

# THE POWER OF THE COPENHAGEN CRITERIA

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*Summary: The following paper examines different aspects of the Copenhagen criteria, which, albeit well-known and often cited, are far from self-explanatory. Historical facts and an analysis of several official documents permit a better understanding of the spirit and purpose of these criteria, which play a decisive role in the integration process. The theoretical part of the paper is rounded out by a case study presenting a general overview of relations between the European Union and Croatia.*

## I. Introduction

With the fall of Berlin Wall on 9 November 1989, the end of the Cold War had begun. Faced with the imminent collapse of communism, many Central and Eastern European countries had to reorient themselves. On the one hand, past history clearly showed them that the communist system did not work; on the other, there existed a European Community of twelve member states, offering the former communist countries the possibility of transforming themselves into democratic states with a free market economy. This represented not only an attractive opportunity, but also a big challenge for all involved.

Although the political changes of the early 1990s led to a new situation in Europe, a similar one could be observed in European history from about forty years earlier. Following the devastation of the Second World War, Europe likewise had to be completely reconstructed. Since two world wars had occurred within a relatively short period of time,<sup>1</sup> it was necessary to bring order and stability to the countries of Europe. One way to a prosperous future was *integration*. Thanks to the dedication of Robert Schuman, Jean Monnet, Konrad Adenauer and Alcide De Gasperi, the first European Community - the European Coal and Steel Community - was founded in 1951. Six countries (the Federal Republic of Germany, Italy, France, Belgium, the Netherlands and Luxembourg) set out on the road to integration and signed the ECSC-Treaty<sup>2</sup> in Rome.

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<sup>1</sup> WW I 1914-1918, WW II 1939-1945.

<sup>2</sup> The Treaty was signed on 18 April 1951 and entered into force on 23 July 1952. The treaty's duration was limited to 50 years, and the ECSC was integrated into the EC on 24 July 2002.

“The choice of coal and steel as the starting point of European integration was no accident”,<sup>3</sup> for those materials had played an important role in the war industry. Peace and cooperation were emphasised, instead of war and independent policy: “Now, once again, after the collapse of Soviet Communism, the Community was a vehicle for the renovation of political and economic structures in Europe. Once again it was a source of optimism.”<sup>4</sup>

Following the events of 1989, the Community received numerous letters of application from various Central and Eastern European countries. Since in previous enlargement rounds the Community had never accepted more than three new members at once,<sup>5</sup> a fundamental decision had to be made. This important decision was reached by the Copenhagen European Council in June 1993.

## II. The Copenhagen Criteria

The European Council summit in Copenhagen was dedicated to the countries of Central and Eastern Europe. First of all, the efforts undertaken by the associated countries to modernise their economies were praised: “Peace and security in Europe depend on the success of those efforts”.<sup>6</sup> The European Community and all its Member States supported this reform process, which was aimed at a rapid transition to a market economy. Therefore, the European Council made a very important and central statement:

“[T]he associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.”<sup>7</sup>

The conditions that an applicant country must fulfil are as follows:

- ▶ Stability of institutions (= **political criteria**) consisting of democracy, rule of law, human rights, and respect for and protection of minorities.
- ▶ Functioning market economy and capacity to cope with competitive pressure and market forces within the European Union (= **economic criterion**).

<sup>3</sup> Weatherill/Beaumont, *EU Law* (3rd edn Penguin Books Ltd, London 1999) 3.

<sup>4</sup> Weatherill, *Law and Integration in the European Union* (OUP, Oxford 1995) 1.

<sup>5</sup> Great Britain, Ireland and Denmark joined the Community effective as of 1 January 1973, Greece effective as of 1 January 1981, Spain and Portugal effective as of 1 January 1986, and Austria, Sweden and Finland effective as of 1 January 1995.

<sup>6</sup> European Council in Copenhagen, Conclusions of the Presidency, (21-22 June 1993, SN 180/1/93) 12.

<sup>7</sup> *ibid* 13.

► Adoption of the *acquis communautaire* (= **acquis criterion**).

As Community law is not only to be adopted, but also applied and enforced, the Madrid European Council in December 1995 added another criterion:

► Expansion of administrative structures for effective adoption of the *acquis*.

Besides the applicants, the European Union itself must fulfil one criterion.<sup>8</sup> Namely, the Copenhagen European Council stated that “[t]he Union’s capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries”.<sup>9</sup>

### III. Analysis of the Copenhagen Criteria

#### 1. Copenhagen Criteria before Copenhagen?

In talking about the recent enlargement of the Union and its future expansion, we automatically think of the Copenhagen criteria, as the conditions a country must meet in order to be allowed to join the European Union. But the birthplace of these fundamental elements was not Copenhagen. Rather, the importance of democratic structures and respect for human rights have been emphasised ever since the foundation of the ECSC. Although the provisions of the founding contracts<sup>10</sup> concerning enlargement of the Community did not mention political criteria explicitly, the accession of a Franco-led Spain, to take one concrete example, was unthinkable. In 1978 the Commission interpreted Art. 237 (1) EECT in the case *Mattheus v Doego*,<sup>11</sup> stating in its submission that a state’s accession is only permitted if “that state is a European State and if its constitution guarantees [...] the existence and continuance of a pluralistic democracy and [...] effective protection of human rights”.<sup>12</sup>

Further proof of the existence of Copenhagen-type content directly prior to the historic meeting itself are the association agreements among the European Community and its Member States, on the one hand, and

<sup>8</sup> For deeper insight into the principal content of this criterion, see Stadlmeier, ‘*Rechtsfragen der EU-Osterweiterung*’, Boston College International and Comparative Law Review Volume 83 (2002-4) 101-106.

<sup>9</sup> *ibid.*

<sup>10</sup> European Coal and Steel Community Treaty (ECSC) art 98; Treaty establishing the European Economic Community, (Treaty of Rome, as amended) art 237; The treaty establishing the European Atomic Energy Community (Euroatom) art 205.

