

## Editorial Note

Marise Cremona\*

2011 will see – if all goes according to plan – the most important stage yet in the story of Croatia’s relationship with the EU since 1992: the signing of the Treaty of Accession between Croatia and the current 27 Member States of the EU. Over the last 20 years we have moved from the EU’s so-called ‘Regional Approach to South-East Europe’ based upon the April 1997 Council Conclusions on conditionality,<sup>1</sup> to the Stabilisation and Association Process launched in 1999,<sup>2</sup> the signing of the Stabilisation and Association Agreement which accepted Croatia as a ‘potential candidate’ state in October 2001, and its conclusion in December 2004,<sup>3</sup> Croatia’s application for membership of the EU in March 2003 and its acceptance as a candidate state in June 2003, the opening of accession negotiations in June 2005 and the formal closing of the negotiations on 30 June 2011. The European Council in its Conclusions of 23-24 June 2011 envisages signing the Accession Treaty by the end of 2011, and the text of the Treaty was made public in September this year.<sup>4</sup> Assuming – and it is of course quite an assumption – that all the stages of signature and ratification by all parties go smoothly, Croatia will become the 28th member of the EU on 1 July 2013.

The process of this latest enlargement of the EU has been very different from the first enlargements in the 1970s and 1980s. As Hillion has pointed out, enlargement has moved from a *procedure* to a *policy*.<sup>5</sup> This

---

\* Professor of European Law, Head of the Law Department at the European University Institute (EUI), Florence, Italy.

<sup>1</sup> Council Guidelines for future negotiations with and between the parties to the conflict in former Yugoslavia (30 October 1995) Bulletin EU 10-1995, 138; Commission Communication on common principles for relations with the countries of the Regional Approach, COM (96) 476 final, 2 October 1996; Council Conclusions on the Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region (1997) Bulletin EU 4-1997, 132.

<sup>2</sup> Commission Communication to the Council and the European Parliament on the Stabilisation and Association Process for countries of South-Eastern Europe; Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia and Albania, COM (99) 235 final, 26 May 1999.

<sup>3</sup> Council and Commission Decision 2005/40/EC, Euratom of 13 December 2004 concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L 26/1.

<sup>4</sup> Council document ‘Treaty concerning the accession of the Republic of Croatia’ (2011) Brussels 14509/11, 21 September 2011.

<sup>5</sup> Christophe Hillion, ‘The Creeping Nationalisation of EU Enlargement Policy’, SIEPS Report 2010:6 <<http://www.sieps.se/en/publikationer/the-creeping-nationalisation-of-the-eu-enlargement-policy-20106>> accessed 18 November 2011.

in itself points to the dual nature of enlargement: as both a policy of the Union and as a Treaty of Accession concluded on the EU side by the Member States. It has in fact since 1993<sup>6</sup> become an on-going policy process, with a continuing procession of countries accepted as potential candidates and then candidates; currently there are eight countries involved in addition to Croatia.<sup>7</sup> The two aspects of enlargement are reflected in the single Treaty provision which deals with the process, Article 49 TEU. The process is highly institutionalised: the application for membership is addressed to the Council; the European Council may – a practice codified by the Lisbon Treaty – establish ‘conditions of eligibility’; the Commission gives a formal opinion and manages the negotiations; the European Parliament must consent. But accession itself requires a new Treaty to be ratified by all the contracting states. Ultimately each Member State must not only agree within the Council but subject the Treaty to national constitutional ratification requirements. Over the years and different enlargements we can see shifts in the balance between these two dimensions. Hillion has identified a number of developments in recent years which he argues represent an increased level of control by the Member States amounting to a nationalisation, or renationalisation, of enlargement policy: the introduction of benchmarks (stricter application of membership criteria); adjustments to the accession procedure by reinterpreting the Article 49 TFEU rules (for example, by introducing conditionality); the increased emphasis on ‘absorption capacity’; and de facto barriers to enlargement imposed at (bilateral) national level.

