

§Law in Context

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Law, Infrastructure,  
and Human Rights

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# EU enlargement

## I Introduction

Once, the roads of the Roman Empire “conserved and unified”<sup>1</sup> Europe. Today, the European Union (EU) is laying roads and rails across Europe with a similar aim. The Maastricht Treaty seeks “the establishment and development of trans-European networks”<sup>2</sup> in transportation (TEN-Ts). This includes railways, roads, airports, and waterways.<sup>3</sup> With the accession of the states of Central and Eastern Europe to the EU, the TEN-Ts are being extended, connecting up new members with old. Like the Roman roads, these transportation networks aim to foster political and economic integration.<sup>4</sup> At the same time, a second aim is to promote the national development of the new member states. In the projects themselves and within their policy documentation, a bias exists in favor of the first aim over the second. The knock-on-effect of promoting EU-wide integration through transportation projects may be the social and economic development of new member states as well. However, in a situation in which the relationships between new members and old are characterized by power disparities, this bias could instead result in

1 R Chevallier, *Roman Roads* (B. T. Batsford Ltd London 1976) 204.

2 Maastricht Treaty (2/7/92) 129b.

3 Although the TEN-Ts encompass multiple modes of transportation, much of the public-private partnership activity to date has been in the road sector. Rail has been on decline. O Stehmann and G Zellhofer “Dominant Rail Undertakings under European Competition Policy” (3/04) 10(3) *European Law Journal* 327. Thus, although other modes are tremendously important, the TEN-Ts are dominated by roads and thus they will receive the bulk of our attention. Traditionally, however, infrastructures in Central and Eastern Europe have favored rail. This is a legacy of the Soviet era. However, since the 1990s, a shift has occurred toward road infrastructure. European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 13. Given shortcomings of roads with respect to sustainable development criteria, the EU hopes to balance out projects in favor of rail aiming for a thirty-five percent share. *Id.* 91. The trend is going sharply the other way, with approximately six hundred kilometers of rail being shut down over the same period that twelve hundred euros have been invested in roads. *Id.* 15. In addition, in the 1990s, the number of private persons owning cars rose by eighty percent in Central Europe. “Survey: Europe’s Building Site” (11/22/03) 369(8351) *Economist* S6. Furthermore, under the single European sky initiative, which is part of the TEN-T action, the air share has increased. European Commission *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 35–36.

4 On the Roman roads see e.g. R Chevallier, *Roman Roads* (B. T. Batsford Ltd London 1976); V W Von Hagen, *Roman Roads* (Weidenfeld and Nicolson [Educational] Ltd London 1966); R Laurence, *The Roads of Roman Italy: Mobility and Cultural Change* (Routledge London 1999).

an aggravation rather than amelioration of preexisting power disparities in which transportation networks are used to exploit cheaper labor markets rather than being used to equalize geographies and wages. Transportation policy is one site in which European Union membership will be given its real world meaning.

If projected economic development in Central and Eastern Europe proceeds to predictions, then the existing transportation infrastructure will be severely over-taxed.<sup>5</sup> The European Commission (EC) tells us: “[E]nlargement is set to trigger a veritable explosion in exchanges of goods and people between the countries of the Union”<sup>6</sup> and it will cost approximately one hundred billion euros to connect the new states up with the old.<sup>7</sup> The need is dire and the EC makes clear that this infrastructure for the new member states is nothing less than “a precondition to their economic development.”<sup>8</sup>

Although the EU has high hopes for transportation, much of the infrastructure planned for Europe has yet to be built. The timeline for doing so is unclear. The network is ambitious amounting to “19,000 km of roads, 21,000 km of railways, 4,000 km of inland waterways, 40 airports, 20 sea ports and 58 inland ports.”<sup>9</sup> By 2002, only twenty percent of the network had been completed. Such an ambitious infrastructure plan will require large outlays of financial capital. However, national investment in transportation infrastructure fell steadily in the 1990s from one and half percent of gross domestic product to less than one percent.<sup>10</sup> Furthermore, the EU had difficulty coordinating the diverse national infrastructure plans of member states. States prefer to pursue domestic projects rather than regional integrationist ones. It is easier for national governments to garner political support for intrastate projects that serve solely domestic interests.

Responding to shrinking public budgets and to hesitation by national governments to promote integrationist projects, to construct these European-wide transportation networks, the EC is promoting public-private partnerships (PPPs). One advantage of PPPs is that national governments are relieved of the responsibility of providing financial capital for projects. At the same time, as indicated in Chapter 2, governments must lend other forms of capital to PPP projects. In its promotion of PPPs, the EC recognizes this role of public sector actors in these privatized projects. The EC defines a PPP as “a partnership between the public and private sector for the purpose of delivering a project or service traditionally provided by the public sector.”<sup>11</sup> For the purposes of EU transportation PPPs, the public sector partner includes both EU institutions and also member state governments.

5 M Marray “Traffic Jam” (September 2000) 209 Project Finance 36.

6 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 87.

7 *Id.* 12.

8 *Id.* 87; “Still Work To Do: EBRD President Jean Lemierre Argues that There Is Still a Role for His Bank When Countries Have Joined the EU” (12/15/03) Business Eastern Europe. The Economist Intelligence Unit 2003 3.

9 European Commission *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 87.

10 European Commission, *Trans-European Transport Network: TEN-T Priority Projects* (2002).

11 European Commission Directorate-General Regional Policy, *Guidelines for Successful Public-Private Partnerships* (March 2003) 16.