<sup>11</sup> Case 93/78 *Mattheus v Doego* [1978] ECR 2203.

<sup>12</sup> *ibid* 2208.

the former communist states, on the other. These “Europe Agreements”<sup>13</sup> were signed in the early 1990s,<sup>14</sup> and offered a legal basis for relations between the European Community and the countries of Central and Eastern Europe. The main goal of these agreements, which were concluded based on Art. 238 ECT (now Art. 310 ECT), was mutual rapprochement between the Community and various European states.<sup>15</sup> The structure and content of the individual agreements are very similar. Their preamble always refers to democracy, the rule of law and human rights; besides these political elements, the importance of a free market economy is also accented. In some of the agreements one finds an article called “General Principles”,<sup>16</sup> which refers to democracy, fundamental rights and a market economy as the main elements of the association.

Hence it is obvious that political criteria in particular have existed for a long time already. The Copenhagen innovation consists only in the fact that membership obliges compliance with those conditions explicitly set forth by the European Council.

## **2. Effectiveness of the Copenhagen Criteria**

Another important issue concerns the influence of these criteria on the applicant states. Do they have any effect on the behaviour of these states and, if so, how? The temptation to consider the Copenhagen statement as a political declaration of the nature of a preamble is, admittedly, very strong. Nevertheless, there are some mechanisms that lend efficacy to the required conditions.

First of all, the criteria did not vanish into thin air. The Copenhagen council was much more than a one-time event, as Member States, applicants and the Community have all referred to the principles stated there. These political criteria have been included in many speeches, and have often caused emotional debate.<sup>17</sup> Since 1993 they have been a very important component of the enlargement process, a fact which did not change with the accession of ten new Member States on 1 May 2004. The

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<sup>13</sup> See e.g. the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland [1993] OJ L348/1.

<sup>14</sup> The first Europe Agreements were signed on 16 December 1991 with Poland, Hungary and Czechoslovakia. After the latter country divided, virtually identical agreements were concluded with the Czech Republic and Slovakia. Between 1993 and 1996 Europe Agreements were signed with Bulgaria, Romania, the Baltic States and Slovenia.

<sup>15</sup> For a detailed analysis of the Europe Agreements, see Vörös/Droutsas, ‘Die Europa-Abkommen. Rechtliche Fundamente für die Beziehungen der EU mit den mittel- und osteuropäischen Ländern’, (1998) ZfV, 2.

<sup>16</sup> See e.g. Europe Agreement with Romania, [1994] OJ L357/1, art 6.

<sup>17</sup> E.g. the lively discussion regarding the accession of Turkey.

current negotiations are also closely connected to them, and there will be no future expansion without consideration of the Copenhagen criteria.

Furthermore, there has been a flood of Copenhagen-related documents,<sup>18</sup> mostly produced by the Commission. One can find<sup>19</sup> opinions, progress reports, composite papers, strategy papers and regular reports, all referring to the Copenhagen criteria to some extent. These documents accompany or even guide the enlargement process. The annually published progress reports, for instance, indicate whether each of the applicant countries has satisfied the various criteria. The candidates' accession maturity is evaluated, and the results are subjected to extensive analysis, which itself becomes the basis for numerous recommendations. This concept has "enabled the Union to make the criteria not just a 'wish-list' or a statement of expectations, but a workable tool in governing the accession".<sup>20</sup> The evaluation process did not end even after the closure of accession negotiations and the subsequent signing of the Treaty of Accession in April 2003. The Commission continued to issue comprehensive monitoring reports on the membership preparations of each of the ten new Member States.<sup>21</sup> The existence of all these documents, however, says nothing about their quality, as we shall see later on.

Another powerful factor emerges in this context. With Council Regulation 622/98 on assistance to applicant states in the framework of the pre-accession strategy and, in particular, on the establishment of Accession Partnerships,<sup>22</sup> a new instrument was adopted. According to the Regulation, financial aid provided by the European Union depends on applicants' fulfilment of the required conditions: "Whereas Community assistance is conditional upon respect of the commitments contained in the Europe Agreements and upon progress towards fulfilment of the Copenhagen criteria".<sup>23</sup> Such financial assistance offers applicant states an added incentive to work on the obligations connected with the Copenhagen criteria.

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<sup>18</sup> This useful term was first mentioned by Kochenov, 'Behind the Copenhagen facade: The meaning and structure of the Copenhagen political criterion of democracy and the rule of law', Volume 8 European Integration online Papers (2004/10), 1.

<sup>19</sup> < [http://europa.eu/pol/enlarg/index\\_en.htm](http://europa.eu/pol/enlarg/index_en.htm) >.

<sup>20</sup> Kochenov, Behind the Copenhagen facade (n 18) 1(6).

<sup>21</sup> See the European Commission's Comprehensive Monitoring Report on the state of preparedness for EU membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, adopted on 5 November 2003, COM(2003) 675 final.

<sup>22</sup> Council Regulation (EC) 622/1998 of 16 March 1998 on assistance to applicant states in the framework of the pre-accession strategy and, in particular, on the establishment of Accession Partnerships, [1998] OJ L85/1.

<sup>23</sup> *ibid.*

Furthermore, one last element strengthening the effectiveness of the Copenhagen principles may be summarised under the heading of “codification”. The Copenhagen criteria, especially the political criteria, have appeared in very significant places. Art. 49 (1) EUT states that “[a]ny European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union”.<sup>24</sup> According to Art. 6 (1) EUT, “[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. An analogous, slightly enriched version can be found in the Treaty establishing a Constitution for Europe.<sup>25</sup> Art. I-58 (1) EC specifies the conditions of eligibility for accession to the Union: “The Union shall be open to all European States which respect the values referred to in Article I-2, and are committed to promoting them together”. In turn, Art. I-2 EC states the Union’s values as follows:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Comparing these provisions indicates that protection of minorities is explicitly set forth in the European Constitution. Another interesting innovation is the mention of respect for human dignity as a general principle of the Union. Finally, the Preamble of the Constitution<sup>26</sup> and the Preamble of the Charter of Fundamental Rights of the European Union<sup>27</sup> refer to democracy and the rule of law.