Perhaps the surprising thing is not that enlargement has been (re)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 EFTA enlargement and the 2004 and 2007 central and eastern European 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 central and eastern European countries in the early 1990s, thus changing the question from ‘whether’ to ‘when’. The size of the central and eastern European enlargement also played a part, the need to demonstrate the objectivity

---

<sup>6</sup> I choose this as the date of the Copenhagen European Council which established the ‘Copenhagen criteria’ for EU membership and which established a political commitment to enlargement towards the countries of Central and Eastern Europe.

<sup>7</sup> Currently Croatia, Turkey, Iceland, Montenegro and the Former Yugoslav Republic of Macedonia are ‘candidates’ for EU membership. Albania, Bosnia and Herzegovina, Serbia and Kosovo ‘under UN Security Council Resolution 1244’ are ‘potential candidates’.

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)? The group of states that are actual or potential candidates is more diverse and the attitudes of Member States are more divided than in previous enlargements. We can also 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.

‘Widening versus deepening’ surfaced as an issue in the early 1990s when the fall of the Berlin Wall and massive changes in central and eastern Europe coincided with the pre-Treaty of Maastricht debates about Economic and Monetary Union, the creation of the Common Foreign and Security Policy and the new cooperation on migration and crime. It was feared by some (and possibly desired by others) that enlargement on the scale implied by the commitments being made to the central and eastern European countries (and the lack of clarity about which countries would be included in this commitment) would compromise the grand projects 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. Another was the said to be the need for continuity through a permanent Union Presidency and a High Representative for Foreign and Security Policy, taking over many of the functions of the rotating national presidencies.

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 numbers of votes in the Council, but implies a tangible commitment to solidarity between Mem-

ber States. The financial crisis has brought home just 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<sup>8</sup> 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.

Solidarity, however, has an external as well as an internal dimension. The EU's enlargement policy towards central and eastern Europe over the last 20 years is not only seen as a successful foreign policy which contributes to achieving the broader foreign policy aims of stability and security. It has immense political and even psychological significance as a 'return to Europe' by the central and eastern European states, a reunification of Europe following the end of the divisions of the Cold War, and with significant and problematic potential for redrawing the boundaries of – and within – Europe. It thus has significance beyond its current membership, and with its explicit conditionality has become an instrument of economic, political and legal change beyond its boundaries. If membership is to be an option for all European States and if enlargement is to be used as an instrument of Union policy, designed to stabilize and restructure Europe, then conditionality –whatever criticism may be made in terms of accountability – is a key to its success. The relationship between solidarity and conditionality is a complex one, both within the context of enlargement policy and – increasingly – within the EU itself.<sup>9</sup> As originally conceived, enlargement conditionality played a gate-keeping role, making possible the EU's internal solidarity based on mutual trust and loyalty. The need to establish trust, and not least to establish the institutional mechanisms which are the foundation for that trust, is one objective of the different elements of the pre-accession process, including conditionality. However the 2004 and 2007 enlargements introduced a new element into the Accession Treaties, an element which has been replicated in the draft Accession Treaty with Croatia, and which accepts a continuation of conditionality for a limited period after accession thro-

---

<sup>8</sup> Case C438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I10779; Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767.

<sup>9</sup> Marise Cremona, 'EU Enlargement: Solidarity and Conditionality' (2005) *European Law Review* vol. 30, issue 1, 3-22.

ugh monitoring and the possibility of safeguard measures being taken where there is a failure to implement commitments.<sup>10</sup> Significantly, this importing of conditionality into the internal system of the EU, so that it is no longer limited to pre-accession but continues as the complement to internal solidarity, is also a defining feature of the EU's response to the most serious crisis in its history. It is clear that applying conditions prior to admittance to the euro zone is not enough; a regular and potentially intrusive monitoring of domestic economic policy by EU institutions is increasingly accepted as inevitable and necessary given the degree of solidarity demanded by monetary union. And this conditionality is not only applicable for a limited post-accession period but is becoming entrenched into the very conception of membership. The Union that I hope Croatia will join in 2013 will look very different from the Union of 1993 or even 2003.

Florence, November 2011

---

<sup>10</sup> Articles 36, 38 and 39 of the draft Accession Treaty with Croatia (n 4).

