EUROPEANISATION AS EMPOWERMENT OF CIVIL SOCIETY: ALL SMOKE AND MIRRORS?¹

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This paper explores the impact of the EU on civil society in domestic public accountability contests. Evidence drawn from three case studies of public policy involving an actual member-State (the UK), a new member-State (leading candidate for accession at the time of writing) (the Czech Republic), and a poorly performing candidate (Romania) support the conclusion that the EU empowers domestic actors in such ways as to reinforce the existing power differential between the government and the public holding that government to account. This finding seems to hold true regardless of whether the public is organized or dispersed, or is civically competent or not. Domestic government, by reason of its centrality in the domestic political arena, already wields a wide panoply of tools, and so it is better placed than the public to take advantage of whatever tools the EU furnish, and overmatch the empowerment of the public by the EU’s public accountability tools (such as the Environmental Impact Assessment).

Europeanisation has been broadly conceptualised in two ways: (1) as EU-caused change in the domestic opportunity structure; and (2) as EU-caused change in domestic ‘norms’ and ‘collective understandings’ (Boerzel and Risse, 2003). This chapter deals with Europeanisation as change in the domestic opportunity structure, a change which consists of a redistribution of resources and opportunities at the national level and a differential empowerment of domestic actors. In the words of Boerzel and Risse (2003:58), the EU ‘provides societal and/or political actors with new opportunities and constraints to pursue their interests’.

Under this rubric of Europeanisation as change in the domestic opportunity structure, the existing literature propounds three major theses. The Central Executive Empowerment thesis claims that participation in the EU empowers the domestic central government executives over other domestic actors, in that (a) it gives them increased control of the domestic policy agenda; (b) it gives them superior access to information; (c) it furnishes them with potential ideological justifications for domestic policies (‘the devil made us do it’); and (d) it boosts the executive’s legitimacy and authority. At the opposite pole, the Power Diffusion thesis claims that participation in the EU diffuses power from the central executive to sub-national governments and interest groups (such as civil society organisations), in that (a) it provides them with new opportunities, such as the EU supranational organs, that allow them to by-pass domestic governmental constraints; (b) it gives them the opportunity to participate in pan-European networks seeking to influence EU policy; (c) it

¹ The paper draws on two cases studies written as part of the Public Accountability in Contemporary European Contexts project funded by the European Commission under the Fifth Framework Programme led by Dr. Simon Joss, Director of the Centre for the Study of Democracy, Westminster University, London, UK. The case studies are: Parau, C. and Joss, S. (2003) ‘The South-East London Combined Heat and Power Incinerator (SELCHP)’; and Stöckelová, T. (2003) ‘Politics of GMO in the Czech Republic: a case study in public accountability’, Centre for Theoretical Study, Prague, the Czech Republic. I am grateful to Dr. Simon Joss and Dr. Tereza Stöckelová for permitting me to use the cases studies which he co-authored with me and she authored, respectively. I also wish to gratefully acknowledge Drs. Joss and Stöckelová for their comments on the first draft of this paper during the Public Accountability Seminar held at the Centre for the Study of Democracy in June 2004. I am also grateful to Chris van Stolck and J.W. Bains for their comments. An earlier version of this paper was submitted to the MidWest Political Science Association Conference, Chicago, April 2005.

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provides them with resources, such as funding; and (d) it provides them with legislation, such as the Environmental Impact Assessment Directive, which may be deployed to sway domestic governmental decision-making (Featherstone and Kazamias 2001:10). Multi-Level Governance is a third thesis, which holds that membership of the EU creates both constraints and opportunities without discriminating between domestic actors, but rather ‘fostering the emergence of co-operative relationships between state and non-state actors’ (Featherstone and Kazamias 2001:10).

Whomever might be empowered by Europeanisation, all such effects are held to depend on whether (and which) domestic actors are positioned to take advantage of the new opportunities and avoid the new constraints created by the EU; their (dis)advantageous positions hinging, in turn, on two broad classes of pre-existing ‘facilitating conditions’: (1) ‘veto points’, or independent agents empowered to block policy change – the more veto points a political system has, the more impediments to change there are in general and so the less the likelihood of change due to Europeanisation; and (2) ‘facilitating institutions’, or social arrangements that furnish domestic actors the ‘material and ideational resources’ necessary to exploit their new opportunities. Such facilitating institutions (if they exist) increase the likelihood of Europeanisation (Boerzel and Risse, 2003:58).

This paper chooses to explore the impact of Europeanisation on public accountability processes and outcomes at the domestic level, bringing up three case studies which throw light on the actual changes in the domestic opportunity structure; on the ‘facilitating’ conditions; and on the three differential empowerment theses. The case studies arose from the ‘Public Accountability in Contemporary European Contexts’ Project, funded by the European Commission under its Fifth Framework Programme, and the case reports submitted as part of it. The Romanian case has been drawn from the author’s own PhD research. Public accountability is understood in this paper to be a series of political proceedings whereby the general public seeks to double-check the representativeness of democratic government against such criteria as transparency of decision-making; public access to information in the possession of government; the adequacy of the government’s consultation of the public, and of the public’s participation in the myriad workaday decisions which government takes in between infrequently occurring elections.

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3 This Project began in August 2001 and was completed in June 2004. The research was co-ordinated by Dr. Simon Joss from the Centre for the Study of Democracy at the University of Westminster, London UK. The participating research teams hailed from the Czech Republic, Denmark, France, Germany, Latvia and Portugal.