### **3. The Meaning of the Copenhagen Criteria**

Although everyone talks about the Copenhagen criteria, and there are a huge number of Copenhagen-related documents available, it is very difficult to ascertain what these criteria are really all about. In 1993 the European Council only stated the various criteria, but said nothing about their content. According to the Conclusions of the Presidency, “[t]he European Council will continue to follow closely progress in each associated country towards fulfilling the conditions of accession to the Union and

<sup>24</sup> For more details on the accession proceedings, see Stadlmeier, *Rechtsfragen der EU-Osterweiterung*, (n 8) 84-87.

<sup>25</sup> Treaty establishing a Constitution for Europe. [2004] OJ C310/1.

<sup>26</sup> *ibid* 3.

<sup>27</sup> *Ibid* 41.

draw the appropriate conclusions".<sup>28</sup> But what exactly were the candidate states expected to do? What was meant by democracy and the rule of law?<sup>29</sup> What were the principles for assessing compliance with conditions that were so vague and general?

Copenhagen-related documents<sup>30</sup> provide some superficial insight into the specific requirements. The general outlines can be found in most of the Commission's papers. It may be observed that while disquisition of the political criteria occupies just two or three pages, a dozen are reserved for assessment of the economic criteria and adoption of the *acquis*. The political analysis is often quite neutral, and it is sometimes impossible to say whether the developments observed in a particular country are positive or not. One can find the same formulas being used over several years. Even after thousands of pages dealing with political prerequisites, their real meaning remains a secret.

#### *a. Political Criteria*

The Commission combines democracy and the rule of law in its evaluation. Although this is practical, the principles of democracy and of rule of law are quite different. Democracy must enable citizens' effective participation in the legislative process, based on free and fair multiparty elections.<sup>31</sup> People should be sufficiently and truthfully informed so that they can make a choice corresponding to their demands and interests. On the other hand, rule of law consists of the following elements:

"Laws must be an effective guide to action, they must be publicised, reasonably clear and prospective, rather than retrospective in effect. [...] Judgements and the reasoning on which they are based must be made public so that they can guide future conduct and be the subject of critical scrutiny."<sup>32</sup>

Intensive study of Commission documents indicates which areas are included under the Copenhagen criteria of democracy and the rule of law. To begin with, elections taking place in all of the applicant countries have been a major focus of these combined principles. For example, one reads that "[t]he elections were free and fair and in line with international

<sup>28</sup> European Council of Copenhagen (n 6) 13.

<sup>29</sup> A very detailed analysis of the Copenhagen criterion of democracy and the rule of law on a broad basis of various documents is given by Kochenov, *Behind the Copenhagen facade* (n 18) 1(5-23).

<sup>30</sup> <[http://europa.eu/pol/enlarg/index\\_en.htm](http://europa.eu/pol/enlarg/index_en.htm)>.

<sup>31</sup> Cf Walter/Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*, (8th edn MANZ 1996), paras 147-152.

<sup>32</sup> See Arnall, 'The Rule of Law in the European Union', in Arnall and Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP, Oxford 2002), 240.

standards and commitments on democratic elections”.<sup>33</sup> The Commission often remarks that candidate countries have continued to strengthen their democratic systems of governance. This general statement speaks for itself.

A national parliament satisfying the political criteria “continues to operate satisfactorily, its powers are respected and the opposition plays full part in its activities”.<sup>34</sup> In addition to this, minorities are to be better represented in the parliament.<sup>35</sup> Any extraordinary legislative procedure which “potentially mixes legislative and executive powers”,<sup>36</sup> such as legislating by executive ordinances, should be limited and well-justified.<sup>37</sup> Furthermore, all stages of the legislative process, including the proposal of legislative amendments, should enjoy the highest degree of transparency, giving the public the opportunity to monitor this process in real time. Another Commission proposal in this context is that legislation related to adoption of the *acquis* should preferably be approved with the help of special organs, legislative procedures, or parliamentary bodies, and that it should be in line with the *acquis*. The goal of accession to the European Union should be clearly stated. Although the requirements for an ideal parliament are specified in great detail, it has not been very difficult for applicant states to meet them. While the Commission may object that a parliament is not part of the state machinery, with most legislation deriving from the executive, the country in question is said to have successfully complied with the political criteria: “The criteria are met even when the Constitutional Court decisions concerning Parliamentary election systems are ignored for years, or the Parliament operates so slowly that it does not satisfy even the most urgent needs of the candidate country”.<sup>38</sup>

A functioning executive is also an integral part of a country founded on the values of democracy and the rule of law. In its Copenhagen-related documents, the Commission criticises inadequate management, the lack of qualified personnel and low salaries in public administration.<sup>39</sup>

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<sup>33</sup> 2002 Regular Report on Latvia's progress towards accession [2002], COM(2002) 700 final, 19.

<sup>34</sup> See 1998 Regular Report on Bulgaria's progress towards accession, [1998] COM(1998) 8.

<sup>35</sup> On participation by Roma in the legislative process, see Sändig/Baumgartner, *Beitrittsvoraussetzungen der Europäischen Union (Kopenhagener Kriterien) in bezug auf die Situation der Roma und anderer Minderheiten in den süd-osteuropäischen Kandidatenländern*, (MRM 3/2002), 161 (163-164).

<sup>36</sup> See 1999 Regular Report on Romania's progress towards accession, [1999] COM(1999) 12.

<sup>37</sup> The result of this requirement is that separation of powers is also a basic principle.

<sup>38</sup> Kochenov, *Behind the Copenhagen facade* (n 18) 1 (17).

<sup>39</sup> See 1999 Regular Report on the Czech Republic's progress towards accession, [1999] COM(1999) 205 final, 12.

