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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**DRAFT OPINION
ON CONSTITUTIONAL ISSUES
INVOLVED IN ESTONIA'S ACCESSION
TO THE EUROPEAN UNION**

**on the basis of contributions by
Mr Luis Lopez Guerra (Spain)
and
Mr Matti Niemivuo (Finland)**

1. Following the conference "five years of the Estonian Constitution", held in Tallinn on 26-27 September 1997, the Estonian Ministry of Justice asked the Commission to give an opinion on the constitutional issues involved in Estonia's accession to the European Union.

2. Opinions on this issue were provided by Mr Matti Niemivuo (CDL (97) 52) and Mr Luis Lopez Guerra (CDL (98) 5). These individual opinions were discussed at the 33rd and 34th meeting of the Commission in December 1997 and March 1998 respectively and they were made available to the Governmental Commission charged in Estonia to prepare proposals for changes to the Constitution of Estonia. This Governmental Commission made an Intermediary Report (CDL (98) 39) outlining proposals for changes to the Constitution of Estonia made necessary by accession to the European Union. Following this report, Mr Lopez Guerra made some additional comments (CDL (98) 5 Addendum).

3. The present opinion is based on the individual opinions by Mr Niemivuo and Mr Lopez Guerra and takes into account the Intermediary Report of the Governmental Commission as well as the discussions at the 33rd, 34th [and 35th] plenary meetings of the Commission.

I. The need for a general provision on transfers of powers to the European Union

4. Article 1 of the Estonian Constitution provides that "Estonia is an independent and sovereign democratic republic wherein the supreme power of the State is held by the people. Estonian independence and sovereignty is interminable and inalienable". Article 59 of the Constitution provides that "legislative power shall rest with the Riigikogu" and Article 86 that "executive power shall be held by the government of the republic". Article 121 establishes the treaty-making power of the Riigikogu which includes Estonia's joining international organisations. There is no provision on the transfer of powers to international or supra-national organisations nor on Estonia's participation in international co-operation in general. Article 123 specifically prohibits the conclusion of treaties which are in conflict with the Constitution.

5. The need for a general "empowerment" provision providing for the transfer of powers to the European Union is extensively discussed in the individual opinions by Mr Niemivuo (CDL (97) 52) and Mr Lopez Guerra (CDL (98) 5 rev.), taking into account the experience of other European countries already members of the Union. Since the Estonian Governmental Commission has also come to the conclusion that a revision of the Constitution should include a general empowerment clause, it seems not necessary to repeat these arguments in detail. The present opinion is therefore limited in this respect to an outline of the main arguments and the Commission refers for the details and the experience of other European States to the individual opinions by Mr Niemivuo and Mr Lopez Guerra.

6. In the opinion of the Commission, the decisive arguments in favour of introducing a general "empowerment" provision into the Estonian Constitution are the following:

a) Accession to the European Union involves a substantial transfer of executive, judicial and in particular legislative power to the institutions of the European Union. The present provisions of the Estonian Constitution, such as "legislative power shall rest with the Riigikogu", would no longer reflect the actual legal situation.

b) Accession would involve a limitation of the sovereignty of the republic, which is proclaimed in Article 1 of the Constitution, since several of the powers transferred may be considered as central components of the State's powers. It should be noted that these Community powers may be exercised without necessarily always obtaining the consent of all member States.

c) The introduction of an empowerment clause would contribute to the legal certainty of the binding force of European law in Estonia. Given the system of the diffuse control of the constitutionality of laws which exists in Estonia, the transfer or empowerment clause, by explicitly providing for the constitutionality of the transfer of competences, would confirm the direct and preferential binding force of European law (treaties, regulations, directives and decisions), and would preclude the possibility of European primary and secondary law not being applied by the Estonian courts on the basis of Article 152 of the Constitution which states that "if any law or other legal act is in conflict with the Constitution, it shall not be applied by the Court in trying a case".

d) The empowerment clause could include a provision guaranteeing the participation of the Riigikogu in the formulation of the European policies of the Estonian Republic. The Estonian Constitution establishes that the Executive power shall "implement foreign policies" (Article 83). In the structure of the European Union, there is a strong presence of organs whose designation or composition depends on the proposals or decisions of the executive powers of the member States. Therefore, a constitutional mandate providing for the participation of the Riigikogu (as the State organ which represents the Estonian people) in the internal processes to define Estonia's position on European matters, and the proposals to be formulated by the Estonian representatives in the European Union institutions, would partially compensate for that predominance of the executive powers, sometimes considered to be a "democratic deficit".

7. The Commission therefore notes with satisfaction that the Governmental Commission in fact proposes the introduction of a general empowerment clause into the present Constitution of Estonia.

II. The actual wording of the empowerment clause

8. From a constitutional standpoint, the proposal contained in the Intermediary Report of the Governmental Commission clears the way for the integration of the Republic of Estonia into the European Union by means of the ratification of the corresponding treaty. The proposal entails the adoption of an empowerment clause, allowing the transfer (or delegation) of constitutional competences to the institutions of the European Union, as well as providing for an extended intervention of the legislative power in the formulation of Estonian European policy (the Government should "give due regard to the positions adopted by the Riigikogu on all related questions"). Some considerations may, nevertheless, be formulated:

a) The reference of the 7 February 1992 Treaty might be considered as superfluous, and may prove a source of constitutional difficulties in the future.

It might prove superfluous because it does not add any new precision to the authorisation to

become a member of the Union. The European Union is what it really and actually is; any empowerment clause related to the European Union does not need to enumerate the instruments by which this Union is created. It is understood that accession to the European Union is authorised to the Union in its present form. If a change of the structure and functions of the Union were to be introduced in the future, the agreement of its members would be necessary, by way of a new Treaty, whose compatibility with the Constitution would once again have to be considered.

