EU CONSTITUTIONAL TREATY IN THE CONTEXT OF ENLARGEMENT

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1. During last two years, for the candidate States two processes went together in the European integration: the accession negotiations and the drafting of the EU Constitution. In this sence, the accession process has had its "moving target": accession to the Union with developing new constitutional basis. How much both processes are related? Formally, there is no direct link and dependence between the Treaty of Accession and the Draft Treaty establishing a Constitution for Europe. The accession to the European Union means that new Member States are undertaking the obligations that are arising from the founding Treaties and existing *acquis communautaire*, as applicable to the new Member States under the conditions laid down in the Treaty of Accession. Even if the EU Constitutional treaty would be concluded before 1 May 2004, day of accession, it is not covered by the Treaty of Accession.

However, in fact it is clear that the new Member States will enter a new constitutional system based on the EU Constitutional treaty together with the existing Member States. Their representatives took part in the works of the Convention and they participate in the Intergovernmental Conference. At the same time, the role of the representatives of the acceding countries in the Convention due to their special status (they did not have decisive voice) seemed less significant than the influence their States could be in the IGS. According to the Thessaloniki European Council of 19 and 20 June Presidency Conclusions "the acceding States will participate fully in the Intergovernmental Conference on an equal footing with the current Member States". The enlargement of the European Union is reflected, however indirectly, in the Draft Constitutional treaty itself: its Preamble is referring to the "reunited Europe" and to the conviction that „the peoples of Europe are determined to transcend their ancient divisions."

2. Politically, it is popular to say that new EU Constitution is necessitated first and foremost by the enlargement of the Union from 15 to 25 Members. This assumption is based on thesis that "the Union of 25 members cannot function in the same way as it functions with 15 members". Nevertheless, any assumption based on difference in numbers, shall be proved by or at least supported with the mathematical methods. Until now, there was no mathematical approval of this political presumption. The same with the numbers in the institutional balance established by Treaty of Nice: nobody has proven that this system will not efficiently function or be worse than such which is proposed in the Draft Constitutional Treaty. Both systems are based rather on political expectations, than on real mathematical models.

The main aim of the EU Constitution cannot be regarded as an adjustment of the Union's structures and rules for the enlarged EU. The Draft Constitution goes far away from this limited task and gives a model of democratic constitution for European Union. According to the Communication of the Commission of 17 September 2003 the draft Constitution (1) fundamentally changes the structure of the Union, (2) introduces a large number of reforms which

[*] Opinions expressed in this paper represent personal views of the author only..

improve the way the Union works and (3) strengthens the Union's means of action.[1] Even if the effect of the Constitutional Treaty would be limited to the simplification, i.e. to consolidation of existing founding treaties into a single one, it should be regarded as a success.

The aims of establishing of the EU Constitution are defined in the Laken Declaration and the later does not include directly the preparation for enlargement. Necessary adjustments have been made already by the Treaty of Nice and the Treaty of Accession. Even if we would examine the Draft Constitutional Treaty only from the angle of enlargement, we shall have in mind that after the enlargement the Union will not yet function under the rules of the constitutional treaty: its institutions will be governed by the rules Treaty of Nice, until new Treaty establishing the Constitution takes effect. Even then, only from 2009 onward, the Commission shall consist of its president, the minister for foreign affairs/vice-president and 13 Commissioners selected on the basis of a system of equal rotation between the Member States.

The Treaty of Nice, which entered into effect in February 2003, introduced the innovations regarding the composition of the Commission, the seats of the European Parliament, the reconsideration of votes by the Council, and the extension of majority voting. The institutions are to be revised already by the Treaty of Nice in order to allow them to function in a Union composed of more than 25 Member States. The Treaty of Accession contains, in principle, the same dispositions in this area. As Treaty of Accession (Article 1, paragraph 2) states: "The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act annexed to this Treaty."

