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THE TREATY OF ACCESSION AND DIFFERENTIATION IN THE EU

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Introduction

With the entering into force of the Accession Treaty, on 1 May 2004, the process of European integration has entered a new phase. The EU of 25 will differ from the EU 15 in many ways.

First, the accession of 10 new Member States has fundamentally changed the institutional framework and decision-making capacity of the Union. Reaching agreement with 25 Member States is obviously much more difficult than with 15. It remains to be seen how the Nice arrangement for QMV will affect the EU's decision-making in practice awaiting the entry into force of the Constitution.

Second, EU enlargement raises the question of balance in the EU. On the one hand, there is a question of balance between Member States: big and small, old and new, countries defending a more intergovernmental and supranational view on European integration. On the other hand, there is the traditional issue of balance between the institutions and in particular the institutional triangle constituted by the Commission, the Council and the European Parliament. The discussions surrounding the inauguration of the Barroso Commission clearly revealed the importance of this institutional balance and the power relations between the institutions.

Third, and this is the central topic of today's conference, EU enlargement raises questions about the future functioning of the Union and the application of the *acquis communautaire*. Under the Accession Treaty, the 10 new Member States will not automatically apply the entire *acquis* nor will they be able to participate in all areas of EU activity on a par with the old Member States. In other words, the Accession Treaty provides for differentiation between the old and new Member States during the first years after enlargement. After a short introduction on the legal basis and structure of the Accession Treaty, this paper essentially tries to discuss the instruments of differentiation and their consequences for the future functioning of the Union.

1. The Treaty of Athens: structure and legal basis

The Accession of new Member States is governed under Article 49 EU:

"Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

Following previous practice, the Member States did not sign a specific agreement with each individual applicant but rather a single set of documents for all 10 new Member States. The Treaty of Athens, signed in the Greek capital on 16 April 2003, comprises three complementary elements: the Treaty itself, the Act of Accession and a Final Act.

The actual Treaty of Accession (TA) only contains three articles. The first of these articles provides that 10 countries become Members of the EU and thereby parties to the Treaties on which the Union is

founded. This article further reveals that accession is not unconditional but is subject to certain 'conditions of admission' on the one hand and 'adjustments to the treaties' on the other. The second article of the TA provides that the Treaty of Athens can only enter into force after ratification by the contracting parties, in accordance with their respective constitutional requirements. It thus reveals that the TA is an international treaty which requires ratification of both the old Member States and the acceding states. The third article of the TA contains the list of languages to which the Treaty of Accession is translated.

By contrast to the TA, the Act of Accession (AA) is a very long document, containing 62 articles divided into five parts together with 18 annexes and 10 protocols. It adds up to 4,800 pages. The Act of Accession reflects the outcome of the accession negotiations and sets out in detail the conditions of admission and the adjustments to the Treaties. Art. 7 AA proclaims that the provisions of the AA may only be amended according to the treaty amendment procedure, which reveals the double legal nature of the AA forming on the one hand an international agreement among Member States and acceding states and, on the other hand, forming EU primary law according to the case law of the ECJ. Interestingly, Article 10 foresees that the application of the Treaties and the acts of the institutions shall, as a transitional measure, be subject to the derogations provided in the AA. The AA thus opens up the way for differentiation in derogation of the Treaties.

Finally, the Final Act supplements the TA and AA. It contains no less than 44 declarations, both from the old and new Member States. By contrast to the TA and the AA, which have the status of primary law equivalent to the founding treaties, the legal nature of the Final Act is more ambiguous. The Court has generally concluded that such declarations do not have binding force but must nevertheless be taken into consideration for the purpose of interpreting the Accession Treaty. Reacting to the unclear legal status of the declarations, the old Member States decided to issue a declaration which states that 'the declarations attached to this Final Act cannot be interpreted or applied in a way contrary to the obligations of the Member States arising from the Treaty and Act of Accession.'

2. Instruments of differentiation: transitional arrangements and safeguard clauses

According to the conclusions of the 1993 Copenhagen European Council, candidates were expected to incorporate the entire *acquis communautaire* before their accession to the EU. Acceptance of the *acquis* has been a key element of the pre-accession strategy with the tight monitoring on the part of the European Commission with regard to the incorporation of the 31 negotiating chapters of the *acquis*. The Act of Accession, which is the outcome of this process, emphasises that from the day of accession the new Member States accepted the provisions of the original treaties, all acts of the institutions, as well as declarations or resolutions of the European Council, agreements concluded by the Member States meeting within the Council, JHA conventions and external agreements to which the Community or the Union are parties (Art. 2-6 AA). The AA further contains arrangements that partly qualify this emphasis on full and immediate application of the *acquis*.

