

NEGOTIATING FOR EU MEMBERSHIP? THE CASE OF BULGARIA AND ROMANIA

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A treaty clause for enlargement has existed since the inception of the European Communities. Article 237 of the founding Treaty of Rome (1957) opened the possibility for any European state to apply and become a member. The legal basis for the accession of Bulgaria and Romania, as well as other countries that formed part of the fifth enlargement,¹ was Article 49 of the Amsterdam Treaty (TEU), which stated that EU hopefuls had to adhere to the principles of liberty, democracy, rule of law, and respect of human rights and freedoms. It also set the main steps on the way to EU accession - submission of an application to the Council, a positive Opinion by the Commission, accession negotiations, a unanimous decision by the Member States to accept the applicant after consultation with the European Commission and Parliament, ratification of the Accession Treaty by the Member States and the acceding country. Over consecutive rounds of enlargement, the practice of taking in new members evolved beyond the Treaty provisions into a lengthy and complicated system.² Conditions for membership were defined unilaterally by EU Member States and progress towards accession depended on annual evaluations by the Commission and the European Parliament (EP).

This article turns back the clock to present the Bulgarian and Romanian experience on the road to EU accession. Bulgaria and Romania were grouped together because of their common geographical location and the dubious course of domestic reforms in the first years of transition. Their second-waver status was established with the Association (Europe) Agreements - the Visegrad states were given priority, while Bulgaria and Romania signed their agreements under tougher conditions in 1993.³ The two were left out of the Luxembourg group that opened membership talks in 1997 (Poland, Hungary, the Czech Republic, Estonia and

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¹ Poland, Hungary, the Czech Republic, the Slovak Republic, Slovenia, Estonia, Lithuania, Latvia, Cyprus and Malta, hereinafter the ten new Member States.

² G Avery and F Cameron, *The Enlargement of the European Union* (Sheffield University Press, Sheffield 1998).

³ D Papadimitriou, *Negotiating the New Europe: The European Union and Eastern Enlargement* (Ashgate, Aldershot 2002).

Slovenia) and were only invited to start accession negotiations in 2000. At the Laeken European Council in December 2001, it became clear that Bulgaria and Romania would not join the EU with the first wave of ten states. The only other case in EU history of enlargement in two waves was the Mediterranean round - Greece joined in 1981 and Spain and Portugal in 1986. But in the Bulgarian and Romanian case, the EU defined supplementary hurdles for opening negotiations and reserved the possibility to postpone membership even after the Accession Treaty was agreed. Such hurdles were not embodied in the EU founding Treaties nor were they applied to previous applicant states. Accession negotiations were the key mechanism for binding the EU and Bulgaria and Romania, but the two EU hopefuls had little bargaining leeway. Membership talks focused on the timescales for adopting existing EU legislation (*acquis communautaire*), rather than on the adjustment of the Treaties to accommodate newcomers. Moreover, it was unlikely that the EU would offer Bulgaria and Romania more than it had agreed with the countries acceding in 2004. But it was possible for the two second-wavers to be offered, and for them to accept, a less generous deal since they feared postponement or even cancellation of membership. In this context, the term accession "negotiations" may be misleading.

The article proceeds by examining critically the general conditions for membership as defined outside the Treaties in Member State declarations. The enlargement process is then desegregated into three broad stages - the pre-negotiation stage, negotiations *per se*, and post-negotiation. During the pre-negotiation stage, the compliance of Bulgaria and Romania with general political and economic criteria was verified, and supplementary conditions for starting talks were specified. The opening and closing of individual chapters during negotiations was conditional on more specific *acquis* criteria and involved the adoption of particular legislative models and institutional templates. The post-negotiation phase spanned from the signing of the Act of Accession up until the actual date of membership and involved extensive monitoring of the implementation of obligations assumed by Bulgaria and Romania during negotiations. This article also examines the internal dimension of EU enlargement. Interactions among EU institutions at each stage of the enlargement process have been somewhat neglected by the enlargement literature.⁴ Inter-institutional dynamics were outside the remit of Bulgaria and Romania but had a direct effect on their membership prospects. Finally, some conclusions are drawn about the changing political and legal context of future EU enlargements.

⁴ G Harris, "The Continuing EU Enlargement Process: Inter-Institutional Aspects" (paper presented at the UACES 34th Annual Conference, Birmingham 2004).

Membership criteria

The setting up of conditions for membership, or “conditionality” was at the heart of the EU’s active leverage for influencing political processes and state institutions in Bulgaria and Romania.⁵ Although the Treaties stipulate that any European state can apply to join, it was only in June 1993 that Central and Eastern European countries (CEECs) were offered the prospect of membership. In Copenhagen in 1993 the Heads of State and Government of the EU Member States made the historic declaration that the associated countries from Central and Eastern Europe “that so desire shall become members of the European Union”.⁶ However, it was the first time in the history of EU enlargements that the carrot of EU membership was made explicitly conditional on the fulfilment of criteria not specified in the Treaties. The Copenhagen European Council concluded that CEECs could join the EU only if they:

- o achieved the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criteria);
- o established a functioning market economy and demonstrated capacity to cope with competitive pressure and market forces within the Union (economic criteria);
- o were able to take on the obligations of membership including adherence to the aims of political, economic and monetary union the (*acquis* criteria);

In addition to what became known as the Copenhagen criteria, the Union’s capacity “to absorb new members, while maintaining the momentum of European integration” was mentioned as a prerequisite for enlargement.⁷

The Copenhagen criteria for membership evolved outside the Treaties to be the mainstay of the EU enlargement policy, not only towards the CEECs but also towards future applicants. At the start of his mandate in 1999, the first Enlargement Commissioner Gunter Verheugen declared that the Copenhagen criteria for membership were “fixed criteria that could not be amended or made flexible”.⁸ His successor, Commissioner Olli Rehn, on the occasion of the EP debate on Turkey’s application, referred to the Copenhagen criteria as “the fundamental values on which

⁵ MA Vachudova, *Europe Undivided: Democracy, Leverage, and Integration after Communism* (OUP, Oxford 2005).

