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**ORIGINAL MANUSCRIPT**

# The evolution of the political criteria for accession to the European Community, 1957–1973

Ronald Janse\* **Abstract**

This article describes the evolution of political conditions for accession to the European Community from 1957 to 1973 on the basis of the responses of the Community and national parliaments to applications for association (Article 238 EC Treaty) and membership (Article 237 EC Treaty) and to a US foreign policy initiative. It challenges the thesis that the European Community was originally uninterested in the political nature of its members as long as they were non-communist and that the Community made a volte face in 1962 in reaction to a request for an association agreement by Franco's Spain. It argues that the Copenhagen political criteria, except minority protection, were firmly established by 1973 after a series of pronouncements and decisions by the European Parliament, national parliaments (both 1962), the Commission (1967) and the Council (1973). The article aims to contribute to the early history of the constitutionalization of the Union and discusses how demands from outsiders prompted the Six to define the constitutional requirements for (candidate) members. It is partly based on new archival research.

## 1 | INTRODUCTION

A country which aims to become a member of the European Union must respect democracy, the rule of law, human rights and the other values listed in Article 2 TEU. This political condition of accession, now in Article 49 TEU, was introduced into primary law in the 1997 Treaty of Amsterdam. The treaties which founded the European Communities only mentioned a geographical criterion. Articles 98 European Coal and Steel Community (ECSC), 237 European Economic Community (EEC) and 205 Euratom stated that “any European State may apply to become a member of the Community” (EEC and Euratom) or “accede to the present Treaty” (ECSC). Political accession criteria were not mentioned, except, perhaps, in the Preamble to the Treaty of Rome (1957), which expresses the desire of the founders of the EEC “to lay the foundations of an ever closer union among the peoples of Europe”; to pool “their resources to preserve and strengthen peace and liberty”; and calls “upon the other peoples of Europe who share their ideal to join in their efforts”. However, Article 237 did not establish a link between membership and the preambular reference to liberty. Besides, liberty can be interpreted as a shorthand for democracy, human rights and the rule of law as well as for the free movement of goods, services and labour. So when did the political accession criteria emerge?

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There are broadly two views on the evolution of the political conditions of accession. Article 21(1) TEU states that the principles of democracy, human rights and rule of law have “inspired” the EU’s “own creation, development and enlargement”. Timmermans, the first Vice President of the Commission, recently said: “The rule of law is part of Europe’s DNA, it’s part of where we come from and where we need to go. It makes us what we are.”<sup>1</sup> These official statements find support in some recent as well as older academic literature.<sup>2</sup> De Búrca, for example, has argued that the European Community was, from its inception, committed to the ideas on membership which had inspired the Statute of the Council of Europe (1949) and in particular the draft treaty for a European Political Community (1953).<sup>3</sup> Article 116(1) of this draft provided that “accession to the Community shall be open to the Member States of the Council of Europe and to any other European State which guarantees the protection of human rights and fundamental freedom”. The alternative view, most forcefully defended by Thomas, is that the EEC was originally a functional organization established to promote the free market and trade.<sup>4</sup> It was not open to the communist states of Central and Eastern Europe and the Western Balkans, and in that sense political conditions did apply, but other than that all European countries were eligible to join as far as the character of their legal and political systems was concerned, including Portugal and Spain, the two dictatorships which survived the Second World War.<sup>5</sup> The fact that the Six could easily have retained the political conditions for membership of the draft 1953 EPC Treaty in the 1957 EEC Treaty, but did in fact choose the ambiguous preambular reference to liberty, suggests that the EEC Treaty marked a “retreat from constitutionalization” in favour of a “functionalist and then a free-market vision of European integration”.<sup>6</sup> “The Six”, he writes, “simply did not share the membership norms that had come closest to realization in the EPC treaty and did not want their membership choices to be constrained by such stringent criteria”.<sup>7</sup> According to Thomas, the origin of political conditions of membership lie in the “highly contested political process” in 1962 over Spain’s rapprochement with the Community which led to a “re-conceptualization of the community’s membership norms” resulting in the principle that “only parliamentary democracies were eligible for membership”.<sup>8</sup>

This article does not aim to establish what Article 237 and the preambular reference to liberty meant in 1957; conclusive evidence is lacking and the arguments in favour of either interpretation have been eloquently and forcefully defended by their proponents.<sup>9</sup> The Treaty of Rome was formulated in exceptionally terse language; the drafters

<sup>1</sup>Frans Timmermans, ‘The European Union and the rule of law’, keynote speech at conference on the rule of law, Tilburg University, 31 August 2015. Retrieved on 21 September 2017 from [https://ec.europa.eu/commission/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://ec.europa.eu/commission/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en)

<sup>2</sup>G. de Búrca, ‘The road not taken: The EU as a global human rights actor’ (2011) 105 *American Journal of International Law*, 649–693; C. Hillion, ‘The Copenhagen Criteria and their Progeny’, in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishers, 2004), 1–22, at 4; H. Mosler, ‘Die Aufnahme in internationale Organisationen’ (1958) 19 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 275, 285–7 (‘Obwohl der Text darüber schweigt, hat das Wort Europa in den Satzungen der Gemeinschaften und des Europarats außer der geographischen Bedeutung auch einen politischen Unterton. Nur Staaten mit freiheitlich-humanitärer Gesellschaftsordnung im Sinne der europäischen Tradition sind als Mitglieder willkommen’)

<sup>3</sup>de Búrca, above, n. 2, 664–667.

<sup>4</sup>D.C. Thomas, ‘Constitutionalization through enlargement: The contested origins of the EU’s democratic identity’ (2006) 13 *Journal of European Public Policy*, 1190–1210; D.C. Thomas, ‘Beyond Identity: Membership Norms and Regional Organization’, (2017) 24 *European Journal of International Relations*, 217–240. See the overview of authors holding a similar position in A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press, 2004), 137–157.

<sup>5</sup>Thomas, ‘Constitutionalization through enlargement’, above, n. 4; Thomas, ‘Beyond identity’, above, n. 4, at 223–228. See also K. Hebel and T. Lenz, ‘The identity/policy nexus in European foreign policy’ (2016) 23 *Journal of European Public Policy*, 473–490, 479–483.

<sup>6</sup>Thomas, ‘Constitutionalization Through Enlargement’, above, n. 4, at 1190–91, 1193.

<sup>7</sup>Thomas, ‘Beyond Identity’, above, n. 4, at 226.

<sup>8</sup>Thomas, ‘Beyond Identity’, above, n. 4, at 227, 229, 233; and Thomas, ‘Constitutionalization Through Enlargement’, above, n. 4, at 1190.

<sup>9</sup>There is no reference to political conditions of membership in the Messina Resolution adopted by the Foreign Ministers of the ECSC Member States (Messina, 1–3 June 1955) or in the *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères* of 21 April 1956 (also known as the Spaak Report), which led to the drafting of the EC Treaty. The silence in other parts of the *travaux préparatoires* is noted in de Búrca, above, n. 2, 664.

took great pains to stay closely to the terms of the mandate of the 1955 Messina conference, which led to the creation of the European Economic Community, and were hesitant to go beyond the most basic institutional and legal mechanisms they deemed necessary for the functioning of EURATOM and the EC to avoid a repetition of the fate of the European Defence Community and the European Political Community, which had been rejected by the French National Assembly in 1954.<sup>10</sup> Indeed, the wording of Article 237 was so concise that it did not even mention economic conditions of membership—a good reason not to read too much into the silence in this provision on political conditions.<sup>11</sup>

Instead, this article reconstructs the evolution of political criteria of membership on the basis of evolving practice in response to a series of concrete cases. It describes the responses of competent organs of the Community and Member States to applications for association and membership under Articles 237 and 238 of the EC Treaty in the late 1950s and 1960s as well as to an external challenge to define the political character of the Community and its members in 1973. This article finds no evidence for a dramatic *volte face* from functionalism to political conditionality in the early 1960s, and argues that political criteria for membership evolved without evident U-turns from the late 1950s to the early 1970s. It concludes with some observations on the relevance of the early history of political accession conditionality. The article is partly based on sources from the archive of the Dutch Ministry of Foreign Affairs.<sup>12</sup>

## 2 | ASSOCIATION AND MEMBERSHIP

Almost all episodes in the evolution of the political accession criteria in the late 1950s and 1960s were not so much about accession (Article 237), but about association (Article 238), or to be more precise, about association with a tentative prospect of membership. It is useful, in preparing the ground for the next sections, to first take a closer look at some aspects of these articles, especially their aims, procedures and mutual relations.

The aim of accession was clear and unequivocal, the aim of association less so. Certainly, an association agreement was more ambitious than a preferential trade agreement but fell short of full membership. But Article 238 was silent on the precise aims and substance of such agreements. It merely stated that an association embodies “reciprocal rights and obligations, joint actions and special procedures”. Association agreements could thus have many different aims, including the extension of the customs union; the establishment of a free trade area; the harmonization of economic policies; the provision of financial or development assistance to enhance employment and the standard of living; and, indeed, preparing the way for membership.<sup>13</sup> Yet it is important to point out that the letter of the treaty did not envision membership as an inevitable objective of an association agreement; an associate could very well have the status of a privileged outsider of the Community. For this reason, a willingness to establish an association agreement with a country cannot, on the basis of the EC Treaty, be taken to imply a willingness to allow that country to become a member—a point to which we shall return.

According to the EC Treaty, the procedures to arrive at association and membership agreements were different. Under Article 238 of the Treaty of Rome, an association agreement “shall be concluded by the Council, acting unanimously after consulting the Assembly”. The Community as a legal person concluded the agreement with the third State. Accession to the European Community, by contrast, required the unanimous vote of the Council, based on an

<sup>10</sup>de Búrca, above, n. 2. The historical literature on the difficult road to the Rome Treaties is very briefly summarised in W. Loth, ‘Der Weg nach Rom—Entstehung und Bedeutung der Römischen Verträge’ (2007) 30(1) *Integration*, 36. See also A. Boerger-De Smedt, ‘Negotiating the foundations of European law, 1950–57: The legal history of the treaties of Paris and Rome’ (2012) 21(3) *Contemporary European History*, 339.

<sup>11</sup>I owe this point to an anonymous reviewer.

<sup>12</sup>See paragraphs 2 and 4. Abbreviated as MBZ, archive number, details on name file.