First, the new Member States still have to meet specific conditions to introduce the Euro and to enter the Schengen area. There is no specified time limit set for the incorporation of the new Member States in these areas. Second, various pre-determined 'transitional arrangements', limited in time and scope, postpone the application of specific parts of the *acquis*. Third, the Act contains three safeguard clauses which allow further restrictions to the implementation of the *acquis* in specific circumstances. These safeguard clauses are instruments of post-accession conditionality, they are a kind of stick behind the door for the Commission in addition to Article 226 EC.

Gradual inclusion in the Eurozone and the Schengen area

Whereas the new Member States accept the EMU and the Schengen acquis from the date of accession, they are not considered as full members of the eurozone and the Schengen area. There is, however, no question of a permanent opt-out for the new Member States such as, for instance, the United Kingdom. During the negotiations, the new Member States did not have a choice of opting out from any fields of the Union's activities. They will thus not be permanently excluded from participation in the eurozone or the Schengen area but will be gradually included. In the case of the EMU, the new Member States still have to fulfil the Maastricht convergence criteria set out in Article 121 EC before they can adopt the single currency. For the time being they will be considered as 'Member States with a derogation' in the sense of Article 122 EC.

One of the convergence criteria requires the Member States' observance of normal fluctuation margins provided for by the exchange-rate mechanism (ERM II) of the European Monetary System (EMS) for at least two years, without devaluation of their currency. In other words, the new Member States' adoption of the Euro cannot happen before May 2006. Lithuania, Estonia and Slovenia may be the first new Member States to enter the Eurozone because they already joined the ERM II in June 2004. Joining the ERM II is a first step towards full integration into the Eurozone but this inclusion will not happen automatically. The two years in the ERM II waiting room is only a minimum. The eventual inclusion will depend on several factors such as differences in the exchange rate arrangements, monetary strategies and fiscal performance. Every country will be evaluated separately, thus providing for differentiation among the new Member States.

A similar differentiation applies with regard to the new Member States' entry into the Schengen area. Article 3 AA reveals that a large part of the Schengen acquis, i.e. the Schengen rules mentioned in Annex I to the AA, is applicable to the new Member States from the date of accession. Among these rules, the *acquis* on external border controls is particularly prominent, giving responsibility for the management and control of the EU external borders to the new Member States. The old Member States were unwilling to accept any derogations or transitional periods in this field, which *inter alia* implied that the new Member States had to impose visa requirements on third country nationals who could previously enter their territory without such travel documents. Poland, for instance, had to introduce a visa requirement for Ukrainian nationals.

All the Schengen rules not mentioned in Annex I are not directly applicable to the new Member States. In practical terms, this implied that the internal border controls between the new and old Member States have not been lifted upon accession. Application of this sensitive part of the Schengen *acquis*, together with the new Member States' participation in the SIS has been postponed until a later date. As with the introduction of the Euro, there is no clear target date for the full incorporation of the new Member States into the Schengen area. This incorporation is subject to a Council decision, to be taken unanimously by all Schengen Members, after consultation of the Parliament. The Council will take this decision on the basis of Schengen evaluation procedures. In other words, the new Member States will have to show their capability to implement all requirements, particularly concerning access to the SIS and effective border control. The Commission continues to monitor this process, which takes place on the basis of funding from the so-called Schengen Facility and in accordance with the Schengen Action Plans which have been drawn up for each new Member State. This mechanism clearly reflects the EU's pre-accession strategy with short and long-term objectives identified in the Accession Partnerships, funding on the basis of the Union's financial instruments PHARE, ISPA and SAPARD, and general monitoring of the Commission on the basis of annual progress reports. It has been argued that the new Member States' full participation in the Schengen area will not take place before the implementation of the second SIS (SISII), foreseen for 2006.

