Wider Always Meant Unequal

How Enlargement Mechanisms Entrench Structural Inequalities

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In his recent post, Spieker criticises the "safeguard clauses" announced in the Commission communication Preparing for a wider Union. These clauses would enable the suspension of voting rights in the Council and the freezing of EU funds if a new Member State seriously breaches foundational EU values (Article 2 TEU) or the principle of sincere cooperation, and could be adopted with reverse qualified majority voting in the Council (meaning that a Commission proposal would be automatically adopted unless a qualified majority of Member States reject it). Given their much broader substantive scope and much lower procedural thresholds than Article 7 TEU, Spieker argues that these safeguard clauses infringe core constitutional values of the EU: the equality of Member States, and the equality of EU citizens.

This contribution shares part of Spieker's critique but argues that the Commission's plans would not direct us into a fundamentally new legal reality. An examination of previous accession conditions and their distributional effects shows that enlargement has *always* produced long-lasting inequalities between older and newer members. Some of these inequalities remain to this day and have even been endorsed by the Court. In these circumstances, the principle of equality between Member States demands not just equal voting rights in the Council, but also addressing the material dimension of equality.

Structuring the Costs and Benefits of Accession

While the protection of EU values, sensitive CFSP issues, and institutional design are important concerns ahead of enlargement, economic issues have traditionally dominated accession agendas. Old Member States worried about the inflow of cheaper goods, the arrival of foreign workers, and a reduced share of EU payments. Candidate countries worried about the benefits offered by EU membership. Both sides negotiated their positions during accession talks, and the outcome was captured in the act of accession.

Throughout this process, economically strong candidate countries were able to secure significant concessions. Denmark was given a transitional period to remove tariff barriers and restrictions on foreign capital, yet was granted immediate access to payments under the Common Agricultural Policy (Articles 31, 50, and 121 here). It also received a permanent "summer house" derogation that prevented foreigners from buying secondary vacation properties on the Danish coast (Article 121(2)). Sweden and Finland negotiated the creation of a new regional category in cohesion policy (so-called "Objective 6") designed specifically to channel aid to regions with low population densities, even if they are rich (see Protocol 6 here). Conversely, economically weaker countries were forced to make important concessions as a condition for accession. To protect the old Member States, Spain and Portugal had to accept a 7- to 10-year transition period in access to agricultural assistance, during which, moreover, their own food exports were limited, as well as a 7-year transition period on the free movement of workers (Article 56 and 67 here; Articles 216 and 233 here). Bulgaria and Romania also accepted similar limitations on free movement for persons for up to 7 years (Annex IV here).

Some may view the different economic treatment of newer and older Member States as a necessary measure to bring about economic convergence and protect the internal market. The statement in C-231/78 *Commission v. United Kingdom* that these special provisions seek to "facilitate [acceding countries'] adjustment to the rules in force within the

Community" could be read in that light. However, this argument is not supported by the economic studies prepared ahead of enlargements. The foreseen economic disruption by the Portuguese accession was very limited, if any. The issues raised by the Spanish accession were treated in a one-sided manner, reviewing these only in light of the potential impact on the French and Italian agricultural regions (see paras. 38 and 47 here). The Danish "summer house" exception was based merely on a concern that foreign buyers could displace the Danish middle classes (when Malta requested a similar derogation, the Commission did require economic data to support it). In addition, some of these provisions are unlimited in time, such as, precisely, the Danish and Maltese derogations on second homes. Their purpose is not to facilitate the sector's adjustment to the internal market, but to exclude it.

Arguably, acts of accession simply reflect political considerations, among which distributional concerns feature prominently. The historical, widespread use of these special provisions underlies the Commission's current assertion that targeted provisions in accession treaties can assuage obstacles to enlargement. The Commission Staff Working Document that accompanies the Communication is very explicit on the potential shift of budgetary allocations towards the acceding countries and the need to include transitional measures to protect farmers of the current Member States (see pages 4 and 90 here). In short, the Commission's suggested approach is not new, but the continuation of a well-established inegalitarian practice.

When Acts of Accession Entrench Inequalities

As Spieker explains, the Court declared in C-231/78 *Commission v. United Kingdom* that certain derogations in the acts of accession must be temporary since they would otherwise be "contrary to the principle of the equality of the Member States" (para. 17). Unfortunately, however, the Court is not entirely consistent in upholding this benevolent vision of equality.

For instance, although the Court proclaimed acts of accession as primary law with which secondary law must comply (see C-445/00 *Commission v. Austria*), in C-203/86 *Spain v. Council* it accepted that the Council had, by Regulation, lowered the milk quotas previously fixed in the Spanish Act of Accession. The Court held that the particularities of the Spanish milk sector had been sufficiently accounted for in other parts of its Act of Accession, and that Spain had committed to the acceptance of the *acquis*, supposedly including acts adopted during the interim period between negotiation and accession (paras. 27 – 28). In C-273/04 *Poland v. Council*, the Court accepted that the Council, by Regulation, expanded the list of agricultural sectors subject to a transitional period, de facto amending the Polish Act of Accession. In the famous sugar saga (see Albi here), the Commission enacted a new "interpretation" of the concept of sugar stocks that the EU-10 had to eliminate before accession, to include sugar held by private households. Where the Court had rejected such an interpretation in relation to the richer Member States joining in 1995 (C-179/00 *Weidacher* para. 42), it upheld the massive fines imposed by the Commission on the poorer Member States joining in 2004, citing the requirement of protecting the sugar producers in the old Member States (see i.a. T-324/05 *Estonia v. Commission*, para. 128, upheld in C-535/09 P *Estonia v. Commission,* para. 45; T-257/04 *Poland v. Commission*, para. 133, upheld in C-335/05 P *Poland v. Commission*, para. 188).