Reforms in Central and Eastern European countries should result in the creation of an independent civil service. A good executive is effective, professional, accountable, well-regulated and transparent. The establishment of special units dealing with the adoption of Community law has been highly advantageous. Applicants have been very creative in this area, establishing special units responsible for European integration in each ministry,<sup>40</sup> creating special European Committees,<sup>41</sup> and appointing ministers responsible for European Union matters.<sup>42</sup> Another condition is a “completely demilitarised Executive, including the police, which should be composed of civilian public servants, serving the rule of law”.<sup>43</sup> Initially, most candidates did not meet the requirements of a functioning administration; yet although the Commission pointed out many defects,<sup>44</sup> conditions relating to the executive had already been fulfilled by all the countries in 1997.

There is no working state without a stable judiciary. Numerous documents state that a judiciary should be independent, well-staffed, well-trained, well-paid, efficient, respected and accessible to citizens. The handling of cases should be speedy, with judges assisted by auxiliary staff. In addition, judges should be specialised in different fields, especially human rights, the functioning of a market economy, and Community law. The Commission demands transparent appointments of judicial personnel, performance evaluations, and open access to legal aid for everyone. Applicants’ judicial systems, insofar as these existed, have fallen short of the ideal conception. Yet, as already indicated, this has not been a reason for the Commission to deny their ability to fulfil the requirements.

One last important element in connection with the principles of democracy and the rule of law is corruption. The European Union places great importance on effectively fighting corruption. One conclusion from the documents is that corruption is widespread in all of the applicant countries: it can be found in diverse areas like municipal government, medical services, the police, the tax authorities, and courts. Many national and international<sup>45</sup> measures have been introduced to deal with this problem.

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<sup>40</sup> See 2000 Regular Report on Bulgaria’s progress towards accession, [2000] COM(2000) 703 final, 14.

<sup>41</sup> See 2000 Regular Report on Lithuania’s progress towards accession, [2000] COM(2000) 701 final, 16.

<sup>42</sup> See 2002 Regular Report on Bulgaria’s progress towards accession, [2002] COM(2002) 700 final, 21.

<sup>43</sup> See 2002 Regular Report on Rumania’s progress towards accession, [2002] COM(2002) 700 final, 24.

<sup>44</sup> E.g. low salaries, no transparency, military nature of the police, dubious structures.

<sup>45</sup> E.g. Council of Europe Criminal Law Convention on Corruption, ETS no. 173 (entered into force on 1 July 2002).

The two other elements of the Copenhagen political criteria, human rights and minority protection, are also subject to combined evaluation by the Commission. In contrast to the principles of democracy and the rule of law, here it is much easier to define the scope of application. The Commission makes its assessment based on generally accepted fundamental rights and international agreements dealing with human rights and the protection of minorities. The understanding of fundamental rights is not as narrow as that given in national constitutions; the Commission refers to civil and political rights, economic, social and cultural rights, and minority rights. The ratification of human rights conventions<sup>46</sup> is enforced and supervised. Some problems in the area of human rights appear in all the applicant states, while others are specific to a few countries. The Commission calls particular attention to trafficking in human beings, police abuse of minorities, homosexuals and prostitutes, and disproportionately long pre-trial detentions. Most prisons are overcrowded, with poor food and sanitary conditions. In some countries, freedom of expression, religious freedom and the right to privacy are not guaranteed. In addition, the European Union requires equal opportunities for women and men, a requirement hardly met by the Member States themselves.<sup>47</sup>

One exceedingly difficult point is respect for and protection of minorities. While there are national minorities in all European states,<sup>48</sup> the appropriate and humane treatment of Roma<sup>49</sup> seems to be especially problematic. Although states with a high proportion of Roma have ratified the Council of Europe's Framework Convention for the Protection of National Minorities,<sup>50</sup> there has been no visible progress concerning its implementation. Roma suffer from social discrimination, unemployment among them is very high, and the majority live in illegally built houses. Their access to health care and public services is very poor. Roma children often do not attend school,<sup>51</sup> and dropout rates are very high for

<sup>46</sup> E.g. Convention for the protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended) (ECHR); Council of Europe European Social Charter, ETS no. 035, as amended; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

<sup>47</sup> What else could explain the fact that there are many women in lower management, some in middle management, and nearly none in upper management?

<sup>48</sup> Cf Courbage, 'Demographic characteristics of national minorities in Hungary, Romania and Slovakia' in Haug/Courbage/Compton, *The demographic characteristics of national minorities in certain European states* (Directorate of Social and Economic Affairs, Population Studies Nr.30, December 1998) 123-158.

<sup>49</sup> See Sändig/Baumgartner, *Beitrittsvoraussetzungen der Europäischen Union (Kopenhagener Kriterien)*, (n 35) 161.

<sup>50</sup> See Council of Europe Framework Convention for the Protection of National Minorities, ETS no. 157; (entered into force on 1 February 1998).

<sup>51</sup> For an alarming description of the real situation, see Sändig/Baumgartner, *Beitrittsvoraussetzungen der Europäischen Union (Kopenhagener Kriterien)* (n 35) 161 (164-166).

those who do. Alternatively, they are placed in segregated schools offering low-quality education, or even schools for mentally ill persons. It is necessary to break out of this vicious circle, for poorly skilled young Roma have great difficulty finding jobs,<sup>52</sup> and are consequently unable to improve their living conditions. There are permanent serious violations of minority rights in several Central and Eastern European states. Although this is a matter of general knowledge, it has not had any (negative) impact on applicant states' ability to meet the political criteria.