4 Undertaken in the Government Department at London School of Economics.
The Evidence of the Case Studies

The following is a review of selected case studies, focusing on the dimension of Europeanisation in relation to public accountability. The case studies are: the case of Genetically Modified Organisms (GMO) legislation in the Czech Republic; the case of the South East London Combined Heat and Power incinerator in the United Kingdom; and the case of the Transylvanian Motorway in Romania.

The case of GMO legislation in the Czech Republic

Biotechnological research has been going on in the Czech Republic since the 1970s. In 1996 the first foreign biotech firms entered the Republic and the first field trials of GMOs were conducted. In all the time up until 2000 no regulation of GM practices existed; however, in 1997 organised non-governmental opposition to GM did appear in the Czech Republic for the first time, when the NGO Greenpeace opened a branch in Prague. Following the Czech Republic’s application to become a member of the EU, *acquis* conditionality required it to set up an institutional framework for implementing that part of the *acquis* regulating GM products and practices; the Environment Ministry was given this task. The Ministry chose as its advisory body in matters of transgenesis the Czech Commission for Genetically Modified Organisms and Products (CCGMOP), which had been formed by scientists in that field in 1986. Several members of CCGMOP proceeded to join a group of academic biologists involved in biotechnological research who, citing a climate of ‘fear and manipulation’ allegedly created by Greenpeace, founded and became directors of Biotrin, a pro-GM non-governmental organisation (NGO), in order to try and neutralise opposition to GM. Thus the two organisations, one private and the other public, were fused through interlocking directorates. Biotrin directors became quite proactive and prolific in generating publicity favourable to GM and unfavourable to the opposition to it. In their capacity as advisors to the Environment Ministry through CCGMOP, these interlocked directors played a major role in drafting Czech law 153/2000 On the Use of Genetically Modified Organisms and Products, the transposition of EU Directives 90/219/EEC & 90/220/EEC on GMOs (Stöckelová, 2003:7). Through the experience of the transposition, Biotrin succeeded to forge a long-term relationship with the Environment Ministry. This draft became controversial in Parliament over the clauses providing for public participation in the Ministry’s procedures for authorising GM practices, over the scope of coverage, and above all over the lack of any sanctions at all for non-compliance with the GMO registration procedure. The draft had to undergo extensive modification by the Ministry, beginning in 2002, to remedy these defects. The interlocking directors of Biotrin and CCGMOP drafted the remedies, but this time Biotrin adopted a strategy of minimal co-operation with the Ministry to substitute for their previous outright hostility to the EU Directives, in order to conserve their influence within the Environment Ministry. During all of these events neither the Czech public nor any part of it became aroused over either the environmental or the accountability issues that transpired. Greenpeace Prague counted only one member of staff working on the GM case.

The following are the main conclusions to be justified concerning the Europeanisation effects transpiring in this case:

- The agencies of domestic governments charged with implementing EU law are vulnerable to ‘capture’ by private interests. When this happens, these interests are positioned to stultify any public participatory provisions mandated in EU law by the way these are transposed, so limiting government agencies’ accountability to the public (and with it that of the capturing interests).
- Domestic governments may limit the effect of EU-mandated public accountability provisions by implementing EU law only minimally.
- The public accountability tools (e.g. public participation in agency decision-making; the Environmental Impact Assessment procedure) provided in EU law do not suffice by
themselves to empower the public to modify governmental decisions, but need supplementing by ‘facilitating conditions’ consisting of tools already in the domestic public’s hands (e.g. ‘counter-expertise’, private means of publicity, private funds). If such facilitators are absent, no amount of EU legislation can compensate for the incompetence of civil society (including, especially, public apathy).

- EU (prospective) membership dilutes domestic governments’ accountability to their own publics in favour of accountability to supranational institutions which themselves are unaccountable to the European publics.

**Agency Capture**

I argue that a captured agency may be expected to act so as to limit its accountability to that part of the public which opposes the private interests that have captured the agency. If Biotrin directors did capture the Czech Ministry of Environment, at least in matters of transgenic policy, then this should transpire from the empirical data gathered in the Project case study report, ‘The Politics of GMO in the Czech Republic’. It would then follow that the Ministry would act in such a way as unduly to minimise public participation in the class of decisions in which the capturing private parties have an interest. This section will evidence that the policy outcomes represented by the legislative drafts and the subsequent administrative practice of the Environment Ministry show that Biotrin (perhaps with help from the biotech industry as a whole) did in fact capture the Ministry.

According to the case study report, Biotrin was set up by and comprised scientists working in the Czech biotechnology industry, becoming the strongest advocate in favour of transgenosis in the Czech Republic. The head of Biotrin, Jaroslav Drobnik, argued that the EU directives regulating GMOs are ‘irrational’ and the creature of partisan interests; that they indirectly support the emotional fears of an ignorant public; and that the precautionary principle contained in them was ‘vague’ and subject to misuse for disadvoving scientific facts, and constituted an import barrier (Stöckelová, 2003:9). It is easily inferred from these statements of their head that Biotrin were committed opponents of EU regulation of Czech biotechnology.

