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## The problem of effective implementation of EU rules: An institutional solution

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reinforce the development of free market economies, democracy and the rule of law. This is an asset for the whole Union.

In the eighties, the democratic revival in Poland was carried out under the slogan "there is no liberty without Solidarity". I believe this slogan still holds its values in the context of European integration. I believe that it can become one of the foundations of a future Federation in Europe, encompassing all Member States of the Union.

### Bilateral and Trilateral Cooperation

French-German cooperation has been instrumental in developing integration. After the collapse of the projects of defence and political communities in the 1950s, it helped to create the European Economic Community, the "mother" of the European Union.

The political framework for French-German cooperation was provided by the *Traité d'Elisée* signed in 1963. Close political consultations at the highest level between Paris and Bonn were complemented by bilateral cooperation in various areas. A very important achievement of the *Traité d'Elisée* was the promotion of exchange and cooperation between young people of both countries. France and Germany put their trust in the new generation, which carried the reconciliation to a good end. Cooperation among youth and the educational institutions is also a challenge to future generations.

Much has already been done in developing relations between Poland and Germany. If there is any lesson to be learnt from history, and if we are looking for a starting-point to build from, it seems desirable to deepen cooperation within the Weimar triangle. The

cooperation within the Weimar triangle is developing remarkably well. This cooperation requires support and a new impulse. A contractual base would provide it with a different quality. Such a trilateral *Traité d'Elisée* – let us call it for example the second *Traité d'Elisée* – could develop into a new and revitalised driving force of integration.

I believe that the three countries Germany, France and Poland represent a community of interest in relation to European integration.

### Conclusion

I have ranged widely, perhaps too widely, over some of the key issues which confront the EU. But I feel strongly that without a profound debate over the future of the Union we will stumble from one crisis to the next, with real dangers for the stability of our Continent.

Let us think deeply about the future of our Continent and let us seize the opportunity of the enlargement of the European Union at the same time.

The six ministers of foreign affairs of the candidate countries considered Minister Fischer's proposals to be a useful and interesting example of positive thinking targeted at the future of Europe. This position of candidate countries is still another proof contradicting the claims of those who think those countries are not ready yet to discuss the development of integration, that they are too involved in the process of harmonisation with the *acquis communautaire*. I hope that this article will also contribute to the repudiation of this cliché. Poland does not solely wish to enter Europe. Poles want to talk about its future.

Phedon Nicolaides\*

## The Problem of Effective Implementation of EU Rules: an Institutional Solution

In June 2000, the Feira European Council declared that the countries that had applied for membership of the European Union would have to implement effectively and enforce the *acquis communautaire* (i.e. the body of EU rules and practice) before they would be able to conclude their negotiations for accession

to the EU. In December 2000, the General Affairs Council stated that the development of capacity for implementation and enforcement of EU rules had become one of the most important issues in the accession negotiations.

The issue of "effective implementing capacity" now attracts far more attention than the mere single-sentence mention it received for the first time in the Madrid European Council conclusions of December

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1995. It also now extends far beyond the confines of mere administrative reform,<sup>1</sup> as was posed in the Madrid conclusions. Yet what is more surprising, and certainly more disconcerting for the candidate countries, is that common understanding of the concept of "effective implementing capacity" has hardly advanced since Madrid.

Perhaps there has been no concerted EU effort to develop a common definition of the concept because it is considered that it is easily or intuitively understood. I will argue below that it is exceedingly difficult to define it precisely. It is for this reason that the EU and the candidate countries need to come to grips with that concept. Otherwise, the accession negotiations may eventually be held hostage to conflicting interpretations.<sup>2</sup>

### What Has Been Done So Far?

Of course, it is a bit of an exaggeration to claim that the EU and the candidates would one day discover to their surprise that they have conflicting views as to what it takes to apply effectively the rules of the EU. The EU monitors their progress very closely and continually offers guidance and sets specific targets to be reached within particular time limits (formally through the accession partnerships and informally through the numerous contacts between the Commission and the governments of the candidate countries).<sup>3</sup>

Nonetheless, the fact remains that the EU has no internally acceptable definition of its own to offer to the candidates. Although its institutions and services have drafted many documents that identify the various elements that constitute capacity for effective implementation and enforcement of its internal market rules and its many policies, there is no single document that attempts to bring together into a single cohesive framework those diverse descriptions, guidelines and lists.<sup>4</sup> Perhaps this is due to the fact that the EU lacks competence over the administrative structures of its members.