*b. Economic Criterion*

Compared to its assessment of political criteria, the Commission's evaluation of the economic situation in candidate countries is more detailed. Although these reports also contain numerous general statements,<sup>53</sup> they are mostly based on economic data and statistics, making reference to real GDP growth, inflation, the overall government budget balance, unemployment, foreign debt and foreign direct investment. As already mentioned, the economic criterion set forth by the European Council in June 1993 requires a functioning market economy and the capacity to cope with competitive pressures and market forces within the Union. According to the Commission:

“the existence of a functioning market economy requires that prices, as well as trade, are liberalised and that an enforceable legal system, including property rights, is in place. Macroeconomic stability and consensus about economic policy enhance the performance of a market economy. A well-developed financial sector and the absence of any significant barriers to market entry and exit improve the efficiency of the economy.”<sup>54</sup>

Privatisation is also an integral part of the necessary transition from a command to a market economy. The Commission has often attested to progress concerning privatisation, even though privatisation procedures were not always transparent, and bankruptcy procedures had to be improved. One very interesting phenomenon in this context is that, in some countries, structural reforms caused an increase in the unemployment rate. Rapid reforms were not automatically accompanied by job creation, while a weak business climate and unskilled labour force did not have a positive influence, either.

<sup>52</sup> For some statistical data, see Sändig/Baumgartner, *Beitrittsvoraussetzungen der Europäischen Union (Kopenhagener Kriterien)* (n 35) 161 (167).

<sup>53</sup> E.g. “Bulgaria has clearly made further progress towards becoming a functioning market economy. It is not yet able to cope with competitive pressure and market forces within the Union in the medium term”. 2001 Regular Report on Bulgaria's progress towards accession, [2001] COM(2001) 700 final, 26.

<sup>54</sup> *ibid* 29.

The second element of the economic criteria, i.e. applicant states' capacity to cope with competitive pressure and market forces within the European Union, is defined by the Commission as follows:

"The ability to fulfil this criterion depends on the existence of a market economy and a stable macroeconomic framework, allowing economic agents to make decisions in a climate of predictability. It also requires a sufficient amount of human and physical capital, including infrastructure. State enterprises need to be restructured, and all enterprises need to invest to improve their efficiency."<sup>55</sup>

In line with this definition, the Commission has evaluated the quality of infrastructure in the applicant countries, since the quality of road, railway and port infrastructure, as well as a functioning information and telecommunications network, is very important for domestic and foreign investors. According to numerous reports, education in most of the candidate countries is not sufficiently focused on the needs of a market economy, even though corporate management skills and properly trained public administration always have a positive effect on economic performance and competitive prospects. In general, expanded trade with the European Union is considered highly advantageous for the economic development of Central and Eastern European countries. Furthermore, there is obvious interaction between the economic criterion and the *acquis* criterion: the higher the degree of economic integration a country achieves with the Union prior to accession, the better able it will be to assume the obligations of membership. This realisation leads us to the last Copenhagen criterion, namely, adoption of the *acquis*.

### *c. Acquis Criterion*

As the obligations of membership, the *acquis*<sup>56</sup> refers to the legal and institutional framework by means of which the Union implements its objectives. For better orientation,<sup>57</sup> the *acquis* has been divided into 31 chapters.<sup>58</sup> Negotiations are based on a screening process, in the course of which national law is compared with Community law; this comparison indicates legal parallels, deviations and gaps and, consequently, the need for additional legislation. The assessment of a country's ability to assume various obligations of membership always has the same structure. The Commission opens with an evaluation of progress related to the four

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<sup>55</sup> *ibid* 33.

<sup>56</sup> Cf Fischer/Köck/Karollus, *Europarecht* (4th edn Geiger/Khan, 2002) paras 93 and 762.

<sup>57</sup> The *acquis* presently comprises about 80,000 pages.

<sup>58</sup> E.g. cooperation in the field of justice and home affairs, consumer and health protection, telecommunications and information technology, fisheries, and company law.

freedoms<sup>59</sup> and the cornerstones of the internal market,<sup>60</sup> and continues with a systematic review of progress in each of the remaining chapters. The main content and area of application of the *acquis* criterion is easier to define, due to the detailed provisions given in EU law. This is also the reason for the extensive examination accorded to this criterion in various reports. The Commission's opinions in this area (unlike those concerning the political criteria) are not superficial; one can even learn how many pages of the Official Journal have been translated, and how many of those have been fully revised.<sup>61</sup> The majority of applicant countries have been successful with regard to adoption of the *acquis*, whereas its implementation and enforcement are still highly insufficient and problematic. This is why the Madrid European Council in December 1995 pointed out the need to create the conditions for gradual, harmonious integration of all the candidates, particularly through adjustment of their administrative systems. The Commission has also repeatedly underlined the importance of effectively incorporating Community legislation into national legislation, and the even greater importance of implementing it correctly via appropriate administrative and judicial structures.

#### IV. The Post-Copenhagen Process

This section is intended to give an overview of the main developments following the meeting of the 1993 European Council, based on the Conclusions of the Presidency.

The meeting of the European Council in Luxembourg in December 1997 marked a moment of historic significance for the future of the Union and of Europe as a whole. In the ongoing enlargement process, the nations of Europe had overcome the divisions of the past. The European Conference<sup>62</sup> was established to bring together Member States of the European Union and states aspiring to accede to it. The European Council formed an idea of the situation in each of the eleven applicant states based on the Commission's Opinions. It decided to start the accession process with ten Central and Eastern European states and Cyprus, declaring that "all these states are destined to join the European Union on the basis of the same criteria, and [...] are participating in the accession process on an equal footing".<sup>63</sup> One significant result of the Luxembourg

<sup>59</sup> Free movement of goods, free movement of persons, free movement of services, free movement of capital.

<sup>60</sup> Cf Streinz, *Europarecht* (6<sup>th</sup> edn, Heidelberg 2003) para 652.

<sup>61</sup> E.g. 13,785 pages translated and 3,000 revised. 2001 Regular Report on Bulgaria's progress towards accession (n 53) 93.

<sup>62</sup> On the purpose and structure of the European Conference, see Vörös/Droutsas, *Die Europa-Abkommen* (n 15) 2 (sub V A).