<sup>13</sup>D. Phinnemore, *Association: Stepping-Stone or Alternative to Membership?* (Sheffield Academic Press, 1999), at 22–28.

opinion of the Commission, and also ratification by all six national parliaments. In theory, membership agreements were thus more directly the subject of debate in national politics of the six members than association agreements. In practice, however, the first two association agreements, with Greece and Turkey, were concluded by the Community and Member States jointly, despite the text of Article 238 of the Treaty of Rome. Negotiators found that the agreements had to cover areas where Member States had retained treaty-making power and the Community had no competence.<sup>14</sup> These “mixed agreements” were presented to national parliaments for ratification. National politics was thus an important factor in determining the fate of association agreements, apart from the fact that the governments of the Six were accountable to their parliaments for their behaviour in the Council. The successful conclusion of association agreements, just like accession agreements, in practice required support in the parliaments of the Six.

In the late 1950s and early 1960s, many countries within Europe expressed an interest in association: Greece (1959), Turkey (1959), Austria (1961), Sweden (1961), Switzerland (1961), Spain (1962) and Portugal (1962).<sup>15</sup> There were also applications for membership under Article 237 from the United Kingdom, Denmark and Ireland (all 1961). In view of this overwhelming interest, a lack of precedent, and the vagueness of the aims and some procedural details of Article 238, the Commission, the Council, the European Parliament and Member States spent a great deal of time on discussing principles of association and membership.<sup>16</sup> In 1959 the Commission attempted to formulate a common position on association at the request of the Council, the so-called First Memorandum.<sup>17</sup> It was followed by a Second Memorandum later that year.<sup>18</sup> The Commission continued to hold meetings on association and wrote an internal report on neutral states in 1962.<sup>19</sup> The Political Committee of the European Parliament, chaired by Willi Birkelbach, submitted a report in late 1961 which was unanimously adopted by the Parliament in January 1962.<sup>20</sup> In 1963 the Parliament's Committee on External Trade released another report, the Blaisse Report.<sup>21</sup> The Committee of Permanent Representatives (COREPER) held a series of meetings on the possibility of a general association policy in 1960 and 1961.<sup>22</sup> There was a conference on association and membership for representatives of Member States in Strasbourg in 1960,<sup>23</sup> the Dutch Ministry of Economic Affairs

<sup>14</sup>W. Feld, 'The association agreements of the European Communities: A comparative analysis' (1965) 19 *International Organization*, 223–249, 225–6; D.M. Cohen, 'The Association of Third Countries with the European economic community pursuant to article 238' (1964–65) 26 *University of Pittsburgh Law Review*, 521–531, 529–531.

<sup>15</sup>Cohen, above, n. 14, at 521.

<sup>16</sup>The brief overview presented here is based on Phinmore, above, n. 13, at 30–40 and on sources in the Dutch National Archive. Procedural difficulties regarding association centred around whether the Commission had the competence to conduct negotiations. See T. Oppermann, 'Die Assoziierung Griechenlands mit der Europäischen Wirtschaftsgemeinschaft' (1962) 22 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 486.

<sup>17</sup>Commission of the European Economic Community, *First Memorandum of the Commission of the European Economic Community to the Council of Ministers of the Community (pursuant to the decision of 3 December 1958), concerning the problems raised by the establishment of a European Economic Association*, Brussels, 26 February 1959. Henceforth First Memorandum.

<sup>18</sup>EEC Commission, Memorandum from the Commission to the Special Committee for the Study of Problems Concerning a European Economic Association. I/COM(59)123 rev., Brussels, 22 September 1959.

<sup>19</sup>Commission, *Association with Neutral Countries: Questions arising from statements by the representatives of Austria, Sweden, and Switzerland*, Report I/3/06524/62, 19 October 1962.

<sup>20</sup>*Rapport fait au nom de la commission politique sur les aspects politiques et institutionnels de l'adhésion ou de l'association à la Communauté par M. Willi Birkelbach Rapporteur*, Services des publications des Communautés européennes, 15.01.1962. (Assemblée parlementaire européenne, Documents de séance 1961–1962, Document 122). Henceforth: Birkelbach Report.

<sup>21</sup>P.A. Blaisse, *Report on behalf of the Committee on External Trade on the Common Trade Policy of the EEC towards Third Countries and on the Applications by European Countries for Membership and Association*, European Parliament Working Paper, no. 134, 26 January 1963. Henceforth: Blaisse Report.

<sup>22</sup>MBZ, PV EEG and EURATOM 2.05.280, 109 'Van GNV aan MinBZ', 23 February 1962 and 'Verslag PV-vergadering', 6 April 1960.

<sup>23</sup>MBZ, PV EEG and EURATOM 2.05.280, 107. See the front page of a discussion paper 'Considerations sur les principes d'une politique d'association de la Commune'.

issued an internal memorandum in 1963<sup>24</sup>; an Italian Memorandum was published in 1964<sup>25</sup> and the Belgian Ministry of Foreign Affairs conducted a lengthy study as well.<sup>26</sup>

In the course of these years a few principles emerged on which all European bodies and Member States agreed.<sup>27</sup> These included the principle that associates would not be offered the right to take part in the Community's internal decision making; an associate remained an outsider to the Commission, the Council, Parliament and COREPER.<sup>28</sup> As the Commission's First Memorandum expressed this "essential difference" between association and membership, "the associate country retains its full individuality on the political plane".<sup>29</sup> Yet none of the many reports achieved the status of official Community association policy. In fact, the Commission and COREPER gave up on the attempt to formulate a general theory because the differences between interested third countries were too significant and because opinion among Member States and Community organs was too divided on some of the issues. The Community decided on requests for association and membership on a case-by-case basis. It was also cautious: after Greece and Turkey the Community would not conclude any association agreements with other European countries until 1970 with Malta.

One of the unresolved issues in the early 1960s with a direct bearing on the story of this article was the relation between association of European states and accession. The letter of the EC Treaty implied that membership was a possible, but not an inevitable, aim of an association, as was mentioned before. Opinion among Member States and Community organs was divided. One view held that an association agreement with a European state was only possible if the state was willing and able in due course to become a full member. The Italian Memorandum, for instance, argued that

*association should ... only be considered as a temporary stage, that is as a preliminary step towards the initial objective, i.e. full membership. It is in fact conceivable that the economic structure of the State concerned might not be sufficiently advanced to enable it to subscribe to all the obligations attaching to membership, and that it would therefore be advisable to resort provisionally to association as a means of enabling the said State to reach the same economic level as its partners.*<sup>30</sup>

If a European state was unwilling to become a member, the "only alternative would be to confine oneself to a trade agreement".<sup>31</sup> Interestingly, Italy believed that membership was conditional upon meeting political conditions. It therefore argued that political conditionality not only applied to Article 237 but to Article 238 as well; in the case of "an association with a view to, and conditional upon membership, it is important that the State in question should meet the necessary political requirements for membership, both at home and abroad".<sup>32</sup> Italy believed that these "guiding principles" were applied in the case of Greece and Turkey "and should also be followed with regard to association applications made by other European countries".<sup>33</sup> Yet there was no consensus that association of a European state was an inevitable stepping-stone to full membership. The Parliament's Blaise Report, for example, argued that association should be possible "for countries which, though unable or disinclined to join the Community, are

<sup>24</sup>MBZ, PV EEG and EURATOM 2.05.280, 109. Ministry of Economic Affairs, *The Widening of the EEC and European Integration (De verbreding van de EEG en de Europese integratie, 1963)*.

<sup>25</sup>Italian memorandum on the Community's relations with third countries', in European Parliament, *Monthly Bulletin of European Documentation*, no. 6, June 1964, 22–24. Henceforth: Italian Memorandum.

<sup>26</sup>Thomas, 'Beyond Identity', above, n. 4, at 228.

<sup>27</sup>Phinnemore, above, n. 13, at 30–40.

<sup>28</sup>*Ibid.*, at 31–32.

<sup>29</sup>First Memorandum, above, n. 17, para. 87.

<sup>30</sup>Italian Memorandum, above, n. 25, 22.

<sup>31</sup>*Ibid.*, 23.

<sup>32</sup>*Ibid.*, 22.

<sup>33</sup>*Ibid.*, 23.

nevertheless prepared to play their part in the integration process by harmonising their economy with that of the Community to a really appreciable extent".<sup>34</sup> In its internal report, the Commission similarly denied a necessary link between association and membership; "association could be considered as a permanent solution rather than with a view to subsequent development into full membership". In short, neither the letter of the EC Treaty nor opinion among Member States and Community organs led to an unequivocal and generally supported view on the relation between association and membership in the late 1950s and early 1960s, when the first requests for association and membership came in.

### 3 | TURKEY AND GREECE

On 8 June 1959 Greece requested an association agreement with the European Community under Article 238. Turkey followed six weeks later.<sup>35</sup> Greece became the first associate of the European Community when the Athens agreement was signed on 9 July 1961 and entered into force on 1 November 1962.<sup>36</sup> Turkey was the second; the Ankara agreement was signed on 12 September 1963 and entered into force on 1 December 1964.<sup>37</sup>

Both agreements provided that membership was a tentative long-term aim of the association. According to Article 72 of the Athens Agreement, "as soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Greece of the obligations arising out of the Treaty establishing the European Economic Community, the Contracting Parties shall examine the possibility of the accession of Greece to the Community".<sup>38</sup> The preamble to the agreement reinforced this by saying that "the support given by the European Economic Community to the efforts of the Greek people to improve their standard of living will facilitate the accession of Greece to the Community at a later date". Article 28 and the preamble of the Ankara Agreement provided, *mutatis mutandis*, the same.<sup>39</sup> These formulations, to be sure, were cautious; membership was a possibility, not a certainty, in a distant, not a near, future—at least 17 years would pass before an assessment could be made of whether negotiations could begin—following new negotiations. Yet they were significant all the same: the Council, the European Parliament and the national parliaments of the six Member States apparently saw no obstacles to the prospect of membership on account of the political systems in Turkey and Greece. This, as we shall see in the next paragraph, was entirely different when Spain and Portugal requested association with a view to membership in 1962.

Negotiations with Greece and Turkey had been complicated and slow for a number of reasons, including the fact that precedent on Article 238 was going to be set and that the precise competences of the Council and the

<sup>34</sup>Blaise Report, above, n. 21, para. 35.

