PRE-ACCESSION, NATURALISATION, AND 'DUE REGARD TO COMMUNITY LAW'

The European Union's 'steering' of national citizenship policies in candidate countries during the fifth enlargement

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Abstract

"Altough the EU Commission holds the necessary tools to determine the candidate countries in the recent enlargement to resolve the citizenship issue, sometimes the conclusions were drawn on other basis than those resulted from the monitorization process. The examples of Latvia and Estonia are both contradictory and presented as successes for the process. When one looks at these countries, sees a high degree of Commission's success in changing the situation of the minorities and "stateless" residents trough concrete measures: elimination of "age windows" system in providing the citizenship, allowing the children from stateless parents to obtain the nationality at birth, elimination of the extra-fees system for the naturalization exams, but can also witness the prevalence of some negative provisions as the income discrimination in the citizenship granting-process. The paper admits that important steps were made during the pre-accession negotiations particularly with Latvia and Estonia but the main criticism, generally available, is that there were not clear standards versus the evaluation of the citizenship policies. The fact that Latvia and Estonia "did" as good as other countries accessing the EU in May 2004 despite the minorities problem is an evidence for this criticism".

Key words: accession, Copenhagen Criteria, naturalization, citizenship policies, minorities

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In addition to limiting the rights of those European citizens who are nationals of the eight new Member States,[1] the EU demonstrated both the willingness and ability to 'steer' citizenship policies in the candidate countries, most dramatically in Latvia and Estonia,[2] making effective use of the tools of the pre-accession strategy and, especially, of the minority protection clause of the Copenhagen criteria.

According to Article 17(1) of the EC Treaty, "every person holding the nationality of a Member State shall be a citizen of the Union." Thus Union citizenship cannot be granted separately from that of a Member State. In order to make this principle work, the Union had to assure that the decisions concerning citizenship taken by one Member State are respected in others, thus assuring the uniform application of Community law and uniform recognition of the status of Union citizen, which is automatically attached to citizenship in any Member State. Following ECJ case law, the Member States of the Union cannot question the citizenship acquired by an individual from one of the Member States. This is very important, since being a citizen of the Union entails certain rights and obligations. Thus, the general rule is that European citizenship is rooted in national regulation and the Union cannot interfere - for instance, by determining for itself who is a citizen of a given Member State and who is not.

EU citizenship, as such, has never been considered a valid topic in the enlargement-related academic discourse.[3] Neither was it mentioned in the 2003 Treaty of Accession, which did, however, manage to effectively limit the scope of the rights enjoyed by citizens of the new Member States, as compared to those of the 'full' European citizens of the 15 'old' Member States.[4] There is no remedy for such limitations under European law.[5] In a similarly 'silent' way, the EU has created a significant precedent for interfering into the national citizenship policies of its (future) Member States, on the basis of democracy and minority protections.

The present article undertakes an analysis of the instances when the tools of the pre-accession strategy, notably those related to minority protection, were used by the Union in order to promote its vision of nationality in the candidate countries, thus affecting the bases for Union citizenship, albeit indirectly. The effects of this influence might not be evident to outside observers, especially those focused solely on the protection of minority right. However, its significance cannot be overestimated: it is the first example of effective intervention by the Union in citizenship policies at the national level. This article omits any discussion of the role played by other actors, such as the OSCE and neighbouring countries, Russia in particular,[6] in pressuring countries to reform

1 An exception was made for the nationals of Malta and Cyprus.

2 Although to a lesser extent, the procedure for granting Czech citizenship was also discussed by the European Commission in the course of the fifth enlargement. However, the present article focuses on the two most extreme cases of EU intervention in national citizenship policy: Latvia and Estonia.

3 Dimitry Kochenov, 'The European Citizenship Concept and Enlargement of the Union', in 3 Rom.J.Pol.Sc. 2, 2003, at 74 et seq.

4 In the Terminology of the Treaty.

5 Kochenov, Dimitry, 'European Integration and the Gift of the Second Class Citizenship', in *ISA (International Studies Association) Montreal Convention Proceedings*, 2004, available at <http://www.isanet.org/archive>.

6 For an overview of the role played by the OSCE, for example, see Metcalf, Lee Kendall, 'International Pressure for Minority Accommodation in Independent Estonia', in *ISA (International Studies Association)* Montreal Convention Proceedings, 2004, available at <http://www.isanet.org/archive> (She totally disregards the role played by the Union).

their citizenship policies. Instead, it focuses solely on the European Union and largely adopts the Union perspective on the issue.

Of course, due attention should be given to the fact that the candidate countries influenced by the Union were not in fact Member States at the time the influence was exerted, as well as to the uniqueness of such interference. As part of the Human Rights conditionality, at large, which is per se discriminatory towards newcomers to the Union, as compared with existing Members, it might be argued that this policy is not in accordance with the basic principles of the Union[7] and, in Andrew Williams' words, "is both dangerous and potentially divisive."[8]

This article will start with a discussion of the implications of the derivative nature of EU citizenship, and on the role played by the Union in the granting of national citizenship. It will proceed with an outline of the main aspects of the pre-accession strategy employed by the Union in the course of preparing for the fifth enlargement. The focus will be on the aspects of the pre-accession strategy related to the citizenship policies of the candidate countries. It will conclude with a presentation of the nature and extent of Union interference in the citizenship policies of the candidate countries and an assessment of the implications for future enlargement rounds and for European citizenship law.

