and currently enlists about 700 members. LCSA arranges seminars, conferences, publishes annuals and other works. However, this organization is more oriented towards historical research and confines itself to representative functions. Thus, it has insufficiently involved itself in the life of modern society, participated in discussions on relevant social problems, and endeavoured to influence social life. The social activity of the LCSA is limited to statements, yet it is invited to pay greater attention to moral problems of the development of the Lithuanian society (Vasiliauskienė, 1997).

Their influence on social life is not particularly remarkable, although Catholic women attempt to get involved in various Caritas campaigns, organize different courses, and pursue charitable activity. Despite these activities, they remain small organizations, having relatively little influence on social processes.

## NGO activities and citizenship in Catholic culture

**NGO and Federation (AF)** are playing a more active role. It was established in Luvine, Belgium in 1910 and set as its goal towards taking care of the spiritual regeneration of the nation and expansion of Christian culture. In Soviet times, its activity moved abroad, and in 1989 it was resumed in Lithuania. AF is oriented to all social groups and strives for better comprehension of Christian principles. The

organization currently enlists more than two thousand active members and is one of the Catholic organizations that actively endeavours to understand and engage new social and cultural conditions. Simultaneously AF distinctly emphasizes its apolitical position. Such striving to alienate itself from daily political problems sometimes manifests itself as indifference to the social sphere. Therefore, some fear that AF may turn into an organization enshrining abstract spirituality. Catholic laymen in Lithuania, there is a predominance of minor organizations, scarcely cooperating with each other and most often oriented to the functions of social care. It is evident that the “top-down” initiative is missing and more remarkable attempts to change society are not yet observed. These organizations also find it difficult to increase their membership.

The situation of the post-communist society and the problems of confessional organizations in this society were particularly demonstrated by the failure of Kolping Society in Lithuania. The Kolping Society was established in Kaunas in 1993. Irrespective of a few minor successful projects, its activities gave the false impression of social solidarity. The majority of people today consider this society to be a charitable organization but not a society that teaches social interaction. Thus, the current actions of this organization go largely unnoticed in Lithuania. The objectives of their research;

1. From the analysis of the current position, it can be stated that the Catholic Church essentially changed its Soviet social thinking.
2. Social problems are solved in a complex way
3. Since 1996 the hierarchy of RCCL has been modernising the social attitude of the society.

It nevertheless became evident that laymen themselves are not adequately ready for such a mission. There are practically no apolitical Christian organizations operating in Lithuania, which would aim at changing social life while only a few thousand members take an active part in the Christian party.

Nonetheless, there is some successful involvement of RCCL in decision-making with respect to social problems. Family Centres functioning under RCCL and the “Caritas” organization have had greater influence on decision-making regarding family problems.

## **NGO, role of the “Caritas” launched its spiritual activity in Lithuania in 1989-2011 at the twilight of the Soviet period**

Structures were formed in all episcopates and in nearly all parishes. Lithuanian “Caritas” had the following goals: religious education, encouragement of solidarity with the disadvantaged, assistance for patients and concern for traditions. However, charitable work came from the West forcing Lithuanian “Caritas” to readjust its goals and pay more attention to coordination of charity campaigns. “Caritas” is the most conspicuous organization with the largest membership that fosters a Christian attitude towards people and solves problems of social assistance.

NGO, “Caritas” was actively formulating social projects, mostly intended for children and orphans, the elderly, single mothers, and family consolidation as well as assistance for prisoners and alcohol addicts. Not only “Caritas” but also Family Centres functioning under the control of churches appeared to initiate many of these projects.

“Caritas” programmes in Lithuania stipulate care for a family. This resulted in the establishment of Family Centres, the activity of which has expanded widely. These Centres prepare youth for marriage, develop programmes of education and preparation of teenagers for family life and provide psychological and social assistance for troubled families or crisis-ridden young mothers and people suffering from violence in their family. Doctors, psychologists, and social workers work together in these Family Centres. This activity of RCCL is particularly beneficial for society, since a Lithuanian family faces numerous societal pressures during this transitional period resulting in the decline in birth rates, an increase of extramarital births, the growth of the number of cohabitation cases, a decrease in the number of marriages, and a high percentage of divorces (Navaitis, 2001).

An important project of social assistance for the family is the Christian maternity hospital that, in line with the Christian principles, declines abortions. By establishing such maternity hospitals, RCCL manifests its attitudes regarding the family in practice. International organizations like “For Life” have their offices in Lithuania, which pursue educational programmes fostering respect for life and responsibility for it. Such organizations also propagate these attitudes.

Both during Soviet times and at present, the RCCL promotes the temperance of society. The K. Valančius Temperance Society unites enthusiasts of an abstinent lifestyle and publishes a newspaper entitled “Blaivi Lietuva” (*Abstinent Lithuania*). However, it should be noted that the struggle for the temperance of society has not been very successful. One of the reasons for the lack of success is the complexity of this work along with the need for a clearer policy of the State towards temperance. Thus, the work of abstinence enthusiasts bring little to no results, while alcohol smuggling and direct or indirect propaganda of its consumption are on the rise. As a member of this organization, Bishop S. Tamkevičius pointed out that “it is difficult to speak of temperance of the nation when the State men consider trade in alcohol a substantial article of the state’s revenue” (Tamkevičius, 1999).

## **Religious and Spiritual Education is the Hallmark Activity of the RCCL and Church**

From 1940 to 1988, religion as a subject was not taught in Lithuanian schools. Religious education of children was prohibited even in churches. Priests were even subject to punishment if they attempted to catechize children in groups.

Religious education by the RCCL returned to schools before the restoration of the Lithuanian state. Priests, monks, and Catholic laymen (i.e., everyone who had pedagogical experience and/or aspired to help children and were keen to give them what was not freely available during the Soviet years) undertook this activity with enthusiasm.

Catechism Centres were established in all episcopates, courses for teachers were arranged, and programmes of religion education were formulated. Translations of Italian and Austrian textbooks were made and original textbooks appeared.

RCCL doctrine maintains that it does not attempt to impose its ideology in the sphere of education; however, it aims at directing education and training to meet the intentions of parents and the needs of children. RCCL, therefore, trains teachers' so that they are able to fulfil their mission. RCCL maintains the position that the State should allow, ensure, and respect the freedom of parents to educate and meet their children's educational needs. In doing so, nobody is forced to attend classes of religion thereby preserving freedom of choice.

At Lithuanian schools, nearly 98% of schoolchildren of the primary forms attend classes of religion; however, this percentage begins to decline at the fifth form. One of the possible reasons for this decline is the lack of qualified teachers of religion missing at these higher levels. It should also be noted that the majority of teachers of religion who worked during the period of 1989–1992 were monks from the underground or teacher-pensioners, who completed short courses of catechism, or priests who were not taught pedagogical disciplines at seminaries. However, since 1996, the number of teachers of religion with university education has already started to increase.

