

The 100% Union: The rise of Chapters 23 and 24

Author: Wolfgang Nozar*
August 2012

The adoption of the Copenhagen criteria for accession to the European Union specified the benchmarks to be met by the accession countries and launched a development putting crucial topics like the respect for fundamental rights and the rule of law high on the enlargement agenda. The following text outlines the reasons for this shift in focus, the developments that followed and the new approach put in place by the European Commission, bringing chapters 23 and 24 into the centre of the EU accession process.

1. Increasing relevance of rule of law and fundamental rights

Europe has seen important changes since the end of World War II, in particular the fall of the Iron Curtain and the integration of the Central and Eastern European countries. These changes also brought about a shift of public attitude towards rule of law and fundamental rights. With State authorities being seen as service providers rather than protected elites, citizens expect conditions that allow them to live in a safe and prosperous environment, protecting their rights towards the State authorities themselves as well as safeguarding them from criminal activities. This means that the judicial system must work effectively and efficiently, organised crime and corruption must be held at bay, and fundamental rights must be respected.

While, for example, bribing foreign civil servants had been widely accepted in the past and bribes could even be tax deducted in certain countries, this situation has now changed completely. Following the U.S. Foreign Corrupt Practices Act of 1977, European countries increasingly also criminalised such practices, and this has become an international standard that is also codified in the UN Convention Against Corruption.

The changes in society have also been translated into EU policies in general and enlargement in particular. Rule of law and the respect for fundamental rights are especially important in light of further integration within the Union. Developments like the establishment of the Schengen area and the European arrest warrant are built on mutual trust between the legal systems of the Member States. Therefore, these systems need to ensure efficiency and the protection of citizens' rights. Accession countries also need to meet the high standards expected. The Stockholm Programme, which sets out EU priorities in the area of justice and home affairs, elaborates that in the Western Balkans "further efforts [...] are needed to combat organised crime and corruption [...] and to build administrative capacities in [...]"

law enforcement and the judiciary in order to make the European perspective a reality".

2. The development of chapter 23 and 24 in the enlargement process

The founding of the European Communities and initial accessions were predominantly based on political decisions without clearly defined criteria. This situation changed with the Maastricht Treaty and the conclusions of the Copenhagen European Council in 1993. Signed in February 1992, the Treaty sets out in its Article O: "Any European State may apply to become a Member of the Union." The conclusions of the Copenhagen European Council further defined the conditions for membership. The Copenhagen criteria require "that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with the competitive pressure and market forces within the Union."

With the Copenhagen criteria, key elements that later became chapters 23 and 24 were formally included in the accession process. At the same time, the Copenhagen criteria opened the way for enlarging the Union towards the transition countries in Central and Eastern Europe ("fifth enlargement"). With the definition of concrete criteria to judge the suitability of countries to join the Union, their accession became a question of "when" they would join rather than "if" they would join at all.

The accession criteria were subsequently specified in more detail in the Treaties through the Amsterdam Treaty (signed in 1997) and the Lisbon Treaty (signed in 2007). Article 49 of the Treaty on

* Wolfgang Nozar is an official at the Directorate General for Enlargement of the European Commission. The article represents solely the views of its author and cannot in any circumstances be regarded as the official position of the Commission.

European Union now clarifies the general conditions for accession to the European Union: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." Article 2(1) of the Treaty on European Union states that "[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."

Despite good results in a number of countries, experience from the fifth enlargement showed that transformation of a country, in particular in the rule of law area, can be a lengthy and difficult process. Accession negotiations with Bulgaria and Romania revealed that shortcomings in key areas such as reform of the judiciary and the fight against organised crime and corruption had not been fully overcome.

In order to remedy the identified shortcomings in the enlargement process, the 2005 negotiating frameworks for Croatia and Turkey introduced a specific chapter 23 - "judiciary and fundamental rights" - in addition to the previously existing and then renumbered chapter 24 - "justice, freedom and security". Both chapters cover key rule of law issues, in particular reform of the judiciary and the fight against organised crime and corruption. The renewed consensus on enlargement, as endorsed by the 2006 European Council, has further strengthened the focus on the rule of law in the accession process: "Accordingly, difficult issues such as administrative and judicial reforms and the fight against corruption will be addressed at an early stage." In parallel, the accession of Bulgaria and Romania to the European Union in 2007 was accompanied by the establishment of the Cooperation and Verification Mechanism to ensure ongoing reform efforts also after the two countries had become Member States.

The creation of chapter 23 and the use of opening and closing benchmarks in the accession negotiations have proved to be a powerful tool to push reforms within the enlargement process and throughout the whole pre-accession period. Chapter 23 and 24 issues have become very important in Croatia and have to a large extent determined the final stages of accession negotiations.