1. Concept definition

European citizenship is a derivative concept.[9] Article 17(1)TEC holds that "every person holding the nationality of a Member State shall be a citizen of the Union." It goes on to state that "citizenship of the Union shall complement and not replace national citizenship," thus making Union citizenship derivative of nationality in the Member States. This is made even clearer in the Declaration on nationality attached to the Final Act to the Union Treaty at Maastricht, which states inter alia that "the question of whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned."[10] O'Leary notes that the declaration does not have any binding legal force under EU law, being rather an instrumental for the correct interpretation of the Treaty, when relied on "in its context."[11] However, the history of the evolution of European law saw multiple examples of the successful use of Declarations, including in the sphere of citizenship and nationality. The Member States used Declarations, for example, in order to

7 Klabbers, Jan, 'On Babies, Bathwater and the Three Musketeers, or the Beginning of the End of Euroepan Integration', in Heiskanen, Veijo and Kulovesi, Kati, (eds) *Function and Future of European Law (proceedings of the International Conference on the Present State, Rationality and Direction of European Legal Integration),* Helsinki: Publications of the Faculty of Law, university of Helsinki, 1999.

8 Williams, Andrew, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?', in 25(6) *ELRev.*, 2000, at 602.

9 Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States', in 32 CMLRev., 1995, at 510.

10 Declaration No. 2, Final Act of the Treaty on European Union, O.J. (C 340), 1997, at 145 - 172.

11 O'Leary, Síofra, *The Evolving Concept of Community Citizenship, From Free Movement of Persons to Community Citizenship,* The Hague: Kluwer Law International, 1996, at 60.

differentiate between the scope of citizenship for the purposes of Municipal and Community Law.[12]

The general rule that the issue of citizenship is regulated by the Member States and not by the Union is also clearly stated in the Micheletti case, where the ECJ found that "under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality."[13] To agree with O'Leary, there is a clear conflict between the wording of this judgement and the Declaration appended to the Maastricht Treaty by the Member States, or at the very least the relationship between them is "confusing."[14] Indeed, the requirement to take Community law into account may have far reaching implications on the Member States' freedom to regulate citizenship.

Here we are drawing nearer to the subject matter of the article: to what extent is the intrusion of the Union into the sphere of national citizenship policies in candidate countries - carried out under the auspices of pre-accession strategy - in line with the wording of the EC Treaty and with ECJ case law? How far-reaching is the requirement to regulate citizenship issues with "due regard to community law," as so stated in Micheletti?

2. Pre-accession conditionality

Before formulating possible answers to the questions articulated above, it would be instructive to briefly outline the pre-accession strategy, as well as the methods used by the Union to exercise influence during the enlargement process. The most recent round of enlargement is undoubtedly unique in the scope of the influence exercised by the Union on the candidate countries. The Union used all the legal, economic, and political means at its disposal to shape the candidates according to its own vision.

The fifth enlargement presented an enormous challenge for the Union, both due to the "sheer number of all applicants"[15] and to the nature of the majority of the newcomers, i.e. ex-communist states.[16] When the first Agreements between the then EEC and the CEECs were signed, following decades of mutual neglect,[17] the EEC appeared to be unwilling to take

12 Declarations on this issue were made by Germany (Attached to the EEC Treaty) and by the United Kingdom (first attached to the 1972 Treaty of Accession by the United Kingdom to the European Communities, later, in the light of a new Nationality Act, the UK made a new declaration on the definition of the term 'nationals' on January 28, 1983). See also Case C-192/99 *The Queen v. Secretary of State for the Home Department ex parte Kaur* [2001] ECR I-1237, commented by Hall, Stephen, 'Determining the Scope *ratione personae* of European Citizenship: Customary International Law Prevails for Now', in 28(3) LIEI, 2001, at 355.

13 Case C-369/90 Micheletti v. Delegación del Gobierno en Cantabria, [1993] ECR I-4239, para 10. The wording of the European Convention on Nationality is essentially similar to that of the judgement: Art. 3 states that 'each State shall determine under its own law who are its nationals'. See Council of Europe, European Convention on Nationality, November 6, 1997, CETS no. 166.

14 O'Leary (1996), at 61.

15 Maresceau, Marc, 'The EU Pre-Accession Strategies: a Political and Legal Analysis', in Maresceau, Marc and Lannon, Erwan (eds.), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis,* Basingstoke: Palgrave, 2001, at 3.

16 For the concise history of CEECs - EEC relations see: de la Serre, Françoise, 'A la recherche d'une Ostpolitik', in de la Serre, Françoise; Lequesne, Christian; Rupnik, Jacques (eds.), *L'Union européenne : ouverture à l'Est ?*, Paris : Presses universitaires de France, 1994 ; Cf. : Smith, Karen E., *The Making of EU Foreign Policy : The Case of Eastern Europe,* (2nd ed.) Basingstoke : Palgrave Macmillan, 2004.

17 Romania and Yugoslavia are exceptional in this respect, as they signed agreements with the EEC before Soviet perestoika had started.

enlargement seriously. Scholars point to the ambiguous stand that the Union took with respect to Eastern enlargement. The wording of the Europe Agreements-only "recognising" the willingness of the CEECs to join the Union-is only one example of such ambiguousness.[18] In the beginning of the nineties, however, a consensus between the Member States on the issue was reached, and the Europe Agreements suddenly became instruments of accession, a function which was not part of their original design.

At the same time, arriving at consensus on what to do with the "new democracies" was accompanied by increased concern for the political and economic strength of these states. According to many, enlargement would likely bring "colossal problems."[19] Clearly, a mechanism was needed to "prepare" them for membership in the European Community. The Commission's Paper "Europe and the Challenge of Enlargement,"[20] served as a starting point for the elaboration of the first principles around which the future relationship between the Union and the CEECs evolved. The paper underlined the importance of the principles contained in Article F(1) of the European Union Treaty (now Art.6(1)TEU)-i.e., democracy, rule of law, and respect for fundamental human rights[21] --and laid down other conditions for membership related to the state of economic development, acceptance of the acquis communautaire and ability to implement CFSP.[22] It also envisaged a transformation of the Europe Agreements, in order to ensure that they might be "exploited fully and improved."[23] Later, the Corfu European Council (1994) made the implementation of the Agreements one of the "essential conditions of accession."