Nevertheless, the number of schoolchildren attending classes of religion has been dropping annually by three per cent for the last ten years. When a comparison between the attendance of classes of religion with the age of schoolchildren occurs this trend becomes even more vivid: from the third to the tenth forms, more than 75% of those who attended classes of religion in the primary forms abandon classes of religion. Only approximately ten thousand of the graduates learn religion, although the same classes in the first form were attended by forty two thousand schoolchildren. Senior school learners and their parents usually make this choice because they are preparing for studies at a higher school and see no need for classes in religion.

These facts distinctly represent the difficulties in the sphere of school education and training. The consideration of the situation of the social activity of RCCL in Lithuania, as well as in the majority of the post-communist countries, shows that the perception of the position of the Church in the society is rather narrow. A strong dichotomy between religion and the daily life is also observed.

A post-communist society must allow space for religion, yet interaction of the State and the Church that deals with the same social problems is obviously inadequate, not to mention the untapped social potential of the Church. Scarce studies of the social activity of the Church indicate the difficulty society has in accepting the multifold aspects of the Church's activity within society. On the other hand, the RCCL is also at fault as a more active role of social influence by the Church is missing. This is not a problem of forced restriction of its activity by the State but rather is a question of the ways of its return to the social environment.

## Conclusions

To conclude it should be pointed out that the Roman Catholic Church of Lithuania NGO is the most influential religious confession and provides social assistance and educative activity through its interaction with the State. Being still in the post-communist transitional period, Lithuanian society faces many social problems that could be more effectively handled through an appropriate interaction and cooperation between the Church and the State. However, the RCCL lacks a strong social organization that can provide proper social assistance. There is also no adequate dialogue between the RCCL and the political and economic elite in Lithuania. Thus, the social impact of the RCCL is minimized and moreover, the RCCL itself lacks competent people to find solutions to social problems. In order to strengthen the power of the RCCL, various Catholic organizations have been re-established, such as the LCSA, LCWS, CWS, AF and others. Nevertheless, all of them are rather minor organizations that scarcely cooperate with one another. Among the more powerful and influential ones are Family Centres and the “Caritas” organization, both of which provide social care for families. Finally, it should be noted that although the RCCL participates more actively in religious education, the number of school children, attending religious classes has been constantly falling. As a result, the social influence of the Church is not very high and the interaction between the Church and the State in social activities remains inadequate.

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## MULTICULTURALISM AND BEING HUMAN: HUMAN IDENTITY, THE WHOLLY OTHER, AND EUROPEAN INTEGRATION

### Abstract

Frustrated with the lack of integration by immigrants into their societies coupled with the fear of extremist activities within their borders, the government leaders of Germany, France, and the United Kingdom have declared multiculturalism to be a dead enterprise in their countries. Though the term is difficult to define, multiculturalism, in essence, is a socio-political ideal that seeks to appreciate, respect, and protect disparate ethnic groups within a unified society, all under the guise of tolerance. How societies attain such an ideal is a rather contentious subject as numerous strategies have been advocated. What is at stake is whether such an ideal should be pursued at all, leaving open the question regarding the role social values play in developing a cohesive, flourishing society.

The intent of this paper is not to offer another approach to achieving the ideal of a multicultural society but to examine contemporary conceptions of multiculturalism as a stated political objective in the European integration process in order to suggest the inclusion of a public conversation on the nature of being human that includes religious discourse, which is a missing or neglected component at best. To achieve this purpose, we will explore the concept of culture as the human response to fundamental, existential questions inherent to being human, what theologian Paul Tillich describes as the “dimension of depth” in all human experience. In doing so, this paper hopes to refocus the debate by creating linguistic space for an interdisciplinary conversation on the nature of human being that includes religious discourse. By engaging in this conversation, perhaps we will better understand our differences, and more importantly, what binds us together as human beings.

**Keywords:** multiculturalism, human being, human identity, European integration, theology

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## 1. Introduction: the failure of multiculturalism?

Frustrated with the lack of integration by immigrants into their societies coupled with the fear of extremist activities within their borders, the government leaders of Germany, France, and the United Kingdom have declared multiculturalism to be a dead enterprise. German chancellor Angela Merkel declared last October in a speech in Potsdam to members of her Christian Democratic Union that multiculturalism, what Germans call *multikulti* where different ethno-cultural groups live side-by-side, is an abject failure.<sup>2</sup> British Prime Minister, David Cameron, echoed similar sentiments at a security conference in Munich this past February, claiming that multiculturalism, which encourages different groups to live separate lives, has nurtured an extremist ideology within the borders of the UK.<sup>3</sup> As if not to be outdone, French President, Nicholas Sarkozy, expressed his disdain for multiculturalism in a nationally televised debate, citing multiculturalism as the culprit for the loss of French identity.<sup>4</sup>

Why does multiculturalism seem to be such a catastrophe? What are the underlying social values inferred by repudiating a policy of multiculturalism? Is there perhaps something missing from the conversation that may enhance the multicultural ideal and the European integration process?

### 1.1 Reasons for declaring the death of multiculturalism

Upon closer examination of these aforementioned public remarks, despite their varying approaches at implementing state multiculturalism, three succinct reasons emerge for rejecting multiculturalism: national security, national identity, and a lack of shared social values.

Cameron directly links the failed policies of multiculturalism with the rise of extremism within his own borders because radical ideologies nurtured within these disparate communities have been allowed to thrive. The same might be said for the violence in 2005 among young French Muslims growing up in suburban Parisian ghettos, although Sarkozy did not mention such security concerns in his remarks. With respect to national identity, Merkel insists that immigrants must do more to learn the German language while Sarkozy sees the issue in terms of wrong emphases, stating that more attention should be placed on what it means to be French. Likewise, Cameron chastises the British government for failing to communicate a compelling, common societal vision. In short, there appears to be a lack of shared social values that inhibits societal cohesion and a sense of belonging.

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<sup>2</sup> BBC News. <http://www.bbc.co.uk/news/world-europe-11559451> (accessed October 18, 2010).

<sup>3</sup> Prime Minister's Speech at Munich Security Conference (Full Transcript). <http://www.number10.gov.uk/news/speeches-and-transcripts/2011/02/pms-speech-at-munich-security-conference-60293> (accessed February 5, 2011).

<sup>4</sup> Reuters. <http://www.reuters.com/article/2011/02/11/us-france-sarkozy-multiculturalism-idUSTRE71A4UP20110211> (accessed February 11, 2011).

It is important to note that these remarks by these leaders are in direct reference to the failure of each country to integrate Muslim communities into their societies, raising various issues whether security concerns in Britain or economic concerns in Germany. Each leader was quick to note that their concerns do not simply relate to one particular ethnic group and made it abundantly clear that diversity is not only part of their societies but a treasured asset. What is at stake, though, is whether the ideal of a multicultural society should be pursued at all.

