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The Creeping Nationalisation of the EU Enlargement Policy

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PREFACE

Often presented as the ‘most successful EU foreign policy’, enlargement has been one of the most important undertakings of the European Union over the last two decades. However, the experience of the Union’s admission of several central and eastern European states has led to growing scepticism about further expansion.

This timely report examines the recent adjustments made to address some of the policy’s shortcomings. It shows that the EU response has, on the whole, taken the form of a reaffirmation of the Member States’ control, both in the implementation of the policy, and through a reinforcement of their ‘constitutional requirements’ for accepting the admission of new Member States to the Union.

What the author characterises as the ‘creeping nationalisation’ of enlargement strikes at the credibility, and thus the efficiency of the Union’s overall policy. It is also argued that it may raise questions about its compatibility with the admission rules and general Union objectives, set out by the Treaty on European Union.

By issuing this report, SIEPS hopes to make a contribution to the on-going debate on the future EU enlargement, and on the role of the Union as international actor.

Stockholm, November 2010

Jörgen Hettne

Acting Director, SIEPS

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SUMMARY

Originally conceived as an intergovernmental *procedure* to allow third states to become contracting parties to the EU treaties, enlargement has become a *policy* through which the Union's institutions transform third states into Member States. This EU Member State-building policy has allowed the Union to exercise its normative power, and to organise the continent in its own image.

Hailed as 'the most successful EU foreign policy', enlargement has nonetheless been marked by shortcomings that have weakened the credibility, effectiveness and legitimacy of the policy. Motivated by past experiences of some candidates' lack of preparedness for admission, mounting doubts about the systemic sustainability of further expansion and increased demands for democratic accountability, adjustments have been made in recent years. On the whole, these changes have entailed the strengthening of Member States' control over the conduct of the policy.

Beyond their craving for control, Member States have also been showing less scruple in instrumentalising enlargement for domestic political gains. The EU Member State-building policy is thus increasingly dominated, if not held hostage, by national agendas. The result of this creeping nationalisation has been a process congested with (sometimes unpredictable) legal and political hurdles, raising new questions as to the credibility of the EU commitments towards aspirant states, and consequently the effectiveness of the enlargement policy's acclaimed transformative power. It may also compromise the integrity of the Treaty provisions and conflict with fundamental principles of EU law, not least the very goal of European (re)unification reaffirmed by the Treaty of Lisbon.

While legal remedies do exist to address the current national *dérive*, the required rebalancing between Member States' interests and EU commitments is however more likely to stem from policy adaptation than from judicial intervention. Whatever the preferred approach, legal or otherwise, it is becoming critical to address the current atmosphere of unpredictability that damages the EU's standing.

'RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe' (Preamble, Treaty of Lisbon)

1 INTRODUCTION

The enlargement policy of the European Union is a paradoxical creature. Built on scarce Treaty provisions, it nevertheless involves a rich body of rules. Though regulatory-intensive, it is seldom subject to judicial review. And while it constitutes a rare example of an integrated EU foreign policy, involving *all* the Union's institutions, and promoting the whole body of EU norms irrespective of 'pillar politics',¹ this *EU Member State-building* policy is increasingly dominated, if not held hostage, by national agendas.

After having recalled the main elements of the policy, the present report will highlight some of its shortcomings, and the adjustments made to address them.² It will be shown that, more often than not, these adjustments have entailed a strengthened control by the Member States, in that the latter are taking a more prominent place in the policy by changing – sometimes even unilaterally – the rules of the game.

This creeping *nationalisation* of the EU enlargement policy has resulted in a process congested by (sometimes unpredictable) legal and political hurdles, raising questions as to the credibility of EU commitments towards current and future candidates, as well as the effectiveness of the policy's acclaimed transformative power. More fundamentally, it will be argued that this development may be at odds with fundamental principles of EU law, not least the very goal of European (re)unification reaffirmed by the Treaty of Lisbon. The report thus exposes the possible inconsistency between the practice of enlargement and EU law, and raises the question of possible legal remedies against the current *dérive*.

¹ M Cremona and C Hillion, '*L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy', *European University Institute Law Working Paper* No 39/2006
<cadmus.iue.it/dspace/bitstream/1814/6419/1/LAW-2006-39.pdf>

² In writing this report, I greatly benefited from many insightful discussions with officials from the European Commission, and from the Ministries for Foreign Affairs of several Member (and non-Member) States. The usual disclaimer applies.

2 EU MEMBER STATE-BUILDING POLICY: KEY ELEMENTS AND MAIN SHORTCOMINGS

Nine countries are currently waiting in line to become EU members. Croatia, Turkey, Iceland and the former Yugoslav Republic of Macedonia have been acknowledged as ‘candidates’ for membership, while Albania, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo under UN Security Council Resolution 1244 are defined by the EU as ‘potential candidates’. Their path towards membership is guided by the provisions of Article 49 TEU which, in its Lisbon version, foresees that:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

The procedure has evolved through successive Treaty revisions.³ However, it has also, and perhaps primarily, grown out of *ad hoc* practice, elaborated in consideration of the needs of each expansion process, and to a great

³ Compared to previous versions (ECSC, EAEC and EEC Treaties), the Lisbon formulation of the enlargement procedure is more specific, both in terms of the conditions that a candidate must satisfy to be eligible (e.g. reference to the values of the Union), and as to the role that the EU (and national) institutions play in the process. In particular, the procedure enshrined in the EEC Treaty only required that the applicant be a European State, and that its application be sent to, and dealt with by the Council after an opinion from the Commission, and with the approval of the Member States. Successive revisions of the procedure have also strengthened the role of the European Parliament, to the effect that it now has to approve of any expansion of the Union. Since the Treaty of Lisbon, the enlargement procedure requires that national parliaments be informed of any third state’s application for membership.

extent *beyond* Treaty provisions. The Member States, notably *qua* European Council and assisted by the European Commission, have been particularly creative in this regard, most notably in the 1990s as the Union was preparing its ambitious enlargement to central and eastern Europe.

New procedural and substantive requirements have thus been articulated in a piecemeal fashion, resulting in a complex body of EU accession rules and mechanisms which supplement the basic Treaty requirements. Together, law and practice have carved out an EU Member State-building policy that defines what state is eligible for membership (A), and how it should prepare itself to become member (B). The result of this incremental process has however raised questions of both the credibility and the effectiveness of the policy (C).

2.1 Accession conditions: Elaboration and codification

From the very start of the enlargement saga, the EU Heads of State or Government have required that the applicant country is a democratic state with a market economy, and committed to accept and comply with the *acquis* of the EU.⁴ Such conditions were elaborated and codified by the European Council at its 1993 Copenhagen meeting. Thus, according to the so-called ‘Copenhagen criteria’, membership requires that the candidate country demonstrates:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

⁴ Further, e.g. M Cremona, ‘Accession to the European Union: membership conditionality and accession criteria’ (2001) 25 *Polish Yearbook of International Law* 219; F Hoffmeister, ‘Earlier enlargements’ in A Ott and K Inglis (eds), *Handbook on European Enlargement* (TMC Asser Press, 2002) 90; C Hillion, ‘The Copenhagen criteria and their progeny’, in C Hillion (ed), *EU Enlargement: a legal approach* (Hart Publishing, 2004) 17, A Tatham, *Enlargement of the European Union* (Kluwer Law International, 2009) 202ff.

With the help of the European Commission, the European Council subsequently refined the normative content of these admission conditions, taking account of the circumstances of each round of enlargement, and of the candidates involved. Thus, the Madrid European Council of December 1995 referred to the need ‘to create the conditions for the gradual, harmonious integration of [the applicant] countries, particularly through the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment.’ The European Council thereby emphasised the importance for the candidates to establish the appropriate administrative structures to cope with the well-established obligations of membership, e.g. implementation of the *acquis*.⁵

Following the Kosovo crisis at the end of the 1990s, the European Council added that candidates ought to settle their bilateral disputes, including through the involvement of the International Court of Justice where necessary, *before* entering the EU.⁶ The Union’s acknowledgment of the ‘European perspective’ of the countries of the Western Balkans⁷ also led to the establishment of specific eligibility conditions for the countries concerned.⁸

⁵ This condition has actually been integrated in the latest formulation of the Copenhagen criteria, as illustrated by pt 18 of the EU Negotiating Framework for Iceland; Doc. 12228/10.

⁶ Pt 4, Presidency Conclusions, European Council, Helsinki, 10–11 December 1999.