As indicated in Chapter 3, PPPs carry with them a range of human rights concerns from how projects deliver on their public good promises to whether projects respect human rights in the construction phase. Human rights here encompass social and development policy, distributional values, and also protecting people against displacement and exploitation. Of course, taken so broadly, some human rights can conflict with others. For example, the interests of users to the lowest possible cost of safe transportation may conflict with the interests of workers who build the systems to a reasonable wage and the interests of people whose land is confiscated in reasonable relocation.<sup>12</sup> Human rights themselves are not absolutes. Louis Henkin reminds us: “The idea of rights accepts that some limitations on rights are permissible but the limitations themselves are strictly limited.”<sup>13</sup> Here some human rights are limited by others.<sup>14</sup> Furthermore, the concern is not with human rights in their abstract, but instead with how they derive their meaning through social practice. Human rights may be universally derived, but they are also strategically constructed.<sup>15</sup>

In the policy documentation supporting the TEN-T projects, the EC has addressed both the concern that projects deliver on public good promises and also the worry that projects may impinge upon human rights during construction. The EC has laid out a specific human rights risk mitigation strategy. Presently, national governments are promoting and managing human rights problems in country-specific ways. As a result, respect for human rights is uneven. To solve this problem, the EC seeks to centralize authority over human rights. The aim with centralization is to achieve a “race to the top.”

How then do concerns that EU transportation projects extending into Central and Eastern Europe may not adequately promote the national development of new member states relate to the EC’s policy to have transportation PPPs conform to a uniform human rights standard? If PPPs take human rights seriously, then will transportation projects devote themselves to delivering the public goods essential for alleviating power disparities between new and old member states? Or are human rights to be more narrowly defined as “user rights,” those rights that travelers of the transportation projects possess? Are “user rights” simply the right to a safe trip or do they include the right to an affordable trip? Will the transportation links connecting up old and new member states promote the freedom of movement of all EU citizens or only some? This chapter seeks to address these and other

12 I am thankful to Eleanor Fox for her help in formulating this point.

13 L Henkin, *The Age of Rights* (Columbia University Press New York 1990) 4.

14 Many constitutions accept this balancing or limiting of rights. For example, the Canadian constitution balances freedom of expression with equality. This is the case with hate speech jurisprudence.

15 For a discussion at many of the interesting, difficult, and at times unsettling issues raised by this strategic dimension of human rights see A Riles “The Virtual Sociality of Rights: The Case of ‘Women’s Rights are Human Rights’” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 420; A Riles, *The Network Inside Out* (Michigan University Press Michigan 2000 (e.g. 174–178)).

questions about the relationship between human rights and the expansion of EU transportation infrastructure through PPPs to new member states.

To do so, Section II explains the origins and the shape of the TEN-T projects, focusing on their extension into the new member states of the EU through PPPs. A discussion follows of the human rights implications of PPPs. To do so, Section III looks at EC human rights policy related to PPPs generally. Then, Section IV focuses specifically on the human rights dimensions of transportation PPPs in Central and Eastern European new member states.

## II TEN-Ts and enlargement

The EU is in the midst of a dramatic transformation of its transportation sector carried out through legal means. This is true in the area of competition law and also in the legally facilitated construction of new large-scale infrastructure projects.<sup>16</sup> This chapter concerns itself with the latter, greenfield projects, ones that are being built from scratch. More narrowly, the focus is on transportation projects connecting up old and new EU member states. This subset of the so-called TEN-Ts is being pursued through the construction of rails and roads and the promotion of air and sea transit. Intermodality is encouraged. And a PPP-based satellite system, Galileo, will moderate the traffic flow of the TEN-Ts. This section places these TEN-Ts into the context of EU transportation law and policy dating back to the 1950s. It then discusses the dual aims of EU-wide integration and national development that run through the legislative history and current policy documentation.

### A Legislative history

The origin of the TEN-Ts is traceable to the Treaty of Rome of 1957, which sought “common rules applicable to international transportation to or from the territory of a Member State or passing across the territory of one or more Member States.”<sup>17</sup> These rules enshrine transportation as a public service.<sup>18</sup> Despite this treaty-level support, common rules were not forthcoming. Furthermore, traffic across the territory lagged as little progress was made on the construction of an EU-wide transportation network. However, things started to change in 1985 with a European Court of Justice ruling that directed states to carry out their treaty obligations.<sup>19</sup> The Maastricht Treaty in 1992 added further force to the court decision. Among other measures, Maastricht launched the TEN-Ts, which have subsequently been further matured through white papers, working groups, and specific transportation projects.

16 See *EC Competition Law in the Transport Sector* (1996).

17 Treaty of Rome, Article 75(1).

18 Article 73 of the EC Treaty stipulates: “aid shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of public service.”

19 Case 13/83 Parliament v. Commission [1985] ECR 1513.

Maastricht sets out a “common policy in the sphere of transport.”<sup>20</sup> It directs the identification of TEN-T projects and encourages their financing.<sup>21</sup> The EU will coordinate the TEN-Ts.<sup>22</sup> The aim of the TEN-Ts is twofold: economic integration among member states and also national development. Accordingly, the Treaty directs that the transportation projects are to pursue the aims of Articles 7a and 130a of the Treaty. Article 7a directs: “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States.”<sup>23</sup> Article 130a concerns itself with the “harmonious development” of the EU, resulting in “the strengthening of its economic and social cohesion.”<sup>24</sup> This strengthening, in turn, will “enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting up of an area without internal frontiers.”<sup>25</sup> To do so, Maastricht promotes “the interconnection and inter-operability of national networks as well as access to such networks.”<sup>26</sup> Furthermore, the networks aim not only at the connecting of member states, but at “reducing disparities between levels of development of the various regions and the backwardness of the least-favoured regions, including rural areas.”<sup>27</sup>

In line with the coordinating role set-forth in the Maastricht Treaty, the EU issued white papers and established working groups to identify TEN-T projects. In 1993, the Christopher Group identified fourteen priority transportation projects to receive EU financial support. The European Council endorsed these projects in 1994. The White Paper on European Transport in 2001 added another set of projects. Most recently, the High Level Group on the Trans-European Transport Network (“Van Miert Group”) issued a report in 2003 identifying additional projects aimed at extending the transportation network to the Central and Eastern European countries then slotted for accession into the EU.<sup>28</sup>

In addition to identifying specific projects, the Van Miert Group set out the goals of the extension of the TEN-Ts into the acceding states. In line with the dictates of the Maastricht Treaty, these projects, according to the Group, aim to improve the internal market<sup>29</sup> and to foster sustainable development.<sup>30</sup> The Van Miert Group

20 Maastricht Treaty 129c(1).

21 *Id.*

22 *Id.* 129c(2).