## 1.2 Should the ideal of multiculturalism be pursued at all?

In these introductory remarks, multiculturalism begs to be defined. Is multiculturalism prescriptive for a society or descriptive of it? Is the implementation of multiculturalism best understood through the analogy of a melting pot or a mosaic? Should tolerance be the core social value for a multicultural society or are there others? If others, how would those social values change the nature of the ideal of a multicultural society?

To be sure, multiculturalism is an elusive term. These various country heads are rejecting elements of a multicultural ideal based on identity, security, and common social values, questioning whether such an ideal should even be pursued. Others scholars question whether multiculturalism, with its implied cultural relativism, would implode because all cultures are assigned equal value such that a culture's conception of the good life becomes immune to criticism (Jacoby, 1994, p. 123). Still others conclude that multiculturalism will fail because human identity is linked primarily, if not solely, with ethnicity, concluding that one's life is largely determined by ethno-cultural factors rather than potential and self-determination (Berliner and Hull, 2011).

The intent of this paper is not to offer another approach to achieving the ideal of a multicultural society but to examine contemporary conceptions of multiculturalism as a stated political objective in the European integration process in order to suggest the inclusion of a public conversation on the nature of being human that includes religious discourse, which is a missing or neglected component at best. Indeed, by including religious discourse, not all the challenges associated with multiculturalism will be solved. In fact, it may only complicate the matter. I am also not suggesting that the conversation should be limited merely to the religious. To do so, would only commit the same genetic fallacy as those who see human identity simply in ethno-cultural terms. An interdisciplinary conversation on the nature of human being is needed.

The inclusion of a religious conversation on the nature of human being may seem precarious to some, while an affront to others. My proposal, though, is a modest one and one that seems to be relevant as evidenced in my introductory remarks. Thus, to achieve the intent of this proposal, we will explore the concept of culture as the human response to fundamental, existential questions regarding what humanity believes, whether it realizes it or not, about God, the world, and others. In doing so, discerning human identity, in part, becomes wrapped in "the other" and particularly "the Wholly Other." The challenge comes, though, in how we conceive of and relate

to the other and the Wholly Other. As such, this paper hopes to shift the focus of the debate by creating linguistic space for an interdisciplinary conversation on the nature of human being that includes religious, existential questions. By engaging in this conversation, perhaps we will better understand our differences, and more importantly, what binds us together as human beings.

Before discussing the concepts of “the other” and “the Wholly Other,” we need to sketch the contours of the term multiculturalism. In doing so, a frame of reference emerges that enables us to navigate through the murky waters of the multiculturalism debate, illuminating some of the main issues, namely the nature of culture and human identity, for engaging in an interdisciplinary conversation on the nature of human being.

## 2. Towards an understanding of multiculturalism

The term, multiculturalism, emerged nearly five decades ago in the 1960s as a way to express a new kind of the early 20<sup>th</sup> century notion of cultural pluralism. Although difficult to define, the contemporary understanding of multiculturalism advances the inclusion of disparate groups into all facets of public life. Currently, the term generally propounds an ideal that seeks to appreciate, respect, and protect disparate ethnic groups within a society, all under the guise of a central social value—tolerance.

### 2.1 The contours of multiculturalism

The widespread public endorsement of the idea of cultural pluralism entered into the American collective psyche during the early 1900s in response to the massive influx of immigrants, particularly from Europe. It was a way to give expression to America’s founding motto, *e pluribus unum* (out of many, one). Against this backdrop, contemporary conceptions of multiculturalism possess a descriptive element, broadly understood as the expression of a “plurality of ethnic and social identities” within a common society (Auerbach, 1994, p. 1179). Similarly, this nebulous idea can be construed simply as a society composed of a plurality of cultures. This, of course, begs the question as to what culture means, which seems to be essential to this discussion.

Although the term can be used descriptively, the majority of contemporary advocates of multiculturalism, whether in America or Europe, contend for a political, prescriptive agenda to address the unjust redresses of exclusion against various ethnic minorities (Auerbach, 1994, p. 1179). Such an approach can be classified, in part, as either “hard multiculturalism” or “soft multiculturalism.” Hard multiculturalism assumes that every “race, ethnic group, or religious group carries a distinct culture that should be preserved and promoted [equally]” whereas soft multiculturalism “simply promotes tolerance and understanding of one group for another” (Glazer, 2006). On one level, these distinctions are helpful as they set the range of approaches

to achieving a multicultural ideal. On another level, though, they fail because they gloss over what constitutes distinct cultures and the nature of human being.

Other possible ways of understanding multiculturalism arise from how a multicultural ideal is achieved or implemented. Two analogies, melting pot and mosaic, are common to the literature. The melting pot analogy seems to have a domestic, dynamic connotation where an amalgam of ingredients are blended together to produce a delightful dish. The mosaic analogy speaks to our artistic sensibilities, appealing to the careful arrangement of individual pieces of colored tiles into a beautiful whole. A static object to be observed, respected, and admired. More concretely, the former seems to identify the economic ideals of multiculturalism while the latter tends to see the creative potential of diverse viewpoints (Hinz, 1996).

Another vantage point from which to survey the landscape of multiculturalism is spatial. Should diverse groups of people learn to co-exist together side-by-side in harmony or should these groups have close interactions with one another? The language of distance and openness as well as urban or rural all tend to connote spatial references for communicating various aspects of a multicultural ideal (Hinz, 1996). Central to the spatial metaphor, though, is the notion of “the other,” which implies the need to know, tolerate, and respect something or someone different from one’s self (Auerbach, 1994, p. 1186).

Moreover, when discussing the notion of the other, it is difficult to avoid the associated religious overtones, what Rudolf Otto identified as the “Wholly Other,” arguing that it is the essence of religion in his 1917 work, *The Idea of the Holy* (Otto, 1958, pp. 25-30). Here, Otto identifies the Wholly Other as a majestic transcendent power that reveals itself dialectically in a moment of dread and awe. Yet, it appears “that religion and morality are topics rarely or overtly addressed in multicultural discourse,” as Evelyn Hinz notes (Hinz, 1996). What do these religious overtones have to do with multiculturalism and human being, and what might the implications be for European integration? The absence of such discourse in connection with multiculturalism seems peculiar and, in my estimation, is perhaps an important conversation, albeit not the only one, that needs to take place along the lines suggested in part three.

These various accounts of multiculturalism are in no way designed to provide a definitive understanding to this nebulous term. They are simply intended to begin tracing the conceptual contours of multiculturalism in order to draw our attention to several important features germane to the cultural aspects of the European integration process. To be sure, other vantage points would highlight different features. Yet, with these sketches in mind, let us consider a few objectives of multiculturalism and the reasons why a multicultural ideal is often pursued.