⁷ See e.g. Presidency Conclusions, European Council, Santa Maria de Feira, 19–20 June 2000; Presidency Conclusions, European Council, Copenhagen, 12–13 December 2002.

⁸ See e.g. Conclusions of the General Affairs Council, 29 April 1997; also the ‘Thessaloniki Agenda for the Western Balkans: Moving towards European Integration’ <ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/thessaloniki_agenda_en.htm> Further: S Blockmans, *Tough Love – The European Union’s Relations with the Western Balkans* (TMC Asser Press, 2007) 241ff; S Blockmans, ‘Raising the threshold for further EU enlargement: process and problems and prospects’ in A Ott and E Vos (eds), *50 years of European Integration: Foundations and Perspectives* (TMC Asser Press, 2009) 203.

2.2 The pre-accession strategy: From procedure to policy

In codifying and elaborating accession conditions, the European Council also laid the grounds for what was to become a proactive and meticulous pre-membership policy, namely the ‘pre-accession strategy’. Launched by the 1994 Essen European Council,⁹ it finds its roots in the 1993 Copenhagen Summit:

The European Council will continue to follow closely progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions.

The European Council agreed that the future cooperation with the associated countries shall be geared to the objective of membership which has now been established.

In contrast to previous accessions, where the candidate had simply been expected to fulfil the admission conditions, without any interference by the Union,¹⁰ the post-Copenhagen approach to enlargement entails a proactive engagement of the EU to steer and monitor the process whereby candidates prepare their accession.

In particular, the Commission’s opinions on the central and eastern European countries’ applications for membership operationalised the Copenhagen criteria into various indicators, which specified the conditions to be met by those countries, through reforms, as part of their accession preparation. Hence, in relation to the economic conditions, the Commission pointed out that

⁹ Presidency Conclusions, European Council, Essen, 9–10 December 1994. Further: A Mayhew, *Recreating Europe. The European Union’s Policy towards Central and Eastern Europe* (Cambridge University Press, 1998), esp Chapter 6.

¹⁰ The Commission had proposed a pre-accession phase in relation to Greece (European Commission’s Opinion on Greek Application for Membership, Bull EC Suppl. 2-1976, 7) however rejected by the Council of Ministers that opted for immediate accession negotiations (Bull EC 1-1976, pts 1101-1111, 6-9).

The existence of a market economy requires that equilibrium between supply and demand is established by the free interplay of market forces. A market economy is functioning when the legal system, including the regulation of property rights, is in place and can be enforced. The performance of a market economy is facilitated and improved by macroeconomic stability and a degree of consensus about the essentials of economic policy. A well-developed financial sector and an absence of significant barriers to market entry and exit help to improve the efficiency with which an economy works.¹¹

Throughout the latter part of the 1990s, new instruments were added to ‘enhance’ the pre-accession strategy.¹² Hence, following the 1997 Luxembourg European Council, the Copenhagen criteria were progressively spelled out in short, medium and long term priorities, compiled in ‘accession partnerships’ (APs) adopted by the EU, and which the candidates would have to meet with a view, and as a condition, to their ultimate accession.¹³ The Commission was also requested to produce detailed evaluations on each candidate’s performance in implementing the

¹¹ Pt 2.2, Commission Opinion on Hungary’s Application for Membership of the European Union, Doc 97/13, 15 July 1997; see also the Commission’s White Paper *Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union*, COM (95) 163 final, 3 May 1995; further: C Hillion ‘Enlargement: a legal analysis’ in A Arnall & D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press, 2002) 403.

¹² Based notably on the proposals made by the European Commission in its ‘Agenda 2000. The Challenge of Enlargement’, COM(97) 2000, vol. II. Further, see Mayhew, above n 9.

¹³ Council Regulation 622/98 (OJ 1998 L85/1). On the basis of the framework AP Regulation adopted by the Council, the Commission drafted individual accession partnerships containing the list of principles, priorities, intermediate objectives and conditions on which the adaptation of the candidate should focus to meet the Copenhagen criteria. Such accession partnerships would then have to be adopted by the Council by qualified majority voting, before being presented to the candidates. For recent examples of APs: see Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC (OJ 2008 L51/4).

APs,¹⁴ through the publication of annual progress reports, on the basis of which the (European) Council would determine the pace of accession negotiations. In particular, the pre-accession financial assistance could be reviewed if progress in meeting the Copenhagen criteria was deemed insufficient.¹⁵ This periodical reporting on candidates' progress contrasted with previous accession procedures in which only two opinions were given by the Commission on any membership application.

EU institutions, and particularly the Commission, were thus vested by the European Council with far-reaching powers to monitor the way candidates prepared their accession. The Commission was indeed re-organised so as to include a specific Directorate General for Enlargement. Acting well beyond its traditional role of 'guardian of the [EC] Treaty' vis-à-vis the Member States, the Commission acquired the pivotal function of promoting and controlling the progressive application of the wider *EU acquis* by future members. Indeed, in articulating *all* the Copenhagen accession criteria and monitoring the candidates' progress in meeting

¹⁴ The 1997 Luxembourg European Council decided that '[f]rom the end of 1998, the Commission will make regular reports to the Council, together with any necessary recommendations for opening bilateral intergovernmental conferences, reviewing the progress of each Central and Eastern European applicant State towards accession in the light of the Copenhagen criteria, in particular the rate at which it is adopting the Union *acquis* (...) The Commission's reports will serve as the basis for taking, in the Council context, the necessary decisions on the conduct of the accession negotiations or their extension to other applicants. In that context, the Commission will continue to follow the method adopted by Agenda 2000 in evaluating applicant States' ability to meet the economic criteria and fulfil the obligations deriving from accession' (Presidency Conclusions, Luxembourg European Council, 12–13 December 1997, pt 29).

¹⁵ On the pre-accession strategy, see e.g. M Maresceau, 'Pre-accession', and P Nicolaidis, 'Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Application of EU Rules' in M Cremona (ed), *The Enlargement of the European Union* (Oxford University Press, 2003) 9 and 43, respectively; K Smith, *The making of EU foreign policy: the case of Eastern Europe* (Palgrave, 1999) 122; Tatham, above n 4 at 287; Mayhew, above n 9.

them,¹⁶ it became intimately involved in defining the prototype of an EU Member State.

Since Copenhagen, enlargement has thus become a *policy* (as opposed to merely a procedure) governed by a set of elaborated substantive rules, encompassing evolving accession conditions and principles. Through this policy, the EU has actively engaged in the preparation of the candidates with a view to transforming them into Member States. Importantly, the evolution from procedure to policy has nuanced the original intergovernmental character of the enlargement process in that it has allowed for an increased role for the EU institutional framework. Having recognized the eastern enlargement as a ‘political necessity and historic opportunity’,¹⁷ Member States were seemingly ready to hand over its daily preparation and management to the EU institutions, and particularly to the Commission.

Moreover, through its pre-accession strategy, and as a key actor of the transformation process in central, eastern and southern Europe, the EU progressively entered new territories of liberal democratic and market economy state-building. In this process, it referred not only to its own norms when offering a recipe for modernization; it also advocated other regional and international standards such as OSCE principles and Council of Europe rules. For instance, in order to assess the candidate’s fulfilment of the Copenhagen criterion relating to minority protection, EU institutions had to rely on the European Framework Convention on the Protection of National Minorities and draw on the expertise of the OSCE High Commissioner for National Minorities to provide their own

¹⁶ As regards more particularly the EU scrutiny of the political conditionality, see e.g. A Williams, ‘Enlargement of the Union and human rights conditionality: a policy’ (2000) 25 *ELRev* 601, K Smith, ‘The evolution and application of EU membership conditionality’ in M Cremona (ed), *The enlargement of the European Union* (Oxford University Press, 2003) 105; E Tulmets, *La conditionnalité dans la politique d’élargissement de l’Union européenne à l’Est: un cadre d’apprentissages et de socialisation mutuelle?* (2005) PhD Thesis, Sciences-Po, Paris (http://ecoledoctorale.sciences-po.fr/theses/theses_en_ligne/tulmets_scpo_2005/tulmets_scpo_2005.pdf); E Lannon, T. Haenebalcke & K. Inglis, ‘The Many Faces of EU Conditionality in Pan-Euro-Mediterranean Relations’, in M Maresceau & E Lannon (eds), *The EU’s Enlargement and Mediterranean Strategies: A Comparative Analysis* (Palgrave, 2001) 97.