But the reference to the Maastricht Treaty could also prove to be a source of future difficulties, since it restricts the empowerment clause exclusively to the accession to the Union as set forth in that Treaty, thus implying the exclusion of any future reform. In other words, the reference to the Maastricht Treaty could reasonably be interpreted as meaning that any amendment to the Union set forth by a subsequent Treaty would require a new constitutional empowerment clause in order to permit the Republic of Estonia to ratify that treaty, even if the reform of the Union did not, in any way, contradict the basic principles and tasks of the Estonian State. (Moreover, the Maastricht Treaty is on its way to being superseded by the Amsterdam Treaty.)

The empowerment clause, therefore, should not make reference to the Maastricht Treaty, but rather to the European Union without any specific reference to either its present or future form (notwithstanding the "safeguard clause" relating to the Preamble of the Constitution - see below).

b) The constitutional reserve clause included in the second item of the proposed reform article ("provided that this does not come into contradiction with the basic principles and tasks of the Estonian State the way they have been fixed in the Preamble of the Constitution") may be understood only as a safeguard clause against future modifications of the Union, not as a reserve referring to the present content of the Treaty of the Union. If it were understood otherwise, the Republic of Estonia's acceptance of its duties as a member of the Union would be a *sub conditione* acceptance, ie. conditioned by a permanent review of the compatibility of the dispositions of the Treaty with the Estonian Constitution on the part of the Estonian authorities. The elimination of the specific reference to the Maastricht Treaty would eliminate any interpretation of that nature. The "safeguard clause" would thus be a constitutional limit *pro futuro*, forbidding ratifications of future Treaties contrary to the Preamble of the Constitution.

III. Specific constitutional issues to be considered in the context of accession to the European Union

The publication of EU norms

9. Article 3 of the Estonian Constitution contains a relevant provision: "Laws shall be published in the prescribed manner. Only laws which have been published shall have obligatory force." At present, the provision only applies to national legislation. EU norms, on the other hand, are not published in the same manner. The only official channel of publication is the Official Journal of the European Communities (OJ) and the provisions enter into force on the date indicated or, failing an indication, on the 20th day after publication. EU legislation is published in all the official languages of the member States (excluding Irish Gaelic). Were Estonia to become a member State of the EU, the legislation would also be published in Estonian. The national provisions on the implementation of EU directives would be published

like national legislation. It would appear that the publication of EU norms does not call for an amendment to the Estonian Constitution.

The division of powers between President and Government in EU matters

10. It is of special importance to determine the division of powers between the President of the Republic and the government in EU matters. The crucial provision is Article 78.1 of the Estonian Constitution: "[The President of the Republic shall] represent the Republic of Estonia in international relations." Does this mean, for instance, that it is the President who represents Estonia in the European Council? In any event, the essential point is to carry out a thorough debate on the issue and to formulate the pertinent provisions clearly and unambiguously.

The right to vote and be elected in local elections

11. Article 8B of the Treaty on the European Union gives to every Union citizen the right to vote in local elections and be elected in the State where he or she is resident. Article 57 of the Estonian Constitution limits the right to vote to Estonian citizens. While Article 156 of the Constitution extends the right to vote in local elections to all permanent residents, no such provision exists with respect to the right to be elected. An amendment to the Constitution is therefore necessary. This amendment would also have to make it possible for EU citizens residing in Estonia to participate as voters or candidates in the Estonian elections to the European Parliament in the terms set out in Article 8B.2 of the European Union Treaty.

The right to be a member of a political party

12. Article 48 of the Estonian Constitution states that "only Estonian citizens may be members of political parties." It is very doubtful that, given the inter-relation among all political rights, such a clause could be considered compatible with the free and equal exercise of voting rights (to vote and be candidate) in local elections, as well as in elections to the European Parliament. Article 8B of the EC Treaty provides that EU citizens shall have the right to vote "under the same conditions as nationals of that State," which would exclude discrimination based on factors as relevant as party membership. This interpretation is also reinforced in Article 6 of the Treaty which forbids discrimination for reasons of nationality when applying Treaty mandates. As a consequence, the Estonian Constitution should also be amended to allow EU citizens resident in Estonia to be members of political parties.

The right to issue currency

13. Another contradiction to be considered is the one existing between Article 111 of the Estonian Constitution ("the sole right to issue currency in Estonia shall rest with the Bank of Estonia") and Article 105A of the EC Treaty providing for the emission of currency by the European Central Bank. Given the present rate of development of the European Monetary Union and the forecast for the future in monetary matters, (which will result in the unification of currencies in the European Union by the year 2002), the contradiction between the aforementioned clauses will soon be more real than hypothetical. Certainly, it might be assumed that the empowerment clause, providing for the transfer of constitutional competences to the EU, could also address this issue. But the categorical terms of Article 111 ("The sole right", in the English version) makes it advisable to amend the text. There would seem to be no more

need for a currency clause once Estonia has joined the Monetary Union. An international comparison indicates that currency provisions seldom belong to the core of the national constitutions.

Conclusion

14. The Commission notes with satisfaction that the intermediary report of the governmental commission recommends the introduction of a general empowerment provision into the Constitution of Estonia. This provision, subject to some amendments as indicated above, provides a satisfactory solution for the main constitutional issues raised by Estonia's accession to the European Union. Further reflection seems advisable on the division of powers between President and Government in EU matters. In addition, some other provisions of the Estonian Constitution should be amended, in particular with respect to:

- the right of EU citizens to be elected at local elections;
- the right of EU citizens to be members of political parties;
- the right to issue currency.