## 2.2 The objectives of and reasons for pursuing multiculturalism

As previously mentioned, multiculturalism often provides a descriptive analysis of cultural and ethnic diversity within a particular society. Descriptions span the range of subjects including sociology, anthropology, psychology, economic, cultural, and other disciplines in the humanities. These descriptions are intended to provide information about various groups, fulfilling the knowledge component of a tolerant society so that

people learn to respect others for who they are and avoid stereotypical conclusions. Such information is also a resource for policy makers, seeking to address the regresses against various ethnic groups in their societies. Hence, descriptive multiculturalism gives way to prescriptive multiculturalism where objectives and motivations can vary widely, although there is some continuity.

Approaches to implementing a prescriptive multiculturalism can vary considerably. If we compare Canada, the United States, and Europe, we see that Canada's efforts to shape a multicultural society focus largely on national identity and individual rights for disparate ethnic groups, although there is an internal conflict regarding French Quebec's multicultural approach (Gagnon and Iacovino, 2005, p. 25). Despite the United States having overlap with Canada, US implementation seems to center on pedagogical concerns, political correctness, and race relations. Europe's efforts at a multicultural society are evident from the introductory remarks and find distinction with Canada and the United States as freedom of migration throughout the European Union are producing security and economic challenges (Kloop, 2002, pp. 23-25).

Despite these differing approaches, there are overlapping objectives and motivations. First, advocates of multiculturalism seek the inclusion of disparate ethnic groups within a particular society. How a society achieves this ideal leads to variation. Does a society actively assimilate these various groups? If so, how? Or, does a society simply advocate coexistence? Second, these disparate groups are often seeking recognition by public/governmental institutions for their distinct ethno-cultural identities and broadened freedoms to practice their traditions. This recognition leads to a third, namely the flattening of various ethno-cultural hierarchies so that equal value is ascribed and equal opportunity for public services is available to all (Cohen-Almagor, 2001; Auerbach, 1994, pp. 1180-81).

Underlying these objectives are common concerns regarding a host of inequalities, whether actual or perceived. Broadly speaking, these inequalities (e.g., social, political, economic, or educational, etc.) prevent societal cohesion, integration into society, or access to public services, employment opportunities, or education. These disparate groups, who are seeking recognition, do so out of a deep sense of wanting to belong, "an expression of a basic and profound universal human need for unconditional acceptance,...which on the deepest level is a religious need," according Charles Taylor (1994, p. 97).

This enduring sense of belonging, of desiring to be a part of something more than oneself, is indispensable to one's identity. Moreover, disparate groups seek to preserve their cultural customs and practices because of the role they play in shaping one's identity. What remains to be seen, though, is whether these cultural factors are determinative of who we are? Are we trapped in our cultural heritages, unable to engage in critical dialogue of ourselves or with others? Or do our cultural backgrounds simply provide us with a heuristic framework for dialoguing with others not only about their cultural heritages but also about what is true, what is good, and what is beautiful?

### 3. The nexus of multiculturalism: human being and the “wholly other”

Some critics of multiculturalism contend that advocates overemphasize particularity and difference, fueling the very ethnocentrism that a multicultural ideal is supposed to dismantle. Diane Ravitch identifies such overemphasis as “cultural fundamentalism” (Ravitch, 1990, pp. 272-76, 337-54). Ralph Smith asserts that these “cultural particularists abjure the ideals of fairness and rationality so basic to contemporary democratic societies;” and in doing so, condemn any critique of their cultural perspective as inherently racist because the dominant culture seeks to retain its hegemonic power and hierarchical structure (Smith, 1993, p. 10).

To be sure, these characterizations of multiculturalism are akin to the *hard* version previously described where disparate cultures begin to envision themselves as “wholly other,” as separate and distinct from all others—nothing in common. Such thinking succumbs to the genetic fallacy, as ethnicity becomes the governing factor for determining human identity. Moreover, claims of immunity from criticism rests on a perceived cultural relativism. After all, how can hard-line multiculturalists legitimately critique the dominant culture while claiming to be immune from criticism? The problem with such cultural relativism is not its ascription to tolerance but its obfuscation of “what constitutes distinct cultures” (Jacoby, 1994, p. 123). Consequently, this brand of multiculturalism, as Edward Rothstein contends, “fails to see the other within us, or us within the other” (Rothstein, 1991, pp. 33-34). What, perhaps then, constitutes distinct cultures?

#### 3.1 Culture and its religious overtones

No matter what variant of multiculturalism, the concept of culture is germane to all of them. Yet, what does culture mean? Bhikhu Parekh defines culture as a “system of meaning and significance...articulated in a body of beliefs and practices, which collectively constitute its content and identity.” These beliefs and practices are historically rooted, providing meaning and structure to “human activities, social relations, and human life in general” (Parekh, 2005, p. 13).

These systems of meaning, of beliefs and practices, are most evident when human beings are confronted with those fundamental questions about life, what Paul Tillich describes as the “dimension of depth” in all human experience (Tillich, 1959, pp. 5, 7). As an existentialist, Tillich believes that cultures are a response to these fundamental questions that are inherent to being human. Culture, he says, is “the totality of forms in which the basic concern of religion expresses itself.” As such, “religion is the substance of culture, culture is the form of religion,” where religion is understood in the broadest sense (Tillich, 1959, p. 42).

T. S. Eliot takes us a step further in exploring the relationship between religion and culture when he remarks that “what we call the culture, and what we call the religion, of a people are not different aspects of the same thing: the culture being, essentially, the incarnation (so to speak) of the religion of a people.” In other words,

“behaviour is also belief” in that “what is part of our culture is also part of our *lived religion*” (Eliot, 1960, pp. 101, 104). Eliot’s point is that culture is not simply a humanistic endeavor but rather is often the place where people express, whether they realize it or not, their beliefs about God, the world, and others. Thus, a society’s culture is charged with expressions of “lived theology” that speak to those ultimate concerns, which take human beings to the limits of their existence.

As such, when moving from a descriptive multiculturalism to a prescriptive multiculturalism, “a respect for, and pride in, one’s own particular identity...grow out of a recognition of the value of the uniqueness in the identity of all other peoples and life forms” (Taylor, 1994, p. 96). All life is sacred. So rather than hegemonic power plays between “wholly other” cultures, we can surmise that all cultures, all people have intrinsic worth not solely based on themselves but upon—God, the Wholly Other. What, though, is meant by the other, and particularly the Wholly Other? How might these concepts relate to being human?