The 2009 Enlargement Strategy again highlighted the rule of law as one of the key challenges within the enlargement process: "[T]aking into account experience from the fifth enlargement, the rule of law is a key priority which needs to be addressed at an early stage of the accession process. With EU assistance some progress has been made in putting into place effective legislation and structures to fight corruption and organised crime,

but rigorous implementation and enforcement of laws are necessary to achieve tangible results."

3. The content of chapters 23 and 24

The elements compiled under chapter 23 are closely linked to the political criteria, which need to be met for overall negotiations to begin. They include four main headings - judiciary, fight against corruption, fundamental rights and EU citizens' rights. Due to the limited amount of "hard acquis" in many of these areas, the requirements to be met are mainly to be found in general principles and European standards. This sometimes makes it difficult to determine exactly what the target to be reached is and how to measure progress.

Chapter 24 covers the fight against all types of organised crime (including drug and arms trafficking, trafficking in human beings etc.) and terrorism, the Schengen rules, border control and visas, as well as migration, asylum, judicial cooperation in criminal and civil matters and police and customs cooperation. Especially the area of fighting organised crime and terrorism again raises the question of how to measure progress.

4. Key challenges faced in the area of chapters 23 and 24

Many of the current enlargement countries, namely those situated in the Western Balkan region, are still undergoing a transition period. The fall of the Communist regimes and the wars accompanying the splitting up of Yugoslavia were fertile ground for the development of criminal networks, which were involved, for example, in cigarette smuggling or enriched themselves illegally in the privatisation process. Some of these networks still persist and have found new areas of activity, such as drug trafficking and trafficking in human beings. In other cases, illegally acquired fortunes are now being invested in the legal economy and threaten to gain influence over decision making in these countries. Corruption is widespread and the judicial systems sometimes struggle with unsuitable personnel recruited under the previous systems and a lack of efficiency.

At the same time, the limited availability of clear and unambiguous rules, i.e. hard acquis, especially under chapter 23, makes it difficult for the candidate countries to identify exactly which reforms they need to adopt. An independent judiciary may be structured in different ways; rules that produce convincing results in certain Member States with a long democratic tradition and independent institutions might not work in a transition country. In addition, measures which might produce results in transition countries, such as broad scale vetting and potential dismissal of established judges and prosecutors, can sometimes be difficult to reconcile with European

standards such as permanent tenure in judicial functions.

Another question that arises concerns the measurability of progress and benchmarks for accession. Perception indicators of various kinds sometimes give the impression that a precise number can be applied to the level of corruption or organised crime in a country. Nevertheless, it is extremely difficult accurately to assess the real levels of such crimes. One can indeed produce surveys on corruption experienced by citizens or perception of political corruption, but the results are often influenced by a number of factors, and reliable figures on high level corruption cannot be found in this way. One can also analyse the existing legislative and institutional framework and the results produced by the law enforcement institutions, but it may remain unclear whether higher numbers of convictions are the outcome of a more serious crackdown on corruption or actually the result of an increase in such offences.

The European Commission has gone to great lengths in producing a realistic picture of the situation in the enlargement countries, in particular in its annual Progress Reports, involving, for example, broad consultations with numerous stakeholders, expert missions and input by EU Delegations and Agencies. However, any final assessment, which does not limit itself to individual aspects of the problem, must be based on an expert evaluation of all available sources, including a weighing of the different information provided; therefore, it will always be open to certain criticisms. As an expert evaluation will be qualitative and does not lead to a numerical result, it is also impossible to give a concrete, unambiguous final target for each part of chapters 23 and 24.

In these circumstances, it is crucial that the European Commission, with the help of Member States' experts, supports the enlargement countries with concrete guidance and suitable models for the specific countries. This should go beyond the existing acquis and take into account the specificities in each of the countries concerned. Such guidance is currently provided under the Instrument for Pre-accession Assistance (IPA) and the TAIEX instrument. However, recent efforts to use expertise directly from inside the EU institutions on a broader scale should be pursued further.

5. The new approach on chapters 23 and 24

As set out above, significant improvements, like the new chapter 23, have already been introduced in the accession negotiations with Croatia. Nevertheless, rule of law issues have so far only been addressed in a comprehensive way at a fairly late stage of the accession process. Reform efforts were slow in the period before opening the chapter, including from the formal opening of

negotiations in October 2005 to the proposal of chapter 23 "opening benchmarks" in mid 2007. Only with the chapter 23 opening benchmarks, was there a strong and effective target for Croatia to prioritise these key issues. Thus, the overall negotiation period for this chapter was relatively limited. Given the challenges faced in chapters 23 and 24, and the long term nature of the reforms, there are strong arguments in favour of opening these chapters earlier in the negotiations process.

