Negotiating Turkey's Membership to the European Union

Can the Member States Do As They Please?

Christophe Hillion*

Limits to member states' discretion in European Union enlargement negotiations – Changing the fundamentals of the EU constitutional order through the conclusion of accession treaties – The case of Turkey – Caveats, precautions and fallback strategies in the 'Negotiating Framework for Turkey' – Enforcing the limits to member states' discretion in European Union enlargement negotiations – The jurisdiction of the European Court of Justice before ratification and after entry into force.

Introduction

The meaning and significance of constitutional principles are not found in the constitutional text so much as in constitutional practice. This is true for states and for the European Union. In this article, it will be shown that studying the 'nitty-gritty' of the enlargement process of the European Union is a fruitful exercise to expose vital components of the EU constitutional order.

In many European states, enlarging the territorial scope of the constitutional order has of old been subject to special procedures requiring parliamentary approval. In a sense, it changes the outlook of the constitutional order itself. This may be at the background of the amendment to the French Constitution requiring a referendum for every enlargement of the European Union after the accession of Bulgaria and Romania.[1] The question is, however, to what extent substantive

* Europa Instituut, University of Leiden. This paper is based on the author's inaugural lecture given at the University of Leiden in March 2006. The author would like to express his gratitude to Anne Myrjord, Alan Dashwood, Marise Cremona, Michael Dougan, Tom Eijsbouts and Leonard Besselink for their invaluable comments, suggestions and support. The usual disclaimers apply.

[1] Art. 88-5: 'Tout projet de loi autorisant la ratification d'un traité relatif à l'adhésion d'un Etat à l'Union européenne et aux Communautés européennes est soumis au référendum par le Président de la République.' A somewhat similar constitutional amendment is pending in the

European Constitutional Law Review, 3: 269–284, 2007

DOI: 101017/S1574019607002696

amendments to, or infringements of the very principles of the constitutional order can be allowed in the process of accession of a new member. For the European Union and, more particulary for its member states, this raises profound questions concerning the extent to which member states are free to conclude treaties of accession. Can they go so far as to change the fundamentals of the EU constitutional order itself?

Negotiating the accession of Turkey

On the 3rd of October 2005, the member states of the European Union decided to open accession negotiations with the Republic of Turkey. That decision was particularly difficult to reach, given several states' worries about the possible negative consequences of Turkish membership. These fears are indeed reflected in the so-called 'Negotiating Framework for Turkey', adopted the same day by the (then) 25 member states. It is a short document, which sets out the principles, the contents and the modalities of the enlargement negotiations with Turkey.[2]

At first sight, this Negotiating Framework resembles the frameworks adopted hitherto with respect to previous candidates. However, as one often finds, the 'devil is in the detail'. The document contains caveats and precautions of a new form, inserted to reassure the existing member states. Some elements of the framework may be regarded as fallback strategies, that is to say, strategies for the European Union to delay, if not to prevent Turkish membership.

Consider, for instance, the second paragraph of the Framework. It states that while accession is a shared objective, the negotiations are nonetheless 'an open process, the outcome of which cannot be guaranteed beforehand.' It also stipulates that, should accession not take place, it must be ensured that 'Turkey is fully anchored in the European structures through the strongest possible bonds'. While negotiations are always open-ended, the mention of alternatives to accession, right from the start of the negotiation process, is in itself remarkable.

Another innovative element can be found in paragraph 13 of the Negotiating Framework. This paragraph sets a date before which, in any event, Turkey's accession to the Union cannot take place. More precisely, it states that Turkey cannot join before the member states have decided on the Union budget for the period starting in 2014. While the 'absorption capacity' of the Union is an established enlargement condition,[3] the Negotiating Framework for Turkey goes one step further by specifying the contents of this condition.

Netherlands, proposing parliamentary approval with a qualified majority not only for substantive amendments of the founding Treaties, but also for enlargement treaties, *Kamerstukken TK* [Parliamentary Documents, Lower House] 30874, nrs 1-3.

[2] The Negotiating Framework can be found at: <http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_TR_framedoc_en.pdf> (last visited 3 Jan. 2007)

[3] The Copenhagen European Council of June 1993 held that accession to the European Union is not only subject to political, economic and legal conditions (the so-called 'Copenhagen

The novel issue upon which I would like to dwell concerns the tools available to the current member states to alleviate the possible negative implications of Turkish membership once Turkey has *entered* the Union. In this respect, the key phrase in the Negotiating Framework reads as follows: '[l]ong transitional periods, derogations, specific arrangements or permanent safeguard clauses … may be considered'.[4]

Transition periods and temporary derogations of the application of EU rules are well-known topics of membership negotiations and have traditionally been an integral part of accession treaties.[5] What is intriguing in the Negotiating Framework for Turkey is the mention of *permanent* safeguard clauses, which the document defines as 'clauses which are permanently available as a basis for safeguard measures'. It also specifies that such mechanisms may be envisaged in areas such as freedom of movement of persons, structural policies or agriculture.