### 3.2 Human being and identity

When discussing the other, the term is often construed in a binary, conflicting, sometimes violent, fashion as us vs. them. Bernard McGrane, in his book *Beyond Anthropology: Society and the Other*, offers several examples: prior to the sixteenth century, Christians in the West viewed the other as pagan. During the Age of Reason, the other was, at times, understood as the unenlightened while developing societies of the eighteenth century viewed the other as primitive. The twentieth century categorized the other as simply different (McGrane, 1989). This us vs. them mentality can lead to ethnocentrism and extreme nationalism. Must we understand the other in such a divisive way?

Emmanuel Lévinas claims that much of western philosophy is violent discourse that seeks to conquer the other by reducing the other to “the same.” Lévinas, though, argues that philosophy should be about disclosing the infinite otherness captured in the face of the other. We have a duty, then, an obligation to the other, to protect the distinctiveness of the other, thereby abandoning any attempts to assimilate one into another (Gibbs, 1992, pp. 155-175). Although Lévinas possesses a high regard for the other, his notion of infinite otherness can lead to the aforementioned cultural relativism that actually results in a net loss of meaning and can even lead to violence. Yet, if Lévinas is correct in surmising that we are unable to make the other ours, nor reduce the other to our cognition, then what is, better said, who is the other and how are we to relate to others?

Paul Ricoeur identifies two primary uses of the concept of identity in his work, *Oneself as Another*, using the Latin words *idem*, meaning sameness and *ipse*, meaning self-constancy. Ricoeur employs these words with regard to personal identity, noting that the self requires “permanence in time” while also being something more. As such, *idem* identity, or sameness, connotes a form of “permanence in time” such that there is numerical identity, “one and the same,” and qualitative identity, “extreme resemblance.” On this view, *idem* identity is egocentric and ethnocentric, exclusive of otherness (Ricoeur, 1992, pp. 116-17).

Ricoeur also notes another form of *idem* identity that overlaps onto *ipse* identity when sameness is understood in terms of personal character, “the set of lasting dispositions by which a person is recognized” (Ricoeur, 1992, p. 121). Yet, because character answers the question of *what* someone is rather than *who*, there may be a tendency to revert to *idem* identity, thereby continuing the politics of exclusion. What if, though, we begin by asking who someone is before asking what?

*Iipse* identity begins with who, according to Ricoeur, and construes “permanence in time” in terms of self-constancy, the idea “of keeping one’s word in faithfulness to the word that has been given.” In other words, “self-constancy is for each person that manner of conducting himself or herself so that others can *count on* that person” (Ricoeur, 1992, pp. 143, 165). It is one thing to maintain continuity of sameness in time (numerically or qualitatively), quite another thing to maintain the constancy of a friendship or the fidelity of a promise. As such, one’s personal, entangled life history with others is mediated through a narrative plot, a drama if you will, that fashions these assorted events into a meaningful whole, requiring otherness rather than excluding it (Ricoeur, 1992, p. 143).

If we employ these ideas in light of our previous discussion on multiculturalism, we see that hard-line multiculturalists succumb to viewing personal or cultural identity as *idem* identity where sameness is understood in terms of ethnicity or cultural distinctiveness. Contrary to this line of thinking, Steven Rockefeller contends that multiculturalism should not recognize the value of a person based primarily on ethnicity or cultural distinctiveness. Rather, the claim to equal recognition should follow from our “universal human identity and potential, . . . which is more fundamental than any particular identity, whether it be a matter of citizenship, gender, race, or ethnic origin” (Taylor, 1994, p. 88).

To be sure, one could fall victim to associating Rockefeller’s “universal human identity and potential” with *idem* identity, producing a totalizing and totalitarian discourse as Lévinas previously noted. But such is not an inevitability, especially when we work out personal or cultural identities not in isolation but “through dialogue, partly over, partly internal, with others” such that “identity crucially depends . . . upon dialogical relations with others” (Taylor, 1994, 34). If we ascribe to an *ipse* identity, then a “dynamic [and I would add dialogical] identity” ensues, where dialogue not only respects the alterity of others but seeks to elucidate charitably the differences (Taylor, 1994, p. 143).

To do justice to this dialogue, to understanding the narrative identity of the other, a distinctive voice is often omitted—the voice of the Wholly Other. This voice, what various religions say about someone or something this is distinctly other than human beings, should be included in order to attain a thicker understanding of human being. If not, it seems that humanity continues as the measure of all things and unable to eclipse its anthropocentrism and egoisms. Who or what, though, is this Wholly Other? To do justice to this question would take us well beyond the scope of this essay, so I can only gesture towards an answer and suggest further lines of inquiry.

In seeking the identity of this Wholly Other, it seems apropos to follow Ricoeur's notion of *ipse* identity. In doing so, "we can identify God only on the basis of his [speech] and acts, configured as a certain kind of whole with an implicit ethical aim," as Kevin Vanhoozer notes (1997, p. 65). This is an important point because much of the interreligious dialogue that discusses the identity of the Wholly Other proceeds on the presumption of an identity of sameness. Under the auspice of sameness, interreligious dialogue, Kenneth Surin argues, "sedately but ruthlessly domesticates and assimilates the other—*any* other—in the name of world ecumenism" (Surin, 1990, p. 200). Thus, keeping Ricoeur's understanding of *ipse* identity in mind, the identity of the Wholly Other, from a Christian perspective, is a matter of his self-constancy to the speech and actions revealed in the entangled life histories of the one God, Father, Son, and Holy Spirit, as attested to in Holy Scripture. Other religions could make similar claims based on their dramatic understanding of the identity of the Wholly Other.

If the multiculturalism debate is to include religious discourse, then discussion about the identity of the Wholly Other will need to shape the conversation, not simply in definitional terms but with particular regard to *the implications of the Wholly Other's identity for the nature of human being*. Fruitful lines of discussion might proceed by asking questions like how a Christian understanding of relationality (or any other religious perspective for that matter) might find continuity and/or discontinuity with proximate patterns of relationality in human development, the binary kinship structures of cultural anthropology, or even the psychoanalytic tradition of the subconscious and conscious. Such discussions would contribute to the needed interdisciplinary conversation on the nature of human being, which is at the heart of the multiculturalism debate.

#### 4. Conclusion: refocusing the European integration process

We began our explorations by briefly examining the public remarks by three leaders of European governments, all who declared multiculturalism to be a dead enterprise. Their epitaphs for multiculturalism centered on security concerns, economic pressures, and a lack of shared social values. However, within their remarks, particularly David Cameron's, there are gestures toward reframing the debate by suggesting the need for a more shared identity, the need to address the basic human search for belonging, etc. As we have seen from our discussion, such suggestions are rooted within the meaning of culture and are particularly germane to the nature of human being itself. Yet, public discussion of these matters, academic or otherwise, tends not to center on these issues but more on pragmatic in nature.