⁶ European Council Presidency Conclusions 180/1/93 of 21-22 June European Council in Copenhagen < http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf> accessed 21 January 2003.

⁷ *ibid* 13.

⁸ *Uniting Europe* (6/09/99) 2.

the European Union is based, [that] are not subject to negotiation”.⁹ The conditions for membership were extensively analysed in the enlargement literature and their ambiguity was emphasised.¹⁰ Karen Smith pointed out that how the EU evaluated progress in meeting the conditions and how it defined violations of the conditions were bound to be highly subjective.¹¹ Furthermore, the fulfilment of the “safeguard” that the EU had to be ready for enlargement was beyond the control of Bulgaria and Romania. It mirrored the concern of incumbent members that enlargement or “widening” might threaten the EU’s functioning unless it was accompanied by appropriate institutional and policy reforms, or “deepening”.¹²

The ability of Bulgaria and Romania not only to adopt, but also to apply, the *acquis* became a main concern for the EU as the accession process progressed. The Madrid European Council (1995) highlighted the need for candidate countries to adjust their administrative structures to ensure coherent operation of Community rules. The EU’s pre-accession strategy was revamped to assist candidates to that end. Subsequent European Councils made it clear that accession preparations were not only about the speedy transposition of the EU *acquis* but also about the quality of its application. As Commission chief negotiator Eneko Landaburu commented, “what is important is not to speak of dates [of accession] but to get on with the job in proper and substantial manner”.¹³ The Feira and Gothenburg European Councils, in 2000 and 2001, respectively, re-asserted that significant efforts were required of CEE governments to strengthen their administrative and judicial capacity to apply the *acquis*. The Copenhagen European Council in 2002 endorsed the Commission’s proposal for continued monitoring of progress on the ground after the signing of the Accession Treaty and until Bulgaria’s accession.

It is unclear whether the EU recognised administrative capacity to be a fully fledged condition for membership, a sort of *bureaucracy criterion*. Dimitrova argued that the administrative capacity requirement was *de facto* defined as an accession criterion by the Commission in Opinions on membership applications by CEECs.¹⁴ Subsequent Regular Reports on

⁹ O Rehn, “EU and Turkey on the Threshold of a New Phase” (speech by Commissioner Rehn, EP Parliamentary Session, Turkey Debate, 13 December 2004).

¹⁰ H Grabe and K Hughes, *Enlarging the EU Eastwards* (RIIA, London 1998) 30; A Mayhew, *Recreating Europe: The European Union’s Policy towards Central and Eastern Europe* (CUP, Cambridge 1998) 29.

¹¹ KE Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe* (Palgrave, Basingstoke 2004) 140.

¹² N Nugent, “The Widening and Deepening of the European Community: Recent Evolution, Maastricht, and Beyond” (1992) 30 *Journal of Common Market Studies* 311, 328.

¹³ *Uniting Europe* (13/02/2000) 1.

¹⁴ AL Dimitrova, “Enlargement, Institution-Building and the EU’s Administrative Capacity Requirement” (2002) 25 *West European Politics* 171, 190; see also JP Olsen, “Towards a European Administrative Space?” (2002) WP02/26 *Arena Working Paper* <<http://www.arena>.

progress towards accession (1998-2001) comprised a separate section on administrative capacity to apply the *acquis*. The EU decision to re-target Phare support on administrative capacity building reaffirmed the direct link between EU accession and administrative reform in candidate countries. In more recent work, Dimitrova suggested that administrative capacity was a “partial” condition or “subcondition” linked to both the first, political, and the third, *acquis* implementation criteria for membership.¹⁵ Rather than being a separate requirement, administrative capacity building involved the improvement of *horizontal* capacity, or the strengthening of the public administration as a whole and at all levels (national, regional, local), and *sectoral* capacity building to implement the *acquis* covered by the thirty-one negotiation chapters. For Dimitrova, the horizontal capacity requirement was equivalent to institution building “as a kind of an institutional healing approach (...) in which the EU tries to fix the ills and problems of postcommunist administrations”.¹⁶ Fournier described the EU’s administrative conditionality as one of “variable geometry” since the requirement to establish democratic institutions was addressed rather fully, but the issue of organisation of national public administrations was vaguely defined.¹⁷ Verheijen suggested that the innovative ingredient of the administrative capacity requirement, as compared to previous rounds of enlargement, was the need for horizontal public administration reform in Bulgaria and Romania.¹⁸ It emerged as a major pre-condition for membership because of the increasing complexity of the EU as a political system and the mutual dependence of Member States in implementing EU rules.¹⁹ Yet Verheijen observed that the requirement for horizontal administrative reform was somewhat abandoned by the Commission in the early 2000s. The incoherence in the EU approach questions the extent to which general administrative capacity represented a true membership criterion. It might have been simply a tool for exerting pressure on candidate countries when necessary, one that the EU could turn a blind eye to when politically convenient²⁰.

uio.no/publications/wp02_26.htm> accessed 3 November 2003; T Verheijen, “Les Critères Administratifs d’Adhésion à l’Union Européenne: Sont-ils Voués au Placard?” (2002) 33 *Revue d’Etudes Comparatives Est-Ouest* 79, 99.

¹⁵ AL Dimitrova “Europeanization and Civil Service Reform in Central and Eastern Europe” in F Schimmelfennig and U Sedelmeier (eds), *The Europeanization of Central and Eastern Europe* (Cornell University Press, Ithaca 2005).

¹⁶ *ibid* 81.

