INSTITUTIONAL DEBATE AND THE ACCESSION TREATY: STRENGTHENING THE POWERS OF THE COMMISSION?

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The enlargement of the European Union and its institutional reform are viewed as parallel and complementary processes. The accession of the new Member States emphasises necessity of a wider reform and provides it with a new momentum. The acceding states have been recognised as full players in the debate on the future functioning of the Union.[1] Given this recognised parallelism, it seems perplexing, how little attention the commentators of the on-going institutional debate have devoted to the outcome of enlargement negotiations.[2]

The EU institutional debate is a matter of great interest to the acceding States: whether the accession will involve adherence to the existing EU institutional *acquis* or to the developing future system? Formally, the accession to the Union only covers the obligations that are arising from the original Treaties, as applicable to the new Member States under the conditions laid down in the Treaty of Accession, and the obligations defined in that Treaty. In this respect, the accession to the European Union would mean that the new members enter the "multilevel governance system" based on the institutional balance well established on the basis of the EU constitutional treaties presently in force. Nevertheless, the drafting of the new EU constitutional treaty gives an impression that this system is becoming a kind of a "moving target", reflected in the *travaux préparatoires* undertaken by the Convention.

Up to now, the Union has been developing in an evolutionary, step by step manner, in a way generally known as the Jean Monnet method. The Convention should, therefore, seriously consider whether the institutional balance modified by the Nice Treaty, which allowed the enlargement of the Union, should be preserved. Stability of the institutional *acquis* is an important argument for the advocates of accession in any State in which this question will be the subject of a referendum. The peoples of the Union[3] should have clear views on the issues discussed within the Convention before they are written into the Con-

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1 For the most recent pronouncement, see point 8 in the Copenhagen European Council Presidency conclusions, December 12-13, 2002: "the new Member States will participate fully in the next Intergovernmental Conference. Without reform the Union will not fully reap the benefits of enlargement. The new Treaty will be signed after accession. This calendar shall be without prejudice to the timing of the conclusion of the IGC".

2 At first sight, this could appear to be justified by the confidentiality of the process. However, current accession talks are marked with openness, which in no way reminds confidential international negotiations.

3 Draft text of the Articles establishing a Constitution for Europe (CONV 528/03) refers to the will of the peoples of the Union, as follows:
"Article 1: Establishment of the Union
1. Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishes a Union [entitled …], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis (...)".

stitutional Treaty by the new IGC. The new Constitutional Treaty will have to be drafted and concluded with sufficiently broad consensus, thus, the EU needs to think seriously about how it can succeed in bringing about agreement on reform.

The composition and organisation of the Commission have recently been subject to many significant changes.[4] Therefore, before discussing many questions appearing before the Convention, it is very important to know whether or not the Commission will continue to be fully representative in the enlarged Union (not only in the sense "one State – one Commissioner"). For instance, once it is agreed that the powers of the Commission would only be extended on the basis of equal treatment of the new and old Member States, it will become easier to reach an agreement to move more rapidly towards the majority voting in new areas.

This could also facilitate further substantial changes, such as providing the Commission with the right to make formal proposals rather than mere recommendations in the context of the EU economic governance. The system might also be complemented with the effective mechanisms of warning and implementation measures. Such warnings on implementation could be issued directly by the Commission to the Member State concerned, allowing voting on the implementation decisions on the basis of the Commission proposal and excluding the votes of the Member State concerned. For instance, the provisions on excessive deficit procedures (Article 104 of the TEC) could be amended to allow the Commission to issue first warnings on excessive deficits directly to the Member State concerned.

The extension of the Commission exclusive power to propose measures for consideration by the Parliament and Council may also appear on the agenda of the next IGC. The gaps in the application of the co-decision procedure could be reconsidered as part of the process of simplifying the Union decision-making procedures. This also closely relates to the process of simplifying the Treaties. The increasing role of the Commission should not be considered as controversial. To certain extent, the institutional reform of the Union is already in place, even without taking into consideration discussions and projects under development in the Convention. It is closely linked to the new, more precise rules on the enhanced co-operation under the Treaty of Nice, extension of the QMV and co-decision procedures, intensive legislative efforts in the Third Pillar area, etc. New institutional challenges *per se* are arising, as the necessity to merge the pillars becomes evident. All these developments already seem impressive, as far as the tasks the Laken Declaration are at stake.