Their visceral reactions to multiculturalism, in my estimation, seem to be a response to the failure of cultural relativism that seeks to achieve equality based on an *idem* identity of sameness rooted in difference, which in fact *excludes* otherness. If we consider, though, understanding personal and even cultural identity in terms

of *ipse* identity, of self-constancy, identity emerges out of a narrative or dramatic structure where various assorted events and interaction with others are arranged into a meaningful whole. This form of identity *requires* otherness, presenting a challenge that is both epistemological and ethical. How do we come to know the other, what disposition should we embody towards the other, and how should we act toward the other?

Our encounter with the other, particularly in light of the Wholly Other, leads to a dialogical relationship that requires respect for alterity, charity toward the other's perspective, all the while pursuing clarity of differences in humility. As Parekh notes, "no culture is perfect and since each represents only a limited vision of the good life, it needs others to complement and enrich it. Cultural diversity is therefore an important constituent of human well-being" (Parekh, 2005, p. 15). We as individuals and societies must be willing to submit our beliefs, even our most cherished beliefs, to critical scrutiny, while attempting to persuade, not coerce, others of our particular perspective.

In my estimation, then, if the European integration efforts are going to succeed and not degenerate into ethnocentrism or extreme nationalism, then "dominant" cultures must be self-critical and open themselves to dialogue with other cultures, creating linguistic space for debate. The prevailing culture will no longer be able to see itself as homogeneous or self-righteous and perhaps consider the other for solutions. Moreover, the "non-dominant" culture must have the courage to challenge the hegemonic power structures of the "dominant" culture, questioning and seeking justification for its assumptions, social values, and vision of the good life (Parekh, 2005, pp. 15-16). Such debates and conversations should be based on civility, charity, and compassion, while seeking to explicate the differences of beliefs and practices.

At the heart of this conversation is the concept of culture, which provides structure and meaning to human life, activities, and social relationships. As such, we argued that culture at its core is the expression of what people believe, whether they realize it or not, about God, the world, and others. Culture possesses, then, a religious component that is often neglected in the multicultural debate. Moreover, this neglect seems evident as disparate groups within various cultures, who are seeking recognition, do so out of a deep sense of wanting to belong, to be legitimate expressions of society. Such a longing for community, in my estimation, is a religious one. If such reasoning is sound, an interdisciplinary conversation on the nature of human being that includes religious discourse is needed. By engaging in this conversation, perhaps we will better understand our differences, and more importantly, what binds us together as human beings.

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Baiba Tjarve<sup>1</sup>

## THE IMPACT OF SUPRANATIONAL INSTITUTIONS ON CULTURAL POLICY OF THE BALTIC STATES DURING THE TRANSITION PERIOD

### Abstract

The aim of this paper is to review the impact of supranational institutions on the development of cultural policy in the Baltic States during the transition period (1991-2010). This paper will focus on the most significant institutions that have had an impact on cultural policy, and they include the United Nations Educational, Scientific and Cultural Organization (UNESCO); the European Union (EU) and the Council of Europe (CoE). Their impact on the cultural policy shall be outlined by describing three major fields of influence: legislation, policy development and financial contributions. The conclusions include the assessment of the impact of supranational institutions on the development of cultural policies in the Baltic States and particularly in Latvia. For example, the National Cultural Policy Review Program of the CoE became an effective tool for cultural modernization and broader pan-European integration of the new democracies. In regard to financial contributions, the most important impact has come from the EU Structural Funds.

**Keywords:** cultural policy, transition, supranational institutions

### 1. Introduction

In the 1990s, after the collapse of Communism many former Communist states in Europe (the so called Central and Eastern European (CEE) countries<sup>2</sup>) engaged in a far-reaching reform of their political institutions, entering the great transitional stage. In a broad sense, two processes started: the transition from a command economy to market economy, and the transition from a totalitarian regime to democracy. This paper will focus on the processes referring to the cultural

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<sup>2</sup> CEE is a term describing former communist states in Europe, after the collapse of the Communism in 1989/1990. That includes the following former socialist countries: Poland, Czech Republic, Slovakia, Hungary, Romania, Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Kosovo (Kosovo under UN Security Resolution 1244), Bulgaria, Albania, Montenegro, Macedonia (officially denoted as Former Yugoslav Republic of Macedonia) and the three Baltic States – Latvia, Lithuania and Estonia.

policy developments<sup>3</sup> during the transition period. Transition to market economy significantly influenced culture consumption patterns, funding models and operation of cultural organisations. Transition to democracy multiplied actors of public cultural life, diversified legal structures of cultural organisations and altered values and ethics, among many other changes. Although from the economic and political perspective it is considered that transition is over for the countries that joined the EU, I argue that cultural systems are still in the transformation phase and transition in cultural policy is not fully completed. Therefore, in this paper I shall analyse the impact of the supranational institutions on the cultural policy development of the Baltic States (Estonia, Lithuania, Latvia) and especially Latvia during the transition period from 1991 up to 2010.

The transition period was also determining for the former communist countries in developing relationships with supranational institutions. A supranational institution is an international organization whose member states share decision-making power. The most significant institutions that had an impact on cultural policy are: UNESCO, the EU and the CoE. Additionally, international trade organizations are known to regulate and influence the market of cultural goods and services, the World Trade Organization (WTO) being the most influential. Politically, the accession to NATO has been a significant priority for the CEE countries, though it has not left an impact on their cultural field. Similarly, the World Bank and the International Monetary Fund have not left significant impact on the cultural field of the above-mentioned countries.

Describing three major influential fields can outline the impact of supranational institutions on the cultural policy: legislation, policy development and financial contributions. In regard to the legal instruments of supranational institutions, UNESCO should take a closer look at the ambiguity of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The impact of the National Cultural Policy Review Program of the CoE on the national cultural policy development of the Baltic States will be discussed as well. In terms of the financial impact, the contributions of the EU will be examined.

## 2. Legislation

In terms of legislation, there are few binding international legislative instruments in the field of culture. UNESCO has, apart from recommendations and declarations, issued conventions as the binding legal instruments. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted in 2005; UNESCO, 2011a) has been one of the most significant conventions of UNESCO in the last decade. However, several experts (Throsby, 2010, p. 165; Inkei, 2005; Graber, 2008, p.161-162 ; Wouters and Vidal, 2007, p. 158-167) point out unclear consequences

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<sup>3</sup> A notion of cultural policy is applied in its utilitarian sense, assuming the public administration of culture as a public good.

and vague commitments the convention requires from the signatory states. Similarly, the EU has little direct influence upon the cultural field in the member states. In the Maastricht Treaty (officially called the Treaty on European Union, signed in 1992, entered into force in 1993; EUR-Lex, 2011) culture has become a field under the responsibility of each member state, and the EU actions and programs can be undertaken only in case the member states find them necessary as a supplementary measure. This condition has been retained throughout the subsequent Treaty revisions and reconfirmed in Article 167 of the current Lisbon Treaty (signed in 2007, entered into force in 2009; European Union, 2010). Nevertheless, many of EU common market regulations have an impact on culture, especially regulations concerning the audiovisual sector and cultural industries, reduced VAT, copyright, and the emerging digital agenda.