<sup>63</sup> European Council in Luxembourg *Conclusions of the Presidency* (12-13 December 1997) para 10.

meeting was the decision to begin negotiations with Poland, Estonia, Slovenia, the Czech Republic, Hungary and Cyprus<sup>64</sup> in the spring of 1998 by convening intergovernmental conferences. The European Council stressed that:

“[t]he decision to enter into negotiations does not imply that they will be successfully concluded at the same time. Their conclusion and the subsequent accession of the different applicant states will depend on the extent to which each complies with the Copenhagen criteria and on the Union’s ability to assimilate new members.”<sup>65</sup>

Concerning the other applicants - Slovakia, Latvia, Lithuania, Romania and Bulgaria - preparations for negotiations were planned.

Two years later, the Helsinki European Council decided to start negotiations with Slovakia, Latvia, Lithuania, Romania, Bulgaria and Malta<sup>66</sup> in February 2000. With the joining of Malta and Turkey, the enlargement process comprised 13 candidate states at that time. Turkey was regarded as a state destined to enter the European Union based on the same criteria as those applying to other candidate states. As Turkey did not meet the political criteria, negotiations were not envisaged.

The European Council in Copenhagen in December 2002 may be regarded as a historic milestone. Accession negotiations with Poland, Estonia, Slovenia, the Czech Republic, Hungary, Cyprus, Slovakia, Latvia, Lithuania and Malta were closed, and these countries were scheduled to become full members of the European Union on 1 May 2004.<sup>67</sup> Romania and Bulgaria were not included along with these ten states, as they had not fulfilled the membership criteria. Some chapters remained open,<sup>68</sup> with judicial and administrative reform absolutely necessary in order to meet the various requirements. The European Council encouraged these two applicants, declaring that “[t]he successful conclusion of accession negotiations with ten candidates lends new dynamism to the accession of Bulgaria and Romania as part of the same inclusive and irreversible enlargement process”.<sup>69</sup> The common objective was to welcome Bulgaria and Romania as members of the European Union in 2007. Concerning Turkey, its voluminous legislative packages and subsequent implementa-

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<sup>64</sup> The “Luxembourg Group”.

<sup>65</sup> European Council in Luxembourg (n 63) para 26.

<sup>66</sup> The “Helsinki Group”.

<sup>67</sup> Cf Koenig/Haratsch, *Europarecht*, (4th edn Mohr Siebeck, 2003) paras 974-977.

<sup>68</sup> For Romania, e.g. taxation, customs, justice and home affairs, employment, fisheries; for Bulgaria, e.g. environment, transport, energy, justice and home affairs, agriculture. For a detailed analysis, see the 2002 Regular Report on Romania’s progress towards accession [2002] COM(2002) 700 final, 52-128, and the 2002 Regular Report on Bulgaria’s progress towards accession [2002] COM(2002) 700 final 47-126.

<sup>69</sup> European Council in Copenhagen (n 6) para 13.

tion measures were praised as important steps towards meeting the Copenhagen criteria. Moreover, it was stated that “[i]f the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations without delay”.<sup>70</sup>

The Thessaloniki European Council in June 2003 reaffirmed the European perspective of the Western Balkan countries in the Stabilisation and Association Process, as stated by the European Council in Santa Maria da Feira (June 2000), where possible integration of these countries into the European political and economic mainstream was proclaimed as a future target: “All the countries concerned are potential candidates for EU membership”.<sup>71</sup> In Thessaloniki, the European Council restated that the Western Balkan countries would become part of the Union as soon as they satisfied the required conditions. In addition, it endorsed the Council’s conclusions on the Western Balkans of 16 June 2003, including the annex entitled “The Thessaloniki Agenda for the Western Balkans: Moving towards European Integration”. This agenda, which drew on previous enlargement experience, was intended to further strengthen relations between the European Union and the Western Balkan countries. Finally, the European Council looked forward to the EU-Western Balkans summit meeting set to take place on 21 June 2003 under the Greek presidency.

As the Commission’s opinion on Croatia’s application for EU membership<sup>72</sup> was positive, and Croatia had met the Copenhagen political criteria, the European Council in Brussels decided to make Croatia a candidate for membership in June 2004. Accession negotiations were to begin early in 2005. In this regard, the European Council emphasised that Croatia had to maintain full cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY), including locating the remaining Croatian indictee, Ante Gotovina, and transferring him to The Hague. Finally, it pointed out that “the achievement of candidate status by Croatia should be an encouragement to the other countries of the Western Balkans to pursue their reforms”.<sup>73</sup>

In December 2004 the European Council announced the conclusion of negotiations with Romania and Bulgaria, which are to become

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<sup>70</sup> *ibid* para 19.

<sup>71</sup> European Council in Feira, Conclusions of the Presidency, (19-20 June 2000, SN 200/00), para 67.

<sup>72</sup> Commission’s opinion on Croatia’s application for EU membership [2004] COM(2004) 257 final.

<sup>73</sup> European Council in Brussels, Conclusions of the Presidency, (17-18 June 2004 no.10679/2/04 REV2), para 34.

EU members in January 2007. The corresponding Accession Treaty was signed in April 2005.<sup>74</sup> Another important matter was the European Council's decision to open accession negotiations with Turkey in October 2005. This remarkable decision was based on a report<sup>75</sup> and positive recommendation<sup>76</sup> by the Commission.

In June 2005 the European Council again made reference to the Western Balkans, stating that its future lay in the European Union.<sup>77</sup> Along with fulfilling the Copenhagen criteria, "full and unrestricted cooperation by countries in the region with the ICTY remains an essential requirement for continuing their progress towards the EU".<sup>78</sup> The European Council also adopted its Declaration on Kosovo.<sup>79</sup>

Responding to the Commission's opinion on the membership application by the Former Yugoslav Republic of Macedonia,<sup>80</sup> the European Council granted candidate status to this country in December 2005.<sup>81</sup> Future steps depend, among other things, on compliance with the Copenhagen political criteria and the Union's absorption capacity.<sup>82</sup> A date for beginning accession negotiations with the Former Yugoslav Republic of Macedonia has not been set.