It seems that the historical process of the EU enlargement would not be endangered by the creation of totally new institutional *acquis communautaire*. Remarkably, future *acquis* is not, without any doubt, a matter of the EU accession negotiations successfully finished in Copenhagen in 2002. What is a matter of paradox, however, is the reverse relationship be-

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[4] These are, first of all: (1) the appointment of Commission President and Commissioners by way of the QMV; (2) the agreement that, after 2005, the Commission should move to one Commissioner per member state, and that it would be sustained at no more than 26 once the Union has 27 members. Membership of a smaller Commission will rotate on the basis of equality between states, geographical and size balance; (3) the President is given the power to control the internal structures of the Commission, to appoint Vice Presidents as he chooses and to request (with approval of the Commission) the resignation of a Commissioner, and (4) flexibility has been strengthened especially where the First and Third pillars are concerned.

tween the two processes: the questions relating to the new institutional *acquis communautaire* may be raised in connection with the new Accession Treaty. One of the most controversial issues in the recently finalised accession negotiations concerns the power of the Commission to take decisions that could touch upon the essential interests of the new Member States, in the context of special temporary monitoring mechanisms.

Creation of a "special transition instrument" for monitoring the application of Community law in the new Member States has been discussed within the Commission in mid-2002.[5] However, it was not until the adoption of the Strategy Paper, complementing the annual progress report for the candidate countries, that the Commission presented the issue in any detail.[6] In its Strategy Paper, the Commission drew attention to the fact that failure to comply with membership obligations entails risk of serious non-economic consequences. Despite the existence of sector safeguards in various pieces of Community legislation, current precautionary system might prove to be insufficient to cater for all unexpected situations that could arise in the larger Union. This justified the necessity of a general and comprehensive precautionary measure designed to safeguard the functioning of internal market. Likewise, the Commission considered the need for a "*sui generis* safeguard clause" to address breaches of implementation of mutual recognition instruments in the area of judicial co-operation.

The Commission's suggestions have almost immediately attracted criticism from the new Member States.[7] However, the Brussels European Council endorsed the Commission proposals and even extended the suggested duration of transitional instruments from two to three years after accession.[8] Subsequently, the issue has been swallowed by an already overburdened negotiating agenda. It has not been raised in the Copenhagen conference, apart of the Commission's declaration, designed to alleviate part of critical remarks by assuring that the Commission would "give the Member State in question opportunity to submit its observations" before considering any special measures.[9]

The relevant provisions, virtually unaltered from their first presentation, appear in Articles 38 and 39 of the draft Act of Accession. Article 38 allows the Commission to take "appropriate measures" where a new Member State fails to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of internal market, including sector policies. Article 39 gives the Commission full

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5 See Minutes of the 1570th meeting of the Commission of June 5, 2002, PV(2002)1570 of June 11, 2002 (http://europa.eu.int/comm/secretariat_general/). The Commissioner Verheugen pointed out that "to ensure that enlargement proceeded as harmoniously as possible, the Commission would keep the monitoring process in being until the date of actual accession of new Member States and even after that, up to 2006, via a special transition instrument."

6 See "Towards the Enlarged Union", Strategy Paper, COM(2002)700 of October 9, 2002, at 26-27.

7 See C. Herma, *Klauzule ochronne w Traktacie Akcesyjnym – propozycje KE zawarte w Strategy Paper i decyzje Rady Europejskiej w Brukseli*, Biuletyn Analiz UKIE 2002 nr 10, at 111; R. Hykawy, C. Herma, B. Otachel, K. Smyk, A. Wójcik, P. Ronkowski, *Omówienie konkluzji Dokumentu Strategicznego Komisji Europejskiej z 9 października 2002 r.*, Biuletyn Analiz UKIE 2002 nr 10, at 3.

8 See Brussels European Council Presidency conclusions, October 24-25, 2002, point 8.

9 Copenhagen European Council Presidency conclusions, December 12-13, 2002, document 21000/02. Resemblance to Article 226 EC is striking, which may be one reason why the wording of a declaration has been subsequently changed.

power to monitor the implementation of provisions relating to mutual recognition in the area of criminal law and mutual recognition in civil matters and also take "appropriate measures" in case of serious implementation shortcomings. The "appropriate" measures may include suspension of the application of relevant judicial co-operation instruments in the relations between a new Member State and any other Member State or Member States.[10]

