Lecture II:

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THE ENLARGEMENT OF THE EUROPEAN UNION

I. General Background: Enlargement as an Inherent Principle of European Union Law

In 1957, when the founding Member States France, German, Italy, Belgium, Luxembourg and the Netherlands established the European Economic Community by the Treaty of Rome, they solemnly declared their determination to "lay the foundations of an ever closer union among the peoples of Europe"[1]. Since Europe is not confined to the six Western European countries it is clear that the future enlargement was *ab initio* an essential element of this project. One could even go so far to say that the enlargement entails the obligation of the existing Member States to admit other European States to the Union if they fulfil the pre-requisites for membership. This would totally be in line with the underlying idea of the Communities, and later of the European Union, to establish a united Europe in which wars as a means for settling disputes should once and forever be eliminated.

It is also interesting to note that the ever closer union should be formed among the *peoples* – and not among the States – of Europe, which is an indication that the process of unification should focus on the individuals, represented by their States and also by their representatives in the European Parliament. In legal terms, this is also reflected in the position of the individual in the Community legal system: unlike in traditional organizations, such as the UN or WTO, where States and their representatives are the only actors, in the EU/EC the individual or the company holds the predominant position which can be also be seen in the case law of the

[1] This declaration was later re-iterated by the Treaty of Maastricht in which the parties resolved to continue that process. Preamble, para. 12.

Courts. Also in this respect the EU is a unique international entity that directly affects the daily lives of its some 380 million citizens.

II. The Legal Framework for Enlargement

A. The Legal Basis in Primary Community Law

Despite these differences the EU has, however, one important element in common with traditional international organizations: membership and its acquisition. As has been said before, the original Communities contained an inherent element of enlargement extending to all peoples of Europe.

But neither the Communities nor the EU are open organizations. Countries intending to become members must undergo a procedure of admission after having made the necessary application. This procedure has undergone some changes. Before Maastricht, a country planning to become a member had to make three applications, namely to each of the three Communities. Membership in one or two Communities was theoretically possible, although it never happened. Austria, as a non-nuclear power State, was at one time considering skipping membership in the EURATOM. After Maastricht, membership in the European Union is the sole type possible, governed by one single Article, namely Art. 49 TEU, while simultaneously the “accession” Articles were deleted in the three EC Treaties

What are the conditions for EU membership? Art. 49 TEU contains substantive as well as procedural conditions. Above all, the applying State must be a European State. This question arose when Turkey and Morocco filed an application for EC membership in 1987.. Although 96 percent of Turkey’s territory is geographically in Asia, this State was, nevertheless, accepted as a European country, partly due to its history, when the Ottoman Empire for many centuries has had occupied large portions of Eastern European territories including what is now Albania, Greece, Romania, Bulgaria, Yugoslavia and most parts of Hungary. By virtue of the Peace Treaty of Paris, ending the Crimean War in 1856, the Ottoman

Empire was officially admitted to the Concert of Europe and it was generously allowed (quote) “to participate in the advantages of Public European Law” (Art. 7). In addition, Turkey became a member of the Council of Europe and also of the North Atlantic Treaty Organization. On the other hand, the Kingdom of Morocco, which based its application on its European orientation and its democratic credentials, was unsuccessful mainly for geographical reasons because its entire territory in situated on the African continent. It was the first and the only case in which the Council of Ministers rejected an application on the grounds that a candidate country is not a European State.. However, as a kind of consolation prize, Morocco was given a favourable trade agreement with the EU.

The second substantive criterion that was *de facto* applied to all previous accessions, but was formally included by the Treaty of Amsterdam in 1997, is that of the “European values”. Any candidate country must respect the four principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These principles are set out in Article 6 /1) TEU. Turkey’s application was hitherto unsuccessful because the human rights record of this country that, according to the Commission’s opinion given in 1989, was inconsistent with Community standards. In the meantime, the original Association Agreement of 1963, which basically established a free trade area, was upgraded to a customs union with effect from January 1996. It includes, with some restrictions, basically all the four freedoms (goods, persons, services and capital) with the exception of the liberalization of agricultural goods.