But the real transformation in relations between the CEECs and the Community came with the Copenhagen European Council, in 1993, which opened up the road to membership. The Presidency Conclusions stated: "The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union."[24] Interestingly, although the Community "acknowledged" the desire for membership of the CEECs in the Europe Agreements, no formal applications for membership had been submitted to the Council (as required by Article 49(1)TEU, then Art.O(1)). This, given the official policy of the Union not to

18 On Europe Agreements see e. g. Maresceau, Marc, 'Pre-accession', in Cremona, Marise (ed.), *The Enlargement of the European Union,* Oxford: Oxford University Press, 2003 (The Collected Courses of the Academy of European Law), at 14 et seq.; Beurdeley, Laurent, *L'élargissement de l'Union européenne aux pays d'Europe centrale et orientale et aux îles du bassin méditerranéen*, Paris : L'Harmattan, 2003, at 45 - 52; Inglis, Kirstyn, 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation', in 37 CMLRev., 2000, at 1186; Bos, Marko and Oskam, Edwin, 'De Europa-akkorden en het integratieperspectief', in 48(9) IS, September 1994; de la Serre (1994), at 33 et seq.

19 Speech of Ambassador Renato Ruggiero, 'Responsibilities of the European Community towards East European Countries', in Bull.Eur., No. 1766, 19 March 1992, at 2.

20 European Commission, 'Europe and the Challenge of Enlargement', in *Bull.Eur.*, No. 1790, 3 July 1992.

21 *Ibid,* para 8.

22 *Ibid,* para 9 and 10.

23 *Ibid,* para 38. For an assessment of the further role played by the Europe Agreements, see Communication of the Commission to the Council 'The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession', in *Bull.Eur.*, No. 1893, 21 July 1994.

24 Presidency Conclusions, Copenhagen European Council (June 21 - 22, 1993), SN180/93, para 7.a.iii. (at 12).

encourage or discourage applications for membership, makes the Copenhagen European Council Conclusions a unique document.[25]

The same European Council adopted the famous Copenhagen criteria - which became the cornerstone of the future pre-accession strategy. According to the Copenhagen political criteria, candidate countries should establish institutions guaranteeing democracy, the rule of law, protection of human rights, and respect and protection for minorities. With the exception of minority protection, the Copenhagen criteria appears to be a paraphrase of Article F(1) TEU, then in force. It goes without saying that the principles of democracy and the rule of law have "always been a constant, albeit implicit, feature of Community law,"[26] as follows from the Commission's statements, enlargement practice, and legal doctrine.[27] Maresceau has noted that similar principles also applied as a precondition for membership in the PHARE programme, meaning that once a part of PHARE, countries already "qualified for a democracy test."[28] There is also a legitimate parallel with membership in the Council of Europe, which is also conditional on a set of democracy-related criteria.[29]

The phrase on "respect for and protection of minorities," however, appears to have been a novel principle of enlargement law, which first appeared in the context of the second enlargement attempt to include Norway (with reference to the Sami people)[30] and in the "protection of the rights of persons belonging to minorities" clause of the Europe Agreements.[31] Somewhat strangely, the minority protection criterion was also given priority by the Union in the assessment of the progress of applicants towards accession.[32]

It is difficult to agree with Tucny, who writes that "en effet, si la Norvège n'avait pas pris en compte la spécificité de la communauté Sami, la Commission européenne en aurait certainement tenu compte, et aurait peut-être émis quelques réserves quant aux conditions de la possible adhésion de la Norvège."[33] Indeed, there is no proof that this is true. In our view, the Copenhagen criteria mark the starting point of any discussion of this principle as an integral part of the legal regulation of EU enlargement.

To return to the central point of this article, it is this part of the block of Copenhagen Political criteria that was used by the Union to promote the reform of citizenship laws in several candidate countries as a precondition for enlargement. Indeed, it has become impossible to enter the Union

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25 Avery, Graham and Cameron, Fraser, *The Enlargement of the European Union,* Sheffield: Sheffield Academic Press, 1998, at 24.

26 Fierro, Elena, *The EU's Approach to Human Rights Conditionality in Practice*, The Hague /London /New York: Martinus Nijhoff Publishers, 2003, at 137. See also Frowein, Jochen Abr. 'The European Community and the Requirement of a Republican Form of Government', in Mich. L.Rev. April/May 1984.

27 Tucny, Edwige, L'élargissement de l'Union européenne aux pays d'Europe centrale et orientale: La conditionnalité politique, Paris /Montréal : L'Harmattan, 2000, at 11.

28 Maresceau (2003), at 12.

29 Edwige Tucny claims that even the methods of assessment based on the development of democracy applied by the European Commission and by the Council of Europe are in a way similar (although the Council of Europe focuses on its Member States in the assessments, not on those wanting to join). Tucny (2000), at 68.

30 See Commission's Opinion on the second Norway's Application for Membership; see also Tucny (2000), at 15 et seq.

31 Maresceau (2003), at 16.

32 Maresceau, Marc, *'The EU Pre-Accession Strategies: a Political and Legal Analysis'*, in Maresceau, Marc and Lannon, Erwan (eds.), The EU's Enlargement and Mediterranean Strategies, *A Comparative Analysis*, Basingstoke: Palgrave, 2001, at 16.

33 Tucny (2000), at 21.

without meeting the Copenhagen criteria. Thus these criteria represent the most important element of the conditionality policy applied by the Union;[34] if the conditions are not met, the applicant can no longer have any legitimate expectation of entering the Union. It has been argued that by asking the candidates to adhere to a set of principles, the most important among them being democracy, the Union is trying to avoid "waiting for a generation or more for overwhelming evidence that democracy was fully institutionalised,"[35] thereby increasing the speed and efficiency of the enlargement process.