The relevant directives included, moreover, important components of public accountability procedure, including mandates to make information available to the public and to consult civil society when authorising GMOs. The interlocked directors of Biotrin and CCGMOP (the Environment Ministry’s expert advisory committee) adamantly opposed these provisions: Drobnik, for example, opined that the participation of civil society in the procedures for authorising GM practices is ‘a nonsense’ (Stöckelová, 2003:9). Biotrin members labelled their political opponents ‘irrational, ignorant, pseudo-religious, fundamentalist’, and insisted that the public, incapable of acquiring substantial knowledge, had to be educated by scientists to form the right opinions on GMOs (Stöckelová, 2003:10). Biotrin was thus biased against the participation of the Czech public in the administrative procedures mandated by EU law, and may be expected to take whatever steps lay in its power to prevent substantial participation from actually happening.

Given that Biotrin’s directors played a key role in the transposition of the transgenic *acquis* into Czech law, the results both legal and practical were in no way contrary to expectation; (1) the Czech GM law of 2000 uttered not a word of the precautionary principle (Stöckelová, 2003:10), a keystone of EU environmental policy; (2) the law imposed some surprisingly low constraints for

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5 Research is part of project Public Accountability Procedures in the Contemporary European Context, funded by the European Commission in 2003.

failure to register new transgenic organisms, an important point of the regulatory scheme. This led in practice to widespread non-compliance with the registration procedure by Czech biotech researchers (Stöckelová, 2003:97). Biotrin thus assured a minimalist transposition of the Directives, greatly reducing the undesirable impact (from the industry’s viewpoint) of the regulatory scheme on the industry.

The GM Directives were exposed to Biotrin’s remoulding not only in the transposition, but, even after the transposition was amended years later, in its implementation by the ministerial agency of the Czech State. This was possible through Biotrin’s members’ continuing influence on the staff of the Environment Ministry. Biotrin’s fingerprints are all over the Environment Ministry’s treatment of the public participatory provisions mandated by the EU. As the case study noted,

CCGMOP and Biotrin … played a substantial role in the process of drafting and finalising the [original] law … The chief guarantor of the bill, Jaroslav Drobník, a member of both the CCGMOP and Biotrin, expressed publicly his aversion to the EU legislation … This cooperation ended up, however, in a long-term partnership between the ME and Biotrin (Stöckelová, 2003:10; emphasis added).

The existence and influence of this partnership is evidenced by the Ministry’s actual administrative practice, which reduced ‘public participation’ to little more than a hollow formality. The public were not permitted in actual proceedings to bring any knowledge of their own to bear on the issues being debated; instead, they were lectured by biotechnologists in the industry. Such practices, which assume the layman to be ignorant and the purpose of his participation to be to get educated by the experts, reflect the views of Biotrin exactly. The Ministry practice neutered the public participatory provisions of the EU Directives, irrespective of the subsequent amendments to the letter of the law made by Parliament in order to bring Czech law fully into compliance with EU law. The Ministry practice even marginalised the only organised and expert opposition: when Greenpeace attempted in 2002 to participate in the proceedings to authorise field trials of Monsanto’s Bt-corn by submitting comments and objections, this input, contrary to the formal administrative procedures, was neither included in the transcription of the minutes of the proceedings nor published on the Ministry’s website, unlike the friendly comments of other, pro-GM lobbyists. Yet the transcripts did include commentary refuting the objections of Greenpeace – even though the matter being refuted had been expunged! Moreover, these minutes had been drawn up by two civil servants of the Environment Ministry with the participation of a member of CCGMOP, and approved by the chairman of CCGMOP (Stöckelová, 2003:15); indicating vividly the continuing influence of Biotrin. In acting thus, the CCGMOP members went far beyond their delegated competence from an expert-advisory capacity to one supervising the work of administration. Furthermore, CCGMOP has played the crucial role in all Ministry decisions to approve field trials or commercial uses of GMOs. Even while CCGMOP remained interlocked with Biotrin, whose directors therefore remained a (perhaps the) major influence on the Ministry in its actual implementation of the GM regulatory scheme. All of these facts indicate that Biotrin had not only ‘captured’ the Czech government agency responsible for regulating the industry’s activities, but had also used the capture to shape Ministerial proceedings in their own interests.

So far, the Czech case illustrates several dovetailing facts: Neither the EU supranational organs nor

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7 ‘This brings us to the important issue of control and execution. According to Karel Jech, this is the weakest point of the contemporary GMO regulatory system…. The one who gives wrong information in the registration application can be punished by a fine of up to 10m Kč (roughly 30 000 Euro). However, the user who does not ask for authorisation in the first place cannot be punished at all! And it is not only a theoretical possibility. In the year 2002, more than a year after the law came in force, there were still quite a few respectable research laboratories which had not asked for authorisation for contained use, no matter how easily their obligation can be identified from comparison with grant research projects published on the internet’ (Stöckelová, 2003:9).
EU legislation exerts any control over the staffing of the member-States’ domestic organs charged with implementing EU legislation. If these organs are captured by private parties who are the enemies of procedurally pivotal arrangements of that legislation (such as public participation and accountability), then the captured organs will likely implement those [accountability] procedures in a sham way which, however, serves the capturing interests. The EU is powerless to prevent this from happening, given its lack of competence to sway personnel policy and ministerial appointments by member-State’s domestic governments.

**Minimalism in Compliance**

There is little doubt that the Czech government chose to transpose and implement the EU Directives on GMOs in the minimal way. Not only was the precautionary principle left out of the original version of the transposition, but other proposals to extend the scope of the domestic law beyond the bare essentials contained in the letter of the Directives were quashed outright. For example, when Greenpeace proposed that the scope of the transposition be extended to include non-living GMOs the Ministry rejected the proposal with no comment except that the proposal was ‘improper’ for going beyond what was contained in the Directive.