<sup>35</sup>S. Ceylanoglu, *Europäische Wirtschaftsgemeinschaft, Griechenland und die Türkei; Die Assoziationsabkommen im Vergleich, 1959–1963* (Nomos, 2004); Feld, above, n. 14, at 225–226; Cohen, above, n. 14, at 529–531.

<sup>36</sup>I.S. Tsalicoglou, *Negotiating for Entry: The Accession of Greece to the European Community* (Dartmouth, 1996), 9–21; S. Verney, 'Greece and the European Community', in K. Featherstone and D.K. Katsoudas (eds.), *Political Change in Greece: Before and After the Colonels* (Croom Helm, 1987), 253–270; V. Coufoudakis, 'Greek Foreign Policy, 1945–1985: Seeking Independence in an Interdependent World—Problems and Prospects', in *ibid.*, 230–252; S. Verney, 'An exceptional case? Party and popular Euroscepticism in Greece, 1959–2009' (2011) 16 *South European Society and Politics*, 51–79; S. Verney, 'The Greek Association with the European Community: A Strategy of State', in A.C. Pinto and N.S. Teixeira (eds.), *Southern Europe and the Making of the European Union, 1945–1980s* (Columbia University Press, 2002), 109–156.

<sup>37</sup>S. Ilkin, 'A Short History of Turkey's Association with the European Community', in A. Evin and G. Denton (eds.), *Turkey and the European Community* (Leske and Budrich, 1990), 35–50; R. Bourguignon, 'A History of the Association Agreement between Turkey and the European Community', in: *ibid.*, 51–64; H. Arikian, *Turkey and the EU: An Awkward Candidate for EU membership?* (Ashgate, 2003), 47–76; S. Verney, 'National Identity and political change on Turkey's road to EU membership' (2007) 9(3) *Journal of Southern Europe and the Balkans*, 213–221; S. Verney, 'National Identity and Political Change on Turkey's Road to EU Membership', in S. Verney and K. Ifantis, *Turkey's Road to European Union Membership: National Identity and Political Change* (Routledge, 2009), 1–9.

<sup>38</sup>'Agreement creating an association between the European Economic Community and Greece', *Official Journal of the European Communities*, no. 26 of 18.02.1963.

<sup>39</sup>EEC-Turkey Association Agreement (1963) *Official Journal of the European Communities*, no. 217 of 29.12.1964.

Commission were unclear and contested.<sup>40</sup> But there was no effort to deny Greece and Turkey negotiations on an association agreement, or the prospect of possible membership, on account of their political systems. Greece and Turkey were, of course, important to the European Community and its members for a variety of reasons, including their strategic importance to NATO, of which the Six as well as Turkey and Greece were members, in one of the most perilous periods in the Cold War—the Berlin Wall was constructed in 1961 and the Cuban missile crisis was in 1962.<sup>41</sup> But there is no evidence that the European Community and national parliaments found the Turkish and Greek political systems unacceptable and were unprepared to conclude an association agreement with a view to membership had not Cold War or other interests come into play.

Unlike Spain and Portugal, Greece and Turkey had been members of the Council of Europe since 1949 and 1950, respectively.<sup>42</sup> Its Statute provided, in Article 3, that every member “must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”. Turkey had seen a peaceful transition from authoritarianism to multiparty democracy in 1946 and an equally peaceful alternation of power after the elections in 1950.<sup>43</sup> On 27 May 1960 there had been a military coup d'état, on account of which the European Community delayed the start of negotiations on the association agreement, but in 1961 a new constitution was adopted after a referendum, and elections were held again that were free and fair. The new constitution provided for additional checks and balances, including the establishment of a constitutional court, and made the media and the universities independent. Greece also had peaceful elections after the civil war ended in 1949, but its democracy was unstable with new elections being held almost every year in the 1950s.<sup>44</sup>

On the face of it, Turkey and Greece were democracies, unlike Spain and Portugal. The Greek government had presented the rationale for its inclusion in the European Free Trade Area in 1957 as “the defence of the European and more specifically of the democratic way of life in the whole area” of south-eastern Europe.<sup>45</sup> In this sense, Turkey and Greece were no litmus test of whether the European Community and national parliaments held that prospective members needed to satisfy political conditions. Reality was less convincing. Turkey saw a return to authoritarian politics in the mid-1950s with government control of the media and universities (which were, however, reversed with the new constitution in 1961), restrictions on political meetings during elections, and a pogrom against Greek citizens.<sup>46</sup> Greece had a lack of press freedom, heavy US involvement in politics and the army, a prevalence of clientelism which undermined the functioning of democracy, and the 1961 elections were rigged.<sup>47</sup> Such facts are insufficient, however, to conclude that the Community was agnostic about the political nature of its possible future members. Such a conclusion would require a test to separate real from (partly) cosmetic democracies which can be used, without anachronism, with respect to candidates as well as then members.

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<sup>40</sup>Ceylanoglu, above, n. 35, at 124–164.

<sup>41</sup>*Ibid.*, at 171–176; J.G. Hershberg, ‘The Cuban Missile Crisis’, in M.P. Leffner and O.A. Westad, *The Cambridge History of the Cold War; Volume 2: Crises and Détente* (Cambridge University Press, 2011), 65–87.

<sup>42</sup>Portugal became the 19th Member State of the Council of Europe on 22 September 1976; Spain became the 20th Member State of the Council of Europe on 24 November 1977.

<sup>43</sup>E.J. Zürcher, *Turkey; A Modern History* (I.B. Tauris, 2004), 215–263; S.J. Shaw and E.K. Shaw, *History of the Ottoman Empire and Modern Turkey; Volume II: Reform, Revolution and Republic: The Rise of Modern Turkey, 1808–1975* (Cambridge University Press, 1977), 402–429; F. Ahmad, *The Making of Modern Turkey* (Routledge, 1993), 102–147.

<sup>44</sup>J.S. Koliopoulos and T.M. Veremis, *Modern Greece: A History Since 1821* (Wiley-Blackwell, 2010), 127–152; R. Clogg, *A Short History of Modern Greece* (Cambridge University Press, 1986), 166–199; D.C. Close, *Greece Since 1945: Politics, Economy and Society* (Longman, 2002), 83–110.

<sup>45</sup>Quoted in Verney, ‘The Greek Association with the European Community’, above, n. 36, at 145.

<sup>46</sup>Zürcher, above, n. 43, at 229–232.

<sup>47</sup>Verney, ‘The Greek Association with the European Community’, above, n. 36, at 116–118; Koliopoulos and Veremis, above, n. 44, at 132–138.



## 4 | SPAIN

On 9 February 1962, Spain's minister of foreign affairs sent a letter to the French minister of foreign affairs and President in turn of the Council of Ministers requesting "the opening of negotiations aimed at studying the possible connection of my country with the European Economic Community in the matter which may be most convenient for our mutual interests", and, more specifically, "an association which may in due time be transformed into full integration".<sup>48</sup> Portugal followed suit; the Salazar government formally requested negotiations on an association agreement on 4 June 1962.<sup>49</sup>

Spain had been a pariah in international society after the Second World War.<sup>50</sup> It was not allowed to join the United Nations, the International Monetary Fund, the World Bank (both 1944) and the Organisation for European Economic Co-operation (1948). It was excluded from the Marshall Plan.<sup>51</sup> Not that Spain's isolation was long-lasting or absolute. By the late 1940s the United States, Britain, France and other Western powers restored diplomatic relations as they concluded that Franco's regime had to be looked at through the lens of the Cold War instead of the last war.<sup>52</sup> In 1950 the United Nations General Assembly revoked its recommendations that Spain be debarred from membership of the United Nations and related international agencies.<sup>53</sup> Spain subsequently joined the Food and Agriculture Organization (1950), UNESCO (1952) and the United Nations (1955). Yet limits to its acceptance in international society remained; Spain was not allowed to join NATO, for example.

Madrid's foreign economic policy consisted in the establishment of a dense and extensive network of bilateral trade agreements with all European countries and many non-European countries. This enabled the regime to survive economically in the 1950s and even to achieve modest yet uneven economic growth.<sup>54</sup> By the end of the decade, however, Madrid became increasingly concerned about the perils of being an outsider in a world of ever-increasing multilateral economic cooperation.<sup>55</sup> In 1958 Spain was allowed to join the World Bank and the IMF, and in 1959 it became a member of the OEEC. Links with economic organizations in Western Europe were also high on the agenda, since this region was most important to Spain.<sup>56</sup> Madrid initially preferred the European Free Trade

<sup>48</sup>The full letter is annexed to F. Guirao, 'Association or trade agreement? Spain and the EEC, 1957–64' (1997) 3 *Journal of European Integration History*, 103–120, 120.

<sup>49</sup>N.A. Leitão, 'A flight of fantasy? Portugal and the first attempt to enlarge the European economic community, 1961–1963' (2007) 16 *Contemporary European History*, 71–87. The Portuguese Question provoked much less controversy than the Spanish Question and does not complement or compromise the reconstruction offered in this article. For reasons of space it is therefore not discussed.

<sup>50</sup>Unless indicated otherwise, this section is based on F. Guirao, *Spain and the Reconstruction of Western Europe, 1945–57* (Macmillan, 1998), 9–38; J.C. MacLennan, *Spain and the Process of European Integration, 1957–85* (Palgrave, 2000), at 14–23; E. Moradiellos, 'The Potsdam conference and the Spanish problem' (2001) 10 *Contemporary European History*, 73–90; J. Tusell, *Spain: From Dictatorship to Democracy, 1939 to the Present* (Blackwell Publishing, 2007), at 75–158.

<sup>51</sup>Guirao, above, n. 50, at 57–132.

<sup>52</sup>J.L. Gaddis, *The United States and the Origins of the Cold War, 1941–47* (Columbia University Press, 1972), 95–352; J.L. Gaddis, *The Cold War: A New History* (Penguin, 2005), 5–32; M.P. Leffler, 'The Emergence of an American Grand Strategy, 1944–52', in M.P. Leffler and O.A. Westad (eds.), *The Cambridge History of the Cold War: Volume I: Origins* (Cambridge University Press, 2013), 67–89.