The need to alter citizenship policies is not obvious from the text of the Copenhagen criteria. However, the generally broad character of the criteria is supplemented by a large number of documents issued by institutions in their implementation. The documents relevant to national citizenship regulation in candidate countries include the Opinions on the application for membership of the Union, released in July 1997, together with a summary report entitled "Agenda 2000."[36] The Opinions and the Agenda were requested by the Madrid European Council (December 1995) and were drafted in accordance with the requirements of Article O (now Art. 49 EU). The Luxembourg European Council (1997), which decided to open accession negotiations with the first wave of applicants-including three Visegrád countries,[37] Estonia, and Slovenia (as well as Cyprus)[38] -also asked the Commission to continue its practice of assessing the progress of the candidate countries towards accession. This resulted in the release of a huge number of Regular Reports on Progress (one for each country, every year), each round of which was accompanied by a summary paper prepared by the Commission.

Furthermore, the 1997 Luxembourg European Council adopted an "enhanced pre-accession strategy," consisting in increased pre-accession aid and Accession Partnerships, Council Decisions adopted on the proposals of the Commission within the framework of Regulation 622/98. The Partnerships were aimed at articulating the immediate needs of the candidate countries, focusing on the most "problematic" areas, according to the European Union. Article 4 of the Regulation made the receipt of pre-accession aid[39] conditional upon progress towards the fulfilment of the Copenhagen criteria, thus creating an enforceable legal instrument, or "an

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34 On conditionality in the enlargement see: Lannon, Erwan; Inglis, Kirstyn M. and Haenebalcke, Tom, 'The Many Faces of EU Conditionality in Pan-Euro-Mediterranean Relations', in Maresceau, Marc and Lannon, Erwan (eds.), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis,* Basingstoke: Palgrave, 2001.

35 Rose, Richard and Haerpfer, Christian, 'Democracy and Enlarging the European Union Eastwards', in 33 JCMS 3, 1995, 428 (the Greek example is cited).

36 COM(1997) 2000.

37 Poland, Hungary and the Czech Republic; Slovakia was not invited.

38 The famous 5 + 1 formula.

39 On pre-accession financial assistance see e.g. Maresceau (2003), at 12 et seq.; Beurdeley (2003), at 55 et seq.; Guggenbühl, Alain and Theelen, Margareta, 'The Financial Assistance of the European Union to Its Eastern and Southern Neighbours: A Comparative Analysis' in Maresceau, Marc and Lannon, Erwan (eds.), *The EU's Enlargement and Mediterranean Strategies : A Comparative Analysis,* Basingtoke: Palgrave, 2001; de Chavagnac, Hughes, 'Le programme PHARE d'appui aux réformes économiques dans les PECO: l'exemple des pays baltes', in *RMCUE*, No. 402, Novembre 1996 ; Mayhew, Alan, 'L'assistance financière a l'Europe centrale et orientale: le programme Phare', in REC, 4, 1996; Deloche-Gaudez, F. and Lequesne, C., 'Le programme PHARE: mérites et limites de la politique d'assistence de la Communauté européenne aux pays d'Europe centrale et orientale', in 14 *PMP* 1, 1996.

additional legal stick," [40] in the words of Kirstyn Inglis, out of a political declaration of "quasi-legal"[41] status.

All the remaining candidate countries, with the sole exception of Turkey, were invited to open negotiations by the Helsinki European Council in 1999. The division of the applicants, by the Luxembourg European Council (or, indeed, by the European Commission), into two groups[42] caused a number of negative reactions, especially from those countries left aside. The European Parliament was not particularly satisfied with such a division either.[43]

3. Citizenship reforms under EU assistance. The cases of Latvia and Estonia

The pre-accession strategy, coupled with a willingness on the part of a number of countries to continue on the road towards accession, created a situation in which the Union became extremely powerful, exercising direct influence on candidate countries. Once again: if the demands of the Union - included in the Commission's Opinions on the Application for Accession, the Commission's Regular Reports on Progress towards Accession and the Composite (Strategy Papers), as well as in the Council's Accession Partnerships - were not met, if candidate countries were unable to achieve the requisite measure of progress, accession aid would be cut, and, ultimately, the prospects of accession would be postponed, potentially indefinitely.[44] In fact, the Union has not been overly strict with candidate countries (with the exception of Turkey). No "moves back"[45] have been made: once a candidate country is recognised by the Commission as satisfying the Copenhagen political criteria, negotiations begin and accession follows.

It is in the Copenhagen related documents-especially in the Opinions on the Application for Accession, Regular Reports, Annual Commission's Papers and the Council's Accession Partnerships-that the citizenship policies of some of the candidate countries were reviewed. All the Composite and Strategy Papers of the Commission released after "Agenda 2000" pay attention to the citizenship policies of two candidate countries: Latvia and Estonia. The 1998 Paper, for instance, welcomed the Latvian referendum on citizenship laws and called the situation in Estonia, where citizenship law does not allow stateless children to become citizens, "regrettable."[46] The assessment changed in 1999, when the Estonian Parliament adopted amendments to the citizenship law,

40 Inglis, Kirstyn, 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation', in 37 *CMLRev.*, 2000, at 1186.

41 Hillion, Christophe, 'Enlargement of the European Union: A Legal Analysis', in Arnull, Anthony and Wincott, Daniel (eds.), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002, at 402, 412.

42 Or three groups, if we count Turkey separately.

43 See EP Resolution C4-0371/97.

44 As the Turkish example demonstrates.

45 In the case of Romania, however, a call for the suspension of accession negotiations has been made by several MEPs (E.Nicholson, A. Oostlanlander and others) on the basis that the country does not meet the Copenhagen political criteria. See *QE* No. 8638, 5 February 2004, at 8.