Despite the plethora of sectoral or policy-specific documents, the concept of implementation has been systematically examined only in the legal literature dealing with the jurisprudence of the Court of Justice. But because that literature considers only the legality of the means of compliance of member states with their obligations, it is not of great value to the candidate countries that have to build new institutions and establish novel administrative mechanisms. For example, the jurisprudence says nothing about the

resources that should be committed to enforcement apart from the fact that member states should enforce EU rules in the same way they enforce their own national rules.

The absence of official definitions of effective implementing capacity in primary or secondary legislation is no major problem when there is extensive jurisprudence which through successive court rulings defines the full meaning of the various principles on which the EU is based (e.g. discrimination, state aid, corporate establishment). Indeed, the EU judicial process is based largely on case-by-case interpretation and elaboration. It does not necessarily offer general advice.

There is also no major problem when other disciplines such as economics or accounting through research and analysis have facilitated the emergence of a consensus with respect to concepts which are used by the EU with no prior attempt to define them (e.g. macroeconomic stabilisation, financial audit).

The same cannot be said for the concept of "effective implementing capacity". There is neither any rich jurisprudence with successive interpretations to identify the various meanings of that concept and provide guidance, nor any voluminous academic analysis to deepen understanding.

However, related developments in adjacent areas of research have shed some light on this problem. Worth mentioning here is the burgeoning literature on "governance" in the European Union. Governance is defined in this context as the interaction within "multi-level networks" made up of all the actors that together formulate and apply EU rules. Contributions to this literature focus on how the interaction between the various actors affects the outcome of EU decision-making, the quality of Community rules and, above all,

<sup>1</sup> "Administrative reform" is a term usually used to describe the process of improvement of public administrations through the adoption of modern management methods and structures.

<sup>2</sup> In a recent article in this journal, I also identified another cause for concern, which was the apparent proliferation of entry requirements through the progressive elaboration of the concept of effective implementing capacity. See Phedon Nicolaides: The End Game of the Enlargement of the European Union, in: INTERECONOMICS, Vol. 35, September/October 2000.

<sup>3</sup> For a detailed review of the relevant literature and the measures taken by the EU to achieve enforcement of its rules see Phedon Nicolaides: Enlargement of the EU and Effective Implementation of its Rules, (Maastricht: European Institute of Public Administration, 2000).

<sup>4</sup> A recent internal Commission working paper has identified all the institutional elements required for implementation of the internal market rules. However, it makes no attempt to define "effective implementing capacity".

their ability to work together towards common objectives. Naturally, these contributions are more concerned with how decisions are made at the Community level and how the mechanisms of interaction may strengthen or weaken collective ability to achieve those common objectives. Most of them stress the importance of mutual trust and formal and informal coordination as the "glue" that binds together the actors and improves their capacity for collective action.<sup>5</sup>

For existing member states and even more so for candidate countries, the problem of effective implementation is not how to formulate rules and work collectively at the Community level, but how to apply those rules to the intended effect once they are adopted by Community institutions. How can their partner countries or the European Commission, which is the Guardian of the Treaties, judge whether the rules have been applied as they have been agreed and in the best possible way? Even this question is problematic. Who shall determine what is the right benchmark of performance or implementation? Member states would certainly dispute that the Commission's competence extends to that kind of assessment. Perhaps this is the reason why recent attempts by the Commission to define benchmarks have been in the form of non-binding recommendations (e.g. recommendations on pricing of access to telecommunications networks). For, as long as the present or future member states have to abide by general rules or principles, there will always be ambiguity as to "how", in terms of the method used, those rules can be best applied. I explore below the meaning and implications of this statement.