23 *Id.* Article 7a(1).

24 *Id.* Article 230a.

25 *Id.* Article 129b(1).

26 *Id.* Article 129b(2).

27 *Id.* Article 130a.

28 The enlargement of the EU has touched on a whole host of legal issues of which the TEN-T network is only a part. On some of these issues see A Ott and K Inglis, eds, *Handbook on European Enlargement: A Commentary on the Enlargement Process* (TMC Asser Press The Hague, The Netherlands 2002).

29 High Level Group on the Trans-European Transport Network, *Report (6/27/03)* 55–56 (footnote omitted).

30 On the EU’s Common Transportation Policy and sustainable development see D C Smith “The European Union’s Commitment to Sustainable Development: Is the Commitment Symbolic or Substantive in the Context of Transport Policy” (*Summer 2002*) 13 *Colorado Journal of International Environmental Law and Policy* 241.

qualified the second aim, making clear that new member states would not become economic equals to the old member states overnight. Instead, only a large-scale post accession effort could ameliorate power disparities. A coherent transportation policy involving the physical extension of the TEN-Ts would contribute to achieving the goal, not accomplish it.

Recognizing the financial constraints on the acceding states, the EU has pledged to provide financial assistance for the priority projects. Before enlargement, the EU had supported projects financially through the PHARE program during the accession phase. PHARE financed Transportation Infrastructure Needs Assessments (TINAs) by the candidate countries starting in June of 1997. The TINAs resulted in a report, published in 1999, setting out the transportation infrastructure needs of an enlarged Europe.<sup>31</sup> In addition, the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB) supplemented the PHARE money. Furthermore, financing for roads was provided during the accession phase through the EU Instrument for Structural Policies for Preaccession, aiming specifically to “enhance economic and social cohesion.”<sup>32</sup> External to the EU, the World Bank also provided financing for specific projects.<sup>33</sup>

With accession, although the EU will continue to support financially projects, the primary responsibility for initiating and financing TEN-Ts lies in the hands of new member states.<sup>34</sup> Given the financial constraints of the new member states, the EC is championing PPPs as the way forward for these TEN-Ts.<sup>35</sup> The Van Miert Group argues that PPPs are more transparent regarding costs and also hold management accountable. Also, the Group argues that PPPs force governments “to clarify their long term” transportation policy in the areas of regulation and charging.<sup>36</sup> Furthermore, PPPs facilitate risk calculation and allocation.<sup>37</sup> Even when projects are primarily financed from private sources and carried out by private

31 V Kronenberger “Transport” in A Ott and K Inglis, eds, *Handbook on European Enlargement: A Commentary on the Enlargement Process* (TMC Asser Press The Hague, The Netherlands 2002) 993.

32 <http://europea.edu.int/comm/enlargement/pas/ispa.htm>.

33 C von Hirschhausen “Infrastructure Development in the Central and Eastern European EU Applicant Countries: On the Road to Europe” (Deutsches Institut fuer Wirtschaftsforschung, Institut fuer Konjunkturforschung) (October 2002) 39(10) Economic Bulletin 333, 335.

34 M Marray “New Europe New Roads” (January 2001) 213 Project Finance 54–55.

35 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 91.

36 High Level Group on the Trans-European Transport Network, *Report* (6/27/03) 61. An inherent conflict exists when private companies are invited to provide a public service. Governments will seek universal services at a low cost, while private companies aim to turn a profit. B Unwin “The European Investment Bank’s Activities in Central and Eastern Europe” (1997) 9(1) European Business Journal 19–26. Because of the risks faced by private sector participants and also the limited returns on some transportation projects, projects must often mix public and private financing. High Level Group on the Trans-European Transport Network, *Report* 61; N Calvert “Perfect TEN-ors” (October 2002) 234 Project Finance 25–27. So, governments here contribute resources for social and economic purposes, altering the logic of otherwise profit-based decision making. Importantly, as an issue of accountability, if the public good is the rationale for subsidizing private projects, then projects must be scrutinized to ensure that they deliver on the public good potential that justifies their government subsidies.

37 High Level Group on the Trans-European Transport Network, *Report* (6/27/03) 61–62.



companies, governments must spearhead projects and also provide many public guarantees. The EIB often explicitly requires public guarantees from the host state before it will advance capital for projects.<sup>38</sup> It is then a transnational mix of public and private powers and financing that characterizes the extension of TEN-Ts into the new member states.

Despite the fact that member states bear the primary responsibility for PPPs, the EU supports them in a variety of ways and in a number of infrastructure sectors. The EIB helped finance approximately one hundred PPPs with over fifteen billion euros in loans.<sup>39</sup> These loans are designed to help private companies leverage resources.<sup>40</sup> They make projects financially viable. At the EU level, PPPs were first pursued in the areas of transportation and water.<sup>41</sup> Galileo, the satellite navigation system, is also a major transnational PPP with agreements concluded with an array of governments including Canada, China, Israel, and South Africa. The charging structure of Galileo will be a system of mandatory user fees.