What could this mean in practice? Imagine that Turkey has been accepted as a member of the Union. On a permanent basis, other member states and/or Union institutions would have the possibility of suspending the right of Turkish nationals to move freely within the internal market. Similarly, they could decide to differentiate between Turkey and the other member states as regards the allocation of funds under the agricultural and structural policies.

The stated rationale of such arrangements is to protect the European integration process against possible disturbances following the accession of a new member state. However, I would argue that the *permanent* possibility to limit, notably, the free movement of persons could paradoxically constitute an erosion, not a protection of core elements of the so-called *acquis communautaire*, which is the body of rules and principles underpinning European integration.[6] Put in more colloquial language, the member states want to have their cake and eat it, too.

criteria'), but it is also dependent on the Union's 'capacity to absorb new Members while maintaining the momentum for integration', *see* Copenhagen European Council, Presidency Conclusions, pt. 7 (iii).

[4] Para. 12, 4th indent of the Negotiating Framework.

[5] *See*, in this regard, the conclusions of the 1969 Hague Summit of the Heads of State or Government of the (then) six EEC member states, *also* J.P. Puissochet, *The Enlargement of the European Communities* (Sijthof, 1975) p. 6-7. The 2003 Accession Treaty signed with the ten countries that acceded to the Union on 1 May 2004 contains various examples of such transitional arrangements, *OJ* [2003] L 236/33; further: K. Inglis, 'The Union's fifth accession treaty: New means to make enlargement possible', 41 *CMLRev* (2004) p. 937; M. Dougan, 'A Spectre is Haunting Europe … Free Movement of Persons and the Eastern Enlargement' in C. Hillion (ed.), *EU Enlargement – A Legal Approach* (Hart Publishing, 2004) p. 111; C. Hillion, 'The European Union is dead. Long live the European Union … A commentary on the Treaty of Accession 2003', 29 *European Law Review* (2004) p. 583.

[6] On the *acquis see* in particular the insightful article of C. Curti Gialdino, 'Some reflections on the acquis communautaire', 32 *CMLRev* (1995) p. 1089; S. Weatherill, 'Safeguarding the Acquis Communautaire' in T. Heukels et al. (eds.), *The European Union after Amsterdam* (Kluwer Law International, 1998) p. 153; C. Delcourt, 'The *acquis communautaire*: Has the concept had its day?', 38 *CMLRev.* (2001) p. 829.

This paradox begs the following questions: Are the member states allowed to do such a thing? Can they, from a legal point of view, insert any clauses they want in the accession treaty? Some would say yes. Given that the accession treaty is in principle a purely intergovernmental treaty,[7] member states should be free to decide its contents. I intend to argue that this assertion should however be qualified, by demonstrating first that there are indeed limits to the member states' discretion in enlargement negotiations,[8] and secondly that, should they cross those limits, the member states ought not to feel entirely safe from judicial scrutiny, even though they may be acting outside of the Community framework.

In raising these issues, it is not my intention to take any position as to the expediency or suitability of Turkey's accession to the European Union. I want simply to identify the legal parameters within which the accession negotiations will go forward. Of course, I am perfectly well aware that politics, not law, will determine the outcome of these negotiations. However, if there are serious legal objections to some elements of the negotiating framework, these may have some consequences at the political level, by either facilitating or impeding the formation of an acceptable compromise.

Allow me first to highlight the principles limiting the discretion of member states *qua* negotiators and contracting parties to an accession treaty; I will then suggest the ways in which these principles could be upheld and applied.

Establishing the limits to member states' discretion in EU enlargement negotiations

Procedural limits

The procedure for enlarging the European Union is set out in Article 49 of the Treaty on European Union.[9] It grants the member states a pivotal role in negoti-

[7] Art. 49 EU refers to 'an agreement between the Member States and the applicant State … [which] shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements'.

[8] Limits to member states' discretion in accession negotiations have been discussed, to some extent, in academic literature; *see*, e.g., U. Becker, 'EU-Enlargements and Limits to Amendments of the E.C. Treaty', Jean Monnet Working Paper 15/01; <http://www.jeanmonnetprogram.org/papers/01/013801.rtf> (last visited on 3 Jan. 2007).

[9] Art. 49 EU reads as follows:
'Any European State which respects the principles set out in Art. 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.'

ating, concluding and ratifying the accession treaty with the candidate state. However, the EU institutions are also part of the process. Accession cannot take place without the consent of the European Parliament. In addition, the European Commission must provide the Council with an Opinion, before the latter can take the unanimous decision to proceed with enlargement.