B. The Legal Basis in Secondary Law

1. Toward a Pan-European Union

These substantive principles were further elaborated by the so-called Copenhagen criteria in 1993. Their background was the collapse of Communism and the end of the division of Europe in 1989. Following these events a number of former socialist countries expressed their willingness to become member of the then European Communities. In a way, this seems paradox: countries which have

just gained their long desired independence, such as Slovenia, Slovakia and the Baltic States, or have freed themselves from Soviet political and economic predominance, such as Poland, Bulgaria, Hungary and Rumania, are now prepared to surrender a substantive part of the prerogatives and powers to a supranational organization, the EC and subsequently the EU! The only explanation seems to be that they expect economic assistance, political influence in a larger union and, last but not least, security.

The Community, on the other hand, has never before been faced with such a great number of candidate countries that, in addition, had an economic and political background entirely different to Western standards. For nearly three decades the EC had prospered in a divided Europe and it had lost sight of the fact that it represented only a part of Europe[2]. European integration was synonymous with Western integration, centered on the Rhine. It reacted rapidly: in 1989 it launched the *Poland-Hungary Actions for Economic Reconstruction* (PHARE) that was subsequently extended to other Central and Eastern European States (CEES). But forty years of Communist rule had left an appalling personal, political, and economic legacy. A successful transition from command or planned to free market economies required an enormous effort, both in terms of manpower and money. One had to introduce property laws, codes of business law, the development of banking services, the privatisation of state-owned companies, agricultural and industrial modernizations and many more reforms which were hitherto unknown to the EC in any of the previous enlargements. No wonder that some States, like France, Spain and Portugal, have opposed any such enlargement but, under general political pressure against their selfishness, they eventually came to their senses[3] and, however reluctantly, accepted the negotiation towards what was later called "Europe Agreements".

[2] Desmond Dinan185
[3] Ibid. 189.

These are Association Agreements designed to prepare a specific CEES for membership. The agreements were based on Article 310 (ex 238) EC Treaty according to which (quote)

"the Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".

These Europe Agreements were concluded between 1991 and 1993 with the CEES making explicit provision for eventual full membership of the European Union, but do not guarantee it. In substance, they were not entirely new: although the expression "Europe Agreements" was not in use at the time they were concluded, the already mentioned Association agreement with Turkey in 1963, Malta in 1979 and Cyprus in 1972 were also of this type, since in each case explicit reference is made to full membership.

2. The Copenhagen Criteria

When it became clear that these Europe Agreements did not – just like the EEA Agreement with the EFTA-Countries – deter the CEES from EC membership applications or did not at least delayed them, the European Council, after having no longer been concerned with the Maastricht ratification crisis, turned his attention fully to the eastward enlargement. At its meeting in Copenhagen in June 1993 it adopted the so-called Copenhagen Criteria, which, in fact, constitute an implementation of Article 49 EU Treaty. These criteria specify the conditions, which each candidate country has to fulfil in order to become a member of the EU.

At this meeting the European Council agreed that all central and eastern European Countries with Europe Agreements "that so desire shall become members of the European Union". These conditions were listed as

1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (new!):
2. The existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union, and
3. The ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union.

On that basis, accession negotiations began after the following applications for membership were made:

1. (Cyprus and Malta July 1990, Malta withdrawn October 1996, resumed in 1999)
2. Hungary and Poland March 1994
3. Romania and Slovakia: June 1995
4. Latvia: October 1995
5. Estonia, Lithuania and Bulgaria: October 1995
6. Czech Republic: January 1996 and
7. Slovenia:: June 1996

C. The Accession Procedure

Apart from the substantive requirements just discussed, a strict procedure outlined in Article 49 EU Treaty must be observed. In the course of the four (five with East Germany) previous enlargements, namely 1973 by the United Kingdom, Ireland and Denmark, Greece 1981, Portugal and Spain in 1986, (East Germany in October 1990 as a consequence of German reunification) and Austria, Finland and Sweden in 1995), his procedure has been further elaborated. It includes the following steps:

1. Application by the candidate State to the EU Council (of Ministers);
2. Delivery of an *avis* , a formal opinion by the European Commission after consultation with the European Parliament; if this avis is negative, the application will be put on hold; if it is positive , negotiations then begin with the applicant State, the Presidency of the Council and the Commission;
3. A draft Treaty of Accession and an Act of Accession is then initialled by the applicant State (or States) and by the representatives of the Member States; these instruments

contain the conditions of admission and the adjustments to the Treaties on which the Union is founded. Every admission entails a number of constitutional changes, such as voting powers, composition of institutions, etc.