¹⁷ J Fournier, “Administrative Reform in the Commission Opinions Concerning the Accession of Central and Eastern European Countries to the European Union” in OECD/SIGMA (ed), *Preparing Public Administrations for the European Administrative Space* (SIGMA Papers, OECD 1998) 114.

¹⁸ Verheijen (n 14)

¹⁹ Y Mény, P Muller and J-L Quermonne (eds), *Adjusting to Europe: The Impact of the European Union on National Institutions and Policies* (Routledge, London 1996).

²⁰ Verheijen (n 14)

The absence of concrete benchmarks against which readiness for membership could be evaluated led national governments to question the EU's commitment to enlargement. Fears were voiced that the membership criteria were formulated "to keep the doors of the Union closed".²¹ In its composite document Agenda 2000, encompassing the Opinions on individual applications and an evaluation of the enlargement impact on key EU policies, the Commission itself recognised that its task in evaluating the candidates' readiness for membership "was unprecedented because the Copenhagen criteria are broad in political and economic terms and go beyond the *acquis communautaire* (for example assessing administrative and judicial capacity), and because the *acquis* itself has expanded considerably since previous enlargements".²² The statement of the European Council in Luxembourg (1997) that compliance with the political criteria was a "prerequisite for the opening of any accession negotiations", but economic and *acquis* criteria "have been and must be assessed in a forward-looking, dynamic way"²³ reaffirmed the conviction of applicant countries that the admission of new members was a political act expressing political preferences.²⁴ Past instances of EU enlargement, especially the Mediterranean round, provided further evidence of the political calculus according to which each application was evaluated.²⁵ In the case of Bulgaria and Romania, the Kosovo crisis contributed to the EU decision to open accession negotiations to give a positive signal to the Balkan region. The fuzziness of the accession criteria could therefore be "as much hindrance as facilitator" to a country's membership of the EU.²⁶

Pre-negotiation

The pre-negotiation phase spans from the moment of submission of the membership application to the start of accession talks. Romania's and Bulgaria's formal applications for membership were put forward in 1995, at the June and December European Councils, respectively. The

²¹ A Inotai, "The CEECs: From the Association Agreements to Full Membership", in J Redmond and GG Rosenthal (eds), *The Expanding European Union: Past, Present, Future* (Lynne Rienner, Boulder CO and London 1998) 162.

²² Commission of the EC, Agenda 2000: For a Stronger and Wider Union (Bulletin of the EU, 5 Supplement 1997) 39.

²³ European Council Presidency Conclusions SN 400/97 of 12-13 December European Council in Luxembourg <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/032a0008.htm> accessed 2 April 2006.

²⁴ R Stawarska, "EU Enlargement from the Polish Perspective" (1999) 6 *Journal of European Public Policy* 822, 838.

²⁵ C Preston, *Enlargement and Integration in the European Union* (Routledge, London 1997).

²⁶ P Nicolaidis and A Close, "The Process and Politics of Enlargement", *European Trends* (1994) 70, 79.

Opinions on Bulgaria and Romania's applications published by the Commission in July 1997 concluded that post-communist reforms in the two countries had not progressed sufficiently and that accession talks could not be opened. In November 1997 the European Parliament recommended that negotiations commence with all applicants from CEE but the European Council in Luxembourg (1997) decided to start talks with five CEECs dubbed the Luxembourg group (Poland, Hungary, the Czech Republic, Slovenia, Estonia). It was only in December 1999 that Member States gathered in Helsinki decided to open talks with the remaining CEECs. Negotiations with the so-called Helsinki group (Bulgaria, Romania, Latvia, Lithuania and Slovakia) were formally launched on 15 February 2000 at ministerial level.

The pre-negotiation phase for Bulgaria and Romania was characterised by add-on EU conditionality. Grabbe argued that respect of human and minority rights was the minimum necessary to open membership talks and, indeed, to conclude any economic or political agreement with the EU.²⁷ Thus, negotiations on the Trade and Association Agreement between the EU and Bulgaria were temporarily suspended in the late 1980s due to Turkish minority rights violations by the Zhivkov communist regime.²⁸ Although important, the fulfilment of the political criterion was by itself not sufficient for opening accession negotiations. The 1997 Commission Opinions on Bulgaria and Romania indicated that comprehensive economic restructuring had to be under way and some level of *acquis* compliance had to be achieved before negotiations could begin. In its 1999 Composite Paper outlining the EU's enlargement strategy, the Commission stated that the opening of negotiations with Bulgaria and Romania was conditional upon confirmation of the economic reform process.²⁹ Furthermore, the 1999 Composite Paper required Romania to reaffirm its commitment to finance and implement structural reform of childcare institutions. The opening of negotiations with Bulgaria was contingent upon agreement of a timetable for decommissioning units 1 to 4 of the Kozloduy nuclear power station. Furthermore, before the substantial phase of negotiations with the two countries was launched, they had to pass a supplementary test of a "mini" progress report on their economic situation.³⁰ This add-on country specific conditionality gave rise

²⁷ H Grabbe, "How Does Europeanization Affect CEEC Governance? Conditionality, Diffusion and Diversity" 8 *Journal of European Public Policy* (2001) 1013, 1031.

²⁸ U Sedelmeier and H Wallace, "Policies towards Central and Eastern Europe", in H Wallace and W Wallace (eds), *Policy-Making in the European Union* (OUP, Oxford 1996) 357.

²⁹ Commission of the EC Composite Paper: Reports on Progress towards Accession by Each of the Candidate Countries [1999] <http://www.infoeuropa.ro/iweb/imgupload/1999_Composite_Paper.pdf> accessed 28 March 2006.