¹⁷ Presidency Conclusions, European Council, Madrid, 15–16 December 1995.

assessment of the candidates' progress.¹⁸ In this manner, the EU filled the broad Copenhagen political criteria with contents that may have been lacking in view of the limited, if not non-existent relevant EU norms.¹⁹

The pre-accession strategy thus turned the enlargement procedure into a policy with a transformative aim, thereby turning the EU into a normative power in Europe. In that, enlargement has also had a self-identification dimension of constitutional significance. It has divulged what is required to be (come) Member State of the Union, and signalled what the Union as an entity intends to be,²⁰ or has been 'catapulted' into being.²¹

2.3 Credible, effective and legitimate?

As shown above, the norms promoted by the Union in the context of enlargement go well beyond the perimeters of the EU *acquis stricto sensu*. While this may be seen as a bold expression of the Union's potential as a normative power, it has also exposed a discrepancy between accession conditions and membership obligations. Put differently, the EU demands on candidates are different from the ones they face once they are accepted as members. This discrepancy may be regarded as the root cause of several of the enlargement policy's shortcomings.

¹⁸ G Sasse, 'The Politics of Conditionality: The Norm of Minority Protection before and after EU Accession' (2008) 15 *Journal of European Public Policy* 842; O De Schutter, 'The Framework Convention on the Protection of National Minorities and the Law of the European Union' *CRIDHO Working Paper* 2006/01; C Hillion, 'The Framework Convention for the Protection of National Minorities and the European Union' (Council of Europe Report, 2008); G Toggenburg (ed), *Minority Protection and The enlarged European union: The way forward* (LGI Books, 2004); P Van Elsuwege, 'Minority Protection in the EU – Challenges Ahead' in K Inglis and A Ott (eds) *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Europa Law Publishers, 2005) 259.

¹⁹ H Grabbe, 'A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants' *European University Institute Working Papers RSC* no 99/12; A Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge University Press, 2005) 46ff.

²⁰ Further, see e.g. H Sjørnsen, 'Enlargement in perspective. The EU's quest for identity' *Recon Online Working Paper* 2007/15; K Smith, *The conditional offer of membership as an instrument of EU foreign policy: reshaping Europe in the EU's image?* (2000) 8 *Marmara Journal of European Studies* 33.

²¹ J Pelkmans and A Murphy, 'Catapulted into leadership: the Community's trade and aid policies vis-à-vis Eastern Europe' (1991) 14 *Journal of European Integration* 125.

First, the discrepancy has raised accusations of double-standards ('do as I say, not as I do') that have consequently undermined the credibility of the Union's commitments to the norms and values it has advocated vis-à-vis the applicants. This, in turn, has questioned the legitimacy of the Union's conditionality, and ultimately the effectiveness of its transformation agenda.²²

Second, and equally worrisome, the incongruity between accession conditions and membership obligations has entailed a post-accession drop in the EU monitoring of new member states,²³ and a setback in the protection of certain rights advocated in the pre-accession context, because the Union lacks adequate tools internally. The protection of minority rights in general, and the situation of the Roma population in particular, is a telling case in point. While the gap may have been partly filled thanks to the Lisbon Treaty, full harmony between accession requirements and membership obligations remains unaccomplished.²⁴

Alongside the systemic flaws of the pre-accession strategy, and perhaps as a consequence of its inherent limitations in terms of effective societal transformation, enlargement has caused criticism, if not outright hostility in some Member States, particularly in the aftermath of the

²² There is an abundant literature on this point, see for instance: A Albi, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums' (2009) 15 *European Law Journal* 46; D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008) and the contributions in F Schimmelfennig and U Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Cornell University Press, 2005).

²³ Except perhaps for Bulgaria and Romania, still formally under specific post-accession monitoring in the form of the so-called 'Cooperation and Verification Mechanism', though itself riddled by shortcomings. Further: e.g. A Łazowski, 'And Then They Were Twenty-Seven... A Legal Appraisal of the Sixth Accession Treaty' (2007) 44 *CMLRev* 401.

²⁴ See eg, U Sedelmeier, 'After conditionality: post-accession compliance with EU law in East Central Europe' (2008) 15 *Journal of European Public Policy* 806; F Hoffmeister, 'Grundlagen und Vorgaben für den Schutz der Minderheiten im EU-Primärrecht' (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 175; D Kochenov, 'A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection' (2008) 31 *Boston College International and Comparative Law Review* 1; C Hillion, 'Enlargement of the European Union: The discrepancy between Accession conditionality and membership obligations' (2004) 27 *Fordham International Law Journal* 715.

French and Dutch rejections of the Constitutional Treaty.²⁵ Fear of social dumping, internal migration pressure and mistrust in candidates' level of preparedness have contributed to recurrent suspicion, sometimes accentuated by rulings of the European Court of Justice such as *Laval* and *Viking*.²⁶ It has indeed been argued that enlargement is taking place with weak democratic backup, and without proper explanation to the population of the Member States.²⁷ In that, enlargement allegedly lacks domestic preparation, engendering scepticism about its benefits, which in turn may have increased disaffection towards the EU more generally.

²⁵ See e.g. the interview of former French Prime Minister Balladur, *Le Monde*, 27 September 2010, and Entretien avec Hubert Védrine : extrait du collectif « François Mitterrand, un esprit européen », sous la direction de Jean Pol Baras < www.hubertvedrine.net/index.php?id_article=132>

²⁶ Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I 10779, Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

²⁷ See, in this sense, J-D Giuliani, 'Elargissement: La Commission européenne fait-elle bien son travail?' http://www.jd-giuliani.eu/fr/article/cat-2/225_Elargissement-La-Commission-europeenne-fait-elle-bien-son-travail.html

3 THE SOLUTION CHOSEN: INCREASED MEMBER STATES' CONTROL

In an effort to tackle the shortcomings evoked above, adjustments were made to the enlargement policy in the aftermath of the 'big bang' expansion to the east. The next section looks at some of these changes. It is argued that while various methodological deficiencies may have been addressed, the corrections introduced in the policy mainly translate the Member States' desire to reassert their control, and consequently, slow down the pace of enlargement. This has been particularly visible as regards the introduction of 'benchmarks' (A), changes in the very application procedure (B) and through the enhanced emphasis on 'absorption capacity' (C). Moreover, certain Member States have introduced rules at national level which effectively makes accession more difficult (D).

3.1 Benchmarks: Stricter conditionality throughout accession negotiations

The Commission's 2006 Enlargement Strategy, published just a few weeks before the accession of Bulgaria and Romania, envisaged new principles that ought to govern the EU enlargement policy and methodology, particularly that of 'rigorous and fair conditionality'. Endorsing the Commission's new approach, the European Council agreed that 'the enlargement strategy based on consolidation, conditionality and communication, combined with the EU's capacity to integrate new members, forms the basis for a renewed consensus on enlargement'.²⁸ The 'new consensus' thus attempts to take on board the concerns related to ill-prepared candidates and public disenchantment.

One of the most noticeable methodological innovations lies in the introduction of conditionality in the accession negotiations phase. Hence, on the basis of a Commission recommendation,²⁹ the Council may define 'benchmarks' which the candidate has to meet for the EU to open, and/or to close a particular negotiating chapter. According to the 2006 Commission document:

²⁸ Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2006 – 2007, COM(2006) 649, pp. 3-4.

²⁹ Benchmarks are drafted by line DGs of the Commission, following the so-called 'screening process', further see <ec.europa.eu/enlargement/the-policy/process-of-enlargement/screening-and-monitoring_en.htm>

Benchmarks are a new tool introduced as a result of lessons learnt from the fifth enlargement. Their purpose is to improve the quality of the negotiations, by providing incentives for the candidate countries to undertake necessary reforms at an early stage. Benchmarks are measurable and linked to key elements of the *acquis* chapter. In general, opening benchmarks concern key preparatory steps for future alignment (such as strategies or action plans), and the fulfilment of contractual obligations that mirror *acquis* requirements. Closing benchmarks primarily concern legislative measures, administrative or judicial bodies, and a track record of implementation of the *acquis*. For chapters in the economic field, they also include the criterion of being a functioning market economy.

Non-fulfilment of such pre-defined benchmarks may lead to the suspension of negotiations, in the form of the non-opening of the related negotiation chapter, or possibly the reopening of a provisionally closed chapter.³⁰ In this process, both the definition of the benchmarks and the assessment of their fulfilment are subject to the Council's unanimous approval, and thus to Member States' endorsement. As long as the Member States do not agree on the benchmarks, the chapter concerned cannot be open or closed.