4. These instruments must be approved by the European Parliament, which shall act by an absolute majority of its component members. The candidate State in question must, therefore, receive 314 affirmative votes (out of 626).
5. The Council must then cast a unanimous vote on the draft instruments. Following that decision, the
6. Instruments of accession are signed. The last ceremony took place on 24 June 1994 in Corfu, when the Member States and the four candidates Austria, Finland, Norway, and Sweden signed the Treaty of Accession. Finally,
7. The Treaty of Accession along with them Act of Accession must be ratified by all fifteen Member states and the candidate State or States. It will enter into force after all parties concerned have deposited the instrument of ratification in Rome.

III. The Present Status of the Negotiation Process

The original Community structure was designed for six Member States. Every enlargement required adaptations as to the composition of the institutions and other reforms. The Community and later the Union was able to “digest” these changes caused by additional nine (with East Germany 10) Member States, but was not able to cope with another twelve or thirteen. The institutional reform was on the agenda of the Intergovernmental Conference (IGC) 1996/97 but no agreement could be reached. It became one of the so-called Amsterdam leftovers, which required another IGC, which, in turn, convened in 2000 and culminated in the Treaty of Nice of 26 February 2001.

This treaty fixed the voting power of the candidate countries in the Council, the number of Commissioners and also the number of the representatives in the European Parliament from 2005 onwards. From this point of view, the door is open for the future enlargement.

As regards the negotiation process, on 31 March 1998, accession negotiations were started with six applicant countries – Hungary, Poland, Estonia, the Czech Republic, Slovenia and Cyprus. On 13 October 1999, the Commission recommended Member States to open negotiations with Romania, the Slovak Republic, Latvia, Lithuania Bulgaria and Malta. The European Council in Helsinki in December 1999 decided to open negotiations with those countries and accepted Turkey in a formal way as a candidate without, however, giving the authorization to the Council and the Commission to open negotiations.

These negotiations determine the conditions under which each applicant country will join the European Union. In joining the Union, applicants are expected to accept the "*acquis*"[4], i.e. detailed laws and rules adopted on the basis of the EU's founding Treaties, mainly the treaties of Rome, Maastricht, Amsterdam and Nice. The acquis is subdivided into 31 chapters. These chapters include the four freedoms (movement of goods, of persons, of services and of capital: chapter 1 to 4), company law (Ch. 5), competition (ch.6), agriculture (ch.7) fisheries (ch.8), energy (ch.14), environment (ch.22), external relation (ch.26) etc.

The pace of negotiations depends on the capacity and willingness of the particular candidate country to adopt the acquis. This allows ambitious countries to overtake the slower ones. On the basis of this principle of differentiation is was possible for some "newcomers" after the summit of Helsinki, such as Slovakia, to catch up with, say, its brother the Czech Republic. This is also called the regatta principle that is supported by the so-called accession partnerships with each individual candidate. This includes technical and financial assistance which, however, can be withdrawn if, for some reasons or another, the candidate country has failed to do its homework.. According to the roadmap all negotiations should be concluded by the end of the year 2003. It is hoped that some of the candidate

[4] Originally "acquis communautaire". Now 3 pillars !

countries could participate in the parliamentary elections for the next period from 2004 – 2009.

Finally, we may have at look at the State of Play of the accession negotiations

Slovenia is the leader of the regatta with 26 chapters closed, followed by Cyprus, the Czech Republic and Hungary with 24 chapters closed, followed by Latvia and Lithuania with 23, Slovakia with 22 chapters closed. Malta, Estonia and Poland have 20 chapters closed, Bulgaria 14 and, limping behind, Rumania with 9 chapters closed. It is expected that the first round of accession will include at least seven, if not more, countries. It will, in any case, the future accessions will include the highest number of States which in history have joined the European Union,.