46 European Commission, 1998 Composite Paper, at 3.

allowing the children of stateless persons to become citizens.[47] The positive assessment of the amendments introduced by Latvia and Estonia to their citizenship laws did not, however, apply to the overall situation of minority protection in those countries. The Commission had reservations concerning language laws and other discriminatory policies targeting minorities in these states. Since we are primarily concerned with the issue of citizenship, we shall not pursue any discussion of these discriminatory practices.

In order to present a detailed account of the causes of the Commission's disappointment in the sphere of citizenship/nationality regulation in several candidate countries, it is necessary to turn to the Opinions on Application for Membership of the Union and to the Regular Reports on the candidate countries' progress towards accession. Surprising many scholars,[48] the Commission gave an overall positive assessment of the state of minority protection in both Latvia and Estonia, resulting in the opening of accession negotiations with the latter, "astonishingly"[49] selected by the Luxembourg European Council. The Opinions on Application for Membership, released by the Commission on July 15, 1997, enable us to assess the scope of the problem. According to this document: "around 35% of the population of Estonia consists of minorities, including non-citizens. […] Of that 35% a group of 23% (numbering around 335.000, mainly of Russian origin) are not Estonian citizens."[50] In Latvia, "minorities, including non-citizens, account for nearly 44% of the population. […] Latvians are a minority in 7 of the country's 8 largest towns. Within that 44%, 28% of the population, i.e. some 685.000 people, do not have Latvian citizenship and a large proportion of that group, consisting of former citizens of the USSR, have no citizenship at all."[51] To summarise, in its assessment of nationality policies, the Commission dealt with the legal status of over a million people, making up a considerable share of the population of the respective candidate countries.

The Commission started the analysis by pointing out that the assessment of minority protection in these countries should be made based on the de facto situation, "regardless of the nationality held and difference in personal status arising from non-possession of Latvian nationality."[52] Almost identical wording can be found in the Opinion regarding Estonia's application.[53] That is to say, starting in 1997, the Commission adopted a 'realistic' or 'inclusive' approach to the assessment of minority protection in the candidate countries.

This step, taken by the Commission, was very significant. Indeed, the candidate countries themselves had not considered these persons, in possession of foreign nationality or of no nationality at all, to be part of their minority populations, and were, therefore, of the opinion that the Copenhagen criterion of respect for and protection of minorities did not apply to their situation.

47 European Commission, 1999 Composite Paper, at 15.
48 Maresceau (2003), at 34; Maresceau (2001), at 17, 18.
49 Maresceau (2001), at 18.
50 Opinion on Estonian application, at 1.
51 Opinion on Latvian application, at 1.
52 Opinion on Latvian application, at 1.
53 Opinion on Estonian application at 1.

These countries were oblivious to the fact that the treatment of these populations might affect their applications for membership in the European Union. To illustrate this point, Estonia adopted the following definition of a national minority, in the course of ratifying the Council of Europe Framework Convention on Minorities:[54]

> Estonia understands the term "national minorities" as follows:
> Citizens of Estonia that
> (a) reside on the territory of Estonia;
> (b) maintain longstanding, firm and lasting ties with Estonia;
> (c) are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics;
> (d) are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity.[55]

The Commission dismissed such a citizenship-centred definition as "not relevant,"[56] further opening the way for the European Union to steer nationality policies in the countries in question. Thus the Commission asserted its right to apply the Copenhagen minority protection criteria to both citizens and foreign residents in the candidate countries. If non-nationals in the respective candidate countries had been excluded from the Commission's assessment of compliance with the Copenhagen Criteria, any kind of influence from the Union aimed at changing national citizenship laws in these countries would have been much more difficult to exercise. However, it is possible to argue that the Commission had no choice but to dismiss the Estonian vision of national minorities, given the sizable number of foreigners and stateless persons residing in some of the candidate countries.

How did the Commission actually use its powerful position, within the framework of pre-accession strategy, to influence citizenship policies? It is very difficult to assess the success of any such attempt. Discussing the Commission's reporting function, Maresceau regrets that "often the Commission's description of the situation is particularly meagre and incomplete if not with a strong intonation of complacency about the authorities of the candidate country."[57] Upon reading the Commission's Opinions and annual Regular Reports it is difficult to disagree with this assessment. However, arguably at the expense of its objectivity as a reporter to the Council, the Commission simply could not avoid playing a significant role in the national citizenship reforms of several candidate countries (especially, Latvia and Estonia).

Indeed, those countries were forced to act in response to the Commission's findings, as reflected in the Opinions and Reports, resulting in considerable

54 Council of Europe, 'Framework Convention for the Protection of National Minorities', Strasbourg, February 1, 1995, CETS no.157.
55 Estonia ratified the Convention on January 6, 1997.
56 Opinion on the Estonian application, at 1.
57 Maresceau (2003), at 34.

reform of the legal regulations and practices of granting citizenship. Of course, it is possible to argue that the Commission was in the position to do much more; it is also possible to try to find inaccuracies in the Commission's representation of the situation of minority protection and citizenship policies in the candidate countries, for instance by comparing the Commission reports with the documents released by non-governmental actors, like the Open Society Institute for example.[58] However, developing such arguments is beyond the scope of the present article. Instead, this article will confine itself to the regular Reports in order to see how far the Commission went in its proposals related to the alteration of national citizenship policies in the candidate countries.

Having asserted its intention to address the situation of non-citizens in the candidate countries, thereby announcing its readiness to tackle the issue of citizenship policy reform in the Opinions and in the Reports, however, the Commission limited its own room to manoeuvre by stating already in the Opinions (i.e. in 1997) that all the candidate countries with the exception of Slovakia had met the Copenhagen political criteria. Apart from sounding "somewhat astounding,"[59] following the enumeration of a long list of problems in almost every field - including citizenship regulation and integration of non-citizens in Latvia and Estonia - such a declaration might have sent the wrong message to the candidate countries.