³⁰ *Uniting Europe* (20/12/99) 2.

to concerns that the EU was not treating Bulgaria and Romania on an equal footing with other CEECs. The closure of Bulgaria's sole nuclear power plant and main energy supplier Kozloduy was more controversial. In early 1999 the Bulgarian Prime Minister Kostov launched an overt attack on the EU and its "diktat" on Kozloduy nuclear power station, claiming that its closure would "destroy what little competitiveness the country now has".³¹ But the Bulgarian stance weakened as the date for the EU decision on opening negotiations approached. In November 1999 the Bulgarian Ambassador to the EU conceded that the country was willing to strike a deal, before the December Summit in Helsinki, that was "mutually acceptable and realistically feasible" but the closure date depended on "what the financial compensation to Bulgaria for closing such a major energy source will be".³² After the Commission declared its readiness to grant Bulgaria's energy sector substantial Phare assistance, a last-minute compromise was reached and negotiations with the so-called Helsinki group (Bulgaria, Romania, Latvia, Lithuania and Slovakia) were scheduled for 15 February 2000.

The decision of the EU Member States to open negotiations is a crucial step on the way to accession, because it indicates willingness to offer fully-fledged membership. Gate-keeping the access to negotiations was therefore the most powerful tool of EU conditionality.³³ The relative economic backwardness of Bulgaria and Romania as well as the domestic salience of accession allowed the EU to add specific requirements to the general criteria for opening negotiations. This was an innovative approach and suggested that EU conditionality was toughening for new waves of applicants. However, if the EU was to achieve the desired reforms in Bulgaria and Romania it had to maintain the long-term membership promise and provide some short-term rewards for compliance. The Romanian President Constantinescu emphasised that the uncertainty over the country's prospects for membership was a major difficulty in the course of internal reforms.³⁴ To ensure that post-communist reforms were sustained, the Member States decided to launch the accession process with all applicants in 1998, although only half of them started accession negotiations. The Commission insisted that the two groups be called the "ins" and the "pre-ins", as opposed to the "ins" and the "outs" to emphasise the inclusiveness of the accession process.³⁵

With regard to the EU's internal dynamics, the work carried out by the Commission was pivotal at the pre-negotiation stage. The Commis-

³¹ *Uniting Europe* (8/03/99) 5.

³² *Uniting Europe* (15/11/99) 3.

³³ H Grabbe (2001).

³⁴ *Uniting Europe* (20/12/99) 2.

³⁵ Vachudova (n 5) 114

sion played a leadership role when the EU was confronted with the sudden collapse of the communist regimes in Central and Eastern Europe. While the Member States were hesitant about how to respond, the Commission, drawing on experience with development programmes, set up the Phare financial instrument and initiated negotiations on trade and cooperation agreements.³⁶ As a guardian of the Treaties and a policy-initiator, the Commission could set the agenda for Council of Ministers' decisions, but could also influence the preferences of some Member States.³⁷ At each step of the enlargement process, the Commission could act as a gate-keeper by publishing evaluations of applicants' readiness to proceed to the next stage. The enlargement clause (Art. 49 TEU) required the European Commission to be consulted on each membership application before negotiations were opened. The Commission Opinions were not a legally binding document but aimed to assist the Council in deciding whether to open accession negotiations or not. However, they had proven to be quite influential when Member States were hesitant or diverged in views on how to proceed. Once the Commission had delivered a positive evaluation, it was difficult for the Council to back off, the most recent example being the decision to launch negotiations with Turkey. Only once in the history of EU enlargement had the Council overruled the Commission's negative Opinion and decided to start membership talks with Greece to encourage domestic democratic reforms.

The Luxembourg Council extended the Commission Opinions to annual Regular Reports on progress towards accession. The Regular Reports became the most influential document in the enlargement process - they were recognised by both Member States and applicant countries as fair overall evaluations of domestic reforms. They also provided a tool for the Commission to influence developments in Bulgaria and Romania by spelling out specific reforms that needed to be undertaken in each area of the *acquis*. A side-effect of the Commission's annual evaluations was the accumulation by national administrations of knowledge in each area of the *acquis* while preparing the so-called national contributions to the Regular Reports. Furthermore, the one-year cycle of the Reports and the Accession Partnerships kept national authorities under pressure to add-

³⁶ U Sedelmeier, "The European Union's Association Policy Towards Central and Eastern Europe: Political and Economic Rationales in Conflict" (1994) 7 SEI Working Paper; U Sedelmeier and H Wallace (1996).

³⁷ L Friis, "'The End of the Beginning' of Eastern Enlargement - Luxembourg Summit and Agenda-Setting" (1998) 2(7) European Integration Online Papers <<http://eiop.or.at/eiop/index.php/eiop>> accessed 20 April 2004; BG Peters, "Agenda-setting in the European Union" in J Richardson (ed), *European Union: Power and Policy-making* (Routledge, London 2001); MA Pollack, *The Engines of European Integration: Delegation, Agency and Agenda-setting in the EU* (OUP, Oxford 2003); SK Schmidt, "Only an Agenda Setter? The European Commission's Power over the Council of Ministers" (2000) 1 European Union Politics 37, 61.

ress issues identified in the previous report so that evidence of progress could be included in the updated version. In September 2003, the Chairman of the Bulgarian Parliament suggested that extended plenary sessions would be held to adopt several laws so that they could be taken into account by the Commission's 2003 Report (Law on Discrimination, on Telecommunications and on Waste and Refuse Management). Priority was also given to amendments in the Penal Code, deemed necessary by the 2002 Commission Report.³⁸ On the flipside, the time pressure and the daunting scale and number of required reforms sometimes led to the mechanical filling of gaps identified in the Reports without prior impact evaluation and a clear strategy for reform.