## **V. Case Study: Croatia**

This last section is dedicated to a closer examination of Croatia, starting with the beginnings of relations between the European Union and Croatia and ending with recent developments.

### **1. Milestones in Relations between the EU and Croatia**

In 1997 the Council set out the political and economic conditions for the development of bilateral relations with Croatia. Two years later,

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<sup>74</sup> Treaty between Member States of the European Union and Republic of Bulgaria and Romania concerning the accession of republic of Bulgaria and Romania to the European [2005], OJ 2005 L157/11.

<sup>75</sup> 2004 Regular Report on Turkey's progress towards accession [2004] COM(2004) 656 final.

<sup>76</sup> *ibid.*

<sup>77</sup> European Council in Brussels, Conclusions of the Presidency (16-17 June 2005 no 10255/1/05 REV), para 41.

<sup>78</sup> *ibid* para 43.

<sup>79</sup> *ibid* Annex III.

<sup>80</sup> Communication from the Commission; Commission Opinion on the application from the former Yugoslav Republic of Macedonia for membership of the European Union [2005] COM(2005) 562 final.

<sup>81</sup> European Council in Brussels, Conclusions of the Presidency, (15-16 December 2005 no 15914/1/05 REV1), para 24.

<sup>82</sup> *ibid* para 25.

the European Union proposed a new Stabilisation and Association Process (SAP) for five South East European countries: Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, and Serbia and Montenegro. In January 2000 parliamentary and presidential elections in Croatia resulted in a change of government,<sup>83</sup> presenting an opportunity for rapid progress in integration. Six months later, the Feira European Council stated that all the SAP countries were potential candidates for EU membership. The year 2000 also saw the opening of negotiations on the Stabilisation and Association Agreement (SAA), which was finally signed in October 2001.<sup>84</sup> This Agreement provides for extensive cooperation, and aims at guiding Croatia's gradual approach to the Union's complex structures. It is a far-reaching framework<sup>85</sup> with mutual rights and obligations. The main objective of the SAA is to identify which areas of Community law Croatia has to adopt in order to be able to effectively participate in the integration process. At the end of 2001, the Commission adopted a country strategy for Croatia covering the period from 2002 to 2006 and providing a framework for EC assistance. This aid is being delivered via the Community Assistance to Reconstruction, Development and Stability (CARDS) programme for the Balkans. CARDS<sup>86</sup> is the main channel for the Union's financial and technical assistance to South East European countries. An Interim Agreement,<sup>87</sup> concluded in parallel with the SAA and covering (only) trade and trade-related measures,<sup>88</sup> has been in force since March 2002. One more very important date is 21 February 2003, when Croatia submitted its application for EU membership. The Commission issued a corresponding Opinion in April 2004,<sup>89</sup> based on which Croatia received candidate status at the Brussels European Council in June 2004.

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<sup>83</sup> For a detailed analysis of the political situation in Croatia, see Roži, *Kroatiens Integrationsfortschritte unter der "neuen" HDZ-Regierung (2004) Südosteuropa 10-12/2004*, 566.

<sup>84</sup> The SAA with Croatia entered into force on 1 February 2005, and was thus the second SAA to do so (the SAA with the Former Yugoslav Republic of Macedonia entered into force on 1 April 2004).

<sup>85</sup> Promotion of political dialogue and economic and trade relations.

<sup>86</sup> Based on Council Regulation (EC) 2666/2000 on assistance to Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, [2000] OJ 2000 L306/1.

<sup>87</sup> Its purpose is to bridge the time gap until the SAA enters into force.

<sup>88</sup> Nearly free access to the Union's market is guaranteed.

<sup>89</sup> Communication from the Commission; Opinion on Croatia's Application for Membership of the European Union [2004] COM(2004) 257 final.

## **2. Opinion of the European Commission on Croatia's Application for Membership in the European Union**

I will begin my summary of the Commission's recommendations with a statement made by former European Commission President Romano Prodi:

"Over the past few years, Croatia has made major efforts to advance along the road to EU membership, and the Commission's Opinion acknowledges this progress. Therefore, the Commission can now recommend to the Council the launch of accession negotiations with Croatia. Croatia's performance shows that the EU strategy for the Western Balkans provides a good framework for economic and political progress, and will hopefully encourage the other countries of the region to redouble their efforts to make progress towards European integration. I hope that the new European Partnership will help the Croatian Government target its reform efforts more efficiently. The European Commission will offer all the support it can, but how far and how fast Croatia will advance towards EU membership will remain in its own hands."<sup>90</sup>

In accordance with the provisions of Art. 49 EUT, the Commission, at the request of the Council, prepared an Opinion on Croatia's application, adopting it on 20 April 2004. The method followed in preparing this Opinion was the same as that used with earlier ones. The Commission analysed the present situation and the medium-term prospects, and evaluated Croatia's application with regard to its capacity to meet the Copenhagen criteria and the SAP conditions, especially those concerning cooperation with the ICTY and regional cooperation.

Regarding political criteria, the Opinion concludes that Croatia is a functioning democracy with stable institutions that guarantee the rule of law. The 2000 and 2003 elections were free and fair. There are no major problems regarding respect for fundamental rights; however, Croatia needs to take measures to ensure that the rights of minorities, in particular the Serb minority, are fully respected. It should speed up implementation of the constitutional law on national minorities and accelerate efforts to facilitate the return of Serb refugees from Serbia and Bosnia and Herzegovina. Additionally, the fight against corruption and reform of the judicial system have to be improved. One very important element in the political context is Croatia's position with regard to the ICTY. In April 2004, Chief Prosecutor Carla del Ponte stated that Croatia was now cooperating fully with the ICTY. The Commission underscores that Croatia must maintain full cooperation and take all necessary steps to ensure that the remaining indictee, Ante Gotovina, be located and transferred to the ICTY.

