Enlargement of the European Union – a Regatta with Moving Goal Posts?

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A. Introduction

With the fall of the Iron Curtain, Europe grew almost over night – back to its real size. The artificial division into East and West, which never had much to do with geography, came to an end and all of a sudden it was not at all obvious who could belong to 'the club' of European Union (EU) Member States and who could not. At this time, there were some states that were outside of the EU even if they almost undoubtedly did belong in 'the club'. The enlargement of 1995 with Austria, Finland (and Sweden) was a consequence of the end of the Cold War, although in a less direct manner than the changes brought about for the former communist states of Central and Eastern Europe (the CEECs). It brought three new 'natural' members into the EU. It is difficult to date exactly the beginning of the current process of enlargement of the EU to the CEECs, because the EU did not immediately, and not even very soon, after the fall of the Iron Curtain have any long-term strategy of integration of the CEECs. There was more a readiness for economic assistance to these countries, but they were still looked upon as outsiders.

It was at the Copenhagen European Council in June 1993 that the EU heads of state and government decided that the CEECs should become members as soon as they are in a position to assume the economic and political obligations of membership. This meeting also set the criteria for membership – a state must accept rights and obligations as well as the legislative framework known as *acquis communautaire*. The use of the word 'shall' in the declarations was presumably conscious, to underline the determination to end the division of Europe. Again in December 1995, at the Madrid European Council, a political statement was made

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declaring enlargement a political necessity and a historic opportunity for Europe. There was political recognition of a right for the CEECs to join the EU but still no deadline was given. Putting concrete action behind the words has proven much more difficult.

Initially, when enlargement turned from just nice words to somewhat more concrete action, the EU chose to divide up the applicant states based on their perceived readiness to join the EU. Several countries which were most advanced in their transition process were put on fast-track negotiations, namely the Czech Republic, Estonia, Hungary, Poland and Slovenia, as well as Cyprus. At the Helsinki European Council meeting in December 1999, prompted by the progress made by the 'second wave' states as shown in the progress reports drawn up by the European Commission, the EU decided to invite a further five CEECs (Bulgaria, Latvia, Lithuania, Romania and Slovakia), as well as Malta, to join those previously admitted to direct accession negotiations. Turkey remains a potential candidate. Apart from the South-Eastern part of Europe (the countries of The Former Yugoslavia – except Slovenia – and Albania)[1] all of the CEECs are now fully included in the negotiation process and direct formal negotiations are to be held for accession to the EU.

Even if dates and deadlines for enlargement are still not set, it is clear that in the not too distant future the EU is facing, in some shape and form, its fifth and by far most important enlargement.[2] The number of countries (ten CEECs, Cyprus, Malta and Turkey) and the size of their population (more than 100 million new EU citizens) and territory (more than 34 per cent increase of territory) are all unprecedented.

By contrast to the initial division of candidates into groups, the situation now is one of a regatta. All participants start at the same time and it is the performance of each participant which decides who gets to the goal first. Everyone is in the race and may the best win. What will be discussed in this article is what the race and its participants look like and how they perform in the race, but also what the race really is about. Is the goal the same as that for which the ships set out at the start of the regatta? Is it even a goal that they want to reach? And what does the reluctance of the crew mean for the outcome of the race?

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[1] For the southern Balkan states, a transition phase has been devised with the Stability Pact composed of road maps that will pave the way to regional integration before European integration. The idea behind this is to make the states further co-operate in different fields. Funds are given only to regional projects. With the important political changes in Croatia in the end of 1999 and very recently in Yugoslavia, the integration and full involvement in the European process may be faster than what was anticipated until recently.

[2] The four previous enlargements were: Denmark, Ireland and the United Kingdom in 1973; Greece in 1981; Spain and Portugal in 1986; and Austria, Finland and Sweden in 1995. There was also a *de facto* enlargement in 1990, when the former German Democratic Republic became a member after the reunification. As it was not a separate country, this was no 'real' enlargement.