Notwithstanding the fact, that the essence of the EU Constitution cannot be diminished to *l'antichambre* of the enlargement, it is evident that the institutional reform provided in draft treaty was closely linked with the enlargement, i.e. composition of the Commission, size of the Parliament, and partly, extension of the QMV. In the Thessaloniki European Council Presidency Conclusions this link between the EU enlargement and the provisions of the Draft Constitutional Treaty is expressed as a step in the direction of furthering the objectives of "facilitating our Union's capacity to make decisions, especially after the enlargement". Existing link between enlargement and Constitutional treaty and possible difficulties which could face new Member States after their accession to the EU should not create practical obstacles neither to enlargement, nor to the future of Constitutional treaty. The problems which could arise during the Intergovernmental Conference should not in any way hamper the enlargement, the ratification of the Treaty of Accession and the elaboration of new EU budget.

3. Most of the acceding States cannot be regarded anymore as the transition countries (economies) necessitating the establishment of strong EU federal structures as it was sometimes suggested before. Friedrich Schneider in 2001 wrote: "Imagine a European Union with 20 or more members without a sound financial system and without some basic constitutional reforms (ending in a European Federal Constitution) - this would lead to a situation where the advantages of the EU are smaller than the disadvantages, with the consequence of destroying the EU. In order to avoid a major crisis of the functioning of the EU and in order to give the transition countries a real chance to become EU members in a foreseeable time,

[1] Communication from the Commission „A Constitution for the Union". Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties. COM(2003) 548 final, p. 1-2.

some (minimal) European federal union will be necessary."[2] However, the stage of transitional economy is successfully passed. The Baltic States may serve an example. In Lithuania, "growth in the first quarter of the year reached an annual rate of 9.4 percent. That's expected to slow later in the year, but still remain around 6 percent-7 percent this year and next. That compares to near-zero growth in Germany and just 0.8 percent in Ireland in the first quarter. Additionally, inflation is nonexistent. And unemployment, while still relatively high at around 10 percent, is dropping."[3] It seems that the acceding countries will not be a disproportionate economic burden for the European Union. Two new studies, prepared by the European Commission's Directorate General of Economic and Financial Affairs, state that low starting debt levels and expected high GDP growth constitute favourable conditions for the future EU members' medium-term fiscal sustainability.[4]

4. The attitude of the acceding countries towards the Constitutional Treaty is often identified with the position of smaller countries of the enlarged European Union. This assumption could be confirmed by the reference to the meeting of 15 deputy foreign ministers from most of the smaller Member States of the enlarged EU met in Prague on 1 September 2003. The meeting was aimed to prepare a common position for the Intergovernmental Conference starting in October. One of the key demands of the smaller countries is that each should be guaranteed a post of a Commissioner with full voting rights. These States would like to reopen the proposal for a permanent president to replace the current six-month rotating presidency.

The meeting of the foreign ministers of the 25 States of the enlarged EU in Riva del Garda on 5-7 September 2003 has shown that the majority of current and all future Member States would like to renegotiate some provisions of draft Constitutional treaty. It seems that only six founding members: France, Germany, Italy, Belgium, Luxembourg and the Netherlands are for the adoption of current text. Main contentious issues at the Riva del Garda meeting were: taking away the right for each Member State to have a full rights Commissioner; changing the voting weights; abolishing the six-month rotating presidency; creating an EU foreign minister; create a European public prosecutor; including a mutual defence clause in the Constitution.

This willingness to reopen some issues decided by the Convention does not mean any opposition to the Constitutional Treaty itself. Any prospects of the unsuccessful reform of the Union are going against the interests of new Members. It is in the economic, political and social interests of the acceding countries to access to the effective, dynamic and democratic European Union. It is closely related to the needs of sustainable development of the acceding States. Therefore, the proposals to discuss and change some dispositions of the draft Constitutional Treaty should be checked from point of view of the effectiveness of the European Union.

Is really the rotation system of the Commissioners necessitated by the needs of effective work of the Commission after the enlargement? In my opinion, this is a pure question of organization of work of the Commission consisting of 25 or 27 its members. It is questionable

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2 Friedrich Schneider. A federal European Constitution for an enlarged European Union: Insights from Constitutional Economics <www.stockholm-network.org/pubs/Friedrich_Schneider.pdf>.