What is more, the Ministry ‘dragged their feet’ in implementing the GM Directives even after Parliament had enacted them in final amended form. For example, reference laboratories still had not (as of the time of the case study’s writing in 2003) received from the Ministry normative methodology for testing and sampling GMOs.

These instances evidence a pattern by which the government implemented an EU directive in a way that closed off public debate and silenced alternative approaches to regulation of GMOs. Insofar as public debate and airing of policy alternatives is part and parcel of government’s accountability to the public, minimalism in complying with EU authority means minimal accountability.

**Lack of Facilitating Conditions**

The EU GMO Directives seemed to presume a developed civil society at the domestic level. The tools furnished to the domestic publics by EU law for holding domestic governments accountable are in general insufficient if not supplemented by other tools already in the hands of the public (e.g. mass media, funding, technical expertise, independent courts of law). The EU does no more than create opportunities, which domestic civil society is responsible to take up by itself and make the most of.

The Czech public repeatedly showed that it was incompetent to enter into public dialogue with either the government or the industry on the regulation of GMOs, or to express autonomous views on any of the issues arising from GM or its regulation. Nor was organised Czech civil society able to furnish the public with means to overcome this incompetence. At the time of writing of the case study, Biotrin and Greenpeace were the only civil society organisations campaigning over the issue of transgenosis. And Greenpeace had only a single person actively working on transgenic issues. Czech civil society was thus much too weak to muster tools of their own to supplement EU tools and incompetent to exploit the opportunities lying before them.

The most debilitating incompetence of all was the Czech public’s utter apathy on all issues to do with transgenosis. As with other post-Communist peoples of East Europe, the Czechs were preoccupied with more urgent matters, namely economic ‘survival’. For these reasons, the Czech government faced no organised opposition to whatever policies on GMOs it wanted to adopt. No amount of EU legislative provisions can compensate for a lack of public demand for government accountability.
Democratic Deficit

The publicly closed manner in which the Czech governmental elite and the European Commission conducted accession negotiations reinforced the pre-existing Czech governmental tradition of non-accountability. The Czech elite used the accession negotiations to insulate itself from any real public criticism or demand for accountability. The elite claimed that the negotiations imposed the necessity to conform to the ‘accession contract’ on offer from the EU. If this claim were true, it would entail that the Czech government is to be more accountable to the Commission than to its own public.

Although the Commission may not have intended such an effect, it is nonetheless the case that the EU’s own legislation is formulated in labyrinthine proceedings which notoriously defy accountability to the European publics. This is at the heart of the so-called democratic deficit. But what is worse is when the government of an accession country, like the Czech government in this case, stretches the scope of its alleged accountability to the Commission to sweep-in purely domestic policies which accession or membership do not require.

The Czech case vividly illustrates the main thesis that the EU does not significantly empower the domestic publics to hold their governments accountable. This may be the case generally, but it is especially so when the domestic public lacks civic competence to make good use of EU tools.

The SELCHP case study: waste incineration in the UK

HISTORY

In 1986 the South East London Waste Disposal Group, a joint committee of the Councils of the London Boroughs of Lewisham, Greenwich and Southwark, agreed to build a waste incinerator, the South East London Combined Heat and Power (SELCHP) incinerator, to substitute for brimming landfills in the disposal of household wastes. At that time they decided to site the incinerator in Deptford, an impoverished part of the Borough of Lewisham peopled with poor immigrants. In 1988 the Waste Disposal Group agreed to bring on board certain private interests, the winners of a competitive tendering, in order to spread the high costs of building and operating the incinerator; for this purpose forming the SELCHP Consortium, which also included the Councils as shareholders. In 1988 as well, EU Directive 85/337 on Environmental Impact Assessments was transposed into UK regulations. As part of the building permit process, the Directive required developers to conduct Environmental Impact Assessments in order to identify their projects’ environmental impact and propose ways to minimise it. SELCHP became one of the first large-scale projects in the UK to fall under these regulations. The Lewisham Planning Department, which served all three Boroughs in the capacity of a permit-granting authority, was required to submit an Environmental Statement, a summary of the EIA, to ‘stakeholders’ in the project. By statute all stakeholders had 21 days to comment on and/or challenge the permit application, or to request further information. The new law obligated the Lewisham Planning Department to take stakeholders’ input into its decisions on permit applications. At the same time, however, the Lewisham Council held a share in the development consortium applying for the permit to build the incinerator. Thus the Borough of Lewisham was both a shareholder in the consortium and the planning authority.

Opposition duly emerged. During the statutory 21 days for public comment, letters of complaint from seven individuals and two petitions in opposition signed by 25 and 57 residents, respectively, were received by the Planning Department. The complaints concerned the impact on their health of an incinerator operating nearby, as well as the non-transparent way in which the Waste Disposal Group had reached their decisions, including the brevity of the public consultation period. The Group responded by organising a few public meetings attended by a few hundred people in total. As a result of the meetings the Group agreed to fund an independent review of the EIA, which would recheck the accuracy of the Environmental Statement; ‘translate’ the technical data into ‘plain English’; and recommend improvements of the incinerator design to abate its impact. The Consortium claimed that as a result of this review, it spent £10 million on a redesign. The Group, moreover, induced the residents in opposition to set up an Incinerator Monitoring Group to ‘monitor’ the operation of the incinerator (as if the locals knew how to do this).