Admittedly, the connection between conditionality and negotiations is not entirely new in the enlargement procedure. Indeed, the *start* of the accession negotiations has always been subject to the fulfilment of specific conditions, now enshrined in the Treaty. In particular, EU enlargement rules include a test, whereby a state is eligible for membership if it is European, and if it respects the values of the Union. The opening and advancement of accession negotiations have also been subject to the candidate's positive track-record in fulfilling its existing contractual obligations with the EU, under e.g. the Stabilisation and Association Agreement for countries from south-east Europe, the Ankara Agreement for Turkey, or the European Economic Area Agreement for Iceland.³¹

³⁰ It should be noted that the substance of such benchmarks, and *a fortiori* the evaluation of their fulfilment, is not public, contrary to earlier indications given by the Commission in the name of transparency (see Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2006–2007, COM(2006) 649, p. 10).

³¹ See Negotiating Framework for Croatia, pt 13, Negotiating Framework for Turkey, pt 6; Negotiating Framework for Iceland, pt 18.

However, the introduction of benchmarks significantly strengthens the use of conditionality in the negotiation process. The rationale behind this stricter linkage between conditionality and progress in negotiations is summarized in the Commission's view that '[th]e pace of negotiations depends on the pace of reforms on the ground' and that 'the negotiations offer countries the opportunity to demonstrate their ability to complete the necessary reforms and meet all membership requirements'.³²

In the same vein, candidate states' compliance with the 'values' of the Union, namely the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law, has been subject to continuous monitoring, and constitutes a potential case for suspension of the process. The mechanism is recalled in the Commission 2006 Strategy Document, as well as in the 2010 Negotiating Framework for Iceland:

In the case of a serious and persistent breach in Iceland of the values on which the Union is founded, the Commission will, on its own initiative or on the request of one third of the Member States, recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council will decide by qualified majority on such a recommendation, after having heard Iceland, whether to suspend the negotiations and on the conditions for their resumption. The Member States will act in the Intergovernmental Conference in accordance with the Council decision, without prejudice to the general requirement for unanimity in the Intergovernmental Conference. The European Parliament will be informed.³³

Thus, the monitoring of candidate's fulfilment of what had hitherto been regarded as eligibility requirements (conditions to trigger the procedure of Article 49 TEU), or admissibility conditions (conditions to begin negotiations) is no longer restricted to a particular point in the accession procedure. Rather, it continues after the EU has declared a state eligible, as well as after it has started accession negotiations, until the moment it effectively accedes.³⁴

³² COM(2006)649, pp. 5-6.

³³ Pt 17 of the Negotiating Framework for Iceland, see also pt 5 of the Negotiating Framework for Turkey.

³⁴ Then, the standard internal EU monitoring applies, based on the lengthy procedure stipulated in Article 7 TEU.

This revamped pre-accession methodology has had both substantive and institutional consequences. In substantive terms, the introduction of benchmarks and the tightened monitoring may have increased the pressure on the candidates to deliver on reforms, and to adapt, at least formally, to the requirements of membership. At the same time, there is a recurrent concern that the monitoring remains a ticking off exercise based on a quantitative evaluation of regulatory output, rather than an in-depth qualitative assessment of how effectively entrenched the imported norms have become. In other words, it is debatable whether the current benchmark approach is effective in encouraging and measuring real and sustainable change in the candidate countries.

Institutionally, the reforms introduced in the aftermath of the New Consensus on Enlargement have shifted further the balance of power in favour of the Member States. Most importantly, the approval of benchmarks, and of the evaluation of their fulfilment, pertains to national capitals. This has provided Member States with additional opportunities to hold up the process whenever there is cause for concern regarding the pace of reforms. Benchmarks may thus be used as an emergency brake at any time during the negotiations. It should be noted in this context, that the list of chapters has grown since the fifth enlargement (from 30 originally to 35), and thus potentially the number of benchmarks to be fulfilled, and mechanically instances of possible suspension of the process.

However, increased Member States' control have also accentuated unpredictability, as their reasons for holding up the negotiations do not always relate to lack of compliance with accession criteria. For instance, in the negotiations with Croatia, Slovenia blocked the adoption of the Commission's benchmarks in relation to chapter 23 on judiciary and fundamental rights, because of the border dispute between the two countries. Similarly, chapter 31 of the negotiations, relating to Foreign, Security and Defence Policy could not be opened, as Slovenia announced

it would not support the adoption of an EU Common Position for negotiation,³⁵ until the settlement of the said border dispute.³⁶

Slovenia's use of accession negotiations (and benchmarks) as leverage in the bilateral dispute with Croatia is an example of how the benchmark method may be abused by individual Member States. Changing the rules of the game while playing and instrumentalising enlargement for domestic political gains do nothing to remedy the shortcomings of the EU enlargement policy. Rather, the result is the opposite: it creates an unpredictable process, which undermines the credibility of the policy and thus its effectiveness.³⁷ Another case in point is the name issue between Greece and (the former Yugoslav Republic of) Macedonia, which has prevented the opening of accession negotiations with the latter, despite the favourable recommendation from the Commission. Enlargement of the Union is thus being high-jacked by some Member States using their relative power vis-à-vis applicants to settle bilateral issues to their advantage.³⁸

Such unpredictability may also be exacerbated by Member States using the benchmark methodology to stall negotiations without giving clear indications as to what is required for the process to start moving again. For

³⁵ See website of the Croatian Ministry of Foreign Affairs: www.eu-pregovori.hr/files/100426-Progress-in-EU-Croatia-accession-negotiations-M.pdf

³⁶ On 6 June 2010, Slovenians agreed by referendum to settle the dispute through an international arbitration panel whose ruling shall be binding for both countries; <http://euobserver.com/9/30222>

³⁷ A point made by the Croatian negotiator, Mr Drobnjak, when underlining that changes to the accession process, in particular the introduction of benchmarking has brought an added degree of insecurity for candidates. See House of Lords, *The Further Enlargement of the EU: threat or opportunity?* European Union Committee, 53rd Report of Session 2005–06, pt 200 (Hereinafter 'House of Lords Report').

³⁸ In its 2009 strategy paper, the Commission specifically referred to the tendency of bilateral issues hampering the enlargement process (see COM(2009) 533, 6). The conclusions of the ensuing General Affairs Council (17217/09, 7 December 2009) and of the European Council (Conclusions, 10–11 December 2009) suggest that Member States did not follow up on this *problématique*, which is not likely to go away, particularly in view of the progressive accession of the countries from the Western Balkans, many of which have unsettled disputes with their neighbours. For instance, Macedonia is in 2010 the only state in the region with fully demarcated borders. Indeed, the Commission reiterates in its 2010 Enlargement Strategy that 'Bilateral issues should not hold up the accession process'; see *Enlargement Strategy and Main Challenges 2010–2011*, COM(2010)660, 11.

instance, in the negotiations with Turkey, several benchmark reports have been blocked without new benchmarks being suggested by the opposing Member States. As a result, the candidate is uninformed of what it takes for the chapters in question to be opened. The enlargement process is thus not as de-politicised and objective as it has sometimes been portrayed to be.³⁹

3.2 Application procedure: Evolving reading and practice of Article 49(1) TEU

Besides the introduction of benchmarks, Member States' control over the enlargement policy has also been strengthened through changes made in the interpretation and implementation of the very application *procedure*, contained in Article 49(1) TEU.

The vagueness and scarcity of Treaty rules have left plenty of room for creative interpretation, which has fallen on the Member States and the EU political institutions, in view of the restrained judicial intervention.⁴⁰ Indeed, in the reading and practice of Article 49(1), political considerations and expediency have been as decisive, if not more, as the quest for objectiveness, certainty and effectiveness.

The evolving interpretation of Article 49 TEU is particularly evident as regards the role of the different EU institutions. As it stands, the provision stipulates that the candidate's application is to be sent to the Council, which decides by unanimity after the Commission has provided its opinion and the European Parliament its consent. The wording of the provision gives the impression that the Council takes its decision only after the other institutions have been consulted.

In practice however, the Council 'decides' at an early stage, and this decision determines the fate of the application. A practice has thus developed according to which the Commission only prepares and gives its Opinion on the application once it has actually been *requested* to do so by the Council.⁴¹

³⁹ H-G Krenzler and M Everson, 'Preparing for the *Acquis Communautaire* – Report of the Working Group on the Eastward Enlargement of the European Union' European University Institute RSC Working Paper 98/6.

⁴⁰ See further, section III, below.

⁴¹ As recalled in the Commission's Opinion on Iceland's application for membership, p. 2.

