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EDITORIAL COMMENTS

Fundamental rights and EU membership: Do as I say, not as I do!

Citizens of Croatia will acquire European citizenship on 1 July 2013 when their country is expected to become the 28th Member State of the Union.[1] While this new episode of EU expansion has not hit the headlines with the same force as the "big bang" enlargement of 2004, it should not be snubbed. It illustrates that the Union is a polity that continues to attract, that it is helping to turn one of the darkest pages of Europe's recent history, and that it can still stick to its commitments.[2] In the current gloomy climate, these are all reasons to rejoice.

This round of enlargement is also noteworthy in view of the considerable place it has granted to EU fundamental rights. The accession negotiations with Croatia were the first (together with the negotiations with Turkey) to include a specific chapter on "judiciary and fundamental rights", presupposing that a specific corpus of EU fundamental rights is developing, and that respect for the norms it contains is inherent to membership in the Union. Such an evolution is particularly significant considering current developments in various EU Member States.

Enhancing fundamental rights in the EU pre-accession context . . .

That respect for fundamental rights is a condition for accession is not new. Its function in the enlargement process has however evolved significantly, both as a result of the changing role of fundamental rights in the EU constitutional order, and also in view of the inherent needs of each wave of accession. In

1. The Accession Treaty was signed on 9 Dec. 2011 (Council of the European Union, doc. 14409/11, Brussels, 7 Nov. 2011). The Croats have endorsed it in a referendum held on 22 Jan. 2012. Its entry into force also requires the ratification of all EU Member States.

2. Macedonia (FYROM), Montenegro and recently Serbia (on 1 March 2012) have been granted "candidate status" by the EU. Bosnia & Herzegovina, Albania and Kosovo (under UN SC Resolution 1244) are recognized as "potential candidate countries". On EU relations with those countries: see e.g. Blockmans, *Tough Love: The European Union's Relations with the Western Balkans* (The Hague, TMC Asser Press 2007); Rodin, "European Union and the Western Balkans – Does the Lisbon Treaty Matter," in *Foreign Policy of the European Union: Assessing Europe's Role in the World* (Brooking Institution Press, 2012, forthcoming); Cremona, "Editorial", (2011) *Croatian Yearbook of European Law and Policy*, VII-XI.

particular, since the establishment of the famous *Copenhagen criteria*, crafted in reaction to the membership aspiration of Central and East European countries, respect for human and minority rights has been a prerequisite for any aspirant State to obtain the "candidate status",[3] in other words to be invited to start accession negotiations. Such an eligibility condition was eventually enshrined in EU primary law (Art. 49 TEU), through the Amsterdam Treaty.

More importantly, the fulfilment of the EU accession conditions, and particularly the respect for fundamental rights, became subject to systematic monitoring. Hence, following the establishment of the Copenhagen criteria, the European Commission began to produce annual progress reports in which it would provide detailed assessments of the reforms undertaken by the candidates to fulfil the accession requirements, including the political conditions. Relying on a variety of external sources (including assessments by the Council of Europe and the Organization for Security and Cooperation in Europe), the Commission not only provided an evaluation of the fundamental rights situation on the ground, it also formulated recommendations as regards measures that ought to be taken to address possible deficiencies, and ultimately to meet the admission conditions. Enlargement thus provided a platform for the development of an EU fundamental rights policy, at least v*is-à-vis* the candidates.[4]

The start of accession negotiations with Croatia (and Turkey) was a milestone in this respect. The list of chapters to be negotiated was increased to include notably a new chapter on "judiciary and fundamental rights".[5] As a result, respect for the latter would no longer be regarded solely as an eligibility condition (i.e. prerequisite for starting accession negotiations) as suggested in Article 49(1) TEU. Fundamental rights would also be conceived as an integral part of the EU acquis which the candidate would have to assimilate and would,[6] as such, be considered under the third Copenhagen criterion related to the "candidate's ability to take on the obligations of membership".

The articulation of an EU fundamental rights acquis has also been fostered by the new *methodology* introduced in the accession negotiations, following

3. According to the Copenhagen political criterion: a candidate must achieve "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." See Conclusions of the Presidency, June 1993, Copenhagen European Council.

4. de Búrca, "Beyond the Charter: How enlargement has enlarged the Human Rights Policy of the EU", 27 *Fordham International Law Journal* (2004), 679.

5. Admittedly, some aspects of this chapter (e.g. independence of the judiciary, fight against corruption) were covered by the specific chapter on Justice and Home Affairs, included in previous accession negotiations.

