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Comment on report

The Creeping Nationalisation of EU Enlargement Policy

by Christophe Hillion (Sieps 2010:6)

1 Introduction

The above report is an extremely careful and detailed account of the development of EU enlargement policy over the past two decades. The case is made from a legal viewpoint that enlargement policy as a Union policy has been hijacked by the member states with the aim of slowing or indeed stopping the enlargement process. The argument is extremely carefully crafted and the paper ends with a proposal for legal remedies to re-establish the primacy of Union enlargement policy following the assertion of member state control.

My critique starts from the first sentence of the report which states that ‘the enlargement policy of the European Union...is built on scarce Treaty provisions, yet it involves a rich body of rules’.

Indeed the sole article of the Treaty which deals with enlargement is Article 49 TEU and the second paragraph of this article clearly attributes the final decision to the Member States which submit the negotiated accession agreement ‘for ratification...in accordance with their respective constitutional requirements’. The other crucial element of Article 49 is that the Council shall act unanimously in taking its decision on any application for accession to the Union. It is obviously open for any member states to withhold its agreement to an accession.

There is indeed a rich body of rules which has grown up around the enlargement process over the last 20 years. As one would expect, after the collapse of Communism and the fundamental constitutional, political and economic changes which followed, these rules were establis-

hed to some extent by trial and error as the EU grappled with the challenge of enlarging to countries in the process of comprehensive structural change. This report gives a very detailed account of how these rules have changed over the last two decades.

However these rules represent political agreements between the member states in the Council and it is clear that they change as the facts on the ground change and as more is learnt about the enlargement process. It appears difficult to support a position which says that these rules cannot be changed even by a unanimous opinion in the Council.

The legal remedies proposed at the end of the report appear to be extremely weak and problematical. It is true that the ECJ might declare an accession agreement void, which included a permanent safeguard clause which limited the application of one of the basic principles of the EU Treaty. But that would hardly be a ‘remedy’ for the applicant state, which after years of adjustment would be deprived of accession by the Court. The idea that the Court might rule a change in the legal procedure for ratification in a member state illegal in its application to an accession treaty is extremely difficult to imagine and would certainly cause a political crisis in the Union.

However the arguments of this critique are not of a legal nature – the author is not a lawyer – but of a political and economic nature.

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2 Were the Member States not in the driving seat from the beginnings of the 'new enlargement policy' after 1989?

Professor Hillion's account suggests that enlargement policy developed as a Union policy in the 1990s and that the member states interfered in only a minor way in the smooth development of that policy. I would dispute this.

In the early 1990s, Member States which favoured the integration of the countries of central and eastern Europe leading to their eventual accession to the Union used every opportunity to advance their policies. The German Presidency of the Council in 1994 led a strong campaign to accelerate the preparation of the countries of the region for accession; this effort led to the Essen presidency conclusions which proposed a 'pre-accession strategy'. The German government was also instrumental in insisting on the urgency of the enlargement process for the central European countries at the Madrid summit at the end of 1995, which led eventually to the Agenda 2000 and raised administrative reform in these countries almost to the level of a condition for membership.

There are also several examples during this period of member states using the accession and integration process as a tool for resolving bilateral disputes. The Slovenian association agreement was held up by the Italian Government, which wished to resolve a bilateral real estate dispute, while the Spanish Government threatened to hold up the integration process in the early 1990s in order to force the central Europeans to reduce the level of VAT on oranges!

It is true that member state control of the enlargement process has continued but this is not new. It is also true that some of the rule changes which the author attributes to Member State interference originated from proposals made by the Commission.

3 Changes in rules derive from the learning process which the Member States and the EU institutions have experienced over the last 20 years

It was Keynes who reputedly said 'when the facts change, I change my opinion – what do you do?'. The enlargement process has been a concentrated learning process for all concerned. This is not surprising if one looks at all the problems faced in understanding countries in central Europe coming out of communist rule and in south eastern Europe, which was convulsed also by a bloody series of wars in the 1990s.