B. The Criteria for Membership

When the Commission in August 1990 first proposed special accession agreements for some CEECs (the Czech Republic, Hungary and Poland), the so-called Europe Agreements, there was no commitment about future membership of the EU. The agreements may indeed have been seen as alternatives to accession rather than steps leading towards it. Possible membership was mentioned in the preamble of the agreements as a final objective, but the agreements were focused on free trade and relations between the countries and the EU rather than preparation for membership. Agreements with these first three states were concluded in December 1991. The Europe Agreements have later been entered into with all the CEECs. These are framework agreements covering a number of sectors, including trade liberalization, competition, political dialogue, legal approximation, areas of co-operation in environment, industry, transport and customs. The objective is to form a free trade area, with some preferential terms for the associated countries. The EU agrees to lower its barriers more than the CEECs and offers some economic and financial assistance, but at the same time makes exceptions for sensitive industries and sectors of the economy in the existing EU members.[3]

In the immediate aftermath of the break-up of the former communist regimes in the CEECs, the initiative of the accession strategies primarily rested upon two countries, namely Poland and Hungary.[4] These countries were in many ways the most advanced of the CEECs and the first to formally apply for EU membership (in April 1994) and to design a strategy for EU accession. The EU Member States reacted late to these first requests and did not offer any specific criteria or strategy to these states. The EU enlargement strategy – if it could at first even be called that – was based on a global and uniform approach through a limited number of criteria applied to all applicant countries.[5]

So it is not just the scope and importance of the enlargement that differs from previous ones, but the preparation for enlargement also differs. At the Copenhagen European Council meeting in 1993, certain, and now well-known, criteria were established by the Member States for applicant countries. These criteria include economic as well as political milestones to be met by the applicant countries before they can be considered for the opening of negotiations.

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[3] See e.g. M. Baun 'Enlargement' in *Developments in the European Union* (Laura Cram et al. (eds)) (MacMillan, 1999) pp. 269–289 and K. Inglis 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation' in (2000) 37 *Common Market Law Review*, at pp. 1173–1210.

[4] And to a certain extent Czechoslovakia, but because of the split-up of this country and ensuing changes it did not keep pace with the other two.

[5] P. Balazs, 'The Globalization of the Eastern Enlargement of the European Union: Symptoms and Consequences' in *Enlarging the European Union* (Marc Maresceau (ed.)) (Longman, 1997) at pp. 358–375.

The criteria may be summarized as follows:

1. stability of democratic institutions, which should guarantee the rule of law, and respect for minorities;
2. a working and sustainable market economy and the capacity to meet the pressure of economic competition from the internal market;
3. capacity to assume the rights and obligations of the *acquis communautaire* and acceptance of the political, economic and monetary unions;
4. adjustment of administrative and judicial structures in order to implement the *acquis communautaire*.

As can be seen, the criteria cover a wide range of issues that need to be implemented or reformed in each applicant country. In addition, it was stated that the EU must have the capacity to absorb the new members while maintaining the momentum of European integration. Since the Copenhagen Council, the criteria have remained the same and were used to draw up the Commission's Opinion on each applicant country's readiness to start negotiations. They have also subsequently been used as benchmarks in the yearly updates of the Opinions, in which the Commission assesses progress made by each state in the respective year.

The pre-accession strategy was first conducted through the so-called structured relationship, a system of regular meetings between the EU and the CEECs, decided at the Essen Council in December 1994. However the structured relationship was not a big success, as it was perceived that meetings were not well prepared and focused and as a result did not achieve much. This is why the Commission in its *Agenda 2000* suggested replacing this strategy with more focused bilateral contacts and accession partnerships.[6]

In 1996, (upon request of the Madrid European Council of December 1995) the Commission launched a comprehensive review of the achievements made by the applicant countries, through a massive questionnaire of over 160 pages sent to all governments concerned. The answers provided by the governments were reviewed and screened by the Commission