Article 49 EU has a mandatory character and, therefore, member states cannot enlarge the Union outside the procedure contained in this Article.[10] Moreover, this procedure is aimed specifically at extending Union membership rights and duties to another state. In other words, Article 49 EU cannot be used to establish a treaty which does not have the object and the effect of bringing the candidate country into the Union, as a full member.

Preservation of the acquis: A key objective of the Union

However, what should an accession treaty contain? Article 49 EU talks about 'conditions of admission and … adjustments to the [EU] Treaties' necessitated by enlargement. The same Article provides that negotiations to determine those conditions and adjustments take place between European Union member states and the candidate state. Negotiations are therefore intergovernmental. Nevertheless, does this mean that the member states have unfettered freedom to define the modalities of Union enlargement? That is what the European Court of Justice seems to suggest. In its *Mattheus* v. *Doego* ruling,[11] the Court held that the provisions of Article 49 EU establish:

> [a] precise procedure encompassed within well-defined limits for the admission of new Member States, during which the conditions of accession are to be drawn up by the authorities indicated in the article itself.
> Thus the legal conditions for such accession remain to be defined in the context of that procedure without it being possible to determine the content judicially in advance.

The Court concluded that it could not 'give a ruling on the form or subject-matter of the conditions which might be adopted'. Adding that 'it is impossible to determine the content of the legal conditions for admission in advance', the Court appeared to preserve the full bargaining powers of negotiators to determine such legal conditions.

[10] In the same vein, the provisions of Art. 48 EU, based on the old Art. 236 EEC on the revision of the Treaties, have a mandatory character [Case 43/75 *Defrenne* [1976] *ECR* 480, para. 58]. Further: B. de Witte, 'International Agreement or European Constitution' in J.A. Winter et al. (eds.), *Reforming the Treaty on European Union – The Legal Debate* (Kluwer Law International, 1996) p. 3 at p. 15.

[11] Case 93/78 *Mattheus* v. *Doego* [1978] *ECR* 2203.

At the same time, the Luxembourg judges pointed out that the procedure of Article 49 EU is 'encompassed within well-defined limits'. While they did not give any indications as to the nature or form of those 'well-defined limits', the Commission did. In its observations submitted to the Court, it argued that when they take part in accession negotiations, states are subject to the following restrictions. First, derogations from Community law may only be of limited duration. Secondly, adjustments to the Treaty may only be made insofar as it proves to be necessary by reason of the accession. Thirdly, when making adjustments to the *acquis*, the member states may not depart from the principles governing the Community.

The Commission's contention that there are some principles from which the member states and institutions may not depart was subsequently hinted at by the Court in its so-called first *EEA* Opinion. In particular, it found that the European Economic Area Agreement was incompatible with some provisions of the EC Treaty and 'more generally, *with the very foundations* of the Community' [emphasis added].[12]

Article 2 EU codifies this notion. It provides that one of the objectives of the European Union is 'to maintain in full the *acquis communautaire*'. Furthermore, Article 3 of the same Treaty stipulates that the institutions of the Union shall respect and build upon the *acquis communautaire*. Therefore, member states and institutions should not retreat from or decrease the degree of integration hitherto achieved. Indeed, observance of this principle is guaranteed by the European Court of Justice, through Article 47 EU.[13]

Another textual argument that supports the proposition that member states may not derogate from the core of the Community legal order is to be found in Article 10 of the EC Treaty. Article 10 EC expresses the general principle of loyal co-operation. One of the key elements of this principle is that the member states and institutions shall abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. Importantly, this principle applies not only in

[12] Opinion 1/91 *EEA* [1991] *ECR* I-6079. Further: J.L. da Cruz Vilaça & N. Piçarra, 'Y a-t-il des limites matérielles à la révision des traités instituant les Communautés européennes?', 29 *Cahier de Droit Européen* (1993) p. 3.

[13] Art. 47 EU provides that: '[s]ubject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.' Art. 46 EU establishes the Court's jurisdiction on those provisions; *see* in this regard: e.g., Case C-176/03 *Commission* v. *Council* [2005] *ECR* I-7879; Case C-170/96 *Commission* v. *Council* [1998] *ECR* I-2763; other cases are pending: e.g., C-91/05 *Commission* v. *Council*, *OJ* [2005] C 115/10, and Case C-440/05 *Commission* v. *Council*.

the context of the EC Treaty,[14] but also governs member states' actions in the context of the European Union.[15] Arguably, the principle obliges member states even when they exercise their reserved powers, like in the field of foreign policy.[16]

It is my contention that the permanent safeguard clause mooted by the member states in the Negotiating Framework for Turkey would constitute a permanent threat to the *acquis*, thereby jeopardizing the attainment of one of the key objectives of the Union. In particular, the clause does not fit easily with what must be considered a fundamental component of the *acquis communautaire*, namely, the principle of non-discrimination based on nationality.