ANALYSIS

EU Directive 85/337 furnishes the general public an accountability tool, the EIA procedure and the public consultation it mandates. It thus created an opportunity for the residents of Deptford, first, to air their opposition to the SELCHP incinerator in a public forum, and then, perhaps, to influence the final shape of the project. The SELCHP case illustrates an important subterfuge which governments are free to resort-to to stay (at least) one step ahead of any EIA accountability proceedings – to place infrastructure such as an incinerator in a poor, immigrant, and/or working-class neighbourhood, where the residents will probably lack the human and economic capacity to exploit the EIA tool. The Deptforders were too poor to hold a recalcitrant government accountable; this takes money, which the public must draw from its own private toolkit. The Deptforders were too ignorant of their own rights to hold governments accountable in the first place; only a public who knows it has this right will act to right a wrong act of government. Finally, the Deptforders, being immigrant, were too little aware of ecological issues and did not appreciate the risks of pollution.

The Waste Disposal Group and the Lewisham Planning Department is likely to have understood these elementary points when in 1986 they decided, consulting neither the residents of Deptford nor the public at large, where to site the incinerator. The Waste Disposal Group settled on Deptford as a neighbourhood where resistance was least likely to arise, or was least likely to succeed if it did arise. Indeed, the minutes of one Lewisham Planning Department meeting, in which the incinerator permit application was discussed, recorded how one officer remarked the unlikelihood of any public inquiry (Lewisham Council, 1989 in Parau and Joss, 2003). This arguably reveals a premeditated strategy of Lewisham’s to minimise the likelihood or (failing that) the effectiveness of grassroots opposition by placing the incinerator in a poor community like Deptford. The Planning Department met the requirement to notify stakeholders in absolutely minimal form: the affected community to be consulted was defined as narrowly as possible. One Planning officer remarked that the consultation zone could have been measured ‘in yards rather than miles’ (Parau and Joss, 2003).

Further evidence that the Deptforders lacked the civic competence to make effective use of the EIA accountability tool transpired in the aftermath of the EIA-mandated public consultation. Lewisham Council and the Consortium reacted to the (rather feeble) resistance with a co-optation strategy to persuade them of the incinerator’s safety. Lewisham Council and the Consortium even paid to take the protest leaders on junkets abroad to visit similar incinerators already operating in urban districts in Europe. According to Joan Ruddock, the Member of Parliament for Lewisham and Deptford:

Initially there was a lot of concern from the local residents and so the Council undertook steps to convince them that the incinerator would be safe. So for example they took them to
Switzerland to see a state-of-the-art incinerator and the leadership of the tenants association came back convinced that it was okay. They saw that in Switzerland the plant was in a city centre area, and therefore they felt that if it was okay for the Swiss, it was going to be okay for the Brits. So their concerns about emissions were quickly removed through an exercise undertaken by the Council. This was not in any sense either accountability or consultation, because the very body that had to take the decision, which was the planning authority for the decision, was also wishing to gain public support, and therefore their consultation went beyond consultation to persuasion (Parau and Joss, 2003).

There was a gap in the perceptions of these shenanigans between the residents’ leaders and their own MP, which highlights the civic incompetence of the residents, whose resistance was overpowered by the Council’s commonplace public relations gimmicks. Another competence the residents’ associations lacked was the expertise to understand the technicalities of incineration, or the capacity to mobilise the expertise of others to challenge the Council’s technical representations. If these residents’ associations had enjoyed the facilitation of ecological groups such as Greenpeace, who do have or can mobilise this expertise, then the outcome of the consultation might have been different.

In this case, as in the previous one, the EU merely provided domestic actors with opportunity-bearing tools, which the actors must be minimally competent to exploit. Thus, ‘facilitating’ conditions must be present for the potential of Europeanisation to be actualised. In the SELCHP case the missing ingredient was technical experts and perhaps professional protest organisers. The lack of such facilitating conditions allowed the Councils to win amidst the very (EU-inspired) procedure that had been designed to hold domestic governments accountable.

On the other hand, it can be argued that the Waste Disposal’s Groups behaviour proved that they acted in good faith to inform the public. After all, the Councils and the Consortium paid an outside expert to review the EIA Report, to translate the technical jargon into plain English, and to make further recommendations concerning the plant design. Some changes were in fact made, to ensure greater dispersal of air emissions; the Consortium claimed that these changes cost them £10 million in total. Although this seems a gigantic sum, the move can be viewed as a strategy of the Consortium to forestall review by an expert more adverse to the Consortium’s interests than one handpicked by Lewisham Council. Likewise the modification of the incinerator design can also be seen as a gambit by the Council to save more money for itself in the long run by avoiding a protracted and possibly losing accountability fight.

The SELCHP case also evidences how potent are the tools of domestic governments compared with the EU’s EIA tool. The Group deployed their own tools to overcome the possibilities of EU law in two ways. The Council and the Consortium drew on their ‘deep[er than the public’s] pockets’ to fund junkets aimed at persuading the locals. The Councils also had much more information than the residents about the intended uses of the incinerator, and exploited this advantage by falsely promising the locals that the plant would provide them cheaper electricity and heat. In reality the by-produced electricity was to be sold to the national power grid and the heat exhausted (Parau and Joss, 2003). The Councils’ success was greatly eased by the incompetence of the affected public, as shown above.