Generating a list of problems and then concluding that, notwithstanding the problems, the countries still meet the Copenhagen political criteria is, indeed, a strategy that is difficult to explain. Even more inscrutable was the early opening of negotiations with one of the most problematic countries from the point of view of minority protection - Estonia. It would have been reasonable to conclude that the issue of stateless residents (even when it amounted to as much as 30% of the country's population) was not really important in the context of accession. Maresceau offered an explanation: i.e., that the fact that a country is invited to open negotiations does not indicate that "everything is perfect"[60] and that improvements would still have to be made. Elsewhere, he goes on to say, "the true and complete story of this unexpected choice of the Commission will probably be never fully known."[61]

Once it is admitted that the criteria are satisfied and negotiations can be opened, even in a situation where considerable improvements should be made, the criteria loose their 'gate-keeping' function and the borderline between those countries meeting them and those "falling short of meeting the criteria" is fast disappearing. Even so, however limited its influence might have been after acknowledging that the candidate countries had met the criteria, the Commission proved to be a powerful actor in the promotion of national citizenship reform - an area previously unexplored by the Union.

In its 1997 Opinions on Estonian and Latvian application for EU membership, the Commission singled out a number of elements of national

58 Marc Maresceau finds the OSI reports to be more detailed and sometimes contradicting the findings of the Commission. See Maresceau (2003), at 34. The OSI Reports are available at <http://www.eumap.org/reports>.

59 Maresceau (2001), at 17.

60 Maresceau (2003), at 25.

61 Maresceau (2001), at 18.

citizenship policy for criticism, which would need to be reformed in order for those countries to comply with the requirements of the Copenhagen criteria. First, and most importantly for the status of the non-citizens in these two countries, the Commission seemed to agree with the general assessment of the causes of the problem, stating that "the Soviet Union's post-1945 policy of encouraging the settlement of Russian speakers in [those countries] is largely responsible for the present situation."[62] This assessment freed the states of Estonia and Latvia of any responsibility for the failure of their naturalisation programmes. In this respect, the example of Lithuania is quite telling. Although, the three Baltic countries all share a similar history of Soviet occupation, the issue of statelessness is not as acute in Lithuania as in Latvia and Estonia, largely due to a radically different approach to naturalisation. By assigning responsibility for the current situation to the Soviet past (while ignoring the Lithuanian example at hand) the Commission does a disservice to the goal of finding workable solutions to the problem, since naturalisation policies for stateless persons lie solely in the hands of the candidate countries.

Second, the Commission provided an overview of the naturalisation requirements in the countries in question, which usually included examinations on language, national history and institutions, as well as some other requirements, like the 'age brackets' established by the Latvian Act of August 1994. The examinations, according to the Commission, pose several potential problems: it might have been made too difficult to pass, too costly to enrol, and it might also have entailed an unreasonably long delay between submitting an application and taking the exam. In the case of Estonia a delay of one year was established, which the Commission called "perhaps no longer entirely justifiable."[63] The 'age brackets' system linked the right to file an application for naturalisation to the age of the applicant. Even in cases where an application satisfied all other requirements, it would not be accepted unless filed during the time period assigned to those of the right age.[64]

Third, the Commission outlined the relative success of naturalisation policies in the various countries. Judging by the Opinions, Estonia and Latvia were far from success stories: in the former, approximately 90,000 had acquired nationality since 1992;[65] in the latter, the naturalisation policy had been even less successful, with only 4700 people naturalised since the start of the naturalisation procedure in 1995.[66] All in all, this meant that, by 1997, only 94,700 out of almost a million stateless and foreign inhabitants of the two countries had been naturalised. What's more, the Commission also noted a fall in the rate of naturalisation in each successive year. According to the data provided in the reports, the meagre results of the naturalisation policy might also have reflected the fact that there were significant disincentives to becoming a citizen, since

62 Opinion on Estonian application for membership, at 1; for a similar wording see Opinion on Latvian application for membership, at 1.

63 Opinion on Estonian application for membership, at 1; Opinion on Latvian application for membership, at 2.

64 Opinion on Latvian application for membership, at 2.

65 Opinion on Estonian application for membership, at 1.

66 Opinion on Latvian application for membership, at 2.

doing so would incur an obligation to military service[67] and could make travel to some countries more difficult. For instance, Latvian resident non-citizens with Soviet passports, unlike naturalised Latvians, were not asked to apply for visas at the consulate in Riga.[68] Even though this policy was later changed, when Russia introduced visa requirements for Latvian and Estonian residents who had been issued 'alien passports', the Commission noted that it was still easier to get a visa as a non-citizen.[69]

The Commission looked closely at instances of discrimination based on statelessness. The Opinion on the Latvian application for membership, for example, stated that if one was not a citizen of Latvia, one was not only banned from civil service posts "where duties have a bearing on the national sovereignty" but also from working as a private detective, a lawyer, a fire fighter, a pharmacist, or an airline crew member. Neither could non-citizens acquire ownership of land or vote (even in local elections).[70] The Estonian situation, on the other hand, was somewhat milder. For example, aliens there had a right to vote in local elections at the time of the release of the Opinions.

The general conclusion drawn by the Commission was always the same: "the rights of the Russian-speaking minority (both with Estonian nationality and without) are observed and safeguarded."[71] However, in the Opinions it is possible to see the first traces of influence exercised by the Union. Justifying the necessity of reform, the Commission concluded that, taking into account the annual rates of naturalisation, "a large number of […] population will continue to remain foreign or stateless for a long time"[72] unless action is taken by the candidate countries.