Non-discrimination and the internal market

The principle of non-discrimination is a cornerstone of the internal market based on the free movement of goods, services, capital and persons.[17] In a specific expression of the general principle of equality,[18] Article 12 EC states that within the scope of application of the EC Treaty any discrimination on the grounds of nationality shall be prohibited.[19] This provision is situated in Part One of the EC Treaty entitled 'principles', indicating its fundamental nature.[20]

[14] In this regard: Case C-266/03 *Commission* v. *Luxembourg* [2005] *ECR* I-4805, particularly para. 58; Case C-433/03 *Commission* v. *Germany* [2005] *ECR* I-6985.

[15] *See* in this regard: Case C-105/03 *Pupino* [2005] *ECR* I-5285; and the Opinion of AG Kokott delivered on 11 Nov. 2004, at paras. 24-26.

[16] In Case C-124/95 *Centro-Com* [1997] *ECR* I-81, the Court of Justice emphasized that member states must exercise their retained competence in the field of foreign and security policy in a manner consistent with Community Law (para. 25). *See also* Case C-266/03 *Commission* v. *Luxembourg* [2005] *ECR* I-4805.

[17] The connection between the principle of non-discrimination on the basis of nationality and the fundamental freedoms is recalled by AG Jacobs in his Opinion of 20 Nov. 2003 in Case C-224/02 *Pusa* [2004] *ECR* I-5763. The link is also explicit in Art. I-4 of the Treaty establishing a Constitution for Europe [*OJEU* 2004 C 310]. On the scope of application of the principle, *see* AG Maduro's Opinion of 16 Dec. 2004 in Case C-160/03 *Spain* v. *Eurojust* [2005] *ECR* I-2077.

[18] *See*, e.g., Case C-224/00 *Commission* v. *Italy* [2002] *ECR* I-2965.

[19] Art. 12 EC applies without prejudice to other provisions of the EC Treaty. For instance, Art. 39 EC on the free movement of workers specifies in its para. 2 that 'such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment' (*see* in this regard, e.g., Case C-411/98 *Ferlini* [2000] *ECR* I-8081). Also, as pointed out by the European Court of Justice, the provisions of Art. 43 EC (freedom of establishment) and Art. 49 EC (freedom to provide services) are 'a specific expression of the principle of non-discrimination'; *see*, e.g., Case C-234/03 *Contse and others* [2005] *ECR* I-9315.

[20] *See* in this regard, Case 43/75 *Defrenne* [1976] *ECR* 480, para. 28. Further on the reach of this principle: S. Weatherill, *Law and Integration in the European Union* (Clarendon Press, 1995) p. 39 et seq. On the notion of principles more generally, *see* C. Flaesh-Mougin, 'Typologie des principes de l'Union européenne' in *Le droit de l'Union européenne en principes*, Liber amicorum en l'honneur de Jean Raux (Apogée, 2006) p. 99.

At the same time, EU law foresees exceptions to the rights to equality and free movement. For instance, in regard to free movement of workers, Article 39(4) of the EC Treaty allows member states to restrict access to employment in their public service sector.[21] Moreover, paragraph 3 of the same Article points out that the rights connected to the free movement of workers may be subject to limitations justified on grounds of public policy, public security or public health. These grounds were elaborated in a Council Directive of 1964,[22] which confirmed that the member states may restrict the rights of nationals of other member states to enter and reside in their territory, in their capacity as workers, self-employed persons or service providers. Importantly, however, restrictive measures taken by the member states should be based exclusively on the personal conduct of the individuals concerned.[23]

A permanent safeguard clause would confer on EU institutions[24] a constant ability to take away the free movement rights of Turkish workers, self-employed persons, or service providers, not because of their personal conduct, but simply because of their nationality. The accession treaty would thus introduce a differentiated enjoyment of fundamental freedoms along national lines. Differentiating the rights of persons who are in the same situation, merely on the basis of nationality, is clearly tantamount to the type of discrimination Article 12 EC prohibits as a fundamental principle of the Community legal order.

The grounds justifying member states' restrictions to equality and free movement of persons have been clarified by the European Court of Justice. This case-law was in turn codified in the 2004 directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member states.[25]

[21] In this respect, *see*, e.g., Case C-149/79 *Commission* v. *Belgium* [1980] *ECR* 3881.

[22] Council Directive 64/221/EEC of 25 Feb. 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, *OJ* [1963-64] L 850/117, special edition. This directive has been repealed and replaced by the 2004 directive on the right of citizens of the Union, *see infra* n. 25.