At the same time, the Court has happily upheld inequalities that have become permanently entrenched. In C-103/14 *Bronius Jakutis*, the Court accepted the calculation formula that continues, after the transition period, to give farmers in the "new" Member States a substantially lower payment per agricultural hectare compared to the "old" Member States. The Court noted that this followed from the Act of Accession, arguing (again) that this Act constitutes primary law (paras. 57 and 59), and adding that *no valid comparison* could be made because the situation in the new Member States was radically different already before accession (para. 90; see also T-333/09 para. 79). Therefore, in the Court's eyes, EU law allows unequal treatment of new Member States, and this more than 10 years after these joined the EU, simply because they had once been different. Indeed, today,

the CAP still provides Central and Eastern Member States with lower per hectare payments than those given to older members (Article 103(3) of Regulation (EU) 2021/2115).

The above cases cast doubt on the claim that Article 49(2) TEU limits the changes which acts of accession can bring to primary law to mere "adjustments" (after all, C-203/86 *Spain v. Council* and C-273/04 *Poland v. Council* show a *very* liberal view of what constitutes an adjustment). More generally, they suggest that, to the Court, there is no superior principle of equality between Member States that acts of accession must respect, at least not if invoking such a principle would benefit new and poor Member States.

Equality Between Member States - Of What?

When Spieker claims that the proposed safeguard measures would infringe the principle of equality between Member States, he therefore seems to ignore that such a *general* principle has not historically applied to the acts of accession.

Can we, however, consider an alternative approach whereby respecting the principle of equality between Member States is crucial when it comes to voting rights in the Council, but not when it comes to the distribution of resources? The logic of such an approach would be that we can accept (legally sanctioned) economic disparities between Member States, but we cannot accept different institutional safeguards, because, well, life is unequal, but procedures should not be. This is probably what Spieker means when he criticises the proposed safeguard for "tak[ing] these inequalities to another level" (he takes issue with the potential suspension of voting rights, but not with the potential freezing of EU funding). And it would be consistent with his claim that there is a hierarchy between the different Treaty provisions. Core provisions on the EU institutions, including Council votes (Article 16(2) TEU) would then take priority over the more mundane policy provisions such as prohibiting discrimination between agricultural producers (Article 40(2) TFEU) or ensuring that cohesion funding goes to those that need it most (Articles 174 and 176 TFEU).

But the ability to vote is only useful insofar as it allows us to *do something*. By enshrining long-lasting or even permanent arrangements, we de facto prevent newcomers from changing the economic deal that they were forced to accept when they first joined (and, exceptionally, prevent older Member States from changing the economic concessions they were forced to give). The criticism of the institutional provisions thus appears to assume that voting in the Council matters outside material (read here "*mundane*") concerns. But while the EU is *more* than an economic union, it is not something *else* entirely, as Article 3 TEU shows. If voting in the Council is deemed important, then insulating certain economic issues from political contestation should be, too.

In addition, it is necessary to pinpoint that this alternative approach *also* relies on a certain substantive conception of the principle of equality between Member States: one that allows, and indeed sanctions, important material inequalities. Under this view, it is permissible to exploit the economic and geopolitical vulnerability of newer Member States and force them to accept a lesser entitlement, often permanently, over our common European goods, be it the internal market or the EU budget. This is what we tried to do with Turkey in relation to the free movement of persons, and what we continue to do to Central and Eastern Member States in relation to agricultural and rural development payments. Such an attitude relies on othering: the unspoken assumption that *the other* should be eternally grateful to join our club – but that it will always remain *the other*. Those who defend or enable this position, including the CJEU, must reflect on what this says about us, as a project and as a European society, if there indeed is such a thing.

Conclusion: The Meaning of Equality Within the Union's Constitutional Fabric

The accession negotiations prompt a deeper reckoning with the meaning and function of the principle of equality between Member States. A diluted principle of equality makes enlargement easier, as it lowers reluctance among current Member States. Yet it also transforms the symbolic and practical meaning of member-

ship. The historical acquiescence to the inequalities embedded in previous acts of accession is problematic, just as the strong reactions to the institutional aspects of the proposed safeguard clauses alone reveal assumptions that can be problematic, too. At its current stage, the European project may require more than simply raising the alarm about institutional disparities. It may require, for instance, serious consideration of how much economic inequality we are willing to accept within the common project, how much inequality we are willing to entrench in the allocation of our common resources for years to come, and for how long we consider such inequalities permissible, if any.

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