### **In Search of a Definition of "Effective Implementation"**

The Oxford English dictionary defines *implementation* as *the process by which a pre-determined objective or goal is reached*. This definition suggests that the act of implementation (of a rule or policy) is predicated on two necessary pre-conditions: (a) ability to identify an objective or goal and (b) ability to assess whether it has been reached.

The identification of these two necessary pre-conditions leads to three propositions concerning the nature of the task of building effective capacity for policy implementation. The first proposition is that it is

virtually impossible to define with great precision the required steps or measures of a process of economic or political integration. Not only are there many and diverse indicators of integration, the process itself reveals new obstacles as it unfolds. This is particularly true when integration moves from relatively simple formats such as a free trade area covering specific industries to more complex formats such as a common market covering all sectors and factors of production.

One may retort that most EU directives and regulations are not about integration in general but about many particular items of law with much narrower scope of application. Although this is in one sense absolutely correct, many aspects of the *acquis* are complex concepts that may be subject to distinct interpretations and may be implemented in different and perhaps incompatible forms. For example, the regulatory supervision of telecommunications services, the fiduciary supervision of financial services, the monitoring and assessment of state aid or the maintenance of health and safety at work are all complex tasks that have to be performed by the member states. There are no exact prescriptions on how to perform those tasks.

In a recent paper Bilal and Nicolaidis have argued that higher levels of integration are supported by a mixture of general principles or norms and specific measures or rules.<sup>6</sup> This mixture of norms and rules requires that partner countries retain a degree of *policy-implementing discretion* in the pursuit of the agreed integration objectives. They need to have discretion so as to interpret the general principles. Interpretation in this context means assessment of how general principles may apply to particular cases or particular market conditions. It may require measurement of the relevant market conditions. Bilal and Nicolaidis further argue that it is for this reason that common institutions are established. Such institutions are vested with that *policy-implementing discretion* so as to prevent "creative re-interpretation" of the common norms by the partner countries, which could allow them to escape their obligations.

It is worth noting that in a rather paradoxical way this need for continuous re-interpretation and adjustment in the implementation of general principles has made the preparation of the present candidate countries for accession to the EU both easier and

<sup>5</sup> For a more detailed review of the governance literature see Les Metcalfe: *European Governance: Design Options and Issues*, Working Paper, European Institute of Public Administration, September 2000.

<sup>6</sup> See, S. Bilal, Phedon Nicolaidis: *Regulatory Instruments and Enforcement in Regional Blocs*, Working Paper, European Institute of Public Administration, November 2000.

more difficult. It has made it easier because after forty years of Community practice and many cases, it is now much better understood how, for example, the establishment of companies can be obstructed by apparently non-discriminatory national measures or how governments may distort competition through complex schemes of state aid. But this long practice has also made it more difficult for any candidate country to escape the obligations of EU membership by arguing, for example, that the general principles on which the internal market is based do not apply to certain of its policies or laws. This is different from the fact that over the last couple of decades the competence of the EU has expanded and therefore affects a wider range of national laws, policies and practices. The point is that the same EU rules today are understood differently than say twenty years ago. For example, the concept of fiscal state aid is today much more developed and elaborate than in the past, without the formal introduction of any new Community rules.

The second proposition follows from the first. Different partner countries starting from different points of economic development would experience different problems and obstacles to integration. Hence, the methods that may be necessary in each one of them and the intensity with which the common rules need to be applied and enforced must consequently vary from member state to member state. General prescriptions cannot suit all of them. The amount of required resources for enforcement would also vary across member states.

Finally, the third proposition is that, at least at the margin, the method of implementation has a non-negligible impact or effect on the goal of integration itself. To understand this, consider first a case where this is not true. The reciprocal elimination of tariffs has nothing to do with the number of customs officers employed by the partner countries. Whether a good is subject to a zero tariff or 10% tariff is independent of how long it takes a customs official to inspect a certain consignment. By contrast, whether a company from a partner can truly exercise its right of establishment by buying up a local company depends to a certain extent on how speedily its acquisition is processed by the competition authority of the host country. That, in turn, depends on how well that authority is staffed. Unreasonable delays would constitute a barrier to establishment, even if all companies, domestic and foreign, were subject to the same treatment and same delays. Although it should be obvious that, at least at the margin, the method of

implementation defines the nature of the integration goal itself, it is not so obvious what is an "unreasonable" delay. It becomes necessary to define goals or standards of integration in relative terms by comparing the performance of the various partner countries. It follows that, ultimately, "effective policy implementation" is a relative concept. This must have implications on how implementing capacity can be established.