[23] Art. 3 of Directive 64/221/EEC. In this respect: *see*, e.g., Case 41/74 *Van Duyn* v. *Home Office* [1974] *ECR* 1337; Case 36/75 *Rutili* [1975] *ECR* 1219; Case 30/77 *Bouchereau* [1977] *ECR* 1999; Case C-348/96 *Calfa* [1999] *ECR* I-11; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] *ECR* I-5257; Case C-503/03 *Commission* v. *Spain* [2006] *ECR* I-1097; Case C-441/02 *Commission* v. *Germany* [2006] *ECR* I-3449.

[24] The reference to this potential EU institutions' power is based on precedents. For instance, in the 2003 Accession Treaty concluded with the ten new member states, it is the *Commission* that has the exclusive power to adopt safeguard measures on the basis of Arts. 38 (temporary 'Internal Market' safeguard clause) and 39 (temporary 'Justice & Home Affairs' safeguard clause) of the Act of Accession, *see OJ* [2003] L 236/33.

[25] European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states [hereinafter the 'Citizens directive'] amending Regulation (EEC) No. 1612/68

Non-discrimination and EU citizenship

However, this citizens directive, which member state legislation had to comply with in 2006,[26] is not only a codification of existing case-law. It also establishes that the principle of non-discrimination on the basis of nationality is no longer limited solely to individuals engaged in cross-border economic activities.

The origin of this line of thought is to be found in the provisions on European citizenship, established by the Treaty on European Union signed in Maastricht.[27] According to paragraph 1 of Article 17 EC, '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. These provisions mean that as soon as Turkey becomes a member state, its nationals, as 'nationals of a Member State', acquire *ipso facto* European citizenship.[28]

Paragraph 2 of the same Article stipulates that citizens of the Union shall enjoy the rights conferred by the Treaty. Article 18 of the EC Treaty clarifies those rights by stating that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect …'.[29]

As regards the limitations to the right to move freely, member states may, here as well, invoke public policy, public security or public health. However, as in the context of free movement of economically active EC nationals, these grounds can only justify restrictive measures against individuals, based on their personal conduct, and irrespective of their nationality.[30] Indeed, these grounds cannot be invoked to serve economic ends.[31] With respect to the right of residence, member states may require that Union citizens do not become an unreasonable burden on their social assistance system.[32]

More generally and more significantly, the Court of Justice has emphasized that European citizenship is destined to be the 'fundamental status of nationals of

and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* [2004] L 158/77.

[26] Art. 40 of the Citizens directive provides that member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by 30 April 2006.

[27] *OJ* [1992] C 191/1.

[28] Art. 2 of the Citizens directive; *see also* Case C-224/98 *D'Hoop* [2002] *ECR* I-6191; Case C-413/99 *Baumbast* [2002] *ECR* I-7091.

[29] Union Citizens' right to leave their country of origin is enshrined in Art. 4 of the Citizens directive, while their right to enter the territory of another member state is guaranteed by Art. 5 of the same directive.

[30] Art. 27(1) of the Citizens directive. *See also*, e.g., Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] *ECR* I-5257.

[31] Art. 27(1) of the Citizens directive.

[32] Arts. 7, 12, 13 and 14 of the Citizens directive. *See also*, e.g., Case C-413/99 *Baumbast* [2002] *ECR* I-7091; Case C-456/02 *Trojani* [2004] *ECR* I-7573.

the Member States'[33] enabling those who find themselves in the same situation to enjoy the same treatment in law. Difference of treatment can be justified only if it is based on objective considerations independent of nationality of the persons concerned, and provided that it is proportionate to the legitimate aim of the national provisions.[34] Indeed, the Court has emphasized that the status of citizen of the Union warrants a particularly restrictive interpretation of the derogations from the freedom of movement.[35]

The foregoing means that it is not only the Turkish workers, service providers and self-employed persons who should enjoy the right of free movement and the right not to be discriminated against on the basis of nationality. All Turkish nationals, as citizens of the Union, should enjoy these rights under EU law.[36] If it is eventually included in the accession treaty, a permanent safeguard clause could however allow the EU institutions to take away the rights inherent in European citizenship, by simple decision.[37] Put bluntly, the clause would entail that the Turkish nationals would not enjoy the same rights as other Union citizens. The European Union would thus become the proverbial animal farm where some citizens are more equal than others.[38] It is my contention that the clause would thus jeopardize the objective that European citizenship should be the *fundamental* status of nationals of member states.

One thing is to establish that an accession treaty containing such a permanent safeguard clause might constitute an erosion of the *acquis communautaire*. The next step is to envisage the means to prevent the member states from undermining fundamental principles of the European Union legal order. Or, put differently, how are the limits to member states' discretion in enlargement negotiations upheld, if at all?

