Professor Danuta Hübner

"Toward 2004 constitutional moment for Europe and what next"

European Court of Justice

Conference on "20 years since the accession of 10 States to the European Union"

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My first visit to Court of Justice of the European Union took place back in 2004 when I made my solemn oath before the Court as first ever European Commissioner from Poland. It is good to be back today.

Let me start by saying what you know better than anybody else, which is that the EU is a community of law. This is the only sustainable mechanism to keep us together. And again you know it better than anybody else how quickly the body of European law expands. And we all know that one thing is to create the legal framework, another is its implementation and enforcement.

Also, when we look for symptoms of Europe as an influential superpower, the first thing we see is its legislative power. The world looks at Europe as a source of shared regulatory space, where standards are imported in a non-coercive manner, though there are geopolitical consequences. I would also say that international business is more open to this soft European nudging than political leaders. Some say that the Brussels effect no longer works as effectively as it once did, there is a growing number of European legislation highly appreciated in the world.

We also know that in the EU there have been throughout its history many efforts aiming at better law making. I think here of Lamfalussy architecture and de Larosiere group reports, both supposed to improve effectiveness of European economic regulation.

There are issues related to the excessively prescriptive character of the European legislation, time consuming, geared toward detailed solutions, precautionary and

never sufficiently simple. The need is recognised to move toward more principle-based legislation, leaving a space for ensuring a good balance between legal certainty and flexibility. We need more unquestionable trust in institutions as only then we can resolve the dilemma “efficiency or democracy”.

There is a huge risk that in the years to come, if we don’t move toward treaty change, coping with new risks and developing new policies will open the door to a tsunami of inter governmentalism in decision making and legislation. We will not move from rules toward trusted institutions, from coordination of national resources toward joint decisions, from national envelopes toward European public goods, joint financing and dual legitimacy.

We know the price European citizens pay for the voluntaristic commitments of member states and spontaneous decisions under pressure of dramatic events. The experience is that in such moments the EU tends to rebalance toward intergovernmentalism at the expense of European solutions. We all know cases when political agenda leads to upsetting of the institutional balance.

The Union is a deeply democratic construct. Unfortunately, Europe, which is based on the assumption of the loyalty in action, is poorly equipped to enforce the respect for common values and rights. And we all know the examples. But we know that free and fair elections do not guarantee democracy. That takes me to Poland. My memory tells me that in Poland during the accession time the most important challenge was to build mutual trust between gate keepers who kept the door opened and us, who wanted to enter, the trust embracing alignment with acquis, its implementation and enforcement.

When we were negotiating with the European Community in 1991 the association agreement, a big issue was the preamble of these agreements and the way our future accession to the European Union was supposed to be mentioned there. Not all member states were ready to endorse our intention to join the Community. It was clear that accession will not come soon and will not be easy.

Why the young democracies were not trusted?

There were many factors behind that. This was an unprecedentedly different enlargement. We were about to join the Union whose 15 member states were still coping with the outcome of Maastricht and Amsterdam treaties, establishment of the EU, new areas of integration, in particular related to CFSP and Justice and Home Affairs, as well as the perspective of EMU looming on the horizon. This meant a massive extension of *acquis communautaire*, keeping member states busy and making the task of those knocking at the door much more difficult than in case of previous enlargements. Also the internal market was relatively new and brought a complex legislative and policy framework. There was also Schengen acquis since Amsterdam treaty, which augmented the challenge of mutual confidence. There was also the breakup of Soviet Union and concerns about possible increase of international crime. The world was divided, with all sorts of dictators and autocrats around. All those issues affected our accession process.

As acquis have expanded, the single market was a challenge for member states themselves. Enormous amount of funds were used for the information campaign addressed to the market participants in the EU 15. Schengen acquis actually had negative impact on trust among member states.

Food security issue has emerged in the context of the BSE, mad cow disease and led to further collapse of trust. The relations between UK and France suffered strongly. This was also the time of growing immigration while unemployment rate in the EU was rather high. Indeed, there were many factors making the perception of the new enlargement much more risky than that of the previous ones. And this awareness reached its peak at the end of 1990s, though it was growing through out the 90s.