Secondly, the Councils deployed their tool of organisation so as to satisfy the requirements of EU law only minimally. When deciding whom to consult, the Lewisham Council made sure to consult as few of the residents of Deptford as possible. Indeed, one Planning officer admitted that the Department’s consultation zone could have been measured in ‘yards rather than miles’ (Parau and
Joss, 2003). (On the other hand, one of the Lewisham Planning officers did claim that the zone was so narrow because Lewisham had had so little experience with the EIA procedure, which was only introduced the year before.) The Southwark and Greenwich Councils decided against consulting any of their citizens at all, although the incinerator was also to impact on residents of these boroughs. Then, the Councils did not extend the time for consultation beyond the legally minimal requirement of 21 days, despite the complaints of the locals that they were not able to grasp such a complex matter in so little time (Parau and Joss, 2003). Furthermore, the Councils, if they had respect for the spirit of the EU law, could have revisited their original decision to build an incinerator in the first place and place it in a densely populated urban setting. The Councils, however, ignored the complaints of Deptford residents, expressed in their letters of protest, that they had never been consulted about this original decision. The Councils did not even release any information about this decision when requested by the residential associations, despite the fact that the EIA law required domestic governments to divulge the information they possess about the projects under review. All of these violations of the spirit if not the letter of the new EU-inspired law trammelled the local publics when they sought to challenge the Councils’ decision.

The SELCHP case leads to the conclusion that domestic governments can easily limit their accountability as mandated under EU law in three ways: (1) by complying minimally with EU procedures; (2) by choosing a social context where public resort to EU-furnished tools is the least likely; and (3) by deploying strategically their own powerful array of domestic tools to constrain the public’s use of EU-furnished accountability tools.

The Case of the Transylvanian Motorway in Romania

HISTORY

The Romanian government in 1996 declared the Transylvanian Motorway (originally styled the Brasov-Bors Motorway) a ‘priority project’ of national importance in the field of transportation. In November 2003 the government approved the technical and economic plan of the Motorway, and took the decision to engage external credit of more than €2 billion to finance the building of the Motorway. A month later the government signed a €2.5 billion contract with the American firm Bechtel. The contract negotiations did not undergo a public call for tenders, as required by the Romanian law transposing the EU directive on public procurement, because the government had in 2003 adopted an Emergency Ordinance 60/2003 exempting the Motorway from this law. These proceedings were kept secret at the time, but the news leaked out nevertheless in January 2004. The EU reacted quite critically, inasmuch as the Bechtel-built Motorway rendered redundant the Romanian section of Corridor IV of the Trans-European Network, running just south of Transylvania, the building of which the EU had previously committed itself to funding. Consequently, in February 2004 the European Commission opened an investigation into the contract, inquiring in particular into the peculiar public-tendering conditions created by the Emergency Ordinance.

Prime Minister Adrian Nastase, backed by American officials, stood firm in his commitment to the Transylvanian Motorway in the teeth of severe criticism from the EU delivered against a background of threats to suspend accession negotiations.

Opposition to the project from civil society and from some political parties erupted in February

9 Adrian Nastase quoted by Reuters. 12 February 2004. ‘Romania says it is committed to the US$2.5 billion Bechtel deal’.
2004, contemporaneous with the EU criticism. Some of the most prominent public policy think-tanks in Romania – The Romanian Academic Society and The Romanian Think Tank’ – criticised the Romanian government for the arbitrary and opaque manner in which the government had let such an expensive contract, given a context in which (a) the EU had already committed funds for a parallel motorway; (b) Romania’s existing road infrastructure was seriously decayed and in need of expensive investments; (c) the Romanian government was running a tight state budget with many other priorities competing for the scarce financial resources. Fourteen environmental NGOs submitted letters of protest to the Romanian government, to the European Commission Delegation, to DG Enlargement, and to the government’s creditors, demanding that the government gives an account of its decision and stops the project immediately.

In response to this criticism the government issued a one-page justification of its decision to exempt the Bechtel contract from the Law on Public Procurement, which claimed that the Motorway was necessary to prepare Romania for its membership not only of the EU but also of the Atlantic Alliance. Indeed, *The Economist* alleged that the ulterior reason for the Bechtel contract was for the Romanian government to ‘buy American friends’ (*The Economist*, 15 April 2004). The Motorway was inaugurated on 15th of June 2004, and is expected to be completed by 2012.

**ANALYSIS**

The conclusion to be drawn from this case is that in domestic accountability contests the effect of the EU is to differentially empower domestic actors so as to reinforce the existing power differential between the government to be held to account and the civil society holding to account. Those interests who already have the upper hand domestically will in general find their hand strengthened even more by the EU. On the one hand, the EU accession process furnished the Romanian government with new tools which it exploited to beef up its pre-existing toolkit the better to resist being held accountable by the Romanian public. On the other hand, the same process also furnished Romanian civil society with new tools with which to attempt holding the Romanian government accountable. The new tools did not, however, actually empower civil society, partly because civil society itself was incompetent to make use of them or to avoid the constraints placed on it by the government’s tools.

The Transylvanian Motorway took place against a background of the Romanian government’s generally strong resistance to giving an account to Romanian civil society (including environmental organisations). The EU influence ‘paradoxically’ beefed up the domestic tools deployed by the Romanian government against its civil societary antagonists, despite the presumption of much Europeanisation literature that EU influence should be expected to strengthen civil society.