[33] E.g., Case C- 184/99 *Grzelczyk* [2001] *ECR* 6193; Case C-413/99 *Baumbast* [2002] *ECR* I-7091; Case C-148/02 *Garcia Avello* [2003] *ECR* I-11613; Case C-200/02 *Zhu and Chen* [2004] *ECR* I-9925. The Court's case-law is recalled in the third indent of the Citizens directive's Preamble which reads as follows: 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence'.

[34] Case C-184/99 *Grzelczyk* [2001] *ECR* 6193; Case C-224/98 *D'Hoop* [2002] *ECR* I-6191.

[35] Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] *ECR* I-5257.

[36] It should be recalled that Art. 18 EC has direct effect: Case C- 184/99 *Grzelczyk* [2001] *ECR* 6193; Case C-200/02 *Zhu and Chen* [2004] *ECR* I-9925.

[37] *See supra* n. 24.

[38] The clause would also sit uneasily with the principle of equality of member states 'in relation to certain rules essential for the proper functioning of the Common Market', *see* Case 231/78 *Commission* v. *UK* [1979] *ECR* 1447, para. 9. This principle of equality is consolidated by Art. I-5 of the Treaty establishing a Constitution for Europe.

Enforcing the limits to member states' discretion in EU enlargement negotiations

During negotiations

First of all, the principle whereby the member states should not undermine the core elements of the *acquis* serves as a *guiding principle* during the accession negotiations. Indeed, the Negotiating Framework for Turkey stipulates in one of its first paragraphs that 'enlargement should strengthen the process of continuous … integration in which the Union and its Member States are engaged'.[39] This is a guiding principle not only aimed at the member states qua contracting parties,[40] but also at the institutions, given their extensive involvement in the negotiation process. They too are expected to act in a manner that would prevent an accession treaty from undermining the fundamental principles of the Union. As guardian of the Treaty, the Commission has, in principle, a particular responsibility in this respect to ensure that the *acquis* is preserved. The European Parliament could also withhold its consent to proceed with accession.

That being said, principles that limit member states' discretion risk remaining ineffective if they merely serve as guiding principles. That leads me to examine what role, if any, the judiciary could play in upholding such principles.

After the end of negotiation, before ratification

According to Article 46 EU, the European Court of Justice has jurisdiction on the provisions governing the admission of new member states, contained in Article 49 EU.[41] Any infringement of an essential procedural requirement provided in those provisions could therefore be challenged before the Court. For instance, if the Council was to proceed with enlargement without waiting for the European Parliament's assent, the latter could challenge the legality of the Council's decision on the basis of Article 230 EC.[42] The Commission could also contest the admission of a new member state if it were taking place outside the framework of Article 49 EU.

[39] Para. 3 of the Negotiating Framework.

[40] Hence, given that accession is subject to a unanimous decision of the Council, and in view of the requirement that the Treaty of Accession be ratified by each contracting party, any member state can prevent an accession that would be based on an accession treaty that would infringe the fundamental principles of the EU legal order.

[41] According to Art. 46 EU: '[t]he provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning *the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply … to… Articles 46 to 53* [EU] (emphasis added).'

[42] Case 138/79 *Roquette Frères SA* v. *Council* [1980] *ECR* 3333 and Case 139/79 *Maizena* v *Council* [1980] *ECR* 3393.

https://doi.org/10.1017/S1574019607002696 Published online by Cambridge University Press

However, the Court's jurisdiction is not restricted merely to ensuring adherence to the *procedural* stipulations of Article 49 EU. It may also ascertain that its *substantive* requirements are fulfilled.[43] Referring back to our initial question concerning the legality of including a permanent safeguard clause in an accession treaty with Turkey: How could the Court play a role to enforce the substantive limits of member states' discretion once accession negotiations are over?

One route could be the following. Suppose that one of the EU institutions or, although less probably, a member state is of the opinion that, by including the permanent safeguard clauses, the signed accession treaty fails to grant Turkey the fundamental rights of membership to the European Union. On the grounds that the envisaged treaty is therefore not an accession treaty in the sense of Article 49 EU, but an international Agreement covering, among other things, large areas of Community competence, that State or institution could ask the Court of Justice to examine the compatibility of the provisions of that envisaged treaty with the EC treaty, and determine whether the Community or any Community institution has the power to enter into that agreement, alongside the member states.[44] According to established case-law, it is not the label of an act that determines the Court's jurisdiction, but its contents and legal effects.[45] Obviously, if the Court considers that it is indeed an accession treaty in the sense of Article 49 EU, it will declare the case inadmissible.[46] The treaty might then enter into force once the ratification process is over. However, if the Court finds that the envisaged treaty is in effect a different type of treaty, notably given that it falls short of offering essential elements of Union membership to the candidate state, it could hold that the agreement is incompatible with the provisions of the EC Treaty. In particular, the Court could consider that the Council's decision to sign, under a EU Treaty procedure, an agreement that covers large areas of Community competence constitutes an act that encroaches upon the powers conferred by the EC Treaty on the Community.