<sup>53</sup>UN General Assembly, Relations of Member States and specialized agencies with Spain, 4 November 1950, A/RES/386. The previous resolutions were UN Security Council, Resolution 4 (1946) of 29 April 1946, 29 April 1946, S/RES/4 (1946); UN General Assembly, Relations of Members of the United Nations with Spain, 12 December 1946, A/RES/39; UN Security Council, Resolution 7 (1946) of 26 June 1946, 26 June 1946, S/RES/7 (1946)

<sup>54</sup>Guirao, above, n. 50, at 52–4, 131–170, 184–8.

<sup>55</sup>MacLennan, above, n. 50, at 37–60; Tusell, above, n. 50, at 107–186; O. Calvo-Gonzalez, *The political economy of conditional foreign aid to Spain, 1950–1963: Relief of input bottlenecks, economic policy change and political credibility* (PhD dissertation, London School of Economics and Political Science, 2002), 240–266; L. Prados de la Escosura, J.R. Rosés and I. Sanz-Villarroya, 'Economic reforms and growth in Franco's Spain' (2012) 30 *Revista de Historia Económica*, 45–89, 54–56.

<sup>56</sup>Guirao, above, n. 48, at 115–117; F. Guirao, 'Solvitur ambulando: The Place of the EEC in Spain's Foreign Economic Policy, 1957–62', in A. Deighton and A.S. Milward (eds.), *Widening, Deepening and Acceleration: the European Economic Community, 1957–1963* (Nomos, 1999), 347–358, at 351.

Association (EFTA) over the EEC.<sup>57</sup> But after the United Kingdom, Denmark and Ireland applied for membership of the EEC in August 1961, it became clear that the Community, not EFTA, was going to be the engine of European economic integration. Moreover, Madrid began to fear the EEC's possible negative impact on its economic fortunes.<sup>58</sup> With its request for "an association which may in due time be transformed into full integration", Spain aimed at a long-term commitment for stable economic development and, as a result, political stability.<sup>59</sup>

Spain, like Greece and Turkey, was unable to meet the economic conditions of accession.<sup>60</sup> Moreover, Spain expected less resistance to an application for association than to an application for membership, since the latter required ratification by all six national parliaments where Franco's regime was controversial.<sup>61</sup> As early as December 1958, an inter-ministerial committee, which had been installed by Franco to study the impact of the Treaty of Rome and to advise on the policy to be followed, had concluded that association would be easier to achieve than accession:

*Article 237 talks about the incorporation into the Common Market on an equal footing to the signatory states, and it requires their unanimity as well as the subsequent ratification by their parliaments, whereas Article 238 sets the association method. The latter seems an easier formula for Spain's entry. It constitutes a second class presence, but it is easier to carry out negotiations with the Council of Ministers than with the delegations of the six member states and their respective parliaments, where enormous problems will arise.*<sup>62</sup>

Spain had reasons to be cautiously optimistic. Both the Federal Republic of Germany (FRG) and France supported Spain's inclusion in the process of European integration.<sup>63</sup> Bonn and Paris had played an active role in preparing the ground for Spain's association agreement with the OEEC in 1958 and its subsequent full membership in 1959.<sup>64</sup> They also supported an association agreement between Spain and the European Community. Indeed, Bonn's support for an association agreement remained unwavering throughout the 1960s and early 1970s, regardless of the political colour of the chancellor and the coalition governments.<sup>65</sup> To be sure, neither France nor the FRG advocated Spain's membership of the European Community under Franco; their support was based on the doctrine that association was not an inevitable stepping-stone to membership. Particularly revealing in this regard is the Council meeting of 25 March 1964 on the Spanish Question. In this Council meeting, Spaak, the Belgian minister of foreign affairs, held that an association agreement with a European country such as Spain would inevitably lead to full membership.<sup>66</sup> The

<sup>57</sup>Guirao, 'Solvitur ambulando', above, n. 56, at 353–5.

<sup>58</sup>Guirao, above, n. 48, at 112–14; Guirao, 'Solvitur ambulando', above, n. 56, at 357; MacLennan, above, n. 50, at 48.

<sup>59</sup>Guirao, above, n. 50, at 202; Guirao, above, n. 48, at 103.

<sup>60</sup>Guirao, 'Solvitur ambulando', above, n. 56, at 347.

<sup>61</sup>Ibid.

<sup>62</sup>Quoted in MacLennan, above, n. 50, at 41; on this committee, see Guirao, 'Solvitur ambulando', above, n. 56, at 348.

<sup>63</sup>B. Aschmann, 'The reliable ally: Germany supports Spain's European integration efforts, 1957–67' (2001) 7 *Journal of European Integration History*, 37–51; A. Muñoz Sánchez, 'A European answer to the Spanish question: The SPD and the end of the Franco dictatorship' (2009) 15 *Journal of European Integration History*, 77–94; A. Muñoz Sánchez, *Von der Franco-Diktatur zur Demokratie: Die Tätigkeit der Friedrich-Ebert-Stiftung in Spanien*, transl. F. Welsch (J.H.W. Dietz, 2013), 13–76. See also, briefly, Thomas, 'Constitutionalization Through Enlargement', above, n. 4, at 1202; Leitão, above, n. 49, at 83; P. Ortuño Anaya, 'The EEC, the Franco regime, and the socialist Group in the European Parliament, 1962–77' (2001) 14 *International Journal of Iberian Studies*, 26–39, 31; V. Fernández Soriano, 'La CEE face à l'Espagne franquiste; De la mémoire de la guerre civile à la construction politique de l'Europe' (2010) 108 *Vingtème Siècle. Revue d'histoire*, 85–98.

<sup>64</sup>For a detailed account of the process of accession to the OEEC, see B. Aschmann, 'Treue Freunde...?' *Westdeutschland und Spanien, 1945–1963* (Franz Steiner Verlag, 1999), 286–297.

<sup>65</sup>Continued German support for an association agreement with Spain is noted in a report on a meeting of COREPER in November 1969. See 'Codebericht', 14 November 1969, in BZ/Ambassade en Consulat Spanje, 1866–1974/ 2.05.249/ 417. See also Muñoz Sánchez, 'A European Answer to the Spanish Question', above, n. 63, at 84; Aschmann, above, n. 63; Muñoz Sánchez, above, n. 63, at 15–76.

<sup>66</sup>MBZ, PV EEG and EURATOM 2.05.280, 120. 'Van GNV aan MlnBZ', 26 March 1964.

consequence of a positive response to the Spanish application, in his view, was that it was only a matter of time before the Commission, COREPER, the European Parliamentary Assembly and the Council of Ministers would have to welcome Francoist members. The Dutch, Italian and Luxembourg ministers concurred. But Lahr, the German state secretary for foreign affairs, argued that the matter at hand was a request for association only and that it could and should be dealt with as such; membership was not on the table. Couve de Murville, the French foreign minister, concurred and pointed to Austria, which had requested an association agreement but was not interested in joining the Community as a member.<sup>67</sup>

Yet resistance to an association with a view to membership was much stronger than Spain anticipated. In autumn of 1961, the European Parliamentary Assembly's political commission had appointed Willi Birkelbach, a German social democrat and political prisoner under the Nazi regime, as rapporteur of a working group on conditions of association and membership.<sup>68</sup> Although Spain had not yet formally requested an association agreement with a view to membership, it was clear that such a request was forthcoming.<sup>69</sup> The Birkelbach Report, as it came to be known, concluded that the Treaty of Rome's preambular references to ever closer union and liberty should be interpreted as strict political conditions for membership:

*The guaranteed existence of a democratic form of state, in the sense of a free political order, is a condition for membership. States whose governments do not have democratic legitimacy and whose peoples do not participate in the decisions of the government, neither directly nor indirectly by freely-elected representatives, cannot expect to be admitted in the circle of peoples who form the European Communities ... One could suggest requiring of States that wish to join the Community that they recognize the principles that the Council of Europe has posed as a condition for those who want to be members of it.*

As a footnote explained, "this involves above all recognition of the principles of the rule of law, human rights and fundamental freedoms (cf. Article 3 of the Statute of the Council of Europe)".<sup>70</sup> With respect to the question whether an association agreement is possible with "European states that do not fulfil the political conditions of full membership", the Birkelbach Report refrained from giving an answer. It called such a case "delicate" and "necessary" to "assess thoroughly".<sup>71</sup>

The Birkelbach Report was adopted by the European Parliament in January 1962, days before Spain formally requested an association agreement with a view to membership.<sup>72</sup> The Report's ideas were widely shared by national

<sup>67</sup>Both France and Germany had economic and military interests in closer economic links between Spain and the Community. Spain's anti-communist credentials, an important consideration in the Cold War, were also impeccable. But Muñoz Sánchez has shown that successive German governments, whatever their political colour, also believed, from the early 1960s onwards, that closer economic ties would soften Franco's dictatorship; the policy of *Wandel durch Annäherung* (change by *rapprochement*). For the interests, see E. M. Sánchez Sánchez, 'French Military Action in Spain from Dictatorship to Democracy: Arms, Technology and Convergence' (2015) 50 *Journal of Contemporary History*, 377–399; E.M. Sánchez Sánchez, 'The French Armament Firms and the Spanish Market, 1948–75', (2010) 52 *Business History*, 435–452; Aschmann, above, n. 63, at 48–51; Thomas, 'Constitutionalisation Through Enlargement', above, n. 4, at 1196; Anaya, above, n. 63. For Germany's belief in *Wandel durch Annäherung*, see M. Sánchez, 'A European Answer to the Spanish Question', above, n. 63, at 78–79, 83–86; M. Sánchez, *Von der Franco-Diktatur zur Demokratie*, above, n. 63, at 31, 45.

<sup>68</sup>L. Whitehead, 'International Aspects of Democratization', in G. O'Donnell, P.C. Schmitter and L. Whitehead (eds.), *Transitions from Authoritarian Rule: Comparative Perspectives* (The Johns Hopkins University Press, 1986), 3–46, 21–3; Thomas, 'Constitutionalization Through Enlargement', above, n. 4.

<sup>69</sup>On 9 December 1960, Spain had established diplomatic relationships with the European Community and a few months later Spain's ambassador to the European Community had sent a letter to Commission President Hallstein expressing 'the desire of my government that Spain participate in the European integration movement'. Quoted in Thomas, 'Constitutionalization Through Enlargement', above, n. 4, at 1196.

<sup>70</sup>Birkelbach Report, above, n. 20, paras 25–6. Translation of this fragment is quoted from Thomas, 'Constitutionalization Through Enlargement', above, n. 4, at 1198.

<sup>71</sup>Birkelbach Report, above, n. 20, para. 98.