After the collapse of Communism, the main challenge of the CoE was to assist the new member states in developing legal instruments to conform to the standards of the CoE. Besides, in the field of culture, the activities of the CoE were targeted to assist the new member states to develop standards and legal framework, mainly in a form of consultations, training and evaluation. Since 1997, cultural diversity has become one of the four strategic priorities of the CoE along with democracy, human rights, social cohesion, and security of citizens. In 2000, the CoE published a Declaration on Cultural Diversity (Council of Europe, 2011), setting a broad definition of cultural diversity and framing it in terms of human rights.

Also, UNESCO and the EU have focused their debates on cultural diversity. Preservation and promotion of cultural diversity is among the EU founding principles. These principles are included in the Treaty of Maastricht and subsequent treaties, as well as in the Charter of Fundamental Rights of the EU (European Union, 2010). Even though the concept of cultural diversity is linked to human rights, Kiwan and Meinhof (2006, p. 58-68) argue that both the EU and the CoE are more concerned with the preservation of cultural industries than with engagement and participation of people of migrant origin and other minority groups.

UNESCO has broadened the idea of cultural diversity embracing the basic concepts of democracy and human rights. There were several reasons for the adoption of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. One is grounded in the existing international cultural rights, including human rights. Another aspect is protection of culture in the international trade negotiations. Formally, the UNESCO Convention imposes binding legal commitments upon the parties. However, in practice it is questionable to what extent the legal instruments of UNESCO are binding for the member states. Experts indicate that there are unclear consequences and commitments that Convention requires from the signatory states. For example, Throsby (2010, p.165) suggests "a considerable challenge remains for countries that have ratified the Convention, most of which are members of the WTO, to find a workable way of integrating the Convention with existing WTO rules". Inkei (2005) opposes by saying, that the text of the Convention does not provide concrete measures to protect cultural diversity, as it does not even contain the word "trade" or "quota". He clearly indicates that the

UNESCO Convention will not alter the WTO agreements. Several experts (Grabber, 2008, p. 141-162; Wouters and Vidal, 2007, p.166-167) suggest that the Convention is lacking a real normative content and, as compared to the earlier drafts, even the language of the Convention has changed from 'obligations' to more vaguely formulated 'measures'. Wouters and Vidal (2007, p. 166) conclude that the Convention is not so much a legal instrument than a political argument for a differentiated treatment of the cultural sector.

Estonia and Lithuania have ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2006, Latvia – in 2007 (UNESCO, 2011b). In all three countries the Ministry of Culture is responsible for the implementation of the Convention. There are no practical steps taken by the governments of the Baltic States, apart from public consultations and debates (Compendium, 2011). However, the high level documents refer to the Convention, for example Riga Declaration of the Ministers for Culture of the Baltic Sea States (adopted in 2008; Council of the Baltic Sea States, 2011) provides among other priorities to promote "cultural diversity, intercultural dialogue and exchange".

The National Culture Policy Guidelines 2006-2015 of Latvia (LR Kultūras ministrija, 2006) refer to cultural diversity as one of the main principles of the cultural policy. First, cultural diversity of the EU countries as a potential threat to national identity is mentioned. Second, cultural diversity is understood as national cultural industries (for example, performance indicators include percentage increase in the demonstration of Latvian films in the cinemas of Latvia as compared to foreign films). Third, when looking at cultural diversity within the country, it is understood as cultural diversity of Latvian cultural heritage, including different dialects and regional differences of intangible cultural heritage. Although rights of historical minorities are recognized by all high-level documents, the performance indicators of the National Cultural Policy Guidelines do not demonstrate that cultural diversity is interpreted within the context of minority rights. However, it is an open question for the upcoming debates, as, since 2011 the Ministry of Culture of Latvia has taken over the responsibility for integration from the Ministry of Justice and in the near future the integration guidelines are to be revised.

### 3. Policy development

Even though there are no binding measures on the level of cultural policy making, a *de facto* European cultural policy exists, several experts argue (Shore, 2001; Kaufman and Raunig, 2002). It influences to some extent the cultural policy agenda on a national level, particularly in the countries that have gone through the accession process. Obuljen (2005) in her study on the impact of the EU enlargement on cultural policies concludes that accession has required direct reform of national cultural policies in the fields of audio-visual or copyright policy. Dragičević Šešić (2010) argues that, although no one is speaking about 'harmonization' in cultural fields within the EU, transnational European discourse is visible in the descriptions of the cultural policy reforms.

Culture and cultural policy are increasingly interconnected with other spheres, in particular with social and economic development and policies. There are several rationales behind this linkage. On the one hand, culture has become a major area of commercial activity, and therefore falls increasingly within the EU legal competence over economic and industrial policies. On the other hand, with the shrinking public funding for culture, cultural players have come up with a range of additional arguments for the necessity to continue public investment in culture. Such arguments as cultural democracy, inclusiveness, participation, quality of citizenship, cultural diversity have become increasingly important. Further arguments cite economic benefits (consumption, jobs, tourism, cultural industries) and social benefits (social cohesion, integration, combating poverty and social alienation, regional access, social welfare and therapy, employment, sense of community, etc.). Cultural policy has also become intertwined with sustainable development and urban planning and revitalization.

The agenda of the supranational institutions has significantly influenced the development of cultural policy in the CEE during the transition period. The National Cultural Policy Review Program of the CoE (initiated in 1985 - 1986) became an effective tool for cultural modernization and broader pan-European integration of the new democracies, Mitchell argues (2002). The main idea of the program is to assess national cultural policies. The evaluation program has been designed for the Western European countries within the context of the 1980s. However, later it was extended to include the new democracies of the CEE.

The whole process was developed into several phases. The national report, usually prepared by the Ministry of Culture, was followed by the field visits of a group of independent international experts who wrote their own report and discussed the cultural field of particular country with the national authorities. A follow-up evaluation process was expected to take place two years after finalization of the review exercise. However, in some countries the follow-up process on decision-making level has failed, for example, the minister that commissioned the report has left and has been replaced by a minister without any interest in the project. In general, it is difficult to be precise about the cause and effect of these endeavours, as major changes in cultural policies are usually the result of complex series of motives for a reform. From the point of view of the CoE (Council of Europe, 2010) the program's outcome was obvious, for example, in the field of cultural legislation, where many of the new democracies updated their existing regulations in the process of, or following the review.