[43] Contrary to Art. 46(e) which expressly limits the Court's jurisdiction to the 'purely procedural stipulations of Article 7 EU', Art. 46(f) EU plainly extends the powers of the Court of Justice, as established by the EC Treaty, to the provisions of 'Articles 46 to 53 [EU]'.

[44] According to Art. 107(2) of the Rules of Procedure of the Court of Justice, '[t]he Opinion may deal not only with the question whether the envisaged agreement is compatible which the provisions of the EC Treaty but also with the question *whether the Community or any Community institution has the power to enter into that agreement*' (emphasis added). *See also* Opinion 1/75 *Local cost standard* [1975] *ECR* 1355, especially p. 1360; Opinion 1/78 *Natural Rubber* [1979] *ECR* 2871, para. 30; Opinion 2/91 *ILO* [1993] *ECR* I-1061, para. 3; Opinion 1/94 *WTO* [1994] *ECR* I-5267, para. 9; Opinion 2/00 *Cartagena Protocol* [2001] *ECR* I-9713, paras. 3-6; Opinion 1/03 *Lugano Convention*, 7 Feb. 2006 [nyr], para. 112.

[45] E.g., Case 22/70 *Commission* v. *Council (AETR)* [1971] *ECR* 263; Case C-355/04 P *Segi and others* v. *Council*, [2007] *ECR* I-0000, para 51.

[46] Under Art. 300(6) EC, the Court can only consider envisaged external agreements, supposedly of the Community. It is well established that the Court cannot control the legality of an Accession Treaty, as primary law: *see*, e.g., Joined Cases 31/86 & 35/86 *LAISA* v. *Council* [1988]

Given that the provisions of Article 46 EU appear fully to extend the jurisdiction of the Court to the provisions of, *inter alia*, Article 49 EU,[47] the Luxembourg judges could also be invited, following the procedure established by the sixth paragraph of Article 300 EC, to determine whether the agreement envisaged is compatible with the provisions of Article 49 EU. If the Court was of the opinion that the envisaged accession treaty fails to grant Turkey the fundamental rights of membership to the European Union, it could declare that the Agreement is incompatible with Article 49 EU.

In both scenarios, an adverse opinion of the Court of Justice would entail that the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union. For instance, the parties would have to amend the provisions of Article 49 EU, or choose a different legal basis for the agreement, a choice that could cause the negotiations to be re-opened to meet the procedural requirements of that new legal basis; or alternatively to amend the accession treaty, in consultation with the third party, to make it compatible with Article 49 EU.

The suspicion that the accession treaty is an external agreement in disguise could also open the way for the Commission to start enforcement proceedings against the member states on the basis of Article 226 of the EC Treaty. The Commission could argue that the conclusion, under a EU Treaty procedure, of an international treaty covering, among other things, large areas of Community competence, would 'affect' the EC Treaty within the meaning of Article 47 EU.[48]

After the entry into force

But what if no institution or member state brings the permanent safeguard clauses to the attention of the Court, and the ratification of the accession treaty proceeds as planned? I would submit that the Court would have a key role to play in ensuring that the application of the contentious provisions of the accession treaty is consistent with the fundamentals of the *acquis*, notably, the principle of non-discrimination on the basis of nationality.

First of all, having jurisdiction over the accession treaty, the Court can interpret and police the application of its provisions.[49] Through the preliminary ruling procedure foreseen in Article 234 EC, the Court could be invited by a judge in a member state to clarify the conditions for the operation of the permanent safeguard mechanisms. In the same vein, the Court could be asked to ascertain that the provisions of the accession treaty are properly complied with. For instance, should the Turkish government find that the conditions for applying one

ECR 2285.

[47] *See supra* n. 41.

[48] *See* case-law related to Art. 47 EU, *supra* n. 13.

[49] E.g., Case C-27/96, *Danisco Sugar AB* [1997] *ECR* I-6653; Case C-30/00, *William Hinton*

of the clauses were not met when a safeguard measure was adopted, it could challenge the legality of that measure on the basis of Article 230 EC. Similarly, Turkish nationals, directly and individually concerned by the safeguard measure, should be in a position to challenge its legality on the basis of the fourth paragraph of the same article. Given the Court's long-standing view that derogations to the fundamental freedoms shall be interpreted narrowly and applied strictly,[50] particularly in the context of an accession treaty,[51] it seems likely that the Luxembourg judges would have the same view with respect to any permanent safeguard clause.