Although the EIB and other EU institutions actively encourage PPPs from above,<sup>42</sup> it is also essential that national governments be on board.<sup>43</sup> Peter Hepburn, the Senior Director of Infrastructure and Project Finance at CIT Group, argues that it is necessary to have “a public sector ‘champion’ that various audiences can relate to.”<sup>44</sup> However, national governments must not only assent to PPPs, they must also provide guarantees. This public backing means that governments are often the lender of last resort when projects run into difficulties. If a project does not succeed economically, governments may be responsible for repaying loans to public and private lenders.<sup>45</sup> The fact that financing for PPPs involves both EU-level and national-level institutions suggests that they are both the ultimate risk bearers of projects. One might then ask why taxpayers should be put in the position of bailing out private companies when infrastructure projects run into difficulty.<sup>46</sup>

The EU is coordinating with member states to ensure that a PPP-friendly regulatory environment is in place. The transnational legal structure for European PPPs is complex.<sup>47</sup> Legislation has been promulgated at the EU, national, and local levels. It covers things such as procurement, construction, and competition. Also, private contractual arrangements are central to carrying forth projects.<sup>48</sup> PPP

38 European Investment Bank, “Lending in Central European Accession Countries: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia” (October 2003) 6.

39 European Commission Directorate-General Regional Policy, *Guidelines for Successful Public-Private Partnerships* (March 2003) 32.

40 *Id.* 64.

41 *Id.* 14.

42 N Calvert “Perfect TEN-ors” (October 2002) 234 *Project Finance* 25–27.

43 *Id.*

44 Quoted in F Hansen “Renewed Growth in Public-Private Partnerships” (April 2004) 106(4) *Business Credit* 50.

45 High Level Group on the Trans-European Transport Network, *Report* (6/27/03) 56.

46 I am thankful to Susan Rose-Ackerman for this observation.

47 High Level Group on the Trans-European Transport Network 37.

48 *Id.* 8.



legal structures applicable to specific projects vary.<sup>49</sup> Governments are updating their laws. The Van Miert Group believes that the EU should “disseminate good practice” so that states can effectively “update the[ir] existing legal framework.”<sup>50</sup> Furthermore, the Van Miert Group advocates a supranational level framework to work in conjunction with national laws.<sup>51</sup> For example, an attempt is being made to produce common rules governing user charges. In its efforts to create a legal environment conducive to privatized transportation infrastructures, the EU is promoting the dual goals of regional integration and national economic development.

## B Integration and national development

In line with the Maastricht Treaty, the EU aims for the TEN-T projects to promote regional economic integration and also the national development of member states. However, although the Maastricht Treaty puts the two aims on equal footing, when it comes to the extension of TEN-Ts into new member states, economic integration takes precedence over national development. The Van Miert Group used economic and social integration as the primary criteria for selecting projects for “priority” status. Its concern for transborder flows was clear: “Borders will not be truly opened and people and goods will not be able to circulate freely and efficiently if the roads, railways, airports and ports of these countries are not modernised.”<sup>52</sup> The projects would produce “socio-economic benefits by reducing costs (internal and external), improving quality of transport and inducing spatial development.”<sup>53</sup> The aim was to choose projects that would “facilitate transnational trade.”<sup>54</sup>

The EIB reinforces the EU’s integrationist orientation in its loan making. The primary purpose of the EIB,<sup>55</sup> which funds many of the TEN-T projects, is not to promote the economic development of new member states. The focus is on integration instead. Wolfgang Roth, the Vice President of the EIB explains: “EIB’s mandate is to contribute to Central and Eastern Europe’s integration into the EU, particularly into its internal market, and not directly to its economic transformation.”<sup>56</sup> The EIB does this by borrowing money itself at a preferential rate from international capital markets and then advancing loans on the money borrowed. From 1993 to 2003, the EIB borrowed eighty billion euros and also pursued PPPs to the tune of forty billion euros.<sup>57</sup>

49 *Id.* 16.

50 *Id.* 63.

51 *Id.* 63–64.

52 *Id.* 16.

53 *Id.* 55.

54 *Id.*

55 The EIB always receives a AAA rating from credit rating agencies. European Investment Bank, “Lending in Central European Accession Countries: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia” (October 2003).

56 J Muir “EIB Preparation for Accession and Economic Integration” (Autumn 2002) Euroinvest 9.

57 High Level Group on the Trans-European Transport Network, *Report* (6/27/03) 59.

Just because the EU prioritizes economic integration does not mean that it is not also concerned with national development. Generally, the assumption is that economic integration will foster national development. The EC tells us that anything else is not “conceivable.”<sup>58</sup> The EU argues that transportation infrastructures will spur deeper economic integration within the Union and this will drive economic growth in the East. This growth will in turn ameliorate power disparities. Transportation will be built in the context of power disparities but will reverse them.

Michael Marray explains the connection between integration and national development, setting forth how transportation will “link the Central and Eastern European countries’ more effectively into Europe’s internal market, thereby fostering these countries participation in labour sharing in Europe, helping to narrow the gap in the level of economic development.”<sup>59</sup> National development will thus occur within the context of greater economic integration. According to the EU, the relationship between integration and economic development is direct. At the same time, it is not always clear how this will work in practice. For example, one of the major economic innovations envisaged by the TEN-Ts is the introduction of just-in-time manufacturing wherein goods are produced on demand with short-term notice.<sup>60</sup> Although this economic model no doubt will benefit major Western European companies, it is not clear how it will result in upgrading of the labor force or other economic development related outgrowths. In the end, EU level policy on PPPs and human rights will shape whether and how economic integration correlates with sustainable national development.

### III PPPs and human rights

In March 2003, the EC Directorate-General for Regional Policy issued its *Guidelines for Successful Public-Private Partnerships*, which set out the human rights policy for EU PPPs. It covered several sectors of the economy, including transportation. The EC argues that projects should take social issues into account at the early stages of projects and also understands human rights in the language of “user rights.” The EC argues that human rights are to be promoted by projects. However, the EC also believes that it should not initiate the internalizing of all human rights into project plans. Instead, watchdog groups should identify human rights issues and mount campaigns for projects to take them seriously. The division of labor with respect to human rights is unclear.