Cultural policy of Estonia was reviewed in 1995, Latvia followed in 1997, and Lithuania – in 1998. Even though the initial methodology was not changed, “the review process itself was rather radically transformed when it was transferred to the new democracies” (Mitchell, 2002). Mitchell points at several peculiarities. First, “the target of evaluation was no more a *stable and highly institutionalised cultural policy system*, but a system that had *experienced a radical change and was still in the process of fast transition*”, and the review process had to focus on the nature and effects of this change. Secondly, while the statistics of the output (number of institutions, visitors,

etc.) were reliable, the statistics on the input side were much more confused and unreliable, and it was impossible to determine in practice the actual contributions of all the levels to the financing (housing, studios, facilities, salaries, etc.) of the arts and culture. Thirdly, Mitchell points at difficulties reaching common understanding of cultural policy set-up in a democratic country, meaning the tendency to defend the old system. For example, safety nets in arts and artist policies, keeping vertical decentralization and related ownership of the regional and local institutions, and the drives of privatization in competition with attempts to maintain the state control in culture industries and the media. As noted by Kleberg (2002) and Cliche (2003), most of the post-Communist countries have participated in the program, not to make real evaluations as much as to find new solutions to a changed political background and “capacity- building”.

Expert reviews of three Baltic States (Conseil de l'Europe, 2000; Council of Europe, 1998a; Council of Europe, 1998b) point out several common problems in cultural policies of Estonia, Latvia and Lithuania. First, it is over-institutionalisation inherited from the Soviet period. Second, expert recommendations propose liberal values and standards applied to Western European cultural policies. They include necessity to diversify funding sources and to extend the role of cultural industries. Moreover, the need to strengthen the role of civil society and the emerging non-governmental initiatives in culture has been stressed. Apart from that, it has been recommended to assign greater autonomy to cultural institutions.

Cultural policy changes have nevertheless been limited, and not enough modernization has been accomplished on the systemic level. Moreover, the economic crisis of 2008 has restrained any reform thinking, imposing radical cuts instead of that<sup>4</sup>.

#### 4. Financial contributions

While the UNESCO and the CoE take more proactive position in supporting cultural field, the European Commission<sup>5</sup> (EC) has direct financial instruments at its disposal: grants supporting cultural projects corresponding to its priorities and many others. For example, some of those funds are pre-accession funds and Structural Funds.

The EC started to cooperate with the CEE Countries at the end of 1980s. In 1989, the EC established the Technical Assistance to the Commonwealth of Independent States (TACIS) program to assist in the development of successful market economies

<sup>4</sup> In 2009, there was a dramatic drop in public financing for culture in Latvia. It was followed by an even deeper crisis in 2010 when the budget of the Ministry of Culture was reduced by 43% as compared to 2008. The budget of the State Culture Capital Foundation – the grant-giving body to secure the diversity of cultural activities all over Latvia was reduced to 2.1 million LVL (3 million EUR) which was 72% less than in 2008.

<sup>5</sup> The EC is an executive body of the EU.

and to foster pluralism and democracy by providing expertise and training. The Baltic States left the program in 1992, becoming eligible for the assistance under the “Operation PHARE” program.

The Maastricht Treaty of the EU was a legal base for culture funding schemes. Three cultural programs were implemented between 1996 and 1999. Since the beginning of 2000, the “Culture 2000” framework program replaced previous actions over a period of 5 years (2000-2004) and was extended until 2006. Then it was followed by the “Culture programme” (2007-2013). The program supports three strands of activities: cultural actions; European-level cultural bodies; and analysis and dissemination activities. The funding for the implementation of the “Culture 2000” program for the period 2000-2006 was set at EUR 236.5 million (ECOTEC, 2008). The budget of the next seven years “Culture programme” for the period 2007-2013 is EUR 400 million (European Commission, 2011).

The potential contribution of the EU Structural Funds to culture is more significant than investment of culture programs. The Structural Funds represent the most important tool of the EU in financing economic and social development. The primary role of the EU in this respect is to reduce disparities between the levels of development of various regions. In the period of 2007-2013, the amount dedicated to the Structural Funds is EUR 347 billion. In the same period, the planned expenditure for culture under Cohesion policy amounts to more than EUR 6 billion (Centre for Strategy & Evaluation Services, 2010), while the budget of the EU culture program is only 400 million EUR.

Within the context of the member states, the funding from the EU culture programs for the cultural projects is not significant either. For example, the EU “Culture programme” supported only 2 projects in 2007 and 3 projects in 2008 submitted by Latvian leader organizations. In financial terms, the EU culture program contribution to Latvian cultural organizations has been 228,784.61 EUR in 2007 (equal to 0.2% of the total budget of the Ministry of Culture of the Republic of Latvia) and 187,082.5 EUR in 2008 (0.16% of the budget of the Ministry of Culture in Latvia). The analysis by the Budapest Observatory (2007) of the EU program “Culture 2000” from 2000 to 2006 clearly shows the disproportion between the Western European and CEE cultural operators as grantees: only 116 projects from the total of 1078 supported co-operation projects are led by the cultural organizations from the CEE countries. The findings show that from 10 new member states Poland, the Czech Republic and Hungary are at the top of the list with 143, 109 and 106 occurrences respectively of leading or co-organizing a winning project. On the other hand, Latvia has only 34 such cases. The reasons for the disproportion between Western and CEE countries in receiving funding from the EU culture program include low administrative capacity (both in terms of managerial knowledge and financial flow) of cultural organizations in CEE, the limited size of the cultural field and the number of established international contacts.

## Conclusions

This paper focused on several aspects of the impact of supranational institutions on the cultural policy development in the Baltic States during the transition period. In terms of legal impact, it has been quite limited in the cultural field. The accession process to the EU has required changes in the legislation in the fields of audio-visual industry and copyright policy. The closer analysis shows that impact of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions has not been significant so far, despite the fact that this Convention is considered as an important tool for protection of both human rights and cultural industries. No concrete measures have been taken by the Baltic States in applying the Convention in the field of cultural policy. On the level of cultural policy development, the impact of supranational institutions is more apparent. The National Cultural Policy Review Program of the CoE, becoming an effective tool for cultural modernization and broader pan-European integration of the post-Communist countries, has been one of the most concrete measures. The experts have called for modernization of cultural policies in the Baltic States, proposing to implement standards of cultural policies of Western European countries. However, systemic changes in cultural policies of the Baltic States have not been implemented. It is recommendable to develop a thorough review of the current state of cultural policies in the Baltic States and continue with systemic changes, many of which have already been proposed in the reports of the National Cultural Policy Review Program of the CoE. That is especially needed in the context of economic crisis, as the Ministries of Culture are forced to take sudden and sometimes conflicting decisions on cultural policy developments on national and local level. Concerning financial contribution, the EU Structural Funds have left the most important impact comparing to the culture programs of the EU. However, this impact remains elusive to trace and analyse in detail, category and effect.

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