Already in 1993 the conditionality in the form of Copenhagen criteria was introduced. These conditions were rather general but very efficiently used by the Commission for assessments across all aspects of candidates' preparedness. Rule of law risk was not excluded. When we applied in mid 1990s Single Market was not at all a matured project and the

White Paper on the Single Market, prepared by the Commission for the newcomers was addressing in details issues of the transposition and implementation of the internal market regulations. Still, when I look at the work of the Commission today, in the context of the Ukrainian accession, I dare say that now the Commission is a much stronger leader in this process.

We saw and felt the lack of trust. There were as well novelties introduced for the first time in the context of enlargement. One was about pre accession financial assistance with a strong conditionality, supporting reforms and structural adjustment, allowing us to prepare to future transfers from the EU budget. The other novelty was the system of monitoring and verification of the implementation and enforcement of the acquis before the accession. Conditionality was everywhere, attached to every commitment and every euro of financial assistance. Very strict verification of implementation before the accession did not exist before, when Accession Treaties were signed by new member states on understanding that acquis will be implemented after accession. Lack of compliance with the commitment was then coped with by infringements and the ECJ procedures. I would say that compared to previous enlargement there were doubts about our capacity to implement acquis unless it was done before the accession. In short, we had to prove before joining that we had built the capacity to implement the acquis and enforce it.

I would say that in Poland the quality of harmonization was good. Also, we treated very seriously the opinions on the alignment of every piece of our legislation with the acquis.
But as the implementation of the acquis had been controlled before accession, the consequences was that the parties that were against the enlargement could always stop the negotiations. It was not only member states, these could be regions or even individuals.

At the beginning of the accession negotiations, in particular with regard to economic legislation, the low capacity to carry out impact assessments was one of the most common weaknesses, not only in Poland but also in other accession countries. Too much attention was paid to draft legal texts transposing Community law, and too little to its substance or its economic and social impact. Insufficient attention was also

paid to practical issues, as well as to the way in which the enacted law was implemented. I would say there was too much dogmatism and formalism in the transposition of the law.

The good news was that in 1996 we joined the OECD which I had the pleasure to negotiate. This accession was about institutional capacities of Poland as market economy and the quality of its law. And we passed this test with a very good result.

Poland's accession to the OECD was also a factor that influenced the introduction of the principles aiming at improving the quality of law in Poland. With membership came the need to implement the OECD recommendations in this regard. The OECD gave Poland the first systemic solutions and pressured the introduction of impact assessment instruments.

We were taking the harmonization of the law very seriously, investing in a good team of legislators. We also learnt very quickly that transposition of each legal act had to be complete to avoid their rejection by the Commission. There were two issues making it more difficult than in previous enlargements. One was the ongoing systemic transition in the candidate countries, the other the mentioned tsunami of new legislation. We faced many moments when we were finalising the alignment with a directive and a new version was coming obliging us to continue the adjustment. Environment acquis could be an example of a moving target.

Rational transposition of the acquis required good understanding which directives were more important in this process from the Union’s perspective. We also expected transparency about the available flexibility in negotiations, also in the context of our national interests. This angle was not sufficiently well addressed on the EU side. A good example here were the negotiations of the competition policy and the state aid. Trust mattered strongly here. Regarding the state aid, we needed a general flexibility clause because we were in the process of major economic transformation. There was also the case of the German unification where enormous amount of public funds were pumped into the economy, actually not at all in line with the acquis. That was on our mind.

So we asked for transformation related acceptability or, if you wish, admissibility, of the state aid in industry, environment and regional development. We also asked for a lengthy transitional process for state aid in special economic zones. We had contracts signed for the category of state aid not admissible in the EU. This was the only chapter under full responsibility of the European Commission and these were difficult negotiations. But the motivation for state aid exceptions was different in our case, related to systemic transformation, than in case of established member states.

I would say that for most negotiation chapters the EU negotiating position was about acquis. But there were exceptions. Certainly it was different in case of agriculture where policy choices played a role. In some policies, major role was played by purely political arguments. That was the case, in the EU side, of free movement of persons or free movement of capital, meaning land acquisition, on our side.