Accession negotiations

The starting point for accession negotiations was the *acquis communautaire*, the body of policies and legislation developed over the years in Treaties and case law of the European Court of Justice. Negotiations were opened on several "easier" chapters out of the thirty-one chapters into which the EU *acquis* was divided. In the case of Romania, five chapters were opened - SMEs, science and research, education and training, external relations, CFSP, while Bulgaria also tabled a position paper on culture and audiovisual policy. The most contentious chapters, those with financial implications and the chapter on the free movement of persons were opened last, during the "hot phase" of the talks. Individual chapters were closed provisionally, when the majority of issues were settled, although particularly sensitive points remained. Chapters could, therefore, be reopened by either side at any time and this constituted a potential threat to the swift ending of negotiations. Compromise on various sensitive issues was reached during the "end game" when the applicants and Member States traded concessions on one chapter for counter-concessions on another. Negotiations were declared closed only after a politically acceptable package deal was struck. The principles that governed accession negotiations were differentiation and catching up - each country was judged on its own merit and was given the opportunity to join the countries that were more advanced in the negotiating process. This created competition among individual applicants and prevented them from forming a coalition that would have increased their bargaining power and possibly earned them better conditions of entry. The EU preferred to negotiate with several countries simultaneously so that peer pressure could be exercised, but to hold meetings with each applicant separately in the frame of country-specific Accession Conferences.³⁹

³⁸ Gerdzikov cited by Dnevnik.bg <http://www.dnevnik.bg> accessed 2 September 2003.

³⁹ L Friis, "EU Enlargement...And Then There Were 28?" in E Bomberg and A Stubb (eds), *The European Union: How Does It Work?* (OUP, Oxford 2003).

The group approach applied by the EU became of particular concern for Bulgaria because it had progressed more vigorously than Romania in the negotiating process.⁴⁰ By late 2003 fears began to be voiced that Romania's sub-optimal performance could hold Bulgarian accession back. It was clear from EU enlargement history that country-by-country accession was highly unlikely.⁴¹ Senior members of the EP shared Bulgaria's worries. Liberal Group leader Graham Watson called in January 2004 for decoupling to allow both countries to progress towards membership at their own pace.⁴² The EP *rapporteur* on Romania, Emma Nicholson, insisted that accession negotiations be suspended as Romania was in breach of the political criteria for EU membership. However, her proposal was not endorsed by the EP's Foreign Affairs Committee. The European Commission itself had always insisted that negotiations with both Romania and Bulgaria could be concluded by the end of 2004.⁴³

Accession negotiations, unlike international negotiations, were asymmetrical. The source of such asymmetry was the non-negotiable status of the Community *acquis* and the fact that applicants were in the position of *demandeurs* of membership. The experience of four enlargement rounds proved that the *acquis* principle was very durable, even though the depth and breadth of the *acquis* had expanded.⁴⁴ For CEECs, the total to be transposed ran to some 85,000 pages of secondary legislation divided into 205 volumes and taking up more than three metres of shelf.⁴⁵ That was not to say that negotiations did not actually take place, but only to emphasise the uniqueness of this process of the "external becoming internal".⁴⁶ Negotiations *per se* were not about the contents of the *acquis* but about the terms under which candidates adopted, implemented and enforced Community legislation. Bulgaria and Romania could require transitory exemptions in some areas - specified and relatively short periods for the gradual adjustment of national provisions to the EU *acquis* followed by equal treatment.⁴⁷

⁴⁰ In the post-negotiation phase, Romania speeded up preparations while Bulgaria fell behind; however, this was still not the case at the time of the writing of this article.

⁴¹ Preston (n 25)

⁴² Uniting Europe (03/3/04) 8.

⁴³ Commission President Romano Prodi, cited in Uniting Europe (03/3/04).

⁴⁴ L Beurdeley, *L'Elargissement de l'Union Européenne aux Pays d'Europe Centrale et Orientale et aux Iles du Bassin Méditerranéen* (L'Harmattan, Paris 2003) 38-41; Preston (n 25)

⁴⁵ EU Publications Office Newsletter 2 (2004) 3.

⁴⁶ G Avery, "The Commission's Perspective on the EFTA Accession Negotiations" (1995) 12 Sussex European Institute Working Paper 1.

⁴⁷ A Inotai, "Some Key Issues in Understanding the Negotiations on Accession to the European Union" (2001) 122 Hungarian Academy of Science Working Paper 18-20.

The Commission in its Enlargement Strategy Paper classified transitional requests into acceptable, negotiable and non-acceptable.⁴⁸ Requests were acceptable when the *acquis* required significant and costly adjustments which could not be implemented prior to accession, particularly in the environment sector. Requests for transition periods in the area of the internal market and competition were generally unacceptable because they “could impair the proper functioning of the single market”.⁴⁹ All other requests were negotiable, as long as Bulgaria and Romania could justify, in their negotiating positions on the particular chapter, why a phasing-in period was necessary and why a particular date for full application was chosen. Then it was the task of the Commission to assess all the data provided by the national authorities, see what was done for new and old Member States, and come up with a Draft Common Position on the chapter under negotiation. However, it was unlikely that Bulgaria and Romania would get longer transition periods than those accorded to the ten new Member States.

Negotiations on chapters with financial implications were highly contentious for two reasons - the dual character of accession talks and the low level of economic development of Bulgaria and Romania. Accession talks required Member States to negotiate both internally, among themselves, and externally, with the applicants. The EU internal decision-making dynamics, therefore, set the pace of accession talks independently of Bulgaria and Romania’s readiness. The basis for internal negotiations was a Draft Common Position (DCP) elaborated by the Commission for each chapter. The DCP had to be approved by the Council unanimously before it was put forward to the applicants. The Commission was blamed by both Member States and applicant countries for delaying negotiations because it did not present in time DCPs on substantial chapters such as agriculture.⁵⁰ The Commission’s task was difficult because its proposals had to reconcile what the Member States were prepared to agree among themselves, what the applicants were ready to accept, and what was feasible in an enlarged EU. Furthermore, discussions on Common Positions for finance-related chapters reopened old debates on EU spending policies, mainly the Common Agricultural Policy and the Structural and Cohesion funds. The preparation of DCPs on individual chapters was co-ordinated by the Directorate General (DG) for Enlargement of the European Commission. The relevant sectoral DG led the technical work, while DG Enlargement as a super-co-ordinator organised inter-service consultations. Legally, the DCP was a “strange beast”, because it was not adopted

⁴⁸ Commission of the EC Enlargement Strategy Paper of 8 November (The European Commission, Brussels 2000).