<sup>72</sup>Assemblée Parlementaire Européenne, Débats, Session 1961–62, Séances du 22 au 25 janvier 1962, 68–96, 186.

and international trade unions, political parties and civil society organizations in the Member States.<sup>73</sup> International fury was fuelled by Madrid's crackdown on prominent anti-Francoists who had attended the fourth Congress of the European Movement in Munich in June, where a resolution had been adopted that the EEC should only start negotiations with Spain if the country established authentic democratic institutions and guaranteed human rights, free trade unions and freedom for political parties.<sup>74</sup> In November 1962, the International Commission of Jurists published a report on *Spain and the Rule of Law*, which concluded, among other things, that Franco's regime was based on "the intolerance and subjugation of all opposition which characterize a totalitarian regime", with widespread use of emergency powers, summary proceedings against political offenders under military law, and retroactive punishment.<sup>75</sup>

The European Parliament had an advisory role under Article 238 and no competence in matters of accession under Article 237. Formally, the adoption of the Birkelbach Report was thus of limited importance to the fate of the Spanish request. The position of national parliaments was of greater significance; accession agreements required ratification by parliaments under Article 237 and so did the mixed association agreements that had become practice in the cases of Turkey and Greece. Of course, the distinction between the European Parliament and national parliaments is artificial, since, according to Article 238(1) EC Treaty, the "Assembly shall be composed of delegates whom the Parliaments shall be called upon to appoint from among their members". Before the Decision and Act on European elections by direct universal suffrage were signed in Brussels on 20 September 1976, with the first elections in June 1979, all members of parliament had a dual mandate.

National parliaments reacted as strongly to the Spanish request as their counterpart at the European level.<sup>76</sup> The Dutch parliament, which considered the Spanish request in terms of its ultimate aim, membership, is a case in point. On 13 and 14 June 1962, on the occasion of the parliamentary debate on the annual government's report on progress made with the execution of the Treaties of the EEC and EURATOM, MPs from all parties seized the opportunity to discuss the Spanish Question with the government. The debate ended with two draft resolutions, the one more pointed than the other, but essentially similar in calling upon the government to make accession to the Community conditional on meeting the political conditions of democracy and human rights as guaranteed under the Social Charter and the European Convention on Human Rights.<sup>77</sup> On 19 June, MPs cast their vote on the draft resolutions. The more

<sup>73</sup>Thomas, 'Constitutionalization Through Enlargement', above, n. 4, at 1198–1205; Leitão, above, n. 49, at 78–86; Anaya, above, n. 63, at 28–33; C. López Gómez, 'Europe as a Symbol: The Struggle for Democracy and the Meaning of European Integration in Post-Franco Spain' (2014) 10 *Journal of Contemporary European Research*, 74–89, 79–81; Soriano, above, n. 63, at 85–98; S. Royo and P.C. Manuel, 'Some Lessons from the Fifteenth Anniversary of the Accession of Portugal and Spain to the European Union', in S. Royo and P.C. Manuel (eds.), *Spain and Portugal in the European Union; The First Fifteen Years* (Frank Cass, 2003), 1–30, 8–11.

<sup>74</sup>Tusell, above, n. 50, at 133–135.

<sup>75</sup>International Commission of Jurists, *Spain and the Rule of Law* (Geneva, 1962), 82–88.

<sup>76</sup>Soriano, above, n. 63, at 90–91.

<sup>77</sup>The Second Chamber, considering that the integration of European Countries in the European Community presupposes the existence of democratic institutions in applicant countries, holds that this entails, in accordance with the European Convention of Human Rights and the European Social Charter:

- a. the presence of a democratically elected parliament, so that the government is founded on the free will of the citizens
- b. an effective safeguarding of human rights, in particular of individual liberty and freedom of expression, which presupposes the termination of government censorship
- c. the right to organization in trade unions on a democratic basis and the recognition that employees must be able to defend their fundamental rights, which cannot exclude the right to strike
- d. recognition of the freedom of assembly and the right to organize in political parties and recognition of the rights of the opposition. Furthermore holds that it is necessary to give special attention to these fundamental starting points with regard to the request of Spain to accede to the E.E.C. Requests the Dutch government to let itself be guided by these considerations in assessing applications for membership of the E.E.C.' (the resolution was drafted by Goedhart from the Labour Party (P.v.d.A); the italicised parts do not occur in the other draft resolution by Schuyt from the Catholic Peoples Party, K.V.P), Handelingen TK Zitting 1961–62 Verslag Europese Economische Gemeenschap, 14 June 1962, 1126–1127.

pointed draft received 88 votes, the other 41 votes. There were no abstentions.<sup>78</sup> It was a remarkable result: there was unanimous agreement in the Dutch parliament that membership of the European Community was conditional on meeting political conditions derived from the European Convention on Human Rights and the European Social Charter. The Belgian and Luxembourg parliaments adopted similar resolutions in 1962.

The Spanish request thus led to a complicated situation. The governments of the FRG and France supported an association agreement with Spain, but held that association and membership were different matters. The European Parliamentary Assembly and national parliaments such as the Dutch regarded the Spanish request as an application for membership, and so did a wide spectrum of non-governmental organizations across the six Member States. Unsurprisingly, COREPER and the Council found it hard to make progress with the matter.<sup>79</sup> The trouble started immediately with the formulation of a simple confirmation of receipt of Madrid's letter: it took two meetings of COREPER and a meeting of the Council of Ministers before agreement could be reached on a three-line reply.<sup>80</sup> After that Brussels went silent for two full years; priority was given to the British application for membership.

On 14 February 1964, after the British application had fallen victim to De Gaulle's veto, the Spanish ambassador to the European Community, Count de Casa Miranda, sent a letter to the President of the Council, Spaak, reminding him of Spain's 1962 letter and repeating its request to establish links with the Community, without however specifying this time which type of agreement was envisioned.<sup>81</sup> Spain now merely asked "for exploratory talks with the aim of finding out the sort of relations that could be established between Spain and the EEC". A series of meetings of COREPER and two meetings of the Council of Ministers were needed before agreement could be reached, on 2 June 1964, on the formulation of a three-line response.<sup>82</sup> Although the Benelux countries and Italy were prepared to start exploratory talks on resolving difficulties which Spain encountered, as a result of the economic integration of the Six they insisted on explicitly ruling out an association agreement as the outcome of negotiations. The Dutch government even proposed that the Council had to limit the mandate of the Commission, which would initiate and organize those exploratory talks, and formally prohibit it from raising the option of an association agreement.<sup>83</sup> This was unacceptable to France and Germany, which did not want to endorse a formal rejection of an association agreement. In the end, the Six agreed on the formulation that "the Council ... authorises the Commission to initiate talks with the Spanish government which aim to examine the economic problems posed by the development of the EEC for Spain and explore appropriate solutions". The Spanish were expected not to mention association in the negotiations.<sup>84</sup> Another two years later, on 23 November 1966, the Commission presented the results and suggested as one of the options to negotiate a preferential trade agreement with Spain. On 11 July 1967 the Council gave the Commission the mandate to start negotiations on such an agreement and, after protracted talks, it was finally signed on 29 June 1970.

According to Thomas, the Spanish Question was a watershed. It turned a purely functionalist Community into an organization which required respect for democracy, human rights and rule of law as a condition of membership. There is no doubt that the Spanish Question is of tremendous importance for the evolution of the Community's political conditionality. Spain was the first litmus test of whether the Community was prepared to consider authoritarian

<sup>78</sup>Motie van de heer Goedhart c.s., 14 June 1962, Tweede Kamer 1961–1962, 6703, nr. 5; Tweede Kamer, 19 June 1962, 1137.

<sup>79</sup>Anaya, above, n. 63, at 29–33; Aschmann, above, n. 63, at 39–46.

<sup>80</sup>MBZ, PV EEG and EURATOM 2.05.280, 120. 'Accusé de réception de la demande d'association de l'Espagne à la CEE' (7 March 1962); 'L.H. to Min BZ', 15 February 1962 and 'LH aan Min. BZ', 22 February 1962; 'Van GNV aan MinBZ', 7 March 1962.

<sup>81</sup>The letter is available at [www.cvce.eu](http://www.cvce.eu)

<sup>82</sup>MBZ PV EEG and EURATOM 2.05.280, 120. Réponse aux demandes d'association de l'Espagne à la Communauté économique européenne (2 June 1964); 'Van Rutten aan Min BZ', 28 February 1964; 'Van Min BZ aan Rutten', 2 March 1964; 'Van g.n.v. aan Min BZ', 6 March 1964; 'Van Spierenburg aan MinBZ', 6 March 1964; 'Van g.n.v. aan Min BZ', 26 March 1964; 'Van MinBZ aan g.n.v. Brussel', 20 May 1964; 'Van Spierenburg aan Min BZ', 1 June 1964.

<sup>83</sup>MBZ PV EEG and EURATOM, 1958–1964, Z201, 120; 'Van MinBZ aan g.n.v. Brussel' (20 May 1964); 'g.n.v. Brussel aan MinBZ' (28 May 1964).

