

Marise Cremona*

Comment on report The Creeping Nationalisation of EU Enlargement Policy

by Christophe Hillion (Sieps 2010:6)

I have enjoyed reading this report very much and in my view Christophe Hillion identifies accurately a number of clear tendencies in current enlargement policy, and indeed has rightly pointed to the fact that enlargement has moved from a *procedure* to a *policy*. This in itself points to the dual nature of enlargement: as both a policy of the Union, and as an accession Treaty concluded by the Member States. Since 9 states are on the road to accession, these developments are important for the future of the Union.

Among these developments – which he identifies as representing an increased level of control by the Member States, are the introduction of benchmarks (stricter application of membership criteria); adjustments to the accession procedure by reinterpreting the Treaty rules; the increased emphasis on ‘absorption capacity’; and de facto barriers to enlargement imposed at national level.

Christophe Hillion refers to the nationalisation, or renationalisation of enlargement policy, and this latter terms suggests an initial reflection.

Perhaps the surprising thing is not that enlargement has been nationalised but that it was de-nationalised, or institutionalised, to the extent that it was. We are now perhaps reverting to the position prior to the 1990s. For a relatively brief but important period covering the EFTAn enlargement and the 2004 and 2007 CEE enlargements, during which the process of accession became a policy of enlargement, the emphasis was on the management of enlargement institutionally rather than on the acceptance of a specific accession by each existing Member State. This was for a number of reasons:

the lack of controversy over the EFTA states joining the EU; the fact that the Member States had to make a credible political commitment to enlargement to the CEE countries in the early 1990s, thus changing the question from whether to when. The size of the CEE enlargement also played a part, the need to demonstrate the objectivity of the (almost technocratic) process as a way of dealing with its intensely political nature and its inherently competitive dimension.

So what has prompted the reversion to a more Member State-driven process? (I do not want to exaggerate this: it is an adjustment rather than an abandonment of the institutionalised policy of 1992-2007) Christophe Hillion points to the problems of credibility, effectiveness and legitimacy. We could also argue that the group of states which are actual or currently seen as potential candidates is more diverse and the attitudes of Member States are more divided than in previous enlargements. We can point to so-called *enlargement fatigue*. All these no doubt play a part. But I would like to mention another dimension: I think we can see a revival, in a different form, of the ‘widening versus deepening’ debate.

What does this mean?

‘Widening versus deepening’ surfaced as an issue in the early 1990s when the fall of the Berlin Wall and massive changes in CEE coincided with the pre-Maastricht debates about EMU, the creation of the CFSP and the new cooperation on migration and crime. It was feared that enlargement on the scale implied by the commitments being made to the CEE countries (and the lack of clarity about which countries would be included in this commitment) would compromise the grand projects

* The author of this commentary is Head of the Law Department and Professor of European Law at the European University Institute, Florence. The commentary was presented at the seminar *The Creeping Nationalisation of the EU Enlargement Policy* on November 29th, 2010.

of deepening political and economic integration that were on the table. However this debate was essentially rather sterile and largely rhetorical (since in practice no-one was going to go back from the commitment to enlargement and there were strong pressures favouring the Maastricht deepening as well) and it rather quickly metamorphosed into an argument for ‘deepening because widening’ – in other words, that Treaty reform in the direction of communitarization – as exemplified by the Amsterdam and Nice Treaties, and then the Constitutional Treaty project followed by the Lisbon Treaty – was a necessary adjunct to enlargement. One aspect of this concerned an increase in qualified majority voting on the grounds that unanimity in a Union of 27 members would be increasingly difficult to manage.

It seems to me that we are now seeing a revived awareness of ‘widening versus deepening’, but in a different sense. Not in the sense of new integration projects that might be put at risk by further enlargements. But rather in a renewed understanding of just how much ‘deepening’ our actual level of integration entails and that enlargement involves extending that integration ever more widely. An understanding that enlargement is not just a matter of how many Commissioners or even numbers of votes in the Council, but implies a tangible commitment to solidarity between Member States. The financial crisis has brought home what that commitment might entail as well as the difficulties of managing deep integration between countries that are still very different in terms of economic management and performance. The *Viking* and *Laval* cases have brought home the challenges in operating an internal market which includes countries with very different social bargains. Both these examples involve impacts on the individual citizen and taxpayer. Admittedly the countries giving rise to anxiety over debt and the euro are long-standing not recently-joined Member States. The point is rather that these events and others have brought home the fact that membership of the Union – and the admission of new members – carry serious implications. No wonder perhaps that enlargement is being re-politicised and re-nationalised.

An additional factor shaping the EU and its Member States’ approach to enlargement is the tendency for the EU to dwell heavily on the recent enlargements to central and eastern Europe as a ‘successful foreign policy’, and to instrumentalise enlargement to achieve the broader foreign policy aims of stability and security. The danger here is that of regarding accession to the EU as offering in itself a solution to problems in state-building or a substitute for strong state institutions.

Christophe Hillion argues that the Court might play a role in re-asserting discipline. Setting aside the question

of how likely this might be, how necessary or appropriate is it? If the issue is again one of ‘widening and deepening’ then one might even argue that the Court of Justice is part of the problem as much as the solution (c.f. *Viking* and *Laval* judgments). Or perhaps, more fairly, that the Court is faced with making sense of the treaty- and legislative compromises it is given. The negotiation of treaties, including treaties of accession, will always involve an element of ungentlemanly bargaining and will always be an exercise in realpolitik, among the Member States themselves as well as between the Member States and the accession country. However I do think that we face a risk that that process may lead to an excessive fragmentation within the Union (too many special rules and special deals in order to keep everybody on side), and that the Court – as a constitutional court – has a natural role in ensuring the unity and autonomy of the Union’s legal order. Christophe has suggested some ways in which that might possibly be done. Ultimately the most challenging question is the one posed at the end of the paper: is enlargement one of the Union’s central objectives? Is it part of the Union’s identity to be open to all the peoples of Europe? If so, then the obligations of solidarity do not only arise from the date of accession but are based on a common European identity.