The Romanian government deployed discursive references to the EU to justify Emergency Ordinance 60/2003, which exempted the Bechtel contract from the law of public procurement. For instance, in its Official Justification [Expunere de Motive], the Prime Minister declared, ‘Romania belongs de facto in the family of European countries, and is committed to integration into the European and Euro-Atlantic structures. In this context modernisation of the system of motorways and national roads is an extremely important condition imposed by international bodies, and which has to be met, given the necessity of integrating Romania into the Euro-Atlantic structures ... The project of building a motorway between Bucharest and Budapest will constitute a first step toward physically connecting our country to the space dominated by NATO and the European Union’ (Romanian Government, 2004). The government interpreted the EU’s accession conditionality in
such a way as to serve its own interests in a domestic political contest having little to do with accession conditions as such. On a separate occasion the Prime Minister argued that the Motorway was ‘essential’ to the Romanian government’s closing negotiations with the EU on Justice and Home Affairs.

The Romanian government resisted giving an account to the EU’s supranational institutions. The European Commission opened an inquiry into Romania’s conformity with the EU’s accession conditions and its internal market rules (Ziua, 2004). The Commission openly criticised the Romanian government for its ‘failure to comply with international norms on public procurement’ in dealing with Bechtel (BBC 18 March 2004). The Commission wrote to the Romanian PM demanding a justification of the Bechtel contract, and announced that it would give no support to the Motorway: ‘Since there was no public tendering, the European Commission ... will not be able to provide any financial support for this project. Furthermore, the European Commission will not be in a position to support any funding by the European Investment Bank for Reconstruction and Development for the construction of the highway’ (European Commission, 2004). In addition to these remonstrances, the Commissioner of the Directorate General for Enlargement threatened to introduce a ‘monitoring clause’ into Romania’s accession conditionality, which would delay accession by a year if Romania is found not to have complied with its obligations under the current conditionality. In this context the Commissioner criticised the government’s lack of transparency in letting the contract to Bechtel (Iordache, 2004). Such a warning implied the resolve to hold Romania to account in future for any similar acts. The Commission also urged the Romanian government to ensure that the investment would comply with EU environmental legislation, in particular with the EU Directive on Environmental Impact Assessments (European Commission, 2004). The Chief of the Commission’s Delegation in Bucharest confirmed this warning (Trandafir, 2004). These interventions by EU staff did bolster the accountability efforts of Romanian civil society, who strove to deploy these and other tools accruing to them from the accession context.

Fourteen Romanian environmental NGOs had already written letters of protest against the Motorway, which they had submitted to the Romanian government, to the Commission Delegation in Bucharest and to DG Enlargement in Brussels. The NGOs also deployed discursive references to EU authority in claiming that the Bechtel contract breached the Romanian law on public procurement transposed from EU directives, but also in admonishing their government that the Commission too had contested the project for breaching international norms on public procurement (Terra Mileniul III, 2004). Environmental NGOs thus were trying to use the organs of the EU, its authority (e.g. EU law), as well as accession conditionality to make their government more accountable to themselves and the Romanian public at large.

Romanian civil society, however, lacked the civic competence to use these tools skilfully enough to move the Romanian government from its course. In particular, they lacked sufficient technical (counter-)expertise (or the ability to mobilise such expertise) to analyse the technicalities of a large-scale transportation investment; to carry out their own environmental impact assessment; or to work out in the requisite detail their own alternative proposals to governmental transportation policy. For example, the NGOs themselves recognised that they ‘did not have a sound basis on which to oppose the Motorway, in that they did not know what Romania’s traffic needs are, and were unable to offer sound alternatives’10. One of the NGOs who subscribed the letter of protest sent to the Romanian government and the Commission’s Delegation admitted that ‘we have within our group neither the

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10 Bako, M. 2004. ‘Nu suntem favorabili protestului impotriva autostrazii Bechtel [We are not for a Protest Against the Bechtel Motorway’], message posted on the 16 March 2004 on the Public List for Environment Protection, administered by the StrawberryNet Foundation, mediu@ngo.ro.
necessary [specialists] nor the necessary information to carry out an environmental study. Indeed, civil society itself was divided over the opportuneness of their opposition to the motorway. As one director of an NGO which refused to subscribe to the letter said in self-justification, ‘From an environmental protection and sustainable development viewpoint we are not convinced that fighting this particular motorway is opportune, unless we include it in a more general campaign against the general transportation policy in Romania, which is so damaging and not only to the environment’.

Another, environmental NGO argued that there might be environmental and economic benefits in such a motorway compared with one built to merely Romanian standards: ‘If the motorway is to have environmentally friendly tunnels and bridges, it might disrupt fewer natural habitats than any national motorway ... which seldom have environmentally friendly tunnels. Besides, if use of the motorway is tolled, and if the toll internalises the environmental cost of transportation, the overall impact may be [relatively] positive’. This resignation in accepting second-best reflects an apathy on the part of Romanian civil society, born of the difficulty of aspiring to anything better.

Whatever the incompetence that Romanian civil society might be blamed for, the Romanian government has surely worsened it by deliberately withholding from the public important information about the plan of the motorway. The actively involved NGOs complained that they could not get access to the vital information needed to organise a credible campaign against the Motorway: ‘We don’t have enough specific information about the Motorway, and without it we may be accused of barratry [“process de inten tie”]. We demanded, in accordance with law 544/2001 on Access to Information, [basic] information [such as the exact route] about a particular segment of the Motorway, but were told that such information is not known ... and that the detailed route is not known, so we cannot tell whether the Motorway will pass through or near by nature reserves. Nor could we find out other details related to design, for example the number, type and location of tunnels, bridges and noise baffles; or the figures for estimated traffic. Although it is arguable that the government really did not have these facts, as the Motorway was still in the planning stages, the timing of the inauguration of the Motorway in June 2004 suggests that the planning must have been already advanced when the NGOs requested the information in March 2004.