⁴⁹ Commissioner Verheugen quoted in *Uniting Europe* (6/09/99) 2.

⁵⁰ *Uniting Europe* (22/5/2000) 1.

formally by the College of the Commissioners and forwarded officially to the Council as any other Commission proposals would be. Instead, it was sent by DG Enlargement to the Council's Enlargement Working Group as an informal paper or "non-paper". It was discussed by the Working Group and then adopted as an EU Common Position by COREPER or national ministers.⁵¹ This indicated the uniqueness of the enlargement negotiations as their preparation happened outside the normal EU decision-making process.

Negotiations with Bulgaria and Romania on the finance-related chapters were delayed in early 2004 as incumbent Member States were wrangling over the global EU budget for 2007-13. However, the Commission managed quite successfully to keep the adoption of the enlargement financial package separate from a decision on a new EU financial perspective. It proposed a financial envelope for Bulgaria and Romania for 2007-9 following the same principles and methodology used for concluding negotiations with the ten new Members. These included capping funding at 4% of national GDP per year and phasing in agricultural expenditure. The financial package was agreed by the General Affairs and External Relations Council on 22 March 2004 and allowed the Commission to develop DCPs on the chapters with financial implications (agriculture, regional policy, budgetary provisions). The total budget available to Bulgaria and Romania for the period 2007-9 was set at just over 11.6 billion (see Table).

Financial package for Bulgaria and Romania 2007-9⁵²

| € millions 2004 prices | 2007 | | 2008 | | 2009 | |
|---------------------------|------------|-------------|-------------|-------------|-------------|-------------|
| | BG | RO | BG | RO | BG | RO |
| Structural operations | 539 | 1399 | 759 | 1972 | 1002 | 2603 |
| Rural development | 183 | 577 | 244 | 770 | 306 | 961 |
| Nuclear safety | 70 | 0 | 70 | 0 | 70 | 0 |
| Transition facility | 30 | 52 | 0 | 0 | 0 | 0 |
| TOTAL | 822 | 2028 | 1073 | 2742 | 1378 | 3564 |

In June 2004 Bulgaria concluded discussions at the technical level on all individual chapters. Negotiations with Romania were closed only after a last-minute compromise was reached on the chapters Justice and Home Affairs, Competition and Environment. In October 2004 the Com-

⁵¹ Interviews with Commission officials (Brussels 20-22 April 2004).

⁵² Commission of the EC Report DG E 1/5859/05 on the Results of the Negotiations on the Accession of Bulgaria and Romania to the European Union (Prepared by the Commission's Departments, Brussels 2005).

mission, in its Opinions, concluded that Bulgaria and Romania fulfilled the political criteria for membership and were expected to fulfil the economic and legal criteria and be ready for membership by 1 January 2007. This paved the way for the formal closure of the accession negotiations with Bulgaria and Romania at the European Council of 16-17 December 2004. The “end game” for Bulgaria and Romania was not as frantic as it was for the ten new Member States.⁵³ The Union’s concessions could not go beyond what had been agreed with the first wave.⁵⁴ Financial concessions were wrapped in the 31st Miscellaneous chapter, which provided for the establishment of a cash-flow and Schengen facilities to improve the budgetary positions of Bulgaria and Romania in the first three years of accession. Over the period 2007-9, the two facilities would transfer some €240 million to Bulgaria and just under €560 million to Romania (2004 prices). Chapter 31 also provided for a €82 million transition facility for institution building projects and limited small scale investments, of which about €30 million was allocated to Bulgaria and €52 to Romania. Bulgaria was accorded supplementary funds for decommissioning of the Kozloduy nuclear power plant amounting to a total of €350 million for the period 2004-9.⁵⁵

Post-negotiation

The post-negotiation phase is defined here as the period between the official closure of accession negotiations and the actual date of entry. In this timeframe, EU hopefuls are labelled “acceding” states. After the closure of membership talks, the agreements reached between the EU and Bulgaria and Romania were incorporated in a joint Accession Treaty and put forward to the European Parliament for its assent. The Treaty was officially signed on 26 April 2005 and submitted to the acceding states and Member States for ratification according to their own constitutional procedures. The Accession Treaty itself was a short document of six articles that listed the Member States and countries to join and set the date of accession at 1 January 2007. It was followed by an Act of Accession with a general part and nine bulky annexes laying down the conditions of membership negotiated by Bulgaria and Romania on each chapter of the *acquis*, together with the transitory arrangements. The Closing Act contained seven declarations, including those on the use of the Cyrillic script and the Bulgarian and Romanian languages as official and work-

⁵³ A Mayhew, “The Financial Settlement in the Enlargement of the European Union: Lessons for Romania” 3 (2003) *Romanian Journal of European Affairs* 5, 34.

⁵⁴ H Grabbe, “The Copenhagen Deal for Enlargement” (Centre for European Reform Briefing Note 2002) <<http://www.cer.org.uk>> accessed 10 December 2003.

⁵⁵ Bulgarian Ministry of Foreign Affairs, “Accession Treaty” <http://www.evroportal.bg/topics.php?category_id=453> accessed 13 March 2006.

ing languages of the Union. The signing of the Treaty of Accession opened a qualitatively different stage in relations between the EU and Bulgaria and Romania. First, as acceding countries they were accorded “active observer” status, allowing them to participate in meetings of EU institutions and working parties, albeit without voting rights. The final part of the Closing Act of Accession was dedicated to the “Exchange of letters” i.e. the interim arrangements for keeping Bulgaria and Romania up to date and taking into consideration their comments on the legislative and political initiatives of the EU bodies. Second, Bulgaria and Romania were held accountable by the EU for the implementation of commitments assumed during the accession negotiations. The Treaty incorporated safeguard clauses and, for a first time in EU enlargement history, a super-safeguard allowing membership to be postponed for one year if a comprehensive monitoring report by the Commission established that the two countries had not kept their reform promises.