Although human rights figure into the EU’s plans, their promotion is not the main purpose of EU PPPs. However, the rationale for pursuing PPPs is not incompatible with human rights. In fact, a strong overlap exists between human rights principles

58 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 13.

59 M Marray “New Europe New Roads” (2001) 213 Project Finance 54.

60 European Commission 13.

and the stated rationale for EU PPPs. Guy Crauser, the Director General for DG Regional Policy, provides four main reasons for pursuing PPPs:

- to provide additional capital;
- to provide alternative management and implementation skills;
- to provide value added to the consumer and the public at large;
- to provide better identification of needs and optimal use of resources.<sup>61</sup>

The aim is for traditional public services to “harness the benefits of the private sector.”<sup>62</sup> In its focus on adding value to consumers and the public and in identifying needs, the rationale for PPPs promotes positive human rights principles, the production of public goods. Furthermore, the EC is concerned that PPPs are pursued in a way that is compatible with other social policies.<sup>63</sup>

The aim of the EC is to make sure that “aggregated benefits exceed total costs” in order to ensure that social objectives are met.<sup>64</sup> The main objective is then to “protect and enhance public benefit” and appraisals “should be taken from this perspective.”<sup>65</sup> The Commission envisages that project planners will demonstrate how they intend to satisfy public interest obligations. Monitoring is important here as is the oversight of projects by “watchdog”<sup>66</sup> groups. Attention is also paid to “how benefits and costs are distributed over societal groups.”<sup>67</sup> According to the EC, distribution issues will be reflected in project policies relating to user charges.

The EC provides guidance for how PPPs are to be sensitive to the public interest. It realizes that member states differentially protect the public interest. In the face of differential protection, the EC urges that EU norms should supplant national norms. To realize this goal, EU monetary grants for PPPs will be conditioned on “the adoption of European norms, quality and performance standards together with effective monitoring and management systems in local public sector partners.”<sup>68</sup> The public interest is protected in a number of ways:

- ensuring PPPs and grants deliver quality of services;
- value for money must be demonstrated;
- public participation in the oversight function should be included for sustainability;
- windfall profits to contractors must be avoided;
- renegotiation of contracts should be undertaken where required to rebalance contracts;
- implementation of PPP should not diminish focus on and responsibility for social consequences including employment and socioeconomic development.<sup>69</sup>

61 European Commission Directorate-General for Regional Policy, *Guidelines for Successful Public-Private Partnerships* (March 2003) 4 (Guy Crauser, Director General, DG Regional Policy).

62 *Id.* 13.

63 *Id.* 78.

64 *Id.* 88.

65 *Id.*

66 *Id.* 9, 39, 54, 88.

67 *Id.* 88.

68 *Id.* 9.

69 *Id.* 67.

The human rights conception on which the EU approach is based is both process and outcome based. This dual basis raises questions as to which types of human rights claims may be brought against projects. The public interest is to be taken into consideration at project design and implementation.

Importantly, the EC sees socioeconomic appraisals as integral to the early stages of a project, not just at the construction and operation stages.<sup>70</sup> A socioeconomic appraisal is conducted as a part of the financial design.<sup>71</sup> At the same time, the EC does not make a case for including civil society organizations in the socioeconomic assessment.<sup>72</sup> Instead, input from these groups is relegated to the design and operation stage. The exclusion of civil society groups from earlier stages means that projects start off with democratic and perhaps human rights deficits.

The EC guidelines are ambiguous about what form public input is to take during the design and operation stage.<sup>73</sup> Generally, the EC advocates a “bottom up” approach that it sees as “crucial to the sustainability of the PPP approach.”<sup>74</sup> Successful implementation “will require coordination with NGOs, consumer associations and the public.”<sup>75</sup> The EC here advocates the promotion of watchdog groups to foster “a strong sense of consumer ownership or participation in PPP projects.”<sup>76</sup>

These “independent consumer groups and associations”<sup>77</sup> are to monitor PPPs from the outside. The public is to “be integrated into the monitoring process,” because “[t]he public, as paying consumers, are therefore a critical barometer of performance and suitability of PPP implementation.”<sup>78</sup> Human rights concerns are to be identified as projects unfold. The EC envisages that civil society groups are to mount human rights strategies directed at projects. If strategies succeed in convincing project planners that a problem exists, then planners will renegotiate the project plan.

If projects cause harm and affected communities bring this harm to the attention of project planners through human rights risk strategies, then changes will be made. Project planners will respond to human rights strategists with their own human rights risk mitigation strategy. The EC provides the following example: consumers of new member states may have an EU facilitated PPP-based toll road built. Citizens may find that the road is too expensive, impeding their right to free movement. As a result, they may seek out substandard parallel roads<sup>79</sup> and also mount a campaign for a change in the toll pricing. Project planners may treat this as a demand risk issue. A shadow toll system might be instigated, whereby the government subsidizes tolls.

70 *Id.* 76.

71 *Id.* 83.

72 *Id.* 10.

73 *Id.* 10.

74 *Id.* 54.

75 *Id.* 10.

76 *Id.* 54.

77 *Id.* 9.

78 *Id.* 48–49.

79 *Id.* 51.

Otherwise, it may encourage private operators to pursue revenue through other channels.<sup>80</sup> Shadow tolls would allow “social considerations to be integrated into the financial implications of concession duration.”<sup>81</sup> One of the keys, according to the EC, of a legitimate project is that it does not produce a windfall for a private operator.<sup>82</sup> If this does happen, the EC will address it.