This leaves the door open for individual Member States to delay a country's accession to the Union even before negotiations have been opened, by refusing to ask the Commission to prepare its Opinion. This was indeed what happened in the case of Albania's application, when the German government indicated the need to consult its parliament before it could agree to invite the Commission to prepare an Opinion. In the context of an upcoming general election, Germany justified its position with reference to the revised ratification law of the Treaty of Lisbon, adopted following the *Lisbon* judgment of the German Constitutional Court.⁴² Albania's application was thus put on hold until November, when Germany finally approved. Then '[t]he Council *decided* to implement the procedure laid down in Article 49 of the Treaty on the European Union. Accordingly, the Commission [*was*] *invited* to submit its opinion' (emphasis added).⁴³

This episode demonstrates that the Council (and thus, each of the Member States) has acquired the power to assess the admissibility of the application, before the Commission and indeed the Parliament, both endowed with a power to give their views, actually have the chance to voice them. It may be wondered whether this practice sits comfortably with the procedural requirements of Article 49(1) TEU which stipulate that the Council's formal decision on the application is to be taken *after* the Commission has formally presented its Opinion.⁴⁴ The introduction of such preliminary Council decision weakens the role of the other EU political institutions and *de facto* changes the nature of the procedure of Article 49(1) TEU: in principle inter-institutional, in practice intergovernmental.

The Council's interpretation of Article 49(1) TEU does not only amount to an institutional and procedural adjustment, it has also entailed substantive changes by establishing new conditionality. Indeed, the Council's preliminary assessment has not been restricted to ascertain that the basic requirement set out in the Treaty is fulfilled, *viz* that the demand comes from a European State. The Council has also set country-specific

⁴² *Lissabon-Urteil*, Judgment of 30 June 2009 (BVerfGE 123, 267). See further below.

⁴³ 16 November 2009; 15913/09 (Presse 328).

⁴⁴ Practice shows that a Commission's positive opinion may be ignored by the Council, as exemplified by the second British application. Further: Tatham, above n 4.

conditions for transmitting the application to the Commission. Hence the request for the Commission's Opinion on the application of Serbia was held back awaiting the Advisory Opinion of the International Court of Justice (ICJ) on Kosovo's declaration of independence,⁴⁵ and importantly, awaiting the Serbian government's reaction to the ICJ's Opinion.⁴⁶ In the same vein, the Council has shown that it feels entitled to decide on the *expediency* of an application. In an unprecedented move, it 'stresse[d] that it [would] not be in a position to consider an application for membership by Bosnia and Herzegovina until the transition of the [Office of the High Representative] to a reinforced EU presence has been decided'.⁴⁷

It should be mentioned that Member States continue to exercise influence on the process also *after* having requested an Opinion from the Commission. The latter establishes a questionnaire on the candidate's legal situation in all areas covered by the EU *acquis*. The answers provided by the candidate state form the basis of the Commission's subsequent Opinion on its application. In principle, the pace at which the Commission processes the answers and produces its Opinion depends on the quality of the candidates' replies. However, practice has shown that political considerations may also play a role in the way in which

⁴⁵ Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (request for advisory opinion) <<http://www.icj-cij.org/search/index.php?p2=2&str=international>>

⁴⁶ In view of the protracted controversy over the status of Kosovo, some Member States insisted that Serbia deal with the ICJ Opinion in 'an appropriate manner', before the Council would decide to transmit its membership application to the Commission. The UN General Assembly Resolution (A/RES/64/298) adopted following the International Court's Opinion, convinced some of these Member States that the precondition was met, though apparently not all, as the Commission was not immediately invited to produce an Opinion. Tellingly, the conclusions of the subsequent General Affairs Council briefly noted that 'The Council briefly discussed recent developments with regard to Serbia'; 13 September 2010, Press Release, 13420/10 (Presse 236). It was the GAC of 25 October 2010 that eventually decided to invite the Commission to submit its Opinion, although pointing out that: 'the EU underlines that at each stage of Serbia's path towards EU accession... further steps will be taken when the Council unanimously decides that full co-operation with the ICTY exists or continues to exist. In this context, the Council will closely monitor the progress reports by the Office of the Prosecutor'; 25 October 2010, Press Release, 15349/10 (Presse 285).

⁴⁷ General Affairs Council, 7 December 2009, Pt 39, Press Release, 17217/09 (Presse 370).

the Commission operates, as the college is not immune to pressure from Member States.⁴⁸

3.3 Absorption capacity: The ultimate emergency brake

Both the introduction of benchmarks during negotiations and the establishment of other conditions before negotiations have even started, have provided national capitals with an increasing number of opportunities to slow down the pace of the EU enlargement process. In addition, Member States have provided themselves with an emergency brake by introducing the concept of ‘absorption capacity’, more recently renamed ‘integration capacity’.⁴⁹

Put simply, absorption capacity refers to the notion that the Union must be *able* to welcome new members and that enlargement should not jeopardise the EU integration process. The idea is not entirely new. Already on the occasion of the first expansion of the EEC, it was made clear that enlargement should not hamper the integration objectives.⁵⁰ This has always been linked, if not inherent, to the notion that all candidates should commit themselves to respecting the *acquis*.

However, the 1993 Copenhagen conclusions *codified* the principle that enlargement ought not to hold back further integration, marking a watershed in the use of absorption capacity in the enlargement narrative. More precisely, having articulated the list of accession criteria, the Copenhagen European Council insisted on the proposition that any enlargement was to be decided taking account of ‘the Union’s capacity to absorb new members, while maintaining the momentum of European integration in the general interest of both the Union and the candidate countries’. The establishment of what is sometimes referred to as the fourth Copenhagen criterion triggered a process whereby questioning the

⁴⁸ See A Willis, ‘National interests creating tension in EU commission’, *EU Observer*, 6.10.1010 <euobserver.com/9/30973>

⁴⁹ Stubb Report on the institutional aspects of the European Union’s capacity to integrate new Member States, A6-0393/2006 (16.11.2006), and COM(2006) 649; Annex 1: *Special Report on the EU’s capacity to integrate new members*.

⁵⁰ A Hassin, ‘La capacité d’intégration de l’UE – prérequis politique ou alibi technique?’ *Les Brefs de Notre Europe*, 2007/06.

feasibility of an enlargement was mainstreamed, and made increasingly significant if not determinant in the Member States' decision on whether or not to enlarge the Union.⁵¹

The Member States thus made it plain that *institutional reform* would be required for the EU to enlarge to central and east European states.⁵² As the Amsterdam Treaty was perceived as a failure in this respect,⁵³ another arrangement was deemed necessary. In the event, the Nice Treaty was considered to have provided the reform needed, thus opening the way to enlargement.⁵⁴ But, the institutional argument came again to the fore in the context of the ratification of the Lisbon Treaty, when some Member States and institutions maintained that enlargement could not proceed without the Lisbon Treaty. Institutional reform, as a means to ensuring the Union's absorption capacity, thereby became a pre-condition to enlargement,⁵⁵ which incidentally could only be fulfilled by the Member States themselves,⁵⁶ hence acting as both judge and party.

The constitutive elements of absorption capacity have proliferated in recent years, while remaining chronically ambiguous. Thus, the European Council meeting in December 2004 considered that 'accession negotiations yet to be opened with candidates whose accession could have substantial financial consequences can only be concluded after the establishment of

⁵¹ See in this respect, the Coalition Agreement of the current CDU-CSU-FDP German Government [<http://www.cdu.de/doc/pdfc/091215-koalitionsvertrag-2009-2013-englisch.pdf>] 167. Also: F Amtenbrink, 'On the European Union's Institutional Capacity to Cope with Further Enlargement' in S Blockmans and S Prechal (eds), *Reconciling 'deepening' and 'widening' of the European Union* (TMC Asser Press, 2008) 111; M Emerson, S Aydin, J De Clerck-Sachsse, and G Noutcheva, 'Just what is this 'absorption capacity' of the European Union?' (2006) CEPS Policy Brief nr 113.

⁵² Presidency Conclusions, European Council, Corfu, 24–25 June 1994.

⁵³ Presidency Conclusions, European Council, Luxembourg, 12–13 December 1997.

⁵⁴ See in particular, Protocol 10 on the Enlargement of the European Union and the Declaration on the enlargement of the European Union, included in the Final Act of the Conference which adopted the Treaty of Nice.

⁵⁵ G Edwards, 'Reforming the Union's Institutional Framework: a new EU Obligation?' in C Hillion (ed), *EU Enlargement: a legal approach* (Hart Publishing, 2004) 23.