The example mentioned above of the increased attention given to reform of the administration in acceding

countries resulted from the experience of the member states suggesting that wholesale reform was being held up by inadequate administrative capacity in government.

The increased attention now being given to corruption, the quality of governance and the practice of the rule of law result from the lessons from the accession of Bulgaria and Romania. The introduction of benchmarks for the opening and closing of chapters in the negotiations results from a judgement that the gulf between agreement to introduce EU *acquis* and its implementation has been too large in the past.

It would clearly be folly not to apply lessons which have been learnt at some cost over the last 20 years.

4 Any enlargement affects the domestic economies and politics of the Member States which are therefore bound to make an economic and political judgement on each accession

Each enlargement affects the domestic economy of the member states in a variety of ways which they are bound to take account of in the economic policy decisions.

The most obvious but by no means sole economic impact comes through the influence of enlargement on the EU budget. Especially at a time when there is enormous pressure on the member states to reduce budget deficits and debt, each is bound to calculate the economic costs and benefits of an accession. It must be admitted that the member states tend to be better at estimating costs than benefits, but nevertheless this consideration is entirely justified and it would be foolish to ignore it.

Migration is another element which has an economic but also a strongly political impact on the member states, and politicians are bound to consider the impact on political stability and the economy of any future likely migratory flows.

5 All member states are democracies which rely on the popular opinion to confirm policies; they are therefore bound to take popular opinion into account

Probably the most important fundamental critique of this report is that it gives the impression of a legal system which is divorced from democratic control, rather than reflecting the democratically expressed values of the citizens of the member states.

It is of course true that at the current stage of political integration in the Union it is difficult to have a true expression of the democratically expressed wishes of the

whole EU population. In its place we have the democratically expressed opinions of the member states and on some issues the voice of the European Parliament.

In a Union of sovereign states, which have agreed to pool some of their sovereign powers, actors in the political arena cannot ignore the democratically expressed opinions of their citizens. This is a difficult principle to uphold in all extreme circumstances, but enlargement questions cannot be considered to pose such extreme threats to the values of the Union expressed in the TEU.

6 But there are two areas of difficulty which the report clearly brings out:

It is inappropriate and against the interests of both the EU and the acceding country, when a member state attempts to resolve its bilateral problems with the candidate through blocking the accession process, in spite of the candidate fulfilling the conditions for accession. The example quoted in the report concerns the attempt by Slovenia (which itself had suffered from Italian bilateralism in the 1990s) to block Croatian accession until its border dispute with that country was resolved.

It would be politically and economically disastrous if an acceding country fulfilled all the criteria for accession, successfully closing all the chapters of negotiation, then to be faced with a refusal of the member states to ratify the accession. This would create obvious political problems within the EU but also between the EU and the applicant state, but it might also lead to severe economic costs for the applicant state.

Every state applying for accession undertakes the adjustment of its economic regulation on the assumption that its future membership of the Union brings more benefits than the costs of preparing for accession. Changes are made in domestic regulation and trading arrangements with third countries which would not be made in the absence of an accession perspective. The changes made may indeed lead to inefficient and costly changes to the economic structure and regulation of the country concerned.

This is a difficult problem to tackle and may simply be a risk which every country has to factor in to its decision to apply for accession. However it does suggest that the EU and its member states should take a far deeper look at the problems associated with the enlargement to a third country before agreeing to the opening of negotiations. There should also be a more open and honest opinion expressed by the member states at key points in the negotiating process.

The author concentrates on the example of the Turkish negotiation and the resistance in several member states to future Turkish membership. A refusal to enlarge

might however be economically more dramatic for a small country like Croatia than a major power such as Turkey.

7 Conclusion

This is an extremely well-researched and well-argued account of the development of enlargement policy in the European Union, by a leading European lawyer. The conclusion that the member states have progressively come to dominate and put at risk a Community policy and that legal remedies need to be found to prevent this development appears to the reviewer to be unjustified. However there are clearly occasions on which the European Union needs to reflect to limit the costs both to the Union and applicant country of a failed accession bid.