<sup>84</sup>Guirao, above, n. 48, at 119.

regimes as future members. The European Parliament and national parliaments gave an unequivocal negative answer on the basis of a clear definition of political conditions of membership. The Council agreed in the sense that it denied Spain negotiations on an association agreement with (or without) a view to membership; its position was reflected in its terse reply to the Spanish request, not in a formal definition of conditions of membership. There is no evidence, however, that the Spanish Question was a *volte face*. It is true that the French and German governments supported an association agreement with Spain, but they did not hold that association inevitably led to membership.<sup>85</sup> Thus, when Thomas notes that “neither the French nor the German government ... criticized the [Birkelbach] report publicly or even behind closed doors in EEC deliberations”,<sup>86</sup> the explanation is probably not that they had bowed to mounting pressure by the European Parliament and others to adopt a new norm of membership, but that they never doubted this norm in the first place.<sup>87</sup>

There are additional reasons why it is implausible to assume that Member States were prepared to welcome authoritarian regimes as members of the Community. One is the spirit of the post-war constitutions of the Six.<sup>88</sup> The Italian and West German constitutions were explicitly anti-fascist. The Constitution of the Italian Republic, which had been adopted on 27 December 1947 and entered into force on 1 January 1948, stated in Article XII of the Transitional and Final Provisions that “It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party”.<sup>89</sup> A draft of the German constitution declared that “the state is made for man, not man for the state” and contained a short historical introduction in the preamble which denounced the recent past.<sup>90</sup> Moreover, the constitutions of the Six were designed to prevent a return to totalitarianism by means of multiple checks and balances and constraints on democracy, especially the establishment in France, Germany, Luxembourg and Italy of constitutional review to safeguard individual fundamental rights.<sup>91</sup> In West Germany, the Constitutional Court invoked the idea of militant democracy in the 1950s to ban extreme left-wing and right-wing parties to defend democracy against authoritarian movements. Indeed, the Six, especially Italy and West Germany, had willingly subjected themselves to the European Court of Human Rights to “lock-

<sup>85</sup>Thomas's positive argument in support of his thesis—the negative is the absence of references to political conditions in the Treaty of Rome against the background of the Draft EPC Treaty, as mentioned in the introduction—consists of statements in the late 1950s and early 1960s by governments and the Commission in support of association agreements with Spain and Portugal. However, the link between association and membership was controversial, as discussed in paragraph 2 above: support for an association agreement with Spain cannot simply be translated as support for membership. Take the fact that, in 1958, the European Community started discussion on the relation between the Community and the Organization for European Economic Cooperation (OEEC), which consisted of 11 members, including Portugal. According to Thomas, the Commission's memorandum on the issue ‘recommended that any of the Eleven willing to pursue deeper integration should be offered association or full membership in the EEC in accordance with Articles 238 and 237 of the Treaty of Rome. Spain was not mentioned in any of these documents because it was not yet a member of the OEEC, but the casual inclusion of Portugal, a highly repressive dictatorship formerly allied with Nazi Germany, confirms that the presence or absence of democracy was not an important consideration’. Thomas, ‘Beyond Identity’, above, n. 4, at 227. But the First Memorandum merely states that ‘any European countries already anxious to go further in economic integration and to benefit more rapidly from its machinery are free to bring into play Articles 237 and 238 of the Treaty of Rome’. The Memo then gives a neutral explanation of the differences between association and membership. There are no country-specific recommendations on which option would be possible or preferred. See First Memorandum, above, n. 17, paras 85–87. Moreover, the First General Report on the Activities of the Community (1 January 1958 to 17 September 1958), 17 September 1958, 120–122, para. 159 explicitly states that the Community should form association agreements under Article 238 with the 11 OEEC countries. This was not about membership.

<sup>86</sup>Thomas, ‘Beyond Identity’, above, n. 4, at 233.

<sup>87</sup>Moreover, given the fact that national parliaments were required for accession treaties and, according to emerging practice, for association agreements as well, the idea of a purely functionalist beginning of the Community presupposes that all national parliaments were agnostic with respect to political conditions of membership before the Spanish Question. In view of the unanimous support for a resolution on political conditions of membership by the Dutch parliament in 1962, to take just one example, this is unlikely—what evidence is there for a seismic shift in all six member states?

<sup>88</sup>I owe this point to an anonymous reviewer.

<sup>89</sup>[https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)

<sup>90</sup>I. Markovits, ‘Constitution making after National Catastrophes: Germany in 1949 and 1990’ (2008) 49 *William and Mary Law Review*, 1307, 1312–1314. The final version stated, in Article 1, that ‘the dignity of man is inviolable’ and the Preamble would begin ‘Aware of its responsibility before God and men’.

<sup>91</sup>J.-W. Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press, 2011), 146–150.

in” their liberal democracies and prevent backsliding.<sup>92</sup> Against this background it is unlikely that the Six would be prepared to give up part of their sovereignty to the partly supranational scheme of the European Community and then allow the two remaining fascist dictatorships to take part in the running of the enterprise.

Another reason lies in the Treaty of Rome itself. Article 138(1) states that the Parliamentary Assembly’s members “shall be designated by the respective Parliaments from among their members” and Article 138(3) adds, as an ambition to be realized in the future, that the “Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States”. Article 138(1) did not specify which procedure Member States needed to follow in electing members of the Assembly, but it was generally understood that both government parties and the opposition were represented in the Assembly.<sup>93</sup> A uniform system of direct elections of representatives of the Assembly, which was the objective of Article 138(3), still needed to be designed, but it was clear that such elections needed to be free, for all citizens and by secret ballot.<sup>94</sup> It is hard to imagine how the Six, given these commitments to the present and future of the European Parliament, could allow countries as members which did not subscribe to the principle of free and fair elections and to political representation of the opposition.

In short, there are good reasons to believe the official story in Article 21(1) TEU as far as political membership conditions are concerned: the principles of democracy, human rights and rule of law appear to have “inspired” the EU’s “own creation, development and enlargement”.

## 5 | GREECE REVISITED

On 21 April 1967, a group of officers, mostly colonels, committed a coup d’état under the pretence of preventing a communist plot. For the next seven years Greece was ruled by a military dictatorship.<sup>95</sup> Thousands of political opponents were put under house arrest or deported to prison islands. Many of those imprisoned were not brought before a competent legal authority; others were sentenced by courts martial for their political opinions. Political parties and political activities were prohibited. Elections were cancelled. Universities were put under direct police control, including regular auditing of lectures. Censorship was applied. Torture was widespread. The right to assembly was abolished. The junta justified many of these measures by “a public emergency threatening the life of the nation”. The European Commission of Human Rights, which examined “The Greek Case” following applications by the governments of Denmark, Norway, Sweden and the Netherlands, found no compelling evidence that the state of emergency was called for. It also concluded that the junta violated provisions on the rights to liberty and security, free speech, fair trial, privacy and a family life and on the prohibition of punishment without law under the European Convention on Human Rights.<sup>96</sup>

Greece’s descent into authoritarianism was painful for the European Community; Greece had obtained the very type of treaty that Spain had requested in 1962 but was denied on account of its political system. The terms of the Athens Agreement went far beyond the preferential trade agreement which Madrid would conclude in 1970. The question was obvious: could the Athens Agreement continue to be upheld now that Greece was no longer a democracy but a military dictatorship? For the first time the European Community was faced with the question of how to deal with democratic backsliding, albeit of an associate who had been offered a prospect of membership, not of a member. Needless to say, neither the Treaty of Rome nor the Athens Treaty provided for this eventuality.

<sup>92</sup>A. Moravcsik, ‘The origins of human rights regimes: Democratic delegation in postwar Europe’ (2000) 54 *International Organization*, 217–252, 230–243.

<sup>93</sup>E. Wohlfahrt, U. Everling, H.-J. Glaesner and R. Sprung, *Die Europäische Wirtschaftsgemeinschaft: Kommentar zum Vertrag* (Verlag Franz Vahlen, 1960), at 434.

<sup>94</sup>*Ibid.*, at 435–6.

<sup>95</sup>Close, above, n. 44, at 83–110.

<sup>96</sup>European Commission of Human Rights, *The Greek Case*, Report of the Sub-Commission, Application nrs 3321/67 (*Denmark v. Greece*), 3322/67 (*Norway v. Greece*), 3323/67 (*Sweden v. Greece*) and 3344/67 (*Netherlands v. Greece*).

The European Parliament immediately took the initiative.<sup>97</sup> Through a series of oral and written questions and a resolution, MPs pressured the Commission and the Council to take position on the consequences of the coup d'état for the Athens Treaty. On 2 May Mr Van der Goes van Naters asked whether the Commission agreed that "the norms, by which European countries are justifiably measured for association with a view to membership, no longer apply to the current regime in Greece" and whether "it is consequently prepared to suspend the execution of the current agreement with Greece".<sup>98</sup> On 9 May Mr Faller asked both the Commission and the Council whether "the normal execution of the Association Agreement can be guaranteed after the military coup d'état".<sup>99</sup> On 11 May the European Parliament adopted a lengthy resolution which stated, among other things, that "the association agreement between Greece and the European Community, which includes the prospect of membership, can only be executed ... if the democratic structures, political freedoms and the freedom of trade associations are restored" and that "the absence of elected institutions in Greece ... makes it impossible for the Mixed Parliamentary Commission, which is indispensable for the proper execution of the Treaty of Athens, to carry out its tasks".<sup>100</sup> On 14 July Mr Seifriz asked the Commission to explain "which articles in the Association Agreement ... are currently applied and executed" and which articles are not.<sup>101</sup>

The Commission's initial response was cautious, but in the summer and autumn it carved out a clear position. On 23 June the Commission declared that the Community "cannot remain indifferent with respect to the constitutional system of a country which, like Greece, aims to become member of the European Community" and that "the events which have occurred since 21 April give rise to serious concerns which threaten the further development of the association".<sup>102</sup> On 22 September the Commission clarified that "articles in the Athens Treaty ... which entail clearly defined legal obligations continue to be applied, particularly where these concern tariffs and trade". It added that "nothing has been done to implement ... articles which do not specify precise obligations but furnish a framework for the future development of the Association, in particular provisions for harmonisation of the agricultural policies of the Communities and Greece".<sup>103</sup> In other words, the Community limited the execution of the Athens Treaty to the day-to-day implementation of specific legal obligations and discontinued efforts to bring about policy harmonization and other objectives. In addition, the Commission decided that the unused balance of the financial protocol, US\$56 million, would not be allocated. It also ruled out negotiations on new financial assistance to Greece after the expiration date of the financial protocol on 31 October 1967.<sup>104</sup> On 28 November the President of the Council endorsed the Commission's position in a session of the European Parliament and emphasized that future development of the association was suspended.<sup>105</sup>

<sup>97</sup>G.N. Yannopoulos, *Greece and the European Communities: The First Decade of a Troubled Association* (Sage, 1975); V. Coufoudakis, 'The European Economic Community and the "Freezing" of the Greek Association, 1967-74' (1977-78) 16(2) *Journal of Common Market Studies*, 114-131; S. Verney, 'Greece and the European Community', above, n. 36.

<sup>98</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 169, 26 July 1967, 169/7-9 (Written question no. 53, 2 May 1967).

<sup>99</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 169, 26 July 1967, 169/9-10 (Written question no. 59, 9 May 1967).

<sup>100</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, No. 103, 2 June 1967, 2058/67 (Resolution with respect to the association between the E.E.C. and Greece, 11 May 1967).

<sup>101</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 243, 7 October 1967, 243/3 (Written question no. 53, 14 July 1967).