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<sup>90</sup> Cf European Commission Press Releases 'Croatia: Commission recommends opening of accession negotiations', IP/04/507 (Brussels 20 April 2004).

Concerning the economic criterion, Croatia is regarded as a functioning market economy. It should be able to cope with competitive pressures and market forces within the Union in the medium term,<sup>91</sup> provided that it continues implementing its reform programme to eliminate the remaining deficiencies. The Commission notes an increasing political consensus on the essentials of economic policy. The Croatian economy has achieved a considerable degree of macroeconomic stability, with low inflation. Infrastructure is good and the labour force is well-educated. Nevertheless, judicial and administrative structures need to be strengthened, the cadastre and land registry system is inadequate, and privatisation has been slower than expected.

Regarding Croatia's ability to assume the obligations of membership, the Opinion includes a detailed analysis based on numerous chapters of the *acquis* that had formed the basis of accession negotiations with the new Member States. As a result, the Commission asserts that Croatia has made significant efforts to align its legislation with the *acquis*, particularly in areas related to the internal market and trade. Administrative capacities and legislative enforcement need to be improved. If Croatia continues its efforts, it should not have major difficulties in medium-term application of the *acquis* in the following areas: Economic and Monetary Union, statistics, industrial policy, small and medium-sized enterprises, science and research, education and training, culture and audio-visual policy, external relations, common foreign and security policy, and financial and budgetary provisions. Further efforts will be necessary in the following areas: free movement of capital, company law, fisheries, transportation, energy, consumer and health protection, customs union, and financial control. Croatia will have to make considerable and sustained efforts to align its legislation with the *acquis* in the following areas: free movement of goods, free movement of persons, freedom movement of services, competition, agriculture, taxation, social policy and employment, telecommunications and information technologies, regional policy, justice, and home affairs. Finally, quite considerable efforts will be needed in the area of the environment.

The Commission's Opinion was accompanied by a draft European Partnership for Croatia, which was inspired by the Accession Partnerships that had helped countries preparing for EU membership in the past. This partnership,<sup>92</sup> drawing on the analysis presented in the Opinion, represents an important step towards a well-functioning relationship between the European Union and Croatia. It is tailored to the country's

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<sup>91</sup> Three to four years.

<sup>92</sup> Based on Council Regulation (EC) 533/2004 on the establishment of European partnerships in the framework of the Stabilisation and Association Process [2004] OJ 2004 L86/1.

specific needs, setting out priorities for the short<sup>93</sup> and medium term. This partnership will help the Croatian Government to concentrate its reform efforts and available resources where they are needed most. The national authorities are expected to respond with a detailed plan for the implementation of European Partnership priorities.

### **3. Recent Developments and Future Prospects**

“If the Commission were to give its recommendation on the basis of today’s information, I could not recommend opening negotiations with Croatia,” said EU Enlargement Commissioner Olli Rehn on 31 January 2005. He urged the Croatian government to intensify its cooperation with the ICTY, or else the starting date for accession negotiations, set by the December 2004 European Council for 17 March 2005, could not be maintained. The ICTY was seeking Ante Gotovina, a Croatian general indicted for killing several hundred Serbs and expelling tens of thousands more. Rehn believed that the Croatian government would be able to locate and hand over the wanted general.<sup>94</sup> Croatian Prime Minister Ivo Sanader promised that the country would do its best to cooperate with the ICTY. However, in the absence of a common agreement, the Council postponed the opening of accession negotiations in its conclusions on Croatia of 16 March 2005,<sup>95</sup> stating that “[t]he bilateral intergovernmental conference will be convened by common agreement as soon as the Council has established that Croatia is cooperating fully with the ICTY”.<sup>96</sup> Although the Croatian population reacted sceptically to these developments, Sanader was quite optimistic, stating that he was sure Croatia would take part in the 2009 European elections.<sup>97</sup> Negotiations finally began on 3 October 2005.<sup>98</sup> According to a report by ICTY Chief Prosecutor Carla del Ponte, Croatia was now fully cooperating with the Tribunal.<sup>99</sup> The Council restated that maintaining full cooperation would remain a requirement for progress throughout the accession process.<sup>100</sup> An assessment of this cooperation would form part of the Commission’s reports on Croatia’s

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<sup>93</sup> One to two years.

<sup>94</sup> The American government offered USD 5 million for the capture of Gotovina, and the Croatian government HRK 300,000 (about EUR 40,000).

<sup>95</sup> Council of the European Union, Conclusions on Croatia, (16 March 2005 no 7138/2/05 REV 2).

<sup>96</sup> *ibid* para 5.

<sup>97</sup> *Wiener Zeitung* (Vienna 9 September 2005).

<sup>98</sup> Parallel to the opening of negotiations with Turkey.

<sup>99</sup> At that time Ante Gotovina was still missing; he was captured on Tenerife Island on 7 December 2005.

<sup>100</sup> See Council of the European Union, Council Conclusions on Croatia - Outcome of proceedings (3 October 2005 no 12877/05).

fulfilment of the political criteria. In addition, a negotiation framework was drawn up, including the main principles governing the negotiations with Croatia.<sup>101</sup> On 9 November 2005 the Commission adopted an overall enlargement strategy for the two candidate countries (Croatia and Turkey), as well as for potential candidate countries from the Western Balkans.<sup>102</sup> This strategy is based on three principles: consolidating the Union's commitments on enlargement, applying a fair and rigorous conditionality, and better communication of enlargement. It seems that the Copenhagen criteria are being taken more seriously in the course of the ongoing enlargement process.

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<sup>101</sup> European Council, 'Negotiation framework, 3 October 2005,' <[http://europa.eu/pol/enlarg/index\\_en.htm](http://europa.eu/pol/enlarg/index_en.htm)>.

<sup>102</sup> European Commission 2005 Enlargement Strategy Paper [2005] COM(2005) 561 final.