The EC aims to centralize human rights decision making at the community level. In particular, it advocates an interstate consultation procedure with a transnational commission of enquiry.<sup>83</sup> This would replace the drafting of multiple impact reports with “a single impact statement” at the European level.<sup>84</sup> The argument is that when dealing with transnational projects, “[n]o single Member State can claim to have an overall picture of transport needs on the scale of the enlarged Europe.”<sup>85</sup> Such a commission is in line with a general move within the Commission toward holistic regulatory statements, encompassing sustainable development concerns.<sup>86</sup> The Van Miert Group proposed the establishing of European level coordinators of the major transportation axes. Coordinators would, among other things, “canvass private and institutional investors.”<sup>87</sup> Can better decisions be made at a supranational level? With regard to world economic federalism, Eleanor M. Fox asks: “At what level of government or community should regulation be lodged, in view of dual objectives to promote efficiency of regulation for the broader community and to serve the values and choices of the local community?”<sup>88</sup>

In a context in which differential national application of human rights sometimes results in a failure to incorporate human rights interests in project plans, this centralization is important. At the same time, the EC also has adopted a “wait and see” approach to human rights. Here human rights will be addressed as public interest groups bring them to the attention of planners. Human rights problems exist only when civil society groups successfully mount human rights strategies. Of course, not all human rights problems are foreseeable. At the same time, some human rights problems are predictable and the success of the EC human rights strategy will depend in part on its ability to learn lessons across projects. For this reason, projects would benefit from an open discussion of the criteria on which socio-economic appraisals will be based. To begin to provide a sense of how these appraisals might work in practice, we next turn to the use of PPPs in the transportation sector of the new member states of Central and Eastern Europe.

80 *Id.* 70.

81 *Id.* 72.

82 *Id.* 35.

83 *Id.* 67.

84 *Id.* 67–68.

85 *Id.* 70.

86 I am thankful to Joanne Scott for this observation.

87 European Commission Directorate-General for Regional Policy 9.

88 E M Fox “Global Markets, National Law, and the Regulation of Business – a View from the Top” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 135.

## IV TEN-Ts, PPPs, and human rights

Even before the identification of the TEN-T projects for Central and Eastern European new member states by the Van Miert Group, the EU supported privatized transportation projects designed to link new member states up with old ones. With respect to human rights, these projects have at times run into problems. The EC has responded to human rights concerns by issuing the *White Paper: European Transport Policy for 2010: Time to Decide*. It understands human rights through a lens of “user rights.”<sup>89</sup> The PPP Guidelines set out in the [previous section](#) with their focus on social assessments build upon and, at times, seek to transform the legacy of the earlier generation of projects and also the *White Paper’s* approach.

Importantly, with respect to human rights, the EC does not provide an unqualified endorsement of transportation PPPs in the new member countries. Although these countries have “enormous financial requirements” and a “large funding shortfall, the need for efficient public services, growing market stability and privatization trends creating a favourable environment for private investment,”<sup>90</sup> PPPs are not seen as a panacea. Instead, the EC argues that the public interest should ultimately dictate the financing technique.<sup>91</sup> If the new member states do pursue PPPs though, then EU human rights policies will impact on project design. Because of limited profitability of some projects, EU loans are necessary to attract private financing. These loans come attached with human rights conditionalities.<sup>92</sup>

The EC aims to translate its financial involvement in PPPs into authority over the human rights practices of projects. Promising trends like an EU policy on resettlement of affected groups<sup>93</sup> and the EIB’s experience with social assessments<sup>94</sup> suggest that human rights could be effectively handled at the EU-level. At the same time, with respect to transportation PPPs, the EU privileges regional integration over national development. Also, civil society organizations are not represented in the EC-led financial planning stage. Thus, although the centralization of authority in EU institutions is an important step toward TEN-T projects that respect human rights, the planning stage must pay greater attention to human rights concerns and it must involve civil society actors.

In addition, the EC channels human rights concerns away from underlying issues of economic development and power differentials and toward a concern for user

89 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001).

90 *Id.* 6.

91 *Id.*

92 *Id.* 7.

93 “Multicriteria Analysis of the Financial Feasibility of Transport Infrastructure Projects in Hungary” (February 2003) 41(1) *Infor* Ottawa 105.

94 European Investment Bank, “Lending in Central European Accession Countries: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia” (October 2003).

rights. The EC presents users as the ultimate beneficiaries of transportation infrastructures. It thus speaks of putting users “back at the heart of transport policy.”<sup>95</sup> The EC refers to user rights and obligations, arguing that transportation is “a service of general interest for the public benefit.” It goes on: “This is why the Commission wants to encourage measures in favor of intermodality for people and pursue its actions on users’ rights in all modes of transport, while also considering whether in future it might not also introduce user obligations.”<sup>96</sup>

A road, train, airplane, or boat only fulfills its human rights promises if it is safe and affordable. Also, transportation infrastructures connect up some, while passing over others. They may provide inroads to exploit cheap labor. These latter sorts of human rights issues do not typically express themselves within the rubric of user rights. They are issues that must be addressed within the context of a more robustly conceived social assessment.

User rights concern themselves with how a transportation project is run, rather than whether the project has been conceived in such a way that it delivers on public good promises. The user is preoccupied here with road safety,<sup>97</sup> rather than the impact of transportation projects on social and economic development more generally. With respect to user rights as human rights, road accidents and public health occupy users<sup>98</sup> as do the conditions of professional drivers.<sup>99</sup> Social legislation for drivers of long-haul vehicles and rails has been a contentious issue. Eventually rules were agreed.<sup>100</sup> However, differences still exist over driver pay.<sup>101</sup> Also, the operating stage of shipping infrastructure is another site of human rights negotiation. Issues such as the safety of ships and also the working conditions of seafarers are ones that the EU is considering.<sup>102</sup>

One area in which the redistribution of resources and user rights converge is the payment of tolls.<sup>103</sup> Under the PPP approach, users are a main financier of transportation projects through the payment of tolls for road use or tickets for air, rail, or sea travel.<sup>104</sup> Just as during Roman times, users are required to pay tolls for the privilege of travelling roads. In the Roman Empire, tolls covered both a right of passage and also a payment on goods carried.<sup>105</sup> At the same time, tolls may be a

95 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 64.