<sup>102</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 169, 26 July 1967, 169/8 (Reply to written question Mr Van der Goes van Naters, 23 June 1967).

<sup>103</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 243, 7 October 1967, 243/3 (Reply to written question Mr Seifriz, 22 September 1967).

<sup>104</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 243, 7 October 1967, 243/3 (Reply to written question Mr Seifriz, 22 September 1967).

<sup>105</sup>Publikatieblad van de Europese Gemeenschappen, Vol. 10, no. 307, 18 December 1967, 307/9 (Oral question and debate with reply by Mr Schiller, acting president of the Council of the European Communities, 28 November 1967).



For the next six years, the Commission would continue to refer to these statements as its final and non-negotiable position until democracy in Greece was restored.<sup>106</sup>

After the return to democracy in 1974, the Greek government applied for full membership of the European Community. It is Opinion on the Greek application, issued in 1976, the Commission recalled that the Community had “frozen” the Athens Agreement from 1967 to 1974 because of the dictatorship.<sup>107</sup> This metaphor of a freeze, which was widely used at the time, made the Communities’ response sound robust; it was the firmest reaction short of the abrogation of the Treaty. Yet the metaphor was deceptive.<sup>108</sup> True, financial aid was terminated. The Commission reduced the application of the treaty to specific legal obligations. But these specific legal obligations were quite significant. The tariff reductions, for example, proceeded as scheduled. Moreover, the distinction between specific legal obligations and other provisions was easy to make in theory but somewhat less so in practice. For example, the progressive introduction of the Common Agricultural Policy made elaborate negotiations with Greece on agricultural policy harmonization inevitable. In the early 1970s the Commission also had to enter into negotiations with the junta to extend the Athens Agreement to the three new members, Great Britain, Ireland and Denmark. It thus seems more accurate to characterize the relation between Greece and the European Community as a “limited association” than as a freeze.<sup>109</sup> Members of the European Parliament grew increasingly impatient with the Commission’s policy and called for the drastic step of revoking the Athens Treaty altogether.<sup>110</sup> On 9 May 1969 the European Parliament adopted a resolution in which it announced its intention “to take initiative towards the revision or suspension of the treaty of association”. On 5 February 1970 a resolution was drafted to unilaterally abrogate the treaty.<sup>111</sup> But the Commission and the Council remained unyielding and argued that the Community was legally bound to meet the specific commitments in the Athens Treaty—a position with which the Legal Committee of the European Parliament concurred.<sup>112</sup>

## 6 | TOWARDS A CLEAR STATEMENT OF POLITICAL MEMBERSHIP CONDITIONS

The Greek Question was the mirror image of the Spanish Question. The Community’s response was consistent: only democratically governed states are eligible for membership or an association agreement with a view to membership. The Community’s response was also inarticulate, except for the European Parliament. In the Spanish case the Council limited itself to a terse confirmation of receipt in March 1962, a concise authorization to start exploratory talks on economic problems in June 1964 and a decision to start negotiations on a preferential trade agreement in 1967. Neither the Commission nor the Council ever so much as hinted at the fact that the nature of the regime stood in the way of an association agreement. In the Greek case, the Commission and Council were somewhat more explicit in short

<sup>106</sup>Commission, *First General Report on the Activities of the Communities*, February 1968, 352–355; *Second General Report on the Activities of the Communities*, February 1969, 349–353; *Third General Report on the Activities of the Communities*, February 1970, 339–341; *Fourth General Report on the Activities of the Communities*, February 1971, 273–75; *Fifth General Report on the Activities of the Communities*, February 1972, 309–10; *Sixth General Report on the Activities of the Communities*, February 1973, 260–1; *Seventh General Report on the Activities of the Communities*, February 1974, 405.

<sup>107</sup>Bulletin of the European Communities, Supplement 2/76 (Opinion on the Greek application for membership), COM(76) 30 final, 20 January 1976, 6.

<sup>108</sup>Yannopoulos, above, n. 97, at 21–28; S. Verney, ‘Greece and the European Community’, above, n. 36, at 258. Incidentally, the Community’s response to brutal repression in Spain in the early 1970s was even more insignificant, despite later claims to the contrary by officials. See the impressive, hard-hitting analysis by F. Guirao, ‘The European Community’s Role in Promoting Democracy in Franco’s Spain, 1970–1975’, in J. van der Harst (ed.), *Beyond the Custom’s Union: the European Community’s Quest for Deepening, Widening and Completion, 1969–1975* (Nomos, 2007), 163–193.

<sup>109</sup>Coufoudakis, above, n. 97, at 126.

<sup>110</sup>Yannopoulos, above, n. 97, at 23.

<sup>111</sup>*Ibid.*

<sup>112</sup>Coufoudakis, above, n. 97, at 128; Yannopoulos, above, n. 97, at 23.

responses to questions from members of the European Parliament. But neither the Commission nor the Council seized the opportunity to articulate general principles on political conditions of association and membership and to assess the Greek and Spanish situations accordingly. Since the early 1960s the Italian government had repeatedly complained in COREPER and the Council of Ministers that there was no “philosophy” of association and membership. There was just ad hoc decision making. Italy had a point.

But a Commission doctrine on political conditions of membership and association was in the making, albeit in an unexpected place. On 29 September 1967 the Commission released its Opinions on the second application for membership from the United Kingdom, Ireland, Denmark and Norway. On 1 October 1969 it published a largely identical Opinion on the third application for membership from these countries. The Commission chose these Opinions to formulate its own take on the principles that had been beneath the Community's responses to the Spanish, Portuguese and Greek cases. The Commission argued that applications for membership should be examined in the “spirit” of the Treaty of Rome's preambular invitation to European countries which share the ideal of liberty. The Commission stated that, from this “political angle”, or “on the plane of principles”, it was clear that membership was only open to democratic states.<sup>113</sup> The Commission continued that “the Community has always considered that full membership was the arrangement that accorded best with the objectives of the Treaties” for European “countries which are sufficiently developed economically and possess institutions and regimes comparable with those of the founder States”.<sup>114</sup> The Commission noted that exceptions must be made for southern European states which are not ready to assume the economic obligations of membership. Links between such states and the Community should normally take the form of a preferential trade agreement. The Commission did not rule out that southern European states could also conclude an association agreement “proper” or “in the strict sense”, but added that association, like membership, was conditional on meeting the political condition of a democratic form of government.

*As regards Europe, the Community has always believed that membership was the solution most in conformity with the aims of the Treaties for those democratic countries which have attained a sufficient degree of economic development. On the other hand, the southern European countries, whose level of development precludes immediate membership, should be able to establish with the enlarged Community preferential relations so conceived that their development would benefit. However, it should be possible for these relations to take the form of an association in the strict sense only where the countries concerned have free institutions; others could be offered agreements in a number of stages, so that the Community could take account of their subsequent evolution.*<sup>115</sup>

In short, the Commission held that both membership and association of European states were subject to political conditions, just like the Italian Memorandum had argued in 1964.

## 7 | EUROPEAN IDENTITY

The Commission's doctrine was not immediately endorsed by the Council or by the Heads of State. On 1 and 2 December 1969 the Heads of State of the Six held a summit in The Hague which was partly devoted to enlargement and political integration. This could have been an occasion for a statement on political conditions for membership and association, yet the Heads of State chose to remain silent on the matter. The final Communiqué merely made the

<sup>113</sup>‘Opinion on the Applications for Membership received from the United Kingdom, Ireland, Denmark and Norway for Submission to the Council under Articles 237 of the EEC Treaty, 205 of the EURATOM Treaty, and 98 of the ECSC Treaty’, COM(67) 750 final, 29 September 1967, 16, paras 21–22; ‘Opinion concerning the applications for membership from the United Kingdom, Ireland, Denmark and Norway submitted under Articles 237 of the EEC Treaty, 205 of the EURATOM Treaty, and 98 of the ECSC Treaty’, 1 October 1969. Bull. Supplement no. 9/10, 1969, 9–10 (paras 6–7)

<sup>114</sup>Bull. Supplement no. 9/10, 1969, 9–10 (paras 6–7).

<sup>115</sup>COM(67) 750 final, 29 September 1967, 16, paras 21–22.

uninspiring remark that Europe is “composed of states which, in spite of their national characteristics, are united in their essential interests”. Three years later, the Heads of State came closer to a statement on political conditions of membership in the outcome statement of the Paris Summit, which was held from 19 to 21 October as a prelude to the first enlargement on 1 January 1973 and was attended by the Heads of State of the founding members and the three new members. It stated: “The Member States reaffirm their determination to base the development of their Community on democracy, freedom of opinion, the free movement of people and of ideas and participation by their peoples through their freely elected representatives”.<sup>116</sup> Yet a clear statement on Member States had to wait another year, when the European Council in—appropriately—Copenhagen issued the *Declaration on European Identity* on 14 December 1973.

It is tempting to view this *Declaration* through the lens of the Spanish and Greek cases. In fact, the *Declaration* was not at all the apotheosis of the recent history of accession and association; it was the spontaneous reaction to a US foreign policy initiative.<sup>117</sup> Earlier in the year, on 23 April 1973, Henry Kissinger, at the time President Nixon's principal National Security Advisor, had given an address to the Associated Press in New York on “The Year of Europe”.<sup>118</sup> The speech came at a moment when relations between Europe and the US were at an all-time low. The Year of Europe was meant to reset the alliance between Europe and the US and lead to the conclusion of “a new Atlantic charter setting the goals for the future”.<sup>119</sup> One of the areas where, according to Kissinger, a fresh start was needed was diplomacy. The US and Europe needed to articulate “a clear set of common objectives” and agree to a division of labour in international affairs which was based on a simple premise: “The United States has global interests and responsibilities. Our European allies have regional interests”.<sup>120</sup> These two lines hit a raw nerve in the European Community, particularly in France and the United Kingdom. The Nine soon endorsed a British proposal to formulate a joint statement on Europe's distinctiveness and its place in world. By the end of August, they finally agreed on a French–British proposal, which the Danish EC presidency presented on 20 September to Kissinger, who became Secretary of State one day later.<sup>121</sup> The Nixon administration was dismayed with this “Proposal on Relations with the US”, both because it had not been consulted and because the proposal hardly attempted to resolve the issues which the Year of Europe was meant to address. On 29 September, the Nixon administration proposed a lengthy “Modified Draft of a US–Common Market Statement”, which seriously amended the European statement.<sup>122</sup> These amendments were in turn rejected by the French. An intense round of discussions between the US and EC governments followed, but to no avail. On 13–14 December the EC just issued its *Declaration on European Identity*, which defined “the unity of the nine member countries of the Community” (part 1), “the European Identity in relation to the world” (part 2) and “the dynamic nature of the construction of a United Europe” (part 3).