Despite certain drawbacks, the use of opening and closing benchmarks in the accession negotiations has proved an effective tool. Going into a similar direction, also during the visa liberalisation dialogues with five Western Balkan countries, detailed roadmaps were applied and led to substantial progress in different JLS areas. This proved again the effectiveness of an approach which sets concrete, specific requirements to accompany the countries along the path of reforms, thus allowing them to better focus their efforts. In addition, the visa liberalisation roadmaps not only provided the benchmarks to be met, they also served as a clear guidance for the countries on how to reform important areas.

Therefore, the European Commission, in its 2011 Enlargement Strategy, proposed a new approach to chapters 23 and 24. This would focus on extending the timeframe of negotiations on the two chapters and would strengthen the use of benchmarks through the introduction of interim benchmarks. It would be applied to all candidate countries starting accession negotiations, with Montenegro being the first.

As one of the key innovations, the two chapters would be among the first to be opened and the last to be closed, once a solid track record of reform implementation has been achieved. In order to implement this, the screening, i.e. the presentation of the acquis under these chapters (explanatory screening meeting) and the country's reporting on meeting the acquis (bilateral screening meeting) would be conducted as early as possible.

As a second step, Action Plans would be drawn up by the candidate country. These Action Plans should be in the ownership of the candidate country, but would be based on clear guidance arising from the screening. The screening reports should provide substantial input, setting out in a clear and structured way the framework for negotiations and the tasks to be addressed by the candidates in the Action Plans. They would also take into account the individual circumstances of each candidate.

The adoption of the Action Plan should be the only benchmark for opening chapters 23 and 24, thus ensuring that the time period for negotiations is as long as possible. In addition, the Action Plans would provide the roadmaps for the negotiations,

setting out measures to take and milestones throughout the process.

With the opening of the chapters, interim benchmarks would be set, instead of closing benchmarks being defined immediately at this stage. Only once the interim benchmarks (included in the opening EU Common Position) have been met sufficiently, would closing benchmarks be adopted. These closing benchmarks would require the candidate to demonstrate solid track records of reform implementation across the board, based on clear actions and measures to be taken over time. Only when these requirements are met, could the chapter be closed.

In order to help candidate countries fulfil their commitments made in the Action Plans, specific incentives and support measures would be put in place. Financial assistance under the Instrument for Pre-accession Assistance (IPA) would be better targeted at earlier stages of the process, and would adopt a sectoral approach, including sectoral budget support based on clear comprehensive plans.

Accountability of the candidates would be strengthened through corrective measures, which could be adopted in case of problems occurring during the negotiations. One possibility is to request new or amended Action Plans or additions to interim benchmarks if the situation on the ground requires such changes. Moreover, if progress on chapters 23 and 24 significantly lags behind overall progress, negotiations on other chapters could be stopped or slowed down until this disequilibrium is resolved. As in previous enlargement rounds, there would also be the possibility to suspend negotiations completely in case of serious and persistent breaches of principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

In this way, the new approach leads to a stronger focus on rule of law issues in enlargement

countries at earlier stages of the process. It provides for additional time for negotiations, structures these negotiations more clearly, and links progress more directly to overall progress in negotiations. This will ensure that reforms produce a track record before actual accession and that sustainability is ensured.

6. The question of double standards and the way forward

Prioritisation of chapters 23 and 24 has triggered some criticism that the EU is requiring higher standards from the current enlargement countries than in previous accessions or than the EU Member States meet themselves. On the one hand, this would not necessarily constitute a problem, as the EU should not be a union based on the smallest common denominator of values. With increasing integration of the Union, it is important to strengthen trust between the Member States and to ensure a high level of protection of citizens' rights. Where shortcomings exist, Member States must take the necessary measure to improve the situation. For newcomers, this can result in higher benchmarks for accession.

On the other hand, it cannot be denied that there is a need to have a closer look inside the EU. The judicial systems in certain Member States are not as independent and efficient as citizens would expect. Corruption is a concern and effective prosecution can be hampered by political influence or restrictive procedural provisions. The situation regarding fundamental rights and civic freedoms is likewise not always satisfactory. The European Commission has only started to address these issues, for example with the establishment of a monitoring mechanism for corruption within the Member States or efforts to establish minimum standards in relation to certain criminal offences. More needs to be done inside the Union and Member States must be ready to be scrutinised themselves in order for the Union to remain a credible exporter of values to third countries.