The wording of both provisions leaves much to desire in view of the legal technique. Reference to "serious breaches" or "serious shortcomings", as criteria for triggering the mechanism, is blurry and perhaps has to be seen in the context of recent attempts at the classification of implementation breaches.[11] "Appropriate measures" remain utterly undefined.[12] On the other hand, the notion of commitments undertaken "in the context of the accession negotiations" is a mere rhetoric designed to shield discriminatory nature of the mechanism. In the accession negotiations the future Member States undertake to respect all membership obligations, therefore, this passage may be interpreted as generally referring to the commitments of a Member State. This interpretation is corroborated by a clear link between the new monitoring mechanism and the adoption of a "comprehensive Monitoring Report" for the acceding States, envisaged for June 2003. This document will serve as a precursor for the Annual Report on monitoring the application of Community law, which is a regular tool of implementation supervision employed by the Commission.[13] Therefore, even though they are framed as accession related instruments, both safeguard mechanisms may provide the Commission with an alternative method of ensuring the application of Community and Union law in the new Member States.[14] Purely hypothetically, the application of this new tool might lead to the situation where the Commission, depending on whether the Member State in breach is "old" or "new", would differently address similar implementation shortcomings.

Also, fluent wording of the provisions raises doubts as to the nature of numerous unilateral acts or statements taken by the candidate countries in the context of pre-accession

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10 See the final draft at http://www.europarl.eu.int/enlargement/access_draft_en.htm.

11 See Commission communication on better monitoring of the application of Community law, COM(2002)725 of December 11, 2002, which at p. 12 lists "infringements that undermine the smooth functioning of the Community legal system".

12 Use of this notion usually indicates that the relevant provisions authorise wide range of action, e.g. Articles 85, 88 or 308 EC.

13 See Strategy Paper, *supra*, at 26.

14 See speech given by the Commissioner Verheugen before the European Parliament, October 9, 2002 (SPEECH/02/462 at http://europa.eu.int/rapid): "After accession, the Commission, as guardian of the Treaties, including the accession treaties, will continue to check that EU law is being properly implemented in the new Member States. That is why we have introduced the concept of a safeguard clause."

process.[15] Moreover, the safeguard provisions say nothing about the availability of judicial protection, including interim protection, in the case of arbitrary or disproportionate use of the mechanisms.[16] The outlined controversies have prompted the adoption of joint declarations by several acceding states,[17] which interpret the notion of "failure to implement commitments undertaken in the context of the accession negotiations" as covering only "the obligations arising from the original Treaties and the obligations defined in the Act of Accession" [18] and emphasise the jurisdiction of the Court of Justice with regard to the relevant Commission decisions. Further controversies arise in respect to the duration of new instruments. Both mechanisms may be invoked even before accession (although the measures adopted may become applicable only from the date accession, otherwise they would directly conflict with the Europe agreements), and the precautionary measures may apply even after the expiry of a three-year transitional period, provided that shortcomings still persist.

Despite their threatening appearance, practical importance of both monitoring mechanisms should not be overestimated. Their primary *rationale* may be found in the attempt by the Commission to "show that the Treaty is a good one. That reliable rules [have been found] in order to alleviate hardship and limit the risks".[19] Would the forthcoming monitoring report evidence serious implementation breaches in any of the candidate countries, political powers in the present Member States could threaten to delay ratification of the Accession Treaty. Introduction of the specific precautionary mechanism removes this argument from the political agenda. The relevant provisions may therefore be regarded as declaratory, their purpose being not to create an effective legal instrument but rather to serve as "a political leverage and to ensure that the will to continue the reforms does not flag following completion of the negotiations".[20]

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15 Allegedly, the notion of "commitments undertaken in the context of accession negotiations" in its broadest interpretation could cover statements recorded in the minutes of the Accession Conference and even the priorities and deadlines existing in the national programs for the implementation of *acquis*, particularly, where the latter correspond to the Accession Partnerships. On legal status of the Accession Partnerships, see K. Inglis, *The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation*, (2000) 37 CMLRev, at 1211; K. Inglis, *The Pre-accession Strategy and the Accession Partnerships // Handbook on European Enlargement*, Asser Press 2002, at 107-108.

16 Even though in most instances such measures would entail substantive legal effect and therefore be susceptible to challenge under Article 230 EC, certain measures could still be presented as mere steps in pre-226 procedure, which are not subject to review. See Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paras 44-47.

17 Joint Declarations by the Czech Republic, the Republic of Estonia, the Republic of Lithuania, the Republic of Poland, the Republic of Slovenia and the Slovak Republic on Article 38 of the Act of Accession (No 22).

18 This interpretation seems to be corroborated by the General Joint Declaration of the present Member States (No 21), stating that the declarations cannot be interpreted or applied in a way contrary to the "obligations of the Member States arising from the Treaty and Act of Accession".