Environmental organisations’ access to information was also stymied by the Environment Ministry’s introduction, only a year before the Bechtel controversy, an order charging fees for producing environmental information, even though both the Act on Access to Information that transposed the EU Directive on Access to Information and the Aarhus Convention on Public Access to Environmental Information mandated that the information should be produced for free. As a result, ‘All environmental information, including economic information, is “filtered” in the sense that if you want information you have to pay, and you have to pay so much that you lose your appetite for asking for any more information’. Romanian NGOs are very short of financial

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11 Sustainable Sighisoara Group, message posted on the 16 March 2004 on the Public List for Environment Protection, administered by the StrawberryNet Foundation, mediu@ngo.ro.
12 Radu Mititean’s reply to Terra Mileniul III on Letter of Protest; message posted on the Public List for Environment Protection, administered by the StrawberryNet Foundation, mediu@ngo.ro on 17 March 2004.
13 Radu Mititean’s reply to Terra Mileniul III on Letter of Protest; message posted on the Public List for Environment Protection, administered by the StrawberryNet Foundation, mediu@ngo.ro on 17 March 2004.
14 Radu Mititean’s reply to Terra Mileniul III on Letter of Protest; message posted on the Public List for Environment Protection, administered by the StrawberryNet Foundation, mediu@ngo.ro on 17 March 2004.
16 Interview by the author with Radu Mititean, Executive Director of the Cyclo-Tourism Club Napoca, Romania, September 2004.
17 Interview by the author with Radu Mititean, Executive Director of the Cyclo-Tourism Club Napoca, Romania, September 2004.
resources; this order disempowered them to carry out some of the most basic functions necessary for accountability proceedings. In the case of the Transylvanian Motorway, ‘[t]he EIA Report just for the motorway segment passing through Cluj County contains 1500 pages. This would cost millions or tens of millions of lei if you paid [the fees] in accordance with the [Ministerial] order’.18

Also no fault of their own was civil society’s lack of funding and its effect on their human resources and the capabilities dependent on them. Thus, in the Bechtel case, ‘[i]t seems that we are the only NGO in the country who managed to study the EIA and make some comments on it; otherwise, people don’t have the time to go and spend a whole day at the Environment Agency and leaf through hundreds and hundreds of pages. Some went, but when they saw the number of volumes and sheer amount of paper they would have had to go through, they gave up’.19

The upshot of all of the foregoing evidence is that, although accession has given Romanian civil society a few more tools (e.g. new [supranational] organs of government, conditionality, legislation and authority) which they may in theory deploy in attempting to hold their government to account, this panoply of tools has ultimately not empowered civil society sufficiently to prevail in this particular accountability contest.

Conclusion

The final conclusion of this paper is that the EU empowers both government and civil society, with the following evidenced outcomes: the EU either empowers government more than civil society on balance; or if the EU does empower civil society (a bit) more than government, the latter’s panoply of tools generally remains too powerful to be overcome by the EU’s tools available to civil society. The evidence presented in this paper also suggests that the differential empowerment theses may be further refined with case study evidence supporting a thesis that it is mainly the elites both of government and of civil society which are empowered by the EU.

The case of the Transylvanian motorway shows that the EU differentially empowers domestic actors so as to reinforce the existing power differential between the government being held accountable and the civil society holding it accountable. The accession process furnished to the Romanian government tools it was able to exploit to beef up its own domestic tools so as to resist being held accountable by the Romanian public. The accession process also furnished to Romanian civil society tools for holding their government accountable. However, these new tools did not in actuality empower the public enough to tip the balance in the accountability contest, partly because civil society was incompetent to make good use of these tools; but also because any domestic government in a tight contest enjoys the licence – in the absence of the right kind of judiciary, that is – to trump its civil society opposition by enacting one-off domestic legislation exempting itself and its favourites from the full rigour of the acquis.

The GMO Czech case shows that agency capture can limit the effectiveness of EU-mandated public accountability procedures so as to empower the government and the agency and with it a civil society elite which captured the government. EU-mandated public accountability is also limited by government’s minimal compliance with EU law as well as by the lack of ‘facilitating conditions’

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18 Interview by the author with Radu Mititean, Executive Director of the Cyclo-Tourism Club Napoca, Romania, September 2004.
19 Interview by the author with Radu Mititean, Executive Director of the Cyclo-Tourism Club Napoca, Romania, September 2004.
such as the domestic public’s own tools e.g. ‘counter-expertise’, means of publicity and private funds. Furthermore, the EU accession process diluted the Czech government’s accountability diverting it from their own publics to EU supranational institutions, themselves unaccountable to the European publics.

The SELCHP case shows that domestic government’s own tools are generally sufficient to overpower the EU’s tools when these are deployed by an ingenuous public, and that the competence and motivation of a public that lacks supplementary, private tools of its own does not suffice to hold domestic government accountable even with the aid of EU tools.

The case studies collectively support the conclusion that the EU differentially empowers domestic actors in such a way as to reinforce the existing power differential between the public seeking to hold government accountable and the government resistant to being held accountable.

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