Pre-determined transitional arrangements

Pre-determined transitional arrangements are classical instruments to allow the smooth accession of new Member States. Although varying in time and scope, comparable transitional arrangements were included in the accession treaties for all previous enlargements. They essentially postpone the full entry into force of specific parts of the *acquis* to a later date. Transitional arrangements apply in fifteen chapters of the *acquis* (out of a total of thirty-one chapters): free movement of goods; freedom of movement of persons; freedom to provide services; free movement of capital; company law; competition policy; agriculture; fisheries; transport policy; taxation; employment and social policy; energy; telecommunications, IT and postal services; culture and audio-visual policy; and environment. In some cases, the derogations are minimal and relatively short, for instance in the chapter on free movement of goods. The derogations are far longer in duration in other areas such as in the case of the agriculture and environment *acquis*. The AA contains annexes specifying the transitional arrangements applicable in each new Member State. For instance, Annex IX lists the transitional arrangements for Lithuania. It is impossible to give a survey of all transitional arrangements in this short presentation. Nevertheless, some major points can be highlighted with a specific emphasis on the transitional arrangements applicable for Lithuania.

Transitional arrangements predominantly introduce derogations for the new Member States but in some areas also for the EU15. For instance, the old Member States are entitled to derogations from Article 39 EC (free movement of workers) and the first paragraph of Article 49 EC (freedom to provide services including temporary movement of workers) in respect of the eight new Member States from Central and Eastern Europe but not with regard to Malta and Cyprus. These derogations include a two-year period during which national measures will be applied by current Member States to new Member

States, with an option for the Fifteen to continue these measures for a further three years and potentially even five years provided there are 'serious disturbances' of their labour market or 'a threat thereof' (2+3+2). Additionally, the transitional arrangement includes a standstill provision, which prevents the EU15 to apply conditions for access to their labour markets that are more restrictive than those prevailing on the date of signature of the Treaty of Accession. When there is a need for foreign workers preference should be given to workers who are nationals of EU Member States over workers who are nationals of third countries. Other examples of transitional arrangements protecting the old Member States' interests are to be found in the chapter on free movement of services: until the end of 2007 the EU15 retain, under certain conditions, the right to prevent the establishment of a branch of a Lithuanian credit institution.

The vast majority of pre-determined transitional arrangements almost exclusively concern the new Member States. For instance, the acquisition of agricultural land and forests will be governed under the national legislation of Lithuania up to seven years after the date of accession. The AA further provides that EU nationals may not be treated less favourably than at the date of signature of the Accession Treaty (standstill provision) and they may not be treated in a more restrictive way than a national of a third country. Additionally, no differential treatment in comparison to Lithuanian nationals is allowed for EU citizens who wish to establish themselves as self-employed farmers and reside in Lithuania and who have been legally resident and active in farming in Lithuania for at least three consecutive years.

Numerous derogations are to be found in the field of agriculture and environment. This means that Lithuania does not have to fulfil all requirements regarding production methods and levels of emissions of certain pollutants into the air. For instance, the emission limit values for sulphur dioxide and for nitrogen oxides shall not apply in Lithuania until 31 December 2015 for large combustion plants in Vilnius, Kaunas and Mazeikliai. Lithuania is also allowed to apply its own legislation relating to the fat content in drinking milk until January 2009.

In addition to these pre-determined transitional measures, Article 41 and 42 AA allow for the introduction of transitional measures in the field of agriculture and with regard to the application of the Community veterinary and phytosanitary rules during the first three years after accession. On this legal basis, the Commission has already instituted several regulations and decisions which impose restrictions to the free movement of food products originating in one of the new Member States. These products may only be sold in the country of origin and/or require special markings. The possibility to adopt such additional transitional arrangements creates a supplementary differentiation between the old and new Member States. For the EU15, the Commission can only bring these countries to the ECJ on the basis of Article 226 EC whereas for the new Member States the additional stick of transitional arrangements, which may exclude certain food products of the new Member States from the Community market, is available.

Safeguard clauses

Apart from the (pre-determined) transitional arrangements, the AA also includes three safeguard clauses on the basis of which application of the acquis could be restricted after accession. A general economic safeguard clause is nothing new and was also provided in previous accession treaties. In addition, the Treaty of Athens contains two specific safeguard clauses on the internal market and on Justice and Home Affairs.