The Commission praised the candidate countries' efforts in simplifying naturalisation procedures. For example, the Commission offered a positive assessment of Estonia's simplification of its citizenship test, reintroduced with new rules on January 1st, 1997, including exemptions for the elderly from having to take the examination;[73] and, Latvia's language training programmes, introduced for Russian speakers with PHARE support.[74] The Commission also expressed its satisfaction with the policy of issuing special 'Foreigners' Passports' to stateless persons in Latvia and Estonia, which provided them a certain freedom of movement.

However, in addition to praising the efforts of the candidate countries, the Commission also outlined their weaknesses, thus giving impetus and direction to further reform. In the case of Estonia, for example, the Commission emphasized the "inadequate resources available for Russian speakers to learn

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67 Opinion on Estonian application for membership, at 1; Opinion on Latvian application for membership, at 2.

68 Opinion on Latvian application for membership, at 2.

69 2001 Latvian Report, at 24.

70 Opinion on Latvian application for membership, at 3.

71 Opinion on Estonian application for membership, at 2.

72 Opinion on Estonian application for membership, at 1; for similar wording see Opinion on Latvian application for membership, at 2.

73 Opinion on Estonian application for membership, at 1.

74 Opinion on Latvian application for membership, at 2.

Estonian."[75] Although, it pointed out that PHARE programme funding helps to tackle the issue. Sometimes the Commission flatly recommended reforms deemed desirous by the Union. For example, the Commission recommended that Estonian authorities consider the issuance of permanent residence permits to Estonian residents, who previously only had a right to a 5-year permit.[76] The Commission also expressed a clearly unfavourable view of the 'age brackets' system and naturalisation exam fees in Latvia.[77]

In contrast with linguistic education and permanent residence permits, the Commission adopted a much more foreceful approach in demanding that Latvia and Estonia allow easier naturalisation of children of stateless persons residing in Estonian and Latvian territory. This was consistent with Art. 6 of the European Convention on Nationality,[78] the 1966 International Covenant on Civil and Political Rights,[79] Art. 7 of the 1989 Convention on the Rights of the Child,[80] which establishes the right to nationality, and Art. 1(a) of the 1966 Convention on the Reduction of Statelessness.[81] These stipulate that a child who would otherwise be stateless should be granted nationality by the state in whose territory the person was born. In such cases, the Commission used stronger language in the Opinions: "Estonian authorities should…"[82] or "Latvian authorities must …"[83]

In sum, depending on the importance of the issue, in its 1997 Opinions, the Commission used four main techniques to influence developments in the citizenship policies of candidate countries:

a. praising the candidate countries' efforts;
b. outlining the main weaknesses of the existing systems of naturalisation and sometimes providing financial assistance to tackle them;
c. recommending further directions for reform;
d. directly dictating naturalisation reforms.

The direction taken by the Commission in the Opinions on the Application for Membership was continued in the Regular Reports beginning in 1998.

The importance of the naturalisation issue is reflected in the organization of the text of the Regular Reports dealing with Latvia and Estonia, which is different from those for other countries. Specifically, the section dedicated to minorities is always subdivided into several sections, including three headings

75 Opinion on Estonian application for membership, at 2.
76 Opinion on Estonian application for membership, at 2.
77 Opinion on Latvian application for membership, at 2.
78 Council of Europe, European Convention on Nationality, November 6, 1997, CETS no. 166.
79 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Estonia Acceded to it on 21 October 1991 and Latvia on 14 April 1992.
80 United Nations, Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept.2 1990. Estonia Acceded to it on 21 October 1991 and Latvia on 14 April 1992.
81 United Nations, Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, entered into force Dec. 13, 1975. Estonia has not signed the Convention, Latvia acceded to it on 14 April 1992.
82 Opinion on Estonian application for membership, at 2.
83 Opinion on Latvian application for membership, at 2.

not found in other country Reports: "naturalisation procedure;" "special passports for non-citizens;" and, "integration of minorities."

The 1997 Opinions were especially critical of two aspects of naturalisation policy: the Latvian 'age-brackets' (referred to by the Commission as 'age-windows'[84]) system and both Latvian and Estonian legislation concerning citizenship for children born to stateless parents. On both issues the Commission's position remained very strict, resulting in policy changes in the candidate countries as early as 1998. For example, Latvia was quick to respond to the Commission's pressure, changing the law to allow the children of stateless parents to receive Latvian nationality at birth and abolishing the 'age-windows' system, in 1998. Both the steps were taken within the framework of a larger reform of citizenship regulation, which had been put to a referendum on June 22nd, 1998.[85]

Estonia proved more resistant to pressure and citizenship reform there lagged behind that in Latvia. In its 1998 Report the Commission underlined that Estonia had not improved the situation of children born to stateless parents[86] In 1999, however, citizenship law was finally amended, affecting 6000 children born from stateless parents since Estonian independence and an estimated 1500 more each year.[87]

In the Reports, the Commission provided a careful accounting of the number of non-citizens that had acquired non-citizen passports; it monitored the abolition of areas of discrimination against non-citizens, like the entry into force of a law on amnesty in Latvia which did not discriminate on the grounds of statelessness;[88] it praised the candidate countries' attempts to abolish professional discrimination,[89] as well as linguistic discrimination against non-citizens who are not proficient in the state language. The Commission reported that naturalisation exams had been made progressively easier, even while calling for further simplification of the exams on history and the constitution, and that the cost of naturalisation applications had been progressively lowered.[90] Indeed, Latvia implemented OSCE recommendations in the area of citizenship and naturalisation in 1999,[91] and Estonia in 2000,[92] resulting in the closure of the OSCE missions in Latvia and Estonia on 31 December 2001.[93]

Sometimes, however, the Commission's approach to citizenship reform in the candidate countries was not consistent enough. For example, when the Commission tackled the Estonian practice of linking the right of residence to a minimum income, they did not sustain their criticism. The Commission initially registered dissatisfaction with the Estonian policy regarding this issue.