A second, more radical, option would be to ask the Court of Justice to hold inapplicable the contentious provisions of the accession treaty. More particularly, according to the procedure of Article 241 of the EC Treaty,[52] known as the plea of illegality, a Turkish national could challenge a safeguard measure and contend that the basis on which it has been adopted, namely one of the safeguard clauses,[53] is itself invalid because of its incompatibility with fundamental principles of Community law.

In summary, the Court should be in a position both to determine the strict framework within which permanent safeguard clauses may be used and to ensure that they are not abused. It might also be able to declare that those clauses are inapplicable altogether. In all cases, the fundamentals of the *acquis*, which limit the member states' discretion during the accession process, would *a fortiori* serve as yardsticks against which the use of permanent safeguard clauses could be tested and controlled.

& Sons L^da [2001] *ECR* I-7511; Case C-171/96, *Rui Alberto Pereira Roque* [1998] *ECR* I-4607.

[50] As regards derogations to the free movement of persons, *see* e.g. Case 41/74 *Van Duyn* [1974] *ECR* 1337; Case 67/74 *Bonsignore* [1975] *ECR* 297; Case 139/85 *Kempf* [1986] *ECR* I-1741; Case C-357/98 *Yiadom* [2000] *ECR* I-9265; Case C-184/99 *Grzelczyk* [2001] *ECR* I-6193, and Case C-138/02 *Collins* [2004] *ECR* I-2703.

[51] *See* in this regard, e.g., Case 231/78 *Commission* v. *UK* [1979] *ECR* 1449; Case 194/85 *Commission* v. *Greece* [1988] *ECR* 1037.

[52] Art. 241 EC stipulates that: '[n]otwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.' According to the Court's case-law, the possibility provided by Art. 241 EC of invoking the inapplicability of a regulation is not limited to regulations, *see* Case 92/78 *Simmenthal* [1979] *ECR* 777.

[53] It should be recalled that the procedure set out by Art. 241 EC does not constitute an independent right of action and recourse may be had to it only as an incidental plea: *see*, e.g., Case 33/80 *Albini* v. *Council and Commission* [1981] *ECR* 2141 and Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v. *Commission and Council* [1985] *ECR* 2523; C-239/99

Conclusion

It is hoped that, in some degree, I have succeeded in showing, first, that there are fundamental principles of the EU legal order which limit member states' discretion in enlargement negotiations and, secondly, that legal ways exist to ensure that such limits are respected. But, could it be that my worries and speculations are a 'storm in a teacup'? After all, the Negotiating Framework is a guiding instrument rather than a legally binding document, and it is impossible to predict clearly what the negotiators will eventually include in the accession treaty. Moreover, as suggested earlier, the accession treaty will enter into force only once it has been ratified by the contracting parties. In other words, national parliaments and/or citizens will be able to check the end result and reject the treaty if it contains improper elements.

The likelihood that the clause may eventually be included in the accession treaty should not be underestimated, however. Previous practice shows a certain degree of correspondence between elements envisaged in the negotiating framework and provisions of the eventual treaty. Democratic control is not sufficient, in my view, to ensure compliance with the fundamentals of the *acquis*. The accession treaty is a package deal. Odd institutional mechanisms may slip through the net of any democratic scrutiny because on balance their inconvenience does not, prima facie, appear to outweigh the benefits of accession.[54] Also, one might argue that, in the present member states, the very prospect of a democratic check may actually create additional pressure for including such permanent safeguard mechanisms. One could not therefore exclude that the permanent safeguard clauses envisaged in the Negotiating Framework for Turkey find their way into the final accession treaty. It is therefore my hope that an early discussion about the likely tension between such clauses and EU fundamental principles could have a preventive role.

From a more academic point of view, this discussion is prone to raising more general questions of EU institutional law. In what manner does it affect the position of member states under public international law? In particular, one may wonder whether the limits to member states' discretion in the specific context of accession negotiations can be transposed to other intergovernmental negotiations, for instance, to revise the EU? If so, can the member states still be considered the 'Masters of the Treaties'?[55] I also hope, therefore, that through this brief analysis I have managed to convey to you my conviction that studying the nitty-gritty of the European Union enlargement process is not only a fruitful exercise to expose the

Nachi Europe GmbH [2001] *ECR* I-1197.

[54] A case in point is the inclusion of various specific temporary safeguard clauses in the previous 2003 and 2005 accession treaties; *see* Hillion, *supra* n. 5, p. 603.

[55] BVerfGE, *Brunner* v. *The European Treaty* [1994] 1 *CMLR* 57.

vital components of the EU constitutional order, but is a source of many further questions for constitutional research.