⁵⁶ See Alexander Stubb, EP Plenary, December 2006 available at <www.youtube.com/watch?v=0idLHjHhCqM> ; see also his interview on 'The EU's integration capacity': <www.euractiv.com/en/enlargement/interview-eu-integration-capacity/article-158959>

the Financial Framework for the period from 2014 together with possible consequential financial reforms'.⁵⁷ In the same vein, the 2005 negotiating framework for Turkey suggested that the latter's accession would be subject to the demonstration that the EU would continue to be in a position to pay for its policies.⁵⁸ Moreover, following the negative referenda on the Constitutional Treaty, additional emphasis has also been put on public opinion and on the necessity, through communication, to increase public support for enlargement.⁵⁹ Requirements of democratic legitimacy and financial sustainability have therefore been added to the initial institutional component of the notion of absorption capacity.

The most recent definition of the concept has been given by the Commission, in a special report on the Union's capacity to integrate new members, annexed to its 2006 Enlargement Strategy.⁶⁰ The report was elaborated at the behest of the European Council, and following various reports from the European Parliament.⁶¹ According to the Commission, the EU should not only be in a position to welcome new states, it should also ensure that enlargement does not hamper its capacity to integrate:

The EU's absorption capacity, or rather integration capacity, is determined by the development of the EU's policies and institutions, and by the transformation of applicants into well-prepared Member States... Integration capacity is about whether the EU can take in new members at a given moment or in a given period, without jeopardizing the political and policy objectives established by the Treaties. Hence, it is first and foremost a functional concept.

In the Commission's view, ensuring the capacity of the enlarging EU to maintain the integration momentum entails that institutions must continue to act effectively, that policies must meet their goals, and that the budget is commensurate with its objectives and with its financial resources. The

⁵⁷ Presidency Conclusions, European Council, Brussels, 16–17 December 2004.

⁵⁸ Negotiating Framework, 3 October 2005, pt 13.

⁵⁹ COM(2006) 649, 2-3 and 5; Presidency Conclusions, European Council, Brussels, 14–15 December 2006, pt 6.

⁶⁰ COM(2006) 649; Annex 1: *Special Report on the EU's capacity to integrate new members*

⁶¹ See e.g. the Stubb Report on the institutional aspects of the European Union's capacity to integrate new Member States, A6-0393/2006 (16.11.2006).

European Council discussed that report at its subsequent meeting. Having recalled that ‘The pace of enlargement *must* take into account the capacity of the Union to absorb new members’ (emphasis added), it concluded that ‘As the Union enlarges, successful European integration requires that EU institutions function effectively and that EU policies are further developed and financed in a sustainable manner’.⁶²

The notion of absorption capacity has attracted criticism, e.g. from the House of Lords EU Select Committee, which has considered ‘the debate about the absorption capacity... harmful since the term is inherently vague and is interpreted by many in the candidate countries as an excuse for closing the Union’s doors’.⁶³ Assuming that the debate is unlikely to go away, the Committee nevertheless suggested that ‘it would be best if the term was deconstructed into its individual components and considered in that light’.

Whether the Commission’s 2006 report in general, and the re-branding from ‘absorption capacity’ to ‘integration capacity’ in particular, have made the fourth Copenhagen criterion more articulate and operational is debatable. As it stands today, it may be seen as the last resort for Member States willing to halt enlargement, even in cases where the candidate itself has met all the accession criteria.⁶⁴ The existence of such an emergency brake tends to suggest that accession is never guaranteed, even for candidates adhering strictly to the rules of the game by respecting and implementing required reforms. The ‘own merits’ discourse,⁶⁵ whereby candidates ‘get what they deserve’ is thus valid only to a certain point.

3.4 National rules to control further enlargement

Thus far, the present report has focused on ways in which Member States have enhanced their control over the enlargement policy through adjustments at EU level. However, Member States have also taken

⁶² Presidency Conclusions, European Council, Brussels, 14–15 December 2006, pts 6 and 9.

⁶³ See House of Lords Report (above n 37).

⁶⁴ A spin-off of the ‘absorption capacity’ discourse is the Union’s attempt to develop alternative cooperation or integration mechanisms as substitutes for membership (e.g. the European Neighbourhood Policy), now codified by the Treaty of Lisbon (Art 8 TEU).

⁶⁵ See e.g. pt 15, Presidency Conclusions, European Council, Santa Maria de Feira, 19–20 June 2000.

measures, unilaterally, at national level that have had a direct impact on the enlargement process, and which have contributed to the creeping nationalisation of the policy.

To be sure, the intergovernmental component of the enlargement process has always been prominent. Hence, Article 49(2) TEU foresees that the Accession Treaty is in principle negotiated and concluded by the Member States and the candidate state(s), before being ratified in accordance with their respective constitutional requirements. Akin to a revision treaty based on Article 48 TEU, an accession treaty cannot enter into force without the unanimous approval of each and every Member State of the Union. Accession to the EU can thus be stopped if a single Member State fails to ratify the Treaty of Accession.

While in practice no such Treaty has ever been blocked, it may be argued that obstruction is not unlikely in the future. First, given that all Member States must approve of further enlargement and given their increasing number, there has also been an increase, at least numerically, in possible national stumbling blocks. Secondly, and as will be shown below, certain Member States have modified their domestic constitutional rules governing the ratification of the Accession Treaty. These modifications have the effect of increasing these Member States' control over EU enlargement, in a way that carries the risk of clogging up the procedure of Article 49 TEU, if not making it nugatory. Indeed, it has been argued that the notion of 'constitutional requirements' has been instrumentalised to the extent that it risks making a 'mockery of the [EU enlargement] process'.⁶⁶

A particularly glaring example of such a trend is the French constitutional requirement introduced in 2008 that future accession treaties be ratified by referendum. According to the first paragraph of new Article 88-5 of the French Constitution,⁶⁷

⁶⁶ House of Lords Report (above n 37).

⁶⁷ This version of Article 88(5) came into effect upon the coming into force of the Treaty of Lisbon, in accordance with Art 2 of Constitutional Act no. 2008-103 of February 4, 2008 and Art 47 of Constitutional Act no. 2008-724 of July 23, 2008.

Any Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.

Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the Bill according to the procedure provided for in paragraph three of article 89.

Exposing the political expediency of the French constitutional amendment, the requirement of Article 88-5 is not applicable to accessions that ‘result from an Intergovernmental Conference whose meeting was decided by the European Council before July 1, 2004’.⁶⁸ The purpose of this convoluted time-limitation to the referendum requirement was to ensure that the latter would not concern the Accession Treaty with Croatia, but would in any event apply to Turkey and subsequent admissions.

Admittedly, the second paragraph of Article 88-5 foresees a possible exception to the referendum requirement if Parliament so decides, by ‘passing a motion adopted in identical terms in each House by a three-fifths majority’. In this case, Parliament may authorize the passing of the Bill by the two chambers, convened in Congress. And to be approved, the Bill must be passed by a three-fifths majority of the votes cast in accordance with Article 89.⁶⁹ The French Constitution thus exceptionally allows for parliamentary ratification of future accession treaties, but on the demanding condition that it is supported by a double qualified majority. In any event therefore, future accessions to the Union are being made more difficult as a result of the revamped French constitutional requirement.

It is not clear how this new requirement would operate in case the Accession Treaty with Croatia concerned another state as well, such as Iceland. Like all other acceding states, save Croatia, Iceland’s accession

⁶⁸ Art 47 of Constitutional Act no. 2008-724 of July 23, 2008.

⁶⁹ Article 89 contains the procedure to amend the Constitution. Paragraph 3 foresees that ‘a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.’

would result from an IGC whose meeting would be decided after July 1, 2004. In view of the Commission's Opinion on Iceland's application, and the country's degree of preparedness, Iceland could well conclude its accession negotiations at around the same time as Croatia. The EU could thus be tempted, as it has been in the past, to conclude one accession treaty for the two candidate states.⁷⁰ The French constitutional requirement would then have the effect of submitting the whole Accession Treaty, and thus Croatia's admission too, to referendum.