2.4.1. The general economic safeguard clause (Art. 37 AA)

The general economic safeguard clause, contained in Article 37 AA, gives the Commission the power to institute temporary emergency measures to protect a sector of the economy or to protect against serious deterioration in the economic situation of a given area. Both the old and new Member States can inform the Commission about the desirability of such safeguard measures up to three years after accession. Upon request of the state concerned, the Commission determines, on the basis of an emergency procedure, the protective measures which it considers necessary and specifies the conditions and modalities of their application. The measures envisaged may involve derogations from the rules of the EC Treaty and the Act of Accession. Priority shall be given to those measures that will least disturb the functioning of the common market. The measures will take into account the interests of the parties concerned and cannot include the establishment of border controls. This general economic safeguard clause gives the new Member States a possibility to react to eventual economic shocks that certain regions or economic sectors might encounter as a result of accession. For the old Member States, on the other hand, this clause might be invoked in case of serious disturbances of transnational competition. In Declaration 43 to the Final Act, the Commission makes clear that the general economic

safeguard clause 'also covers agriculture'. Safeguard measures may be instituted in respect of the agriculture sector due to the extent of specific problems of the agricultural sector in Poland. To this end, the Commission made clear that the measures envisaged 'may include systems of monitoring of trade flows between Poland and other Member States.'

The Internal Market safeguard clause (Art. 38 AA)

The Commission may also take 'appropriate measures' under Article 38 Act of Accession 'if a new Member State has failed to implement commitments undertaken in the context of the accession negotiations'. Such a failure must, however, cause 'a serious breach of the functioning of the internal market'. Remarkably, Article 38 AA defines the scope of the internal market safeguard clause broadly, including 'any commitments in all sectoral policies which concern economic activities with cross-border effect'. An 'imminent risk' of a breach of the functioning of the internal market is sufficient to trigger the application of the safeguard clause. Here the distinction with Article 226 EC, the Treaty basis for pursuing a Member State that has failed to meet its obligations, becomes obvious. Article 38 Act of Accession can be used as a tool of prevention anticipating eventual problems of compliance and implementation. Article 226 EC, on the other hand, can only be applied after a breach of the Community rules occurred and the Commission decided to start a procedure against the Member in question. As under Article 226 EC, the Commission has a wide discretion to apply the internal market safeguard clause. The Commission may act on the request of a Member State or on its own initiative. Safeguard measures may be imposed up to three years after accession. They can be kept after the end of the three-year period, as long as the relevant commitments are not implemented.

It is noteworthy that Article 38 AA refers to the broad notion of 'commitments undertaken in the context of accession negotiations'. 'One may wonder why reference is made to the negotiation process and not to the commitment enshrined in the Act of Accession itself, considering that the Act of Accession reflects the outcome of the negotiations and contains all essential commitments undertaken during these negotiations'. The ambiguity of the formulation of Article 38 AA has forced six new Member States to issue a joint declaration on the application of this Article. According to the Czech Republic, Estonia, Lithuania, Poland Slovenia and the Slovak Republic, 'the notion 'has failed to implement commitments undertaken in the accession negotiations' only covers the obligations that are arising from the original Treaties … under the conditions laid down in the Act of Accession, and the obligations defined in this Act.' Accordingly, these six new Member States understand that the use of the internal market safeguard clause is restricted to failures to fulfil Treaty obligations, in the same way as under Article 226 EC. The Commission does not accept this point of view. In its own declaration on the safeguard clauses, the Commission only agrees to hear the view(s) and positions of the Member State(s) concerned before deciding to apply the safeguard measures. The Commission promises to take into account these views and positions. Article 38 AA further specifies that the safeguard measures must be proportionate and priority will be given to those that least disturb the functioning of the internal market. Moreover, they should not be invoked as a means of arbitrary discrimination or a disguised restriction of trade between Member States. Finally, 'the measures shall be maintained no longer than necessary, and, in any case, will be lifted when the relevant commitment is implemented.' As was already mentioned, this may imply that the application of the safeguard measures exceeds the period of three years after accession.

2.4.3. The Justice and Home Affairs safeguard clause (Art. 39 AA)

Except for the Schengen acquis, the Act of Accession does not contain any temporary derogations in the functioning of the so-called Area of Freedom, Security and Justice. The Member States, however, included a specific safeguard clause to address 'serious shortcomings or any imminent risks of such shortcomings in transposition, state of implementation or the application of framework decisions or any other relevant commitments, instruments of co-operation and decisions relating to mutual recognition in criminal law under Title VI of the TEU, and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty'. As with the internal market safeguard clause, the possibility of safeguard measures is targeted exclusively for shortcomings of the new Member States. The Commission has a wide discretion to adopt such measures, either on its own initiative or upon a motivated request of a Member State and after consulting the Member States. The latter requirement can be linked to the observation that the Act of Accession gives the Commission a power to adopt safeguard measures to Title VI TEU, whereas the Commission does not have such far-reaching powers under the TEU.