6. Chapter 23 consists of four main components: judiciary, fight against corruption, fundamental rights including freedom of expression, and EU citizens' rights.

the so-called "renewed consensus on enlargement".[7] Agreed in the aftermath of the signature of the Accession Treaty with Bulgaria and Romania, the new consensus foresees the strengthening of conditionality in accession negotiations with a view to enhancing the credibility of the candidates' membership preparation. In practical terms, most negotiation chapters are to be opened and closed only once the candidate has met, respectively, the "opening" and "closing benchmarks" defined by the EU. The Commission is in charge of proposing such benchmarks to the Member States, and of gauging whether these are met, or not. On the basis of that assessment, the Member States ultimately decide to open and/or close each of the negotiation chapters. For instance, one of the closing benchmarks relating to chapter 23 required that Croatia strengthen the independence, accountability, impartiality and professionalism of its judiciary. It was otherwise expected to strengthen its protection of minorities, notably through effective implementation of a Constitutional Act on the Rights of National Minorities.[8]

The inclusion of a specific chapter on the matter, combined with the articulation of benchmarks considerably strengthened the significance of fundamental rights in EU accession negotiations, both in substantive and normative terms. To be sure, the role of the Commission was significantly reinforced, both in articulating their substance, and in monitoring compliance. Thus, in assessing fulfilment of the above-mentioned benchmarks, the Commission considered, early 2011, that Croatia had not yet established a convincing track record of recruiting and appointing judges and State prosecutors based on the application of uniform, transparent, objective and nationally applicable criteria. It also held that there had been no tangible improvement in the level of employment of national minorities as required by the Constitutional Act on the Rights of National Minorities (CARNM), and thus exhorted Croatia "to set out long term plans, backed by statistics, for fully meeting its obligations under the CARNM as regards minority employment, and [to] adopt a plan to tackle the shortcomings . . . on the under representation of minorities in the wider public sector".[9] In the event, the Commission considered that chapter 23 could not be closed.[10]

Indeed, the latter turned out to be one of the most difficult chapters to negotiate.[11] Yet, in view of the increasing political pressure to complete the

7. Presidency Conclusions, European Council, Brussels, 15 Dec. 2006.

8. Interim Report from the Commission to the Council and the European Parliament: Reforms in Croatia in the Field of Judiciary and Fundamental Rights (Negotiation Chapter 23), COM(2011)110, 2 March 2011, pp. 3 and 5.

9. Ibid.

10. Other deficiencies had been detected by the Commission that contributed to its negative assessment.

11. *Euractiv*, 7 June 2011; *EUObserver*, 13 Dec. 2010.

whole negotiation process, chapter 23 was eventually closed, on the last day of the Hungarian presidency of the EU Council in June 2011.

Two spinoffs of these difficult negotiations are worth mentioning. First, the ensuing Act of Accession (AA), which is part of the Accession Treaty (AT) signed in December 2011, foresees in its Article 36 that the Commission's monitoring of commitments undertaken in the context of accession negotiations would continue, notably in the field of fundamental rights and judiciary,[12] possibly even after accession.[13] Annex VII, attached to the AT, enounces the "specific commitments undertaken by the Republic of Croatia in the accession negotiations", mentioning *inter alia* Croatia's commitments "to continue to improve the protection of human rights", "to continue to strengthen the independence, accountability, impartiality and professionalism of the judiciary", "to continue to strengthen the protection of minorities". Moreover, Article 36(2) AA foresees that non-fulfilment of such broad commitments would open the possibility for the Council, on the basis of a Commission proposal, to take "all appropriate measures if issues of concern are identified during the monitoring process", without specifying what form such measures could take, but adding that they would be lifted "when the relevant issues of concern have been effectively addressed".

Secondly, the Commission has suggested various adjustments to the negotiations of chapter 23, based on lessons learned from Croatia's accession process.[14] The general purpose of what has been coined the "new approach" is to invigorate the monitoring of the candidates' absorption of the EU fundamental rights acquis in the context of accession negotiations.[15] Among the practical adjustments envisaged, the Commission recommends the early

12. According to Art. 36(1): "The Commission shall closely monitor all commitments undertaken by Croatia in the accession negotiations, including those which must be achieved before or by the date of accession. The Commission's monitoring shall consist of regularly updated monitoring tables, dialogue under the Stabilization and Association Agreement . . . , peer assessment missions, the pre-accession economic programme, fiscal notifications and, when necessary, early warning letters to the Croatian authorities . . . Throughout the monitoring process, the Commission shall also draw on input from Member States and take into consideration input from international and civil society organisations as appropriate. The Commission's monitoring shall focus in particular on commitments undertaken by Croatia in the area of the judiciary and fundamental rights (Annex VII), including the continued development of track records on judicial reform and efficiency, impartial handling of war crimes cases, and the fight against corruption . . . As an integral part of its regular monitoring tables and reports, the Commission shall issue six-monthly assessments up to the accession of Croatia on the commitments undertaken by Croatia in these areas".