What seemed important in the negotiation process was the clarity that at the end of the day new member states will apply the acquis. That in the justified cases there will be transitional arrangements not respecting acquis but still ensuring focus on objectives to be reached. The challenge was to see with clarity what was absolutely necessary for the functioning of the single market. This logic was respected throughout the negotiation process.

Of course, aligning our law with entire acquis was an obligation but our ambition was also to use this opportunity to improve the quality of our law in general and modernise the approach to legislating. We were aiming at entering a high quality regulatory environment. I would say that we understood that.
I remember a meeting in the Constitutional Tribunal when we talked about how the European law will protect our human rights, minorities, women, people with disabilities. About the rights of our judges to ask the ECJ the prejudiciary questions, about Poland after accession shaping and deciding on the European law through the European legislative process. Our courts were preparing to apply in a direct way provisions of the European law.

When I look now back at how we cared about being as the economy and as the jurisdiction fit for the accession, how we spared no effort to be seen by Brussels as a

trustworthy partner, I come to the conclusion that there was more than just national angle to our accession. We cared about Europe. Solid preparation was about building our credibility and we made it. It was sufficient for the first ten years. For ten years Poland was a role model for young democracies. But after the ten years the collapse of rule of law came and stayed for eight years. Something happened that had no right to happen. The rule of law was gone , its foundations were destroyed. The question is whether there is any warning or any lesson learnt in this experience for the future.

In the first years of Poland's membership in the EU, there was a clear tendency for Polish administrative courts to boldly apply the provisions of Community law in a direct manner. This was not a substitute for the correct and timely transposition of Community law, but it showed that, in cases of legislative omissions, Polish courts did not hesitate to apply EU law directly, disregarding national law.

The process of adapting Polish law to Community law did not end with 1 May 2004. It continued to proceed in a very dynamic manner, even more when from that date onwards all shortcomings or legislative deficiencies were presented almost immediately to the Polish side within the framework of infringement proceedings under Article 226 of the Treaty establishing the European Communities (TEC)

I would say today that before joining the Union we understood why regulation matters even though we were not aware of the importance of Brussels effect. We did not know enough about the way the interests representatives participate in the European decision making.

But, on the other hand, as our preparation for the accession ran in parallel to our transition to democracy and market economy we appreciated the importance of rules and institutions. In particular, when it comes to managing the economy, reforms enabling the functioning of national and European markets and rather quickly could appreciate as well the transformative power of European legislation when it comes to Brussels effect.

We did not appreciate sufficiently the role of the European Parliament. We underestimated the disruptive force of national interest in the system where the whole of the acquis was supposed to be respected.

We understood rather quickly that our capacity to benefit from the state aid was relatively limited as our fiscal space was much smaller. While this fragmentation of the single market seemed to be tolerated by the system, our potential comparative advantage related to lower labour costs was not tolerated. I hope that the EU will manage to find better balanced solutions to major challenges related to the single market in the context of the upcoming enlargement.

I am strongly convinced that both joint financing and joint programs and projects and enabling through strategically important legislation a robust development of the cross border economy, can be important drivers for well balanced benefits for all. They can facilitate ensuring levelled playing field within the EU and reduce the distortions coming from national interests. They can help get rid of regulatory arbitrage and the risk of the race to the bottom.

Now we know that under our watch, before our eyes our legal institutions can be violated and can crumble in a clash with political power.
Even the best institutions of the rule of law can lose in a concrete situation of a member state. Elections in Poland in October prove that only citizens can save the democracy when the state itself acts against its own judges and courts aiming at destroying the essence of independent judiciary system.

It would be good to hear from the ECJ whether the treaty instruments we have can be effective in defending the principle of the rule of law, defending rights and freedoms of individuals, effective democratic mechanisms, independence of judiciary, minority rights and apolitical character of institutions. Maybe we need ECJ in the article 7 and elsewhere in the treaties. Enlargement that is ahead of us will bring more challenges and our duty is to see it as a new constitutional moment.