The Year of Europe did not bring about a new blueprint for US–EC relations, but it did have the unintended consequence of a joint statement by the Council on political conditions of membership: “The Nine wish to ensure that the cherished values of their legal, political and moral order are respected ... they are determined to defend the principles of representative democracy, of the rule of law, of social justice—which is the ultimate goal of economic progress—and of respect for human rights. All of these are fundamental elements of the European Identity.”<sup>123</sup> Almost all the values

<sup>116</sup>Statement from the Paris Summit, 19–21 October 1972, para. 1.

<sup>117</sup>A.É. Gfeller, *Building a European Identity; France, the United States and the Oil Shock, 1973–1974* (Berghahn Books, 2012); B. Stråth, ‘A European identity; to the historical limits of a concept’ (2002) 5 *European Journal of Social Theory*, 387–401; M. Gäinar, ‘Aux origines de la diplomatie européenne: Les neuf et la coopération politique européenne de 1973 à 1980’ (2013) 154 (2) *Relations Internationales*, 91–105; G. Kreis, ‘L'émergence de la notion d'identité dans la politique de la Communauté européenne: Quelques réflexions autour de la Déclaration du sommet de Copenhague de 1973’ (2009) 140 *Relations internationales*, 53–72.

<sup>118</sup>‘The Year of Europe’, Address by Henry A. Kissinger (1973) 68 *Department of State Bulletin*, 593–598.

<sup>119</sup>*Ibid.*, at 594.

<sup>120</sup>*Ibid.*

<sup>121</sup>Text of the European Economic Community's Proposal on Relations with the US', *New York Times*, 24 September 1973.

<sup>122</sup>Text of the modified draft of a US–Common Market Statement', *New York Times*, 9 November 1973.

<sup>123</sup>Document on the European Identity published by the Nine Foreign Ministers (Copenhagen, 14 December 1973), *European Political Co-operation (PEC)*, Fifth Edition (Press and Information Service, 1988), 48–54, para. 1.

listed later in Article 2 TEU were included here. The *Declaration* also established a clear link between these values and accession: “The construction of a United Europe, which the Nine Member Countries of the Community are undertaking, is open to other European nations who share the same ideals and objectives”.<sup>124</sup>

These were general statements. No attempt was made in 1973 to articulate what the values meant and required of Member States. That would have to wait another 20 years, in the aftermath of another Copenhagen Summit, when the European Council had decided that “the associated countries in Central and Eastern Europe that so desire shall become members of the European Union” and that “accession will take place as soon as ... the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.<sup>125</sup>

## 8 | CONCLUSION

According to Article 2 TEU, the European Union is “founded” on a set of values, including rule of law, democracy and human rights, which are “common to the Member States”. Not only is respect for these values a condition for accession to the Union, Member States must also, according to Article 7 TEU, respect them to keep their membership rights intact.<sup>126</sup> This article is about the origins of this requirement that Member States of the Union uphold democracy, human rights and the rule of law. It shows how a doctrine on political conditions of membership gradually evolved from the late 1950s to 1973 in the responses of the Community to a series of concrete cases and a foreign policy initiative of the United States. No support has been found for the thesis that the Community was originally prepared to welcome authoritarian states like Spain and Portugal as members. Instead, the very abstract identity of the Community in the preamble to the EC Treaty gradually became more concrete in the Community’s responses to association requests from Greece, Turkey, Spain and Portugal; to membership applications by the United Kingdom; to the 1967 coup d’état in Greece and Kissinger’s Year of Europe. The European Parliament and many national parliaments were the first to explicitly require respect for human rights, democracy and rule of law as condition for membership in 1962. The Commission and the Council agreed, but implicitly. The Commission explicitly endorsed political accession conditionality in 1967 and the Council in 1973. The Copenhagen political criteria, except minority protection, were firmly established 20 years before they were formally launched.<sup>127</sup>

Demands from outsiders thus made insiders articulate the common political identity of their national legal and political systems in the context of European integration. This dynamic would remain: the Copenhagen political criteria and the launch of Article 7 were responses to the prospect of accession of the Central and Eastern European countries.<sup>128</sup> This is not to say that there is nothing more to the early history of the constitutionalization of the Community than the evolution of a normative reading of Articles 237 and 238 in response to requests for membership and association from

<sup>124</sup>*Ibid.*, para. 4.

<sup>125</sup>Presidency Conclusions, European Council, Copenhagen, 21–22 June 1993 (no. 7 A iii).

<sup>126</sup>Evidently under pressure after the illiberal turns in Hungary and Poland. See L. Pech and K.L. Scheppele, ‘Poland and the European Commission, Part III: Requiem for the Rule of Law’, *VerfBlog*, 2017/3/03. Retrieved on 21 September 2017 from <http://verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law/>

<sup>127</sup>The significance of the Copenhagen European Council lies not so much in the political criteria—though minority protection was new—but in the fact that satisfaction of these criteria became an aim of the pre-accession strategy, a policy with a transformative aim, which was announced in Copenhagen and formally launched by the Essen European Council in 1994. The pre-accession strategy involved formulating reform targets, monitoring whether these targets were met, and using conditionality to enforce compliance, and all of this required the Commission to clarify the meaning of the political accession criteria. For the pre-accession strategy, see C.A.P. Hillion, ‘EU Enlargement’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), 187–216. For a critical assessment of whether the Commission adequately articulated the meaning of the Copenhagen political criteria, see D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008).

<sup>128</sup>W. Sadurski, ‘Adding bite to a bark: The story of article 7, EU enlargement, and Jörg Haider’, (2009–2010) 16 *The Columbia Journal of European Law*, 385–426; W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012).

the late 1950s to the early 1970s. It can also be traced in the early internal development of the Community, especially the case law of the Court of Justice. While the language of rule of law was introduced in the case law of the ECJ in 1986 in *Les Verts*, many core ingredients of this value were already figuring in judgments from *Algera* in 1957 onwards, and were derived from constitutional traditions common to the Member States.<sup>129</sup> Indeed, the rule of law was built into Article 164 of the EC Treaty, which provided that the Court of Justice shall ensure observance of law and justice in the interpretation and application of this Treaty.<sup>130</sup> The protection of fundamental rights became a self-evident characteristic of the constitutional systems of Member States by the late 1960s, if not before.<sup>131</sup> Building on its 1969 judgment in *Stauder*, the ECJ argued in *Internationale* that respect for fundamental rights forms an integral part of the general principles of law which must be ensured within the framework of the structure and objectives of the Community and that the protection of these rights is “inspired by the constitutional traditions common to the Member States”.<sup>132</sup> Even so, the constitutionalization of the Community began very early in its history in response to demands from outsiders.

This does not mean, incidentally, that the Community or its members felt at the time that they were obliged to treat third countries according to their own constitutional values. Strong reactions against the prospect of Franco's Spain as a member of the Community and against Greece's descent into dictatorship under the Colonels went hand in hand with decolonization wars and conflicts in Algeria, New Guinea and elsewhere.<sup>133</sup> The idea, in Article 5(1) TEU, that “in its relations with the wider world, the Union shall uphold and promote its values”, had not yet arrived. Still, it is worth noting that the European Community has always required that its members uphold democracy, rule of law and fundamental rights in their constitutional orders. The current Polish and Hungarian governments have repeatedly claimed that the rule of law and human rights in Member States are not the EU's proper business but “a national competence with which the EU should not be involved”; Member States should be free to establish “democracy without adjectives”.<sup>134</sup> This is not only unacceptable for a variety of legal and moral reasons.<sup>135</sup> It is also historically inaccurate; the idea that the European Union was originally and properly a purely functional and economic organization is nostalgia for a past that never was.

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<sup>129</sup>N. Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart Publishing, 2009), 119–138, at 125; Th. von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 *Fordham International Law Journal*, 1311–1347, 1314–1321; Case C-294/83, *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23; Joined Cases 7/56 and 3/57–7/57, *Algera and others v. Common Assembly*, ECLI:EU:C:1957:7, para. 41, 55.

<sup>130</sup>I owe this point to Morten Rasmussen. See also M. Rasmussen, 'Revolutionizing European law: A history of the van Gend en loos judgment' (2014) 12(1) *International Journal of Constitutional Law*, 136; Morten Rasmussen and Anne Boerger, 'Legitimizing the European court of justice? The constitutional paradigm in European law, 1950–1993' (2014) 10 *European Constitutional Law Review*, 199.

<sup>131</sup>I. Pernice, *Grundrechtsgehalte im Europäischen Gemeinschaftsrecht; Ein Beitrag zum gemeinschaftsimmanenten Grundrechtsschutz durch den Europäischen Gerichtshof* (Nomos, 1979), 42–50; A.J. Menéndez, 'A rights-based Europe? The charter of fundamental rights of the European Union', (2002) 20 *Mennesker & Rettigheter*, 31–46, 31–35; de Búrca, above, n. 2, 667–670; B. Davies, 'Pushing back: What happens when member states resist the European court of justice? A multi-modal approach to the history of European law' (2012) 21(3) *Contemporary European History*, 417.

<sup>132</sup>Case 29/69, *Stauder v City of Ulm*, ECLI:EU:C:1969:57; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, para. 4.

<sup>133</sup>P. Hansen and S. Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic, 2014).

<sup>134</sup>'Poland Avoids Talks on Rule of Law-Sanctions', *EU Observer*, 16 May 2016; the term democracy without adjectives is from Poland's Minister of Foreign Affairs, Waszczykowski, quoted in Pech and Scheppele, above, n. 126.

<sup>135</sup>J.-W. Müller, 'Should the EU protect democracy and the rule of law inside member states?' (2015) 21 *European Law Journal*, 141; J.-W. Müller, 'Defending democracy within the EU' (2013) 24 *Journal of Democracy*, 138; L. Besselink, 'The Bite, the Bark, and the Howl', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017) at 128; C. Closa, D. Kochenov and J.H.H. Weiler, 'Reinforcing rule of law oversight in the European Union', *Robert Schuman Centre for Advanced Studies Research Paper No.* 2014/25.