By taking into account the three propositions outlined above, it becomes obvious that the dictionary definition of implementation is insufficient to capture the meaning of capacity for effective policy implementation. That capacity must also include an ability to assess the results or outcomes and then adjust the methods accordingly. In other words it must necessarily include a feedback and adjustment or a learning mechanism (because learning is indeed about feedback and adjustment). Not only should the ministries or agencies responsible for implementation have the required resources (i.e. capability), they must also have the required incentives to act accordingly (i.e. willingness to identify or measure, assess, learn and adjust).

### **Towards an Institutional Definition of Effective Implementing Capacity**

We can now define the concept of effective implementing capacity as "the establishment of institutions which are fully 'empowered' (they have the necessary resources and legal discretion) and fully 'responsible or accountable' (meaning that they have the right incentives to act and adjust)".

It may be thought that this is a definition which is too general and therefore of little value to the candidate countries. Naturally, any definition, if it has to have wide applicability, must be sufficiently general. Yet, this is a powerful definition because it forces candidate countries to ask the necessary questions. In every case, they must determine whether they have granted sufficient legal power, whether they have committed enough manpower and financial resources, whether the responsible agency has clear tasks, whether it has no overlapping responsibilities with other agencies, whether it is obliged to follow open and transparent procedures so that it can be accountable, whether it is shielded from undue political interference and whether it is subject to some review procedure.

There is another reason why such an institutional conception of the problem of effective implementing

capacity is useful to the candidate countries. To understand it, one has to go back a step and consider the overall method of European integration with respect to the creation of a single market. Broadly, the purpose of the EU with regard to the single market is to eliminate barriers to trade, movement, establishment and competition and to lay down the foundations for further cooperation. The question which is often asked in the literature is why do countries need to agree to remove their barriers. Unless they are large enough so as to command market power, it is in their individual interest to liberalise their markets unilaterally, rather than reciprocally or collectively.

Many answers have been given to that question but one of the most convincing and illuminating is that reciprocal liberalisation is a mechanism for making commitments credible in the eyes of the partner countries. They are assured that market opening will be irreversible.

The irreversibility of commitments is a problem of particular significance to the candidate countries. Although most of them have been found in the Commission's most recent progress report (published on 8 November 2000) to have largely completed the transition to market-based economies, there are lingering doubts whether their achievements are solid enough. But irrespective of the completion of that transition process, the candidate countries still have to persuade the EU that their new political regimes will allow their economies to function without interference. This is hardly a transition issue. Until recently, government interference of this kind had been endemic in most western democracies. Indeed, one may argue that democratic regimes are more prone to such interference because governments have to respond to the demands of the electorate and the pressure of organised groups. So the completion of the transition cannot provide the assurances that the EU is asking.

Moreover, given the absence of uniformity in the implementation methods chosen by the existing member states, whatever quantitative evidence is submitted by the candidate countries can easily be questioned by the EU. A more convincing approach by the candidate countries would be to demonstrate that the institutions they establish are shielded from political interference; that their integration process and the commitments they make are irreversible.

The establishment of empowered and accountable institutions and agencies provides a substantial guarantee of that irreversibility. If they have sufficient

legal power and resources at their disposal they will be less dependent on the whims of the government and the politicians. If they are accountable they will also have a strong incentive to resist attempts to influence them or corrupt them. In this way, candidate countries will gain the credibility they need so as to function as an integral part of the networks that make up the governance structures of the EU and which are based on mutual trust.

### Conclusion

After the completion of the inter-governmental conference for reform of EU institutions and the drafting of the Treaty of Nice, the road has opened for the entry of the candidate countries into the EU. Barring any hiccups during the ratification of that Treaty by member states, the only remaining hurdle to the entry of new members is the conclusion of the accession negotiations.