13. The phraseology of Art.36 AA is not entirely clear as regards the time span of the envisaged monitoring.

14. The adjustments also concern chapter 24 (see Strategy paper of 12 Oct. 2011).

15. Communication from the Commission to the European Parliament and the Council, *Enlargement Strategy and Main Challenges 2011–2012*, COM(2011)666 final, 12.10.2011, p.

opening and late closing of the chapter so as to permit the candidate's production of a solid track record of reform implementation, thereby demonstrating that such reforms are solidly embedded in its constitutional fabric prior to admission. The Commission also envisages a reinforced negotiating scheme as regards chapter 23, including the establishment of "interim benchmarks" in addition to the opening and closing ones, so as to identify milestones in the candidate's absorption of the EU acquis. "Corrective measures" could be considered should problems arise in the course of negotiations, with the possibility, for the Commission itself, of halting technical work on other negotiations chapters should progress in implementing the benchmarks related to chapter 23 be deemed to lag behind.

What transpires from these latest developments is the further reinforcement of the fundamental rights discourse in the context of EU accession. In particular, the proposed elaboration of benchmarking should stimulate further articulation of EU fundamental rights standards and means to achieve their assimilation by the candidate. Both developments equally point towards a significantly strengthened EU monitoring power, and notably of the Commission.

In view of the current situation in some Member States, any initiative to ingrain EU values in future members' polity is commendable. Preventive measures to ascertain upstream assimilation of, and compliance with EU fundamental rights might indeed contribute to them becoming a matter of course. But will this be sufficient to ensure the "irreversibility of progress in those areas"?[16] What should happen in case of post-accession setbacks?

And ever after?

As the Union strengthens the promotion of fundamental rights in relation to candidates for membership, it displays some discomfort in addressing internal contentious situations. The obvious case in point these days is Hungary, though it is certainly not alone. Setbacks in fundamental rights protection have indeed mushroomed in old and newer Member States alike, as evidenced for instance by the controversial treatment of Roma,[17] the encroachment upon

5. See also the General Affairs Council Conclusions on enlargement and stabilisation and association process, 5 Dec. 2011, pt 4.

16. The Negotiating Framework for Croatia foresees that: "to ensure the irreversibility of progress . . . and full and effective implementation, notably with regard to fundamental freedoms and to full respect of human rights, progress will continue to be closely monitored by the Commission, which is invited to continue to report regularly on it to the Council" (pt 12).

17. On the treatment of Roma in particular, see the Report of the Commissioner for Human Rights, Human rights of Roma and Travellers in Europe (Council of Europe Publishing, 2012),

media freedom,[18] or calls for discriminatory treatment in relation to new Member States' migrant citizens,[19] all occurring in founding members of the Union.[20] Yet, in most cases, it appears that the fundamental rights acquis, vigorously promoted in the context of accession has not proved as effective a remedy as more conventional elements of EU law.

Hence, the three initial enforcement proceedings against Hungary triggered by the Commission related respectively to the independence of the Hungarian central bank (Arts. 127(4) and 130 TFEU, Art. 14 of the Statute of the European System of Central Banks and of the European Central Bank), the retirement age of judges and prosecutors (Directive 2000/78/EC), and the data protection supervisory authority (Art. 16 TFEU and Art. 8 of the Charter of Fundamental Rights); while "further explanations concerning the independence of the judiciary" were being asked.[21]

Indeed, in a plenary debate at the European Parliament on the situation in Hungary, the Commission President conceded that "the issues at stake here may go beyond the European Union law matters that have been raised . . . In fact, beyond legal aspects, some concerns have been expressed regarding the quality of democracy in Hungary, its political culture, the relations between the government and opposition and between the State and the civil society". Implicitly admitting the limited reach of EU law and of the Commission monitoring powers on this terrain,[22] the President pointed out that "the Council of Europe is currently considering other points of the Hungarian legislation which are under its remit. The Council of Europe Venice Commission could play an important role in this respect."[23]

available at: <www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf> See also Dawson and Muir, "Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the Roma", 48 CML Rev., 751–775

18. See e.g. the 2010 report of *Reporters Without Borders* on the freedom of the press: <fr.rsf.org/press-freedom-index-2010,1034.html>

19. *EUobserver*, 14 Feb. 2012.

20. One might also evoke a growing debate, notably in the UK and the Netherlands, about circumscribing the jurisdiction of the European Court of Human Rights.

21. Barroso, "A Europe of values and principles", Plenary debate on the situation in Hungary; Strasbourg, 18 Jan. 2012; and the letter of Viviane Reding to Hungarian *Vice-Prime Minister Tibor Navracsics, and its annex,* 12 Dec. 2011 (available on the Commissioner's official website). Following Hungary's replies to the Commission's letters of formal notice, the Commission has decided to send two reasoned opinions on the retirement age of judges and on the independence of the country's data protection authority, respectively. See MEMO/12/165 (7 March 2012).