84 1999 Latvian Report, at 16.
85 53% of Latvians voted for the liberalisation of citizenship policies. See 1998 Latvian Report, at 11.
86 1998 Estonian Report, at 11.
87 1999 Estonian Report, at 12.
88 1998 Latvian Report, at 13; ABOLISHION OF DISCRIMINATION
89 1998 Latvian Report states that stateless persons acquired the right to work as pharmacists, veterinary pharmacists, fire-fighters, and airline staff (at 13)
90 See 1998 Latvian Report, at 11.
91 1999 Latvian Report, at 17.
92 2000 Estonian Report, at 18.
93 2002 Latvian Report, at 27; 2002 Estonian Report, at 28.

According to an Estonian Government decree then in force, an application for any change of status for resident non-citizens of Estonia must be accompanied by a proof of income. In line with this regulation, if an applicant's income did not meet state-approved minimum standards, he or she would not be able to obtain a residence permit or exchange a temporary for a permanent permit. The Commission initially found that "the decree introduces an important obstacle for illegal residents to regularise their situation."[94] This issue is raised in the 2000 Report[95] and then completely disappears from the Commission's discussion of naturalisation policy.

The Commission also monitored Latvia and Estonia's ratification of international instruments related to Minority protection and nationality issues, sometimes "urging"[96] the candidate countries to ratify these documents. Examples of these international agreements are: the UN Convention relating to the status of stateless persons,[97] the Council of Europe Framework Convention on Minorities, and the European Convention on Nationality. Some of these were ratified with declarations watering down the force of the document (like the Estonian declaration made at the ratification of the Framework Convention on Minorities), and some have not been ratified, to date, like the Convention on the Reduction of Statelessness, which has not yet been signed by Estonia. Thus the Commission was not very successful in promoting accession to international instruments regulating the issue of the minority protection and naturalisation. Neither was accession to all of these documents made a necessary precondition to meeting the Copenhagen criterion of respect for and protection of minorities.

Taking into account all the positive developments in the area of naturalisation, the results reported by the Commission were still modest (although the Commission did not refer to them as such). The last round of Regular Reports dealing with Latvia and Estonia (2002)[98] stated that the percentage of non-citizens living in those countries was still very high: 22.4% in Latvia and 19.5% (12.5% stateless) in Estonia. The Comprehensive Monitoring Reports of 2003 were almost silent on the problem. The Commission contents itself with encouraging further progress on the naturalisation of Russian minority populations in Estonia[99] and in Latvia.[100]

94 1999 Estonian Report, at 12.

95 2000 Estonian Report, at 19.

96 2002 Latvian Report, at 30.

97 United Nations, Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, entered into force June 6, 1960. Estonia has not signed the Convention; Latvia acceded to it on 5 November 1992.

98 The 2003 Country Comprehensive Monitoring Reports are not included here, since they apply a different approach to progress assessment, beings structurally built around the chapters of the acquis, rather than around the Copenhagen criteria, and avoiding the provision of statistical data in the area of naturalisation.

99 2003 Comprehensive Monitoring Report on Estonia, at 33.

100 2003 Comprehensive Monitoring Report on Estonia, at 34.

Conclusion

It is possible to argue that, already by 1999, the Commission had achieved its two principal goals: first and foremost, establishing the very fact that the Commission could intervene in this domain; and, second, reforming specific types of policies, like the Latvian 'age-windows' system and in the area of nationality for the children of stateless parents. At the same time, keeping in mind the enormous potential of the pre-accession strategy and the range of tools the Commission had at its disposal to promote compliance with its standards, the final results of the Commission's attempt at steering citizenship policy in candidate countries can only be seen as modest at best. Indeed, even given its considerable influence, the Commission failed to solve the problem of statelessness in Latvia and Estonia.[101] The Commission also failed to provide a serious and consistent assessment of the real problem of statelessness in the candidate countries, probably not giving sufficient weight to its consequences for the future. By releasing an assessment, in 1997, that both Latvia and Estonia had already met the Copenhagen political criteria (the respect for and protection of minorities included), the Commission limited its own room to manoeuvre for 'steering' nationality policies in Latvia and Estonia, and sent the wrong message to the candidate countries. Furthermore, making matters worse, Estonia was invited to open accession negotiations even after the Opinions named it as one of the 'problematic' states. This can only be read as an indication of how minor, indeed, was the issue of statelessness in the context of enlargement.

However, the main achievement of the Commission cannot be ignored: it is now clear that a significant precedent for Union interference in the nationality policies of candidate countries has been established. Using the pre-accession strategy, the Commission pushed the candidate countries to liberalise their naturalisation procedures. This had effects for both the candidate countries and the Union, since all those who were naturalised in Latvia and Estonia as a result of the citizenship reform implemented under the Union pressure became EU citizens on May 1 of this year.

It is difficult to predict how the relationship between the Union and its new Member States, Latvia and Estonia, on this issue will evolve in the future. What is clear, however, is that "having due regard to Community law," as stated by the ECJ in Micheletti, has the potential to gain in importance. We may some day witness Union interference in the nationality policies of one of its Member States. Indeed, this kind of intervention would most likely occur in Latvia or Estonia, since it is difficult to imagine any other states in which the issue of nationality regulation would be so acute and controversial. It is clear, however, that if the Commission feels the need to interfere in the

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101 I do not want to suggest that it was up to the Commission to find solutions, however it did possess all the necessary tools to force the candidate countries to resolve the issue.

domain of citizenship in the course of the future enlargements, it will certainly do so, now with the benefit of the valuable experience gained during preparation for the fifth enlargement. Hopefully, in the future, the Commission's approach to this issue will be more consistent and more effective.