So far the candidate countries have accepted the whole of the *acquis* and have made no requests for permanent derogations. They have only asked for transitional measures of varying time lengths. The Commission has recorded a total of about 500 such requests, 340 of which concern agriculture. In its regular report of November 2000, the Commission proposed classifying those requests into three categories: acceptable, negotiable and unacceptable. There is, evidently, willingness on the part of the Union to accommodate, to some extent, the wishes of the candidate countries. But, the candidates still have to work hard to convert requests which are now perceived as unacceptable into acceptable or at least negotiable ones.

However, if the statements of the EU are to be taken at face value, the negotiations will not be completed simply by an agreement on all outstanding requests for derogations. The candidates will have in addition to demonstrate their capacity to apply and enforce effectively EU rules. I have suggested in this article that the concept of effective implementing capacity has an important institutional dimension. It requires the establishment of institutions which are fully empowered and accountable so that they can have both the ability and willingness to fulfil their obligations and resist political interference. In this way candidate countries will strengthen the credibility of their commitments.

The experience and practice of the EU itself suggest that integration and its rules evolve continually. It would be wrong for the candidates to presume that

they will have completed their task of preparation for EU membership once they have put into place the myriad of requirements, measures and mechanisms stipulated by the *acquis communautaire*. Even if no new regulation or directive were adopted in Brussels, the new members would still have to adjust, calibrate and improve the functioning of their domestic arrangements for the implementation of the *acquis*. They have to establish mechanisms which are capable of learning, adjusting and resisting political interference; in other words, of acting like the “national guardians of the Treaties”.

While the candidates clearly have the responsibility to establish such mechanisms, the task of the EU in this respect should be to define the criteria by which it will judge the results of their efforts. These criteria have to be transparent and objective so that the candidates will know the benchmark against which they will be judged. So far the EU has progressed in a piecemeal way. Its criteria will have to become more systematic and coherent. Otherwise there is a serious risk that the negotiations will in the end stumble over conflicting interpretations and assessments of the performance of the candidates.

Edward Best\*

## The European Union after Nice: Ready or Not, Here They Come!

The Intergovernmental Conference (IGC) which concluded in Nice in December 2000 was convened to agree institutional reforms required to prepare the EU for enlargement to 27 Members. The agenda focused on the three issues “left over” from Amsterdam – size and composition of the Commission, weighting of votes in the Council and possible extension of qualified majority voting (QMV) – as well as “other necessary amendments to the Treaties arising as regards the European institutions in connection with the above issues and in implementing the Treaty of Amsterdam”. The Feira European Council in June 2000 agreed that the new provisions on closer cooperation should also be considered.

Despite fears that no deal would be possible, given the depth of the differences and sensitivities, some agreement was reached in most areas. The way was thus cleared for enlargement to proceed, but life in the the enlarged European future may not have been made easier. Moreover, the negotiations were so long and difficult that there was widespread feeling that this is not an effective way to decide new steps in European integration. This contribution assesses the results of the IGC in each of the main issue areas, and offers some early reflections about the impact of Nice for the future.

The only specific agreement regarding the size and composition of the Commission was that the five largest countries will lose their right to name two Commissioners: as of 1 January 2005, the Commission will include “one national of each of the Member States”.<sup>1</sup> Further changes will take place “[w]hen the Union consists of 27 Member States”. The maximum number of Commissioners in EU27 is not fixed: the *Protocol on the Enlargement of the European Union* only states that the number “shall be less than the number of Member States” and will be agreed by the Council, acting unanimously. Finally, a future “rotation system based on the principle of equality” is agreed, but the implementing arrangements are to be adopted by the Council, by unanimity, only after signing the treaty of accession of the 27th Member State of the EU.

The smaller countries were thus successful, at least for the medium term, in defending their position. They continue to believe that a strong and independent Commission, like a strong legal system, is an essential guarantee of their interests in the face of the larger countries. The presence of a national of each country is seen as reassurance that all interests will really be taken into account (although others argue that such a Commission would be an intergovernmental body less able to defend small countries’ interests), as well

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<sup>1</sup> This and all other quotes from the treaty refer to the provisional text approved at Nice (SN 533/00).