96 *Id.* 76.

97 *Id.* 64.

98 *Id.* 11.

99 *Id.* 29.

100 *Id.* 25.

101 *Id.* 88.

102 *Id.* 89.

103 As well, the EC hopes that the social costs of infrastructures will be reflected in their charges: “The fundamental principle of infrastructure charging is that the charge for using infrastructure must cover not only infrastructure costs, but also external costs, that is, costs connected with accidents, air pollution, noise and congestion.” *Id.* 70. Costs will be more sophisticatedly assessed when Galileo comes online. *Id.* 72.

104 *Id.* 87.

105 R Chevallier, *Roman Roads* (B. T. Batsford Ltd London 1976) 195.



site of human rights negotiation. After all, the ability of projects to deliver on public good promises depends upon their affordability.

Tolls are a contentious issue with users not always able or willing to pay them.<sup>106</sup> As a result, states may supplement toll payments. Here, operators may lower fares and the government may step in and make up the difference. Or, instead, if private users shy away from using transportation infrastructures, governments may agree to pay the private operator a fixed amount. This payment would ensure that projects maintain their profitability in the face of decreased usage. When the state steps in, it is the taxpayer who ultimately becomes the cofinancier.

When the government steps in, wider issues of social policy are introduced. However, by focusing on user rights and obligations that arise in the running of transportation infrastructures, the EC generally sidesteps more difficult questions about the nature of transportation as a public service in relation to users. Instead, the EC speaks about the need of users to exercise their rights vis-à-vis transportation companies. Although it speaks of the public service model and about clarifying what rights are at stake, the model is based upon the list of rights that airline travellers may avail themselves of when flying. The goal is to export this list-based approach to other transportation modes.<sup>107</sup> The move is toward maintaining standards of service to paying customers and away from broader issues of national economic development.

This approach is not a dramatic departure from how human rights have been handled by preTEN-T projects in Central and Eastern Europe. As we shall see by references to preTEN-T privatized roads in Hungary and Poland, the ability of projects to promote economic development has been contested. Protests directed at projects led to discussions over the appropriate roles of governments and companies in constructing and operating roads.

The M1/M15 toll motorways in Hungary represent an early experiment with PPPs in which tolls ultimately were the terrain on which battles over human rights were waged. Control over the road was transnational, both public and private, and contested. It involved the EBRD, foreign financiers, domestic and foreign operators, and also an active national government. This project was conceived in 1991, before accession.<sup>108</sup> The underlying concessionary contract was to run for thirty-five years.<sup>109</sup>

The roads were carried out through a transnational PPP in which control was contested and changed over time. In 1995, the M1 became the first build-operate-transfer project in Eastern Europe.<sup>110</sup> As indicated in Chapter 2, in this type of

106 C von Hirschhausen “Infrastructure Development in the Central and Eastern European EU Applicant Countries: On the Road to Europe” (Deutsches Institut fuer Wirtschaftsforschung, Institut fuer Konjunkturforschung) (October 2002) 39(10) Economic Bulletin 333, 337.

107 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide* (2001) 78.

108 European Commission, Directorate-General Regional Policy, *Resource Book on PPP Case Studies* (June 2004) 94.

109 *Id.* 93.

110 C von Hirschhausen, 338.

contractual scheme, the private concessionaire builds and operates the project, recouping sunk costs and garnering a profit through the collection of toll payments. It then transfers the road to the government. Thus, although this contractual scheme is a common in privatization, control over the project ultimately will rest in the government's hands.

Even though control over the project formally resides in the private sector during the building stage, in practice governments and companies shared control. For example, at the management level decision making was shared between the government and the concessionaires.<sup>111</sup> Furthermore, the state conducted initial planning. The government recouped its costs here through profit sharing.<sup>112</sup> At the EU level, the EBRD helped to raise a syndicated loan.<sup>113</sup> Furthermore, the concessionaire consortium itself included both public and private actors, domestic and international.<sup>114</sup> The major parties were the Bureau for Concession and Motorways and ELMKA, Rt., an international private company.<sup>115</sup> Further indicative of the transnational character of the project, Banque Nationale de Paris arranged financing.<sup>116</sup>

The transnational consortium constructed a fifty-seven kilometer toll road. However, travellers found the tolls too expensive. The EBRD characterized the impact of tolls on users for whom paying to use roads was foreign as a "social shock."<sup>117</sup> Instead, users preferred to travel on a substandard parallel road that did not charge tolls. The road also ran into further problems. The building of more convenient shopping centers in other areas reduced road use.<sup>118</sup>

So, great was the public antagonism toward the toll road that a lawsuit by the Hungarian Automobile Club and others was brought against ELMKA. Plaintiffs claimed that the road did not deliver adequate value for the money. The court lowered tolls by fifty percent. In response, the EBRD suspended disbursements and construction was delayed for seven months.<sup>119</sup> Further, ELMKA defaulted on its loans. Ultimately, the government took over the road in 1999. The public placed blame on foreign "outsiders" for the road's problems.<sup>120</sup> The government then

111 European Commission, Directorate-General Regional Policy, *Resource Book on PPP Case Studies* (June 2004) 88.

112 *Id.* 93.

113 M Marray "Traffic Jam" (September 2000) 209 *Project Finance* 36.

114 P Bennett "The Long and Winding Road" (May 1998) 8(4) *Central European* 41.

115 European Commission, Directorate-General Regional Policy, *Resource Book on PPP Case Studies* (June 2004) 94.

116 *Id.*

117 P Bennett "The Long and Winding Road" (May 1998) 8(4) *Central European* 41.

118 European Commission, Directorate-General Regional Policy, *Resource Book on PPP Case Studies* (June 2004) 94.

119 European Commission Directorate-General Regional Policy, *Guidelines for Successful Public-Private Partnerships* (March 2003) 53 (citing to JD Crothers "Project Financing of Toll Motorways in Central and Eastern Europe: A Signpost for Transition" (Spring 1997) *Law in Transition* 6.