The influence the EU can exercise on acceding states during the post-negotiation phase has by far been under-research. The reason might well be that for previous rounds of EU enlargement the Accession Treaty fixed a membership date within one year of its signing. Safeguard clauses could only lead to a temporary moratorium on participation in some Community policies, but not to the postponement of actual membership. For Bulgaria and Romania, the post-negotiation period was much longer than for previous applicants - 18 months between the signing of the Accession Treaty and the earliest possible date of membership. Furthermore, the post-negotiation phase for the two countries was somewhat open-ended due to the possibility of revising the actual membership date. On one hand, the Copenhagen European Council in 2004 declared the fifth enlargement irreversible and ongoing, and a Treaty was signed with Bulgaria and Romania guaranteeing their accession. On the other hand, national political elites had an interest in seeing their countries join sooner rather than later. Domestically, the attainment of accession in 2007 became the benchmark against which the performance of the state institutions and the ruling party coalitions was evaluated. Failure to join in time could mean public discontent and loss of power. Moreover, the legal-institutional and political context of enlargement was changing and enlargement fatigue was evident in most Member States as the queue of EU hopefuls lengthened.

The most obvious expression of the changing legal context of EU enlargement was the signing of a new Accession Treaty with Bulgaria and Romania, which incorporated an increased number of safeguard clauses to deal with unforeseen developments during the first years of accession. Safeguards were strengthened for the ten new Member States as their socio-economic and political situations differed significantly from those of

previous rounds of applicants. The traditional safeguard clause covering cases of serious economic deterioration in particular sectors or areas was complemented by two further safeguards to be activated if new Member States failed to implement negotiation commitments in the areas of the internal market and judicial cooperation. The introduction of a super-safeguard clause and enhanced monitoring for Bulgaria and Romania suggested greater concern on the EU side with implementation capacity and progress on the ground. New applicants from the western Balkans and Turkey observed that EU conditionality was toughening, and simple reform promises were no longer sufficient for achieving membership.⁵⁶ Bulgaria's Prime Minister warned that delaying his country's membership would signal a second-class treatment both to Bulgarian citizens and to neighbouring countries aspiring for EU accession. He insisted that joining in 2007 would be recognition for the reform efforts and adaptability of Bulgaria and would provide an impulse for the war-ridden countries of the western Balkans to sustain democratic reforms.⁵⁷ Bulgarian diplomats expressed strong support for the integration of neighbouring states, provided the principles for the ten new Member States, notably progress according to their own merit, were maintained.⁵⁸ This also meant that Romania and Bulgaria should not hold each other back on their way to membership.

Another aspect of the changing legal context of EU enlargement was the higher probability of enlargement blockage after ten new members had joined. According to Art. 49 TEU, the accession of each country had to be approved unanimously by all incumbent Member States. The "One Europe" declaration, adopted at the Copenhagen Summit in 2002 by EU-25, and later annexed to the Accession Treaty for the ten new members, promised full support for Bulgaria and Romania to join in 2007 (Phinnemore, 2004).⁵⁹ However, in future enlargements outstanding border issues between new Member States and applicant countries could be a source of tension and vetoes. According to Art. 49 TEU, the Accession Treaty had to be ratified by Member States according to their constitutional provisions - in most cases done by national parliaments. This process was expected to be much lengthier because 25 parliaments were now involved instead of 15. Furthermore, ratification by some countries could turn problematic, especially where the parliamentary majority had changed due to national elections and was now sceptical about enlarge-

⁵⁶ <<http://www.FT.com>> accessed 3 October 2004.

⁵⁷ <<http://www.Europortal.bg>> accessed 17 February 2006.

⁵⁸ Bulgarian Foreign Minister Passy cited in *Uniting Europe* (10/3/04) 3.

⁵⁹ D Phinnemore, "And Not Forgetting the Rest...: EU(25) and the Changing Dynamics of EU Enlargement" (paper presented at UACES 34th Annual Conference, Birmingham 2004).

ment (for example Germany). The governments of Bulgaria and Romania invested considerable effort in touring the capitals of the Member States and lobbying the main political parties and actors to speed up the process of ratification.

The EU's reluctance to involve Bulgaria and Romania in EU policy-making during the post-negotiation phase created uncertainty as to whether it was actually committed to accept them in 2007. After the signing of their Accession Treaty, the ten new members sent to Brussels a "shadow-Commissioner" to share a portfolio with the Commissioners from the incumbent Member States. Until March 2006, such an invitation had not been extended to Bulgaria and Romania. Furthermore, the European Parliament delayed the invitation of national MPs - initially they were expected to join the EP immediately after the signing of the Accession Treaty in April 2005, as had happened with the ten new Member States. Instead, MEPs decided to receive Bulgarian and Romanian observers from early 2006 or, if the two did not deliver on their reform promises, from January 2007. MEPs suggested that the delay was due to technical problems, namely space and translation issues. But the liberal leader Graham Watson said "this decision suggests more than reluctance to welcome Bulgaria and Romania into the EU" .⁶⁰

Politically, the fifth enlargement was driven predominantly by considerations of "kinship" and the moral obligation to welcome CEECs back to Europe.⁶¹ The modest ceremony at which Bulgaria and Romania's Accession Treaty was signed, with very few EU leaders present, compared with the grandeur of the ceremony for the previous group of ten CEE accessions, was a clear indication that the post-Cold War rhetoric of "historic reunification of the continent" was quickly fading. Furthermore, the economic appeal of Bulgaria and Romania was smaller because of the geographic distance and lower GDP per capita compared to the ten new Member States. Over time it was becoming increasingly difficult to evoke the same arguments and insist on the enlargement principles applied to the previous group of acceding CEECs. The attitude of the Member States and their citizens towards EU enlargement was also changing. The deteriorating economic situation in net contributors to the EU budget such as Germany made them unwilling to pay for enlargement. The French and Dutch no-votes on the European Constitution made the EU more concerned with deepening integration and with updating institutional arrangements than with widening. The French Interior Minister and Presidential candidate, Sarkozy, thus called for enlargement to be frozen until

⁶⁰ <http://www.EUobserver.com> accessed 6 May 2005.