Whether it is referendum or specific parliamentary vote, France's new constitutional requirement for the purpose of Article 49 TEU⁷¹ undoubtedly affects the implementation of the EU enlargement procedure. Some Member States, like Austria, have been inspired by the French arrangement,⁷² while others, like the Netherlands, are considering introducing specific constitutional requirements notably for ratifying accession treaties in the form of e.g. a 2/3 qualified majority in parliament.⁷³ Indeed, the European Union Bill being discussed in the United Kingdom envisages a referendum requirement (or 'lock') for the UK ratification of future EU treaties involving a transfer of power from the UK to the EU. Arguably, the 'referendum lock' could concern accession treaties if they were to include such a transfer,⁷⁴ as did the Act of Accession of 1972.⁷⁵

⁷⁰ The only accession treaty that has been concluded with a single candidate is the one with Greece.

⁷¹ On the initiative of its President, Mr Pompidou, France held a referendum on 23 April 1972 on the first enlargement of the European Communities: 68.32% of the voters were in favour. The decision to hold a referendum was based essentially on internal political considerations: the centre right French President intended to divide the left. The communists voted against, and the socialist abstained.

⁷² See Government Programme 2007–2020: <www.austria.gv.at/DocView.axd?CobId=19542> at 8.

⁷³ Kamerstukken TK 30874, nrs 1-3.

⁷⁴ See Written Ministerial Statement on European Union Bill, by Minister for Europe David Lidington, 13 September 2010, <www.fco.gov.uk/en/news/latest-news/?view=PressS&id=22851533>

⁷⁵ The Accession Treaty with Denmark, Ireland, (Norway) and the UK foresaw a Member States' transfer of competence in the field of fisheries (Chapter 3 of Act of Accession); as confirmed by the European Court of Justice in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045.

Member States have also strengthened their grip on other stages of the enlargement procedure through changes in national laws. Following the German Constitutional Court judgment on the Lisbon Treaty, the amended German ratification law foresees an increased involvement of the Bundestag in EU affairs.⁷⁶ In particular, the new rule requires that the German government seek the opinion of the parliament on the opening of accession negotiations.⁷⁷ Since then, the consultation requirement has been invoked at various stages of the enlargement procedure, and not only for the specific decision to open accession talks. This is illustrated by the ‘Albanian application’ episode, referred to above, in which the law was brought into play prior to the decision to request the Commission’s opinion.⁷⁸ While the government is not bound by the opinion of the Bundestag, in the specific field of enlargement, they are asked to seek a common position.⁷⁹ All in all, if the German Parliament was to give a negative opinion on the matter, the start of the EU enlargement procedure could be stalled.

⁷⁶ *Gezets zur Änderung des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (EuZBBG; available at <http://www.bundesrat.de/nm_8396/SharedDocs/Beratungsvorgaenge/2009/0701-800/715-09.html> Prior to the judgment, the Bundestag had already proposed that the German Government seek its approval before the start of new accession negotiations, as recalled in the House of Lords Report (above n 37) 20.

⁷⁷ §3(1)2 EuZBBG.

⁷⁸ The slowing-down effect of the German law has been all the more tangible that the consultation of the Bundestag requires prior translation of relevant background documents, notably the Commission reports, mostly written in English. It should however be noted that §9(1) EuZBBG stipulates that the involvement of the Bundestag should not hold up the EU decision-making process.

⁷⁹ This is foreseen in §10(2) EUZBBG, which also stipulates that the Bundesregierung has the right to take a decision that contradicts the position of the Bundestag for ‘important reasons of foreign or integration policy’. Both institutions can turn to the Bundesverfassungsgericht, in case they consider that their rights are violated by the other institution (‘Organstreitverfahren’ laid down in detail in the Bundesverfassungsgerichtsgesetz). I am grateful to Thomas Ackermann and Jens-Uwe Franck for their helpful explanations on these points.

4 LEGAL REMEDIES AGAINST THE NATIONALISATION OF ENLARGEMENT?

As shown above, Member States increasingly assert, often unilaterally, their specific interests and domestic considerations in the context of enlargement, arguably at odds with the Treaty-based procedure. This tendency challenges the discipline which is fundamental to the EU as a Constitutional Order,⁸⁰ thus raising the question of how the latter's integrity may be protected against too much encroachment by Member States. Is the national *dérive* inevitable and unstoppable?

The strongest incentive to discipline within the EU legal order emanates from the European Court of Justice. The final part of this report explores the Court's jurisdiction in issues related to enlargement (A). It then evaluates possible legal means available to circumscribe Member States' eagerness to restrict further the application of Article 49 TEU, focussing in particular on Member States' non-compliance with procedural and substantive requirements (B) and the infringement of the principle of loyal cooperation (C).

4.1 Could the Court play a role?

Already acknowledged in the founding Communities treaties, the Court's jurisdiction over the enlargement procedure entails that the latter is not immune from judicial control. The establishment of the multi-pillar EU by the Maastricht Treaty did not change this. Article L TEU made it clear that the Court had unrestricted jurisdiction over the Final Provisions of the Treaty, which included the enlargement procedure (Article O TEU). Under the Lisbon dispensation, Article 49 TEU is equally subject to the Court's jurisdiction as articulated in Article 19 TEU, and Article 275 TFEU. In principle therefore, the Court of Justice is expected to ensure that in the interpretation and application of the provisions of Article 49 TEU, the law is observed.

Yet, the *existence* of jurisdiction is a necessary but not sufficient condition for the Court's ability to encourage discipline. It is the *exercise* of such

⁸⁰ See A Dashwood, 'The elements of a constitutional settlement for the European Union' (2001) 4 *Cambridge Yearbook of European Legal Studies* 1; and the various contributions in A Arnulf, C Barnard, M Dougan and E Spaventa (eds), *The Constitutional Order of States: Essays in Honour of Professor Alan Dashwood* (Hart Publishing, 2011).

jurisdiction that creates a genuine pressure to act together. As indicated by the *Mattheus* judgment, the Court's jurisdiction as regards the enlargement procedure has been exercised with caution. Asked once about the latter, the Court considered that it establishes

a precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession are to be drawn up by the authorities indicated in the article itself. Thus *the legal conditions for such accession remain to be defined in the context of that procedure without it being possible to determine the content judicially in advance...* [Thus the Court cannot] give a ruling on the form or subject matter of the conditions which might be adopted. (Emphasis added)

Nonetheless, in its pronouncement, the Court of Justice also stated that the enlargement provisions establish 'a precise procedure *encompassed within well-defined limits* for the admission of new Member States' (emphasis added). While the Court did not specify what these limits are, the phrasing of the ruling suggests that they are located in the enlargement procedure itself, but may also derive from other parts of EU primary law more generally.⁸¹

If the enlargement procedure is not immune from the application of rules and principles underpinning the EU legal order, and from the judicial control by the Court of Justice, it may be worth speculating briefly on the possible forms such a control would take. In particular, are there legal and

⁸¹ Hence, limits applying to the procedure could stem from the 'very foundations of the Community', which the Court of Justice emphasised in its *Kadi* judgment (Case Joined Cases C 402/05 P and C 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I 6351, paras 282 and 304) and in its first *EEA* Opinion (Opinion 1/91 [1991] ECR I 6079, paras 35 and 71), as well as from the General Principles of Union Law, e.g. equality, proportionality, protection of legitimate expectations (further on these: T Tridimas, *The General Principles of the EU Law* (Oxford University Press, 2006); P Craig, *EU Administrative Law* (Oxford University Press, 2006). Limits may also derive from the rules of regional organisations such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, notably once the Union has acceded to the Convention (as envisaged by Article 6(2) TEU), and from international law (e.g. the Vienna Convention on the Law of Treaties), particularly in view of the insistence, in the Treaty of Lisbon, on the Union's respect for the principles of the UN Charter and of international law (Art 21 TEU). See also: JL da Cruz Vilaça & N Piçarra, 'Y a-t-il des limites matérielles à la révision des traités instituant les Communautés européennes?' (1993) 29 *Cahiers de Droit Européen* 3

judicial means to address the nationalisation of the EU enlargement policy, and preserve the integrity of the Treaty procedure? Two avenues could be explored: one based on non-compliance with procedural and substantive requirements of Article 49 TEU and another founded on a breach of the general obligation of loyal cooperation.

4.2 Non-compliance with procedural and substantive requirements

In case of a violation of the ‘well-defined limits’ referred to by the Court in *Mattheus*, the annulment of one of the many Council decisions adopted in relation to enlargement could be sought on the basis of Article 263 TFEU. A Council decision could thus be disputed on the ground that one of the essential *procedural* requirements of Article 49 TEU has not been complied with. For instance, the European Parliament could be tempted to challenge the Council’s refusal to consider an application from a European state, on the ground that the Treaty bestows on it the right to give its consent before the Council so decides. Indeed, delaying tactics in Council to postpone indefinitely the invitation to start the procedure, as in the Albanian episode referred to above, could be addressed through an action to establish a failure to act, on the basis of Article 265 TFEU.