120 High Level Group on the Trans-European Transport Network, *Report* (6/27/03) 54.

renegotiated the loans, arranging a twenty-five-year maturity with lower interest. This amount was lowered in part as a result of a sovereign guarantee that was added on.<sup>121</sup> In the end, the number of users turned out to be somewhere between one-third<sup>122</sup> and one-half<sup>123</sup> of the number predicted. A default of the private operator had led to a “renationalisation.”<sup>124</sup> It also heralded an era in which government guarantees became necessary to raise private capital.<sup>125</sup>

Another preaccession experiment with transnational PPPs involving EU institutions is the A2 road in Poland. The country suffers from some of the worst roads in Central Europe.<sup>126</sup> The A2 is to connect Poland and Germany. The contract runs seventeen years. The A2 was built through a transnational PPP, part of which was pursued through a build-operate-transfer contractual arrangement.

The PPP is transnational at the financing and operating stages. Credit Lyonnais and Commerzbank led the loan syndication. The EIB provided financing, making the A2 the first major PPP road project supported by it. Also Deutsche Bank served as the financial advisor. The law firms of Baker & McKenzie and Allen & Overy provided legal assistance, further adding to the transnational character of the project.<sup>127</sup> Although the concession company is Policy, Autostrada Wielkopolska SA, a transnational consortium will construct and operate the project.

Support of the Polish government in the form of guarantees was essential for bringing the project forward.<sup>128</sup> However, this support stood in the face of popular opposition to the project. Controversy existed over whether the road would promote economic development of the country’s poorer regions. At the same time, project promoters marshaled arguments that the economic integration of the EU would result from the road. Although arguments were put forward, the underlying economic premise of the project was not scrutinized.<sup>129</sup>

Given the popular opposition, the elected government of Poland had difficulty making guarantees. At the EU level the road was pushed because of its integration potential. An inability to properly incorporate the national development goal into the project planning was undermining the project in the minds of the public. This and similar experiences with unpopular PPPs led the Van Miert Group to underscore: “Prudent investors” must “make careful assessments of the

121 European Commission, Directorate-General for Regional Policy, *Resource Book on PPP Case Studies* (June 2004) 94.

122 C Melville-Murphy “Going East” (March 1997) *Central European* 28.

123 European Commission, Directorate-General Regional Policy, 94; R Bruce “Disappointing Returns at the Toll Booth” (October 1996) 5(7) *Infrastructure Finance* 29.

124 European Commission, Directorate-General Regional Policy, 95.

125 T Ahmad “Easy Rider” (June 2000) 206 *Project Finance* R2.

126 “Survey: Road Rage” (10/27/01) (361(8245) *Economist* 9.

127 “European Transport: A2” (January 2001) 213 *Project Finance* 14.

128 M Marray “New Europe New Roads” (January 2001) 213 *Project Finance* 54–55.

129 E Judge “The Regional and Environmental Dimensions of Polish Motorway Policy” (July 2000) 34(5) *Regional Studies* 488.

approvals required for their projects, as well as public sentiment towards the projects before deciding to invest.”<sup>130</sup> However, all was not lost for the integrationists; in spite of public opposition, laws were amended allowing for more government guarantees.<sup>131</sup>

## V Conclusion

Despite EU support for PPPs in the transportation sector of new member states, progress has been slow going.<sup>132</sup> The private sector has been reluctant to invest in European-wide projects. The Commission blames this reluctance on uncertainties around profitability.<sup>133</sup> Nonetheless, with government guarantees and EU financial support, many projects have gone forward. However, perhaps as a sign that the projects themselves are not perceived as delivering on their public good promises, a trend has started toward challenging PPP projects in court.<sup>134</sup>

If projects require government participation to make them financially and politically viable, then the public must be convinced that projects will deliver on national public good promises. When the projects are directed at encouraging connections within Europe, these national public good promises must not only be delivered on by national governments, but also EU institutions must be seen as playing a role. Otherwise, membership in Europe will seem increasingly less attractive with regard to infrastructure.

In this regard, the move toward a European-level social and economic assessment of projects is an important advance for human rights. From the perspective of human rights strategists, a centralized authority helps to organize directed and efficient campaigns. However, European-level assessments should open the door to these groups not only at the construction and operation stages but also at the financial planning stage.

New transportation networks will open up Eastern labor markets to Western companies. Construction companies will experience “rising profits.”<sup>135</sup> Will less expensive labor be exploited? Will a progressive equalization of salaries ensue? Do workers of the “West” benefit when their own taxes are spent through EU institutions to open up these cheaper Eastern labor markets? The answers to these questions are muddy at best and are intimately connected to issues around the benefits and burdens of the common market and the common monetary unit.<sup>136</sup> Transportation

130 High Level Group on the Trans-European Transport Network, *Report (6/27/03)* 54.

131 M Marray “Traffic Jam” (*September 2000*) 209 *Project Finance* 36.

132 For a discussion of a number of PPP projects in Europe see European Commission, Directorate-General Regional Policy, *Resource Book on PPP Case Studies (June 2004)*.

133 European Commission, *White Paper: European Transport Policy for 2010: Time to Decide (2001)* 58.

134 High Level Group on the Trans-European Transport Network, *Report (6/27/03)* 23.

135 S J Dannhauser “Enlarged European Union” (*4/15/04*) 70(13) *Vital Speeches of the Day* 409.

136 High Level Group on Trans-European Transport Network 58.

projects are of course embedded in a wider social and economic context and thus extra infrastructure structural impediments may undermine hopes for the transportation infrastructures. At the same time, the move toward centralization is an important step forward for how infrastructure projects of the new member states respect human rights.