3 Mark Baker. Lithuania: Make Way For The New European Economic 'Tiger' <www.rferl.org/nca/features/2003/08/13082003162500.asp>. See also: Baltic tiger: Lithuania has the fastest-growing economy in Europe. The Economist, Jul 17th 2003.

4 See <europa.eu.int/comm/economy_finance/publications/enlargement_papers/2003/elp16en.pdf>.

even with regard to the Member States to suggest that a government of 15 ministers is more effective than a government of 25 ministers. On the other hand, it is unclear whether the principle of rotation will be applicable to the President of the Commission and the Minister of Foreign Affairs. If not, once the EU reaches 27 Member States in 2007, at least one Member State will have to wait more than 10 years for its turn after this reform of the Commission will come into place. Moreover, if the principle of rotation does not apply to the President and the Minister, there are no obstacles to creation of situation where one Member State has 3 members of the Commission: 1 voting or non-voting member, the President and the Minister. In any case, the role of non-voting Commissioners remains unclear. All efforts shall be made in order to avoid political controversies within the Commission related with different status of two groups of its members and unclear system of rotation.

With regard to new system of the QMV model proposed in the Draft Constitutional Treaty, it raises a question whether a size of population should be so much decisive in the decision making, especially when the QMV procedure will be extended to new areas? According to article 24, paragraph 1, of the Draft Constitutional Treaty "[W]hen the European Council or the Council of Ministers takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union." In comparison with the existing system of the QMV where the number of votes is not so directly related with the size of population of a Member States, the new system gives direct preference to the population. In practical terms it would mean, that the biggest 4 Member States will gain. Paradoxically, but the smallest countries will gain too, since their population will not matter. In the system where the votes of 4 biggest countries will be so much decisive, the votes of the smallest 6 countries will approximately have the same weight as the votes of the remaining 15 medium and small countries.

After the enlargement of 2004, the six-month rotating presidency would lead to situation that a Member State should wait for its presidency 12,5 years. Does it mean that this rotation should be abolished? It seems that a presidency of a group of Member States would resolve this problem. In this case, this group would propose a candidature of the President of the European Council. Could the Legislative and General Affairs Council "ensure consistency in the work of the Council of Ministers" as it is provided for in the Article 23 (Formations of the Council of Ministers)? If the legislative function would be reserved to this Council, it could become overloaded. Secondly, having in mind the representation of the Member States in Legislative and General Affairs Council we should not neglect and ignore practical divisions of competencies, powers and works within the governments of the Member States. All this raises questions about necessity of establishment of Legislative Council.

As for the common foreign and security policy and the mutual defence clause, on may envisage some modifications in order to make more open for all Member States structural and closer cooperation in this area (Articles III-213 and III-214). There are enough reasons to agree with recent suggestion of Commission President Romano Prodi made with regard to the draft Constitutional Treaty: the Member States "should be able to discuss it once more and see whether there are areas where it can be improved".

5. When dealing with the constitutional problems which could face new Member States we should not neglect potential problems of acceptance by the constitutional systems of new

Members of constitutional principles embodied in the EU Constitution, such as principles of conferral (Article 9), and primacy of the EU Constitution (Article 10). These principles will be transposed into legal order of new Member States within the structures created by their national constitutions. Notwithstanding the fact that already most of the acceding countries have inserted into their constitutions so called "Community clauses" permitting the transfer of the part of sovereign powers to the EU, direct effect and supremacy of the EU law, practical constitutional conflicts could arise. New Member States of Central and Eastern Europe are more attached to the concepts of sovereignty regained after Soviet rule. On the other hand, they have already created new modern and dynamic legal systems; it will facilitate the acceptance of new EU constitutional system. It seems that the experiences acquired during the pre-accession harmonization process will help them to adapt themselves to this new constitutional framework.