⁶¹ H Sjurson, "Why Expand? The Question of Legitimacy and Justification in the EU's Enlargement Policy" (2002) 40 *Journal of Common Market Studies* 491, 513.

a watered down version of the EU Constitution was agreed. He also suggested that France should hold referenda on future accessions to ensure that the concerns of its citizens had been fully taken into account.⁶²

EU internal decision-making processes were an important determinant of relations with acceding countries. In early 2005, Bulgaria and Romania were held hostage to an EU inter-institutional conflict over the technicalities of enlargement funding. The Council had included in the Accession Treaty financial figures for enlargement without consulting the European Parliament, which is a co-decider on budgetary matters. The European People's Party group, the largest fraction in the EP, threatened to postpone the vote on the Accession Treaty as a protest against the "violation" of the EP's legislative and financial powers.⁶³ But a last-minute compromise was reached and MEPs voted overwhelmingly in favour of Bulgaria and Romania's membership. Before holding the vote, MEPs extracted a promise from the Commission to be kept involved in the process of monitoring compliance with the obligations assumed in the accession negotiations. The monitoring process was "unchartered grounds" because it had not previously been used as a basis for deciding on the actual date of membership. According to the Treaty provisions (Art. 49 TEU), the EP's role in the enlargement process should end with its assent on Bulgaria and Romania's accession to the EU. MEPs insisted that decision-making practices established for other policy areas had to be followed and the Commission had to consult the EP before presenting the comprehensive Monitoring Reports on Bulgaria and Romania and before recommending the activation of the super-safeguard clause to the Council. EU hopefuls had to recognise the EP as an important veto-player at the post-negotiation stage. Bulgaria, for example, used a public relations agency specialised in lobbying EU institutions to manage relations with it.

Conclusions

Negotiations for EU membership are highly asymmetrical as there are no reciprocal commitments on the EU side. The term "negotiations" may seem somewhat misleading because in practice only the timeframe for applying parts of the EU *acquis* is negotiable. Furthermore, membership negotiations are two-dimensional - talks with applicant states are preceded by complex inter-institutional processes and cumbersome negotiations among Member States. EU internal dynamics, therefore, sets the pace of the enlargement process independently of applicant states. The fifth round of EU widening, and the Bulgarian and Romanian experience in particular, reconfirmed the non-negotiability of the EU *acquis*

⁶² <<http://www.EUobserver.com>> accessed 13 January 2006.

⁶³ <<http://www.EUobserver.com>> accessed 13 April 2005.

but also ascertained the increasing importance of the stages preceding and following the accession negotiations. The EU itself underwent a steep learning curve when devising enlargement policies for CEECs and would apply this newly gained “knowledge” to other poor neighbours with fragile democracies. What conclusions can then be drawn for future EU enlargements?

The criteria for membership set unilaterally by EU Member States in Copenhagen in 1993 remain the minimal threshold to be met by future applicants. However, the pre-negotiation experiences of Bulgaria and Romania and more recently of Croatia and Turkey proved that the Copenhagen criteria are not “one-size-fits-all” requirements. They had to be topped up with specific demands on a country-by-country basis (for example, cooperation with the ICJ in the case of Croatia). Since the opening of accession negotiations is an important milestone for all EU hopefuls, the EU will continue to use it as a powerful leverage for influencing domestic politics. With regard to negotiations *per se*, closure of negotiating chapters would depend on what has actually been accomplished on the ground rather than on what has been promised or what is about to be launched. In this context, the administrative and judicial capacity of candidate countries to implement and enforce the *acquis* would be a benchmark for assessing membership readiness. Furthermore, monitoring during the post-negotiation stage is likely to be more stringent to ensure that EU hopefuls do not relax their reform efforts once membership is “in the bag”. The super-safeguard clause had arguably become one of the mainstays of the EU enlargement policy, allowing the EU to give an irreversible political promise of membership, but to take time to ensure that technical requirements are met in full before the actual date of accession. It is therefore possible to see in the future even longer post-negotiation phases than in the case of Bulgaria and Romania.

The major threat to future rounds of enlargement remains the extent to which widening can be reconciled with deepening. The other key determinant is the economic situations of candidate countries and Member States. The accession of applicants with GDP well below the EU average depends on the ability and willingness of incumbent Member States to pay more into the EU budget or to give up current benefits. Better-off countries and potential net contributors, on the other hand, are more than welcome in the EU. The rejection of the European Constitution by France, one of the founding members of the EU, signalled a widening gap between the governing political elites and the European public. This may compel national governments to make the enlargement process more democratic. The peoples of the ten new Member States were given the opportunity to have their say on accession, and the same should not be refused to the peoples of incumbent Member States. However, the fact that

the EU handles candidate countries in a group manner poses the danger of some countries being rejected in enlargement referenda only because they have been grouped with the “wrong” applicant. Moreover, referenda on enlargement may have a negative impact on European integration if they are used by Member State governments to threaten or put off future applicants. On the positive side, referenda may allow for an honest debate about the costs and benefits of admitting each applicant and thus help close the gap between EU politicians and citizens, making the EU more accountable and democratic.