The JHA safeguard measures may take the form of 'temporary suspension of the application of relevant provisions and decisions in the relations between a new Member State and any other Member

State or Member States'. Such measures can be adopted during the first three years after accession but, as with the internal market safeguard clause, they can go beyond this period.

Conclusion

The Treaty of Accession adds with its actual and potential derogations from the application of the *acquis* new forms of differentiation between the Member States. Specific parts of the *acquis* are applicable for different groups of Member States. In some cases, this differentiation will end after a pre-determined period of time. For other areas, such as the inclusion of new Member States in the Schengen area or eurozone, differentiation will continue for an indefinite period.

This increased differentiation during the first years after accession is not unusual and reflects the complexity of the enlargement exercise. In comparison to previous enlargements, however, it seems that the conditions for accession have been strengthened. This practice leads to the observation of differentiation and a perception of double standards. For instance, the new Member States were not allowed to permanently derogate from the *acquis* or to opt out from those chapters where certain of the old Member States have opted out (Schengen and EMU). Most remarkable, however, is that two new forms of safeguard clauses included in the Act of Accession create a new form of legal differentiation in the EU. The broadly formulated internal market and JHA safeguard clauses are explicitly targeted at the new Member States, in addition to Article 226 EC which remains the only enforcement procedure applicable for the old Member States. The transitional arrangements in general and the safeguard clauses in particular thus provide the means for different and - according to some observers - potentially discriminatory treatment of the new Member States in comparison to the EU15.

In legal terms, the accession treaty introduces a complicated structure for the Union during the first years after accession by excluding or delaying participation in some policy areas and by providing for difference in the treatment of the new and old Member States for implementation and compliance with the *acquis communautaire*. The drafting of a new Accession Treaty, to be signed in 2007 with Bulgaria and Romania will add another set of transitional arrangements. Consequently, the future functioning of the EU will be characterised by increased differentiation: multiple combinations of Member States will participate in different activities of the Union.

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Stojimo sutartys ir diferenciacija Europos Sąjungoje

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Gento universitetas

Pagrindinės sąvokos: *Europos Sąjungos plėtra, Stojimo sutartis, teisiniai saugikliai, eurozona, Šengeno erdvė, pereinamojo laikotario susitarimai.*

SANTRAUKA

Po 2004 m. gegužės 1 d., kai į Europos Sąjungą įstojo daug naujų valstybių, iš esmės pasikeitė ES funkcionavimo pagrindas tiek instituciniu, tiek sprendimų priėmimo, tiek kompetencijos aspektu. Iš esmės pasikeitė ir Europos Sąjungos ateities vizija. Šiame straipsnyje daugiausia dėmesio skiriama naujųjų valstybių narių stojimo sutarčių analizei: nagrinėjama šių sutarčių struktūra, teisinė prigimtis, valstybių išsiderėti pereinamieji laikotarpiai ir ES saugumo klauzulės.

Pagrindinė straipsnio mintis yra ta, kad pereinamaisiais laikotarpiais naujosios valstybės narės negali lygiuotis į senąsias, kadangi ES acquis communautaire nėra perimamas visa apimtimi. Be to, pačios senosios valstybės narės stojimo sutartyse įtvirtinto saugumo klauzules, pasilikdamos sau teisę suspenduoti netinkamai adaptuojančios acquis naujosios valstybės narės narystę siekdamos užtikrinti tinkamą ES ekonomikos, vidaus rinkos, teisės ir vidaus reikalų raidą.

Visi šie aspektai išsamiai analizuojami pateikiant istorinį kontekstą ir atskirų stojimo sutarčių straipsnių analizę. Ypač daug dėmesio skiriama euro įvedimo ir naujųjų valstybių narių įsiliejimo į Šengeno erdvę pereinamiesiems laikotarpiams. Taip pat aptariami pereinamieji laikotarpiai laisvo darbuotojų judėjimo, laisvo paslaugų teikimo, žemės ūkio ir aplinkos apsaugos srityse.

Straipsnio pabaigoje pateikiamos išvados, kad ES ir naujųjų valstybių narių pasirašytos stojimo sutartys diferencijuoja jų padėtį senųjų valstybių narių atžvilgiu ir iš anksto numatė potencialų nukrypimą nuo vienodo ES acquis taikymo. Pabrėžiama, kad skirtingose naujųjų valstybių narių grupėse taikomos skirtingos ES acquis dalys, pereinamieji laikotarpiai nevienodos trukmės, o saugumo klauzulės užtikrina senųjų valstybių narių pranašumą.