19 See speech by the Commissioner Verheugen delivered at the European Parliament Plenary Session on December 18, 2002 (http://europa.eu.int/comm/commissioners/verheugen/speeches).

20 See "Enlargement: the final straight", speech given by the Commissioner Verheugen to the Foreign Affairs Committee of the French National Assembly, September 25, 2002.

Secondly, the new mechanisms are explicitly regarded as exceptional "rapid reaction facility", designed to "tackle unforeseen developments",[21] which is unlikely to be used under normal circumstances.[22] The Commission has given clear indications that, in principle, it will use structures existing under the Europe agreements (before accession) and the same mechanisms as applied to the present Member States (after accession).[23] Declaratory, as they may be, new mechanisms create a bad precedent. In its attempt at drafting a "good Treaty", the Commission overlooked that mere inclusion of the discriminatory mechanisms in the new Accession Treaty might alienate the equality of the Member States. Further, the Commission failed to consider what disastrous effects these provisions could create in the debates surrounding national referenda in the acceding States.

There remains yet another important implication. Remarkably, the main concern of the future Member States with respect to the new monitoring powers relates to their discriminatory nature. On the other hand, little was said about the justification for strengthening the Commission's executive powers in general. Increasing number of actors stresses the need for a greater centralising force. In this regard, the adoption of new monitoring tools goes hand in hand with other recent pronouncements, advocating for a wider reform of the Commission's supervisory powers. There certainly exists scope for enhancing monitoring mechanisms in the sphere of judicial co-operation and for extension of the formal infringement procedures to all aspects of justice and home affairs.[24] Suggestions for a reform of monitoring mechanisms appear in the recent Commission communication on the institutional architecture,[25] as well as in the "Penelope" contribution to the Convention.[26] The latter two documents provide for the Commission's power to determine failure to meet the obligations under the Union law by issuing reasoned opinion, subject to review by the Court of Justice, a mechanism similar to that which existed under the ECSC Treaty.

The Commission must obviously be seen as "nerve centre" of the Union executive.[27] If that centre were to expand in an attempt of greater coherence, this would inevitably lead to increasing the Commission's role. The future new Member States are predominantly small and therefore may be expected to entertain favourable attitude towards strengthening of

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21 See point 5 in the Copenhagen European Council Presidency conclusions, December 12- 13, 2002.

22 See speech by the President of the European Commission to the European Parliament, October 23, 2002: (SPEECH/02/509 at http://europa.eu.int/rapid).

23 See Strategy Paper, supra, at 25; also Commission Communication on the Action Plans for administrative and judicial capacity, and the monitoring of commitments made by the negotiating countries in the accession negotiations, COM(2002)256 of June 5, 2002, at 2-3 and 24.

24 See "Models of Co-operation within an enlarged European Union", speech by the Commissioner Vitorino at the Royal Institute for International Affairs, Brussels, January 28, 2003 (SPEECH/03/31 at http://europa.eu.int/rapid).

25 See Commission Communication on the Institutional Architecture: "For the European Union Peace, Freedom, Solidarity", COM(2002)728 of December 11, 2002, at 14.

26 See Articles 45(e) and III-12(5) of the Draft Constitution of the European Union, produced at the request of President Prodi and Commissioners Barnier and Vitorino; also Article 21 of the Additional Act No 4 on Supplementary Institutional Provisions.

27 See "Montesquieu and the European Union", speech by the Prime Minister Guy Verhofstadt at the College of Europe, Bruges, November 18, 2002.

the Commission's position.[28] It is the present system *as accepted by them in the Accession Treaty* that will have to serve as a fundament for further discussion. Accession mechanisms, despite their transitional and *ad hoc* nature, may constitute a "stimulus for all Member States".[29] Interestingly, the discussed provisions of the recently finalised draft Accession Treaty may give an insight in how the Union would function after enlargement. At least, they provide a forceful argument for widening and strengthening of the Commission's executive functions in the on-going institutional debate.

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[28] See J. Temple Lang, *How much do the smaller Member States need the European Commission? The role of the Commission in a changing Europe*, (2002) 39 CMLRev, at 315.

[29] See "Enlargement debate", speech by the Commissioner Verheugen to the European Parliament, June 12, 2002: "We are being extremely demanding. And whatever problems remain, I may say that this approach has already borne fruit and set a high standard in the candidate countries themselves. If we go on working on this aspect after accession, as the Commission suggested at the end of January, the long-term benefits might even act as a stimulus to some of today's Member States".