22. The Balance of Payments aid which Hungary is asking from the EU might be used by the latter, if granted, to put pressure on Hungarian authorities as regards the independence of the central bank and its judiciary.

23. Barroso, "A Europe of values and principles", Plenary debate on the situation in Hungary; Strasbourg, 18 Jan. 2012.

Against the backdrop of the invigorated EU fundamental rights discourse in the enlargement context, evoked above, the Commission President's confession brings home the notion that a discrepancy endures between accession conditions and membership obligations.

Such a discrepancy, which undermines the credibility of the EU fundamental rights policy, is multifarious. It finds its first expression in the scope of fundamental rights to be respected by candidates and by Member States, respectively. A cursory look at the EU pre-accession documents (such as the so-called screening reports regarding fundamental rights, and the interim report of the Commission regarding chapter 23), against the backdrop of the Commission President's speech, clearly illustrates that the EU fundamental rights acquis related to chapter 23 is broader than the list connected to Article 2 TEU, or the EU Charter of Fundamental Rights. The issue of minority protection remains a case in point.[24]

Beyond this substantive discrepancy, the obligation to respect EU fundamental rights appears to vary depending on the pre or post accession contexts. In principle, EU fundamental rights only bite Member States when they act in the context of EU law,[25] whereas *any* conduct of a candidate is considered for the purpose of evaluating progress in assimilating EU fundamental rights. Admittedly, Article 7 TEU provides a ground for controlling Member States' behaviour also when they act outside the context of EU law. Yet, it presupposes a higher threshold of breach for any sanction to materialize ("a clear risk of a serious breach . . . of the values referred to in Article 2"), compared to the potential swift EU reaction in the pre-accession context. Indeed, triggering the procedure of Article 7 TEU is more demanding than what is envisaged in recent negotiating frameworks. While the former requires a unanimous decision of the European Council and the consent of the European Parliament to establish the existence of "a serious and persistent breach . . . of the values referred to in Article 2", the latter foresees that the Council decides by ordinary qualified majority voting to suspend negotiations, based on an initiative of the Commission, or on the request of one third of the Member States.[26]

A third level of incongruity concerns the *monitoring* of EU fundamental rights. The latter significantly differs whether operating in the context of pre-accession, or within the Union. In the former case, monitoring is

24. See e.g. Hillion, "The Framework Convention for the Protection of National Minorities and the European Union", Report, Council of Europe, 2008.

25. See e.g. Art. 51(2) EU Charter of Fundamental Rights. Further: Von Bogdandy et al., "Reverse *Solange:* Protecting the essence of fundamental rights against EU Member States" in this *Review.*

26. See pt 17, Negotiating framework for Iceland, 12228/10, pt 12 Negotiating framework for Croatia, 3 Oct. 2005.

systematic, based as it is on the regular reporting by the Commission, and involving a considerable leverage on the candidates' behaviour. By contrast, EU monitoring of Member States' compliance with the Union's fundamental rights appears circumspect, despite the substantial know-how to monitor compliance with Article 2 TEU acquired by the Commission in the context of pre-accession, the presence for the first time of a specific Commissioner for Justice, Fundamental Rights and Citizenship, and the establishment of an EU Fundamental Rights Agency.[27] While this may reveal the actual limited normative basis for providing such an assessment,[28] a certain political reluctance to undertake monitoring internally cannot be excluded.

Time to bridge the gap?

Despite considerable changes in EU constitutional law as regards fundamental rights, the Union seemingly remains ill-equipped to monitor and guarantee respect of the fundamental values on which it prides itself to be based. Paradoxically, this might sustain the discrepancy outlined above: as the EU fundamental rights policy still lacks teeth internally, the leverage of the pre-accession conditionality is used to push for ambitious adaptations that are paramount to the proper functioning of the EU legal order, adaptations which are difficult to force post-accession. Assuming that the new approach is sufficient to prevent post-accession regressions of the kind witnessed in today's Union is illusory. More consistency ought to be secured between the Union values and accession criteria, as suggested by some members of the Convention on the Future of Europe notably from Hungary,[29] and in the supervision of these values.[30]

27. See generally von Bernstorff and von Bogdandy, "The EU Fundamental Rights Agency within the European and international human rights architecture: The legal framework and some unsettled issues in a new field of administrative law", 46 CML Rev., 1035–1068.

28. It has been suggested that Art. 7 TEU could provide the legal basis for systematic internal monitoring. See Hoffmeister, "Monitoring Minority Rights in the Enlarged European Union", in Toggenburg (Ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Budapest, LGI Books, 2004) p. 85.

29. See: <european-convention.eu.int/amendments.asp?content=2&lang=EN>

30. Cf. the Commission's supervisory role foreseen in the context of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in the margins of the European Council meeting on 1 and 2 March 2012.