Equally, an action for annulment could be triggered in case of violation of the *substantive* limits of Article 49 TEU, or other substantive requirements derived from the Treaty. For instance, if an agreement negotiated and concluded under Article 49 TEU were to contain permanent limitations to the application of fundamental freedoms, thus not offering full membership to the acceding state, it could be argued that the agreement is not an Accession Treaty, but an external agreement of an advanced form. The legal basis of the negotiation and conclusion of such an agreement would thus have to be altered, and so would the procedure. Alternatively, the agreement would have to be renegotiated so as to ensure its compatibility with the substantive requirements of membership deriving from Article 49 TEU, which the Court is empowered to interpret.⁸²

⁸² The Court could for instance be asked to shed light on the notion of ‘conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails’; see in this respect: see Case C-413/04 *European Parliament v Council* [2006] ECR I-11221, and Case C-414/04 *European Parliament v Council* [2006] ECR I-11279.

For example, if the Treaty of Accession with Turkey were to include permanent safeguard clauses in the field of movement of persons, regional and agricultural policies, as contentiously envisioned in the 2005 Negotiating Framework,⁸³ the Treaty in question would arguably fall short of offering full membership to Turkey, amounting instead to the ‘privileged partnership’ sought by several Member States.⁸⁴ The choice of legal basis for the conclusion of the agreement could therefore not be Article 49 TEU, but e.g. Article 216 TFEU and/or Article 8 TEU (substantive legal basis) together with Article 218 TFEU (procedural legal basis). In that, the suggestion sometimes made by some politicians that the current negotiations with Turkey could lead to such a privileged partnership is based on the erroneous assumption that the procedure of Article 49 TEU can be used for this purpose.

4.3 Infringement of loyal cooperation

Another ground for a more active involvement by the Court in preserving the integrity of the Treaty enlargement procedure could be that Member States have violated their obligation of loyal cooperation enshrined in Article 4(3) TEU:

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

More specifically, enlargement may be considered as being one of the objectives of the Union. The Preamble of the Treaty on the Functioning of the European Union continues to refer to the founding Member States’ ‘[call] upon the other peoples of Europe who share their ideal to join in their efforts’. Indeed, the Treaty remains clear as to the right of a European State to apply to become member (Article 49 TEU).

⁸³ As it has been suggested elsewhere, such clauses would put at risk the functioning of the internal market. More generally, they could strike at the heart of the EU legal order, and in particular at the principle of equality of EU citizens and states (Case 231/78 *Commission v UK* [1979] ECR 1447, para 9. This principle of equality is enshrined in Article 4(2) TEU). Further: C Hillion, ‘Negotiating Turkey’s membership to the European Union – Can Member States do as they please?’ (2007) 3 *European Constitutional Law Review* 269.

⁸⁴ See Coalition Agreement of the current CDU-CSU-FDP German Government <www.cdu.de/doc/pdfc/091215-koalitionsvertrag-2009-2013-englisch.pdf> 166-167.

The Court might thus be asked, notably by the Commission, to sanction actions or omissions on the part of Member States or institutions (e.g. the Council),⁸⁵ that would jeopardize the attainment of the objective of enlarging to a state, whose membership prospect has been acknowledged by the European Council, and with whom accession negotiations have begun.

The *rationale* of the enforcement approach would thus be that the effectiveness of the procedure to achieve that objective, i.e. Article 49 TEU, ought to be guaranteed.⁸⁶ Measures at EU or national levels that would make it impossible for those provisions to operate in practice would arguably endanger the attainment of the Union's objectives, in infringement of Article 4(3) TEU. A scenario which appears legally feasible, though politically distant, would be that the Commission on this basis starts enforcement proceedings against a state which, for instance, has introduced constitutional requirements that would make it virtually impossible for it to ratify the Accession Treaty.

⁸⁵ Art 13 (1) and (2) TEU.

⁸⁶ It may be argued, using the Court's jurisprudence exposed at para 226 of its *Kadi* judgment, that Article 49 TEU is the expression of an EU 'implicit underlying objective' of enlargement; see Joined Cases C 402/05 P and C 415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I 6351.

5 CONCLUSIONS

Enlargement has always been significantly coloured by Member States' domestic interests. This was conspicuous already in the first episode of EEC enlargement when France vetoed twice the membership aspiration of the UK (and incidentally Denmark, Ireland and Norway). However, it has been particularly noticeable in the aftermath of the accession of central and eastern European countries to the Union, so much so that a policy once hailed as the most successful EU (foreign) policy⁸⁷ is arguably being nationalised.

On the one hand, Member States' enhanced control over the accession procedure has been motivated by past experiences of some candidates' lack of preparedness for admission, doubts about the systemic sustainability of further enlargement and increased demands for democratic accountability.

On the other hand, the nationalisation of the Union's enlargement policy also reflects a more general trend whereby promoting national interests over the common interest is no longer a taboo in the EU.⁸⁸ Indeed, beyond their craving for control over a process sometimes regarded as a *'fuite en avant'*,⁸⁹ Member States have also been showing less scruple in instrumentalising enlargement for domestic political gains.

As suggested in this report, this development may well compromise the integrity of the Treaty provisions and incidentally, the credibility of the policy. While legal remedies do exist, the required rebalancing between national interests and EU commitments is however more likely to result from policy adaptation than judicial intervention. Whatever the preferred approach, legal or otherwise, it is crucial to address the current atmosphere of unpredictability which damages the EU's standing. The future of the Union as a normative power, emphatically called for by the Treaty of Lisbon, might be at stake.

⁸⁷ Alexander Stubb, EP Plenary, December 2006.

⁸⁸ See C Kupchan, 'As Nationalism Rises, Will the European Union Fall?', *The Washington Post*, 29 August 2010
< <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/27/AR2010082702138.html> > (last visited on 4 October 2010)

⁸⁹ D Vaughan-Whitehead, 'L'élargissement de l'Union Européenne: une fuite en avant?' *Notre Europe* Policy paper N° 5, Septembre 2003.

SAMMANFATTNING

Från att ursprungligen ha varit tänkt som en mellanstatlig metod för att göra det möjligt för ansökarländer att underteckna EU:s fördrag, har utvidgningsförhandlingarna kommit att bli en politisk process genom vilken EU:s institutioner omvandlar ansökarländer till medlemsstater. Med hjälp av denna medlemsstatsbyggande politik har unionen kunnat utöva sin normerande makt och därmed kunnat forma den europeiska kontinenten till sin egen avbild.

Hyllad som ”EU:s största framgång”, har utvidgningen dock också präglats av brister som har bidragit till att minska dess trovärdighet, effektivitet och legitimitet. Inte minst har erfarenheterna av vissa kandidatländers bristande förberedelser inför EU-inträdet – i förening med stigande tvivel på huruvida EU-systemet klarar av ytterligare expansion samt ökade krav på demokratiskt ansvarstagande – medfört att man på senare år har vidtagit korrigerande åtgärder. Dessa åtgärder har inneburit att medlemsstaternas kontroll över utvidgningen har stärkts.

Vid sidan om den ökande kontrollen, har medlemsstaterna också visat allt mindre betänkligheter mot att utnyttja utvidgningen för inrikespolitiska syften. EU:s medlemsstatsbyggande politik har därigenom i ökad utsträckning kommit att domineras – för att inte säga kidnappats – av nationella dagordningar. Resultatet av denna smygande nationalisering har blivit en process präglad av (i bland oförutsägbara) rättsliga och politiska hinder. Detta reser i sin tur nya frågor när det gäller trovärdigheten i EU:s utfästelser till aspirerande länder och följaktligen också hur verkningsfull utvidgningspolitikens omtalade makt att omvandla egentligen är. Det kan också äventyra fördragsbestämmelsernas okränkbarhet och hamna i konflikt med EU-rättens grundläggande principer och i synnerhet avvika från målformuleringarna för den europeiska integrationen såsom de uttrycks i Lissabonfördraget.

Och samtidigt som det faktiskt finns botemedel mot den rådande nationella tendensen, talar det mesta för att balansen mellan nationella intressen och EU:s åtaganden kommer att dikteras mer av politisk anpassning än av rättsliga ingripanden. Men oavsett vilken väg man föredrar, den juridiska eller någon annan, är det absolut nödvändigt att ta itu med den nuvarande anda av oförutsägbarhet och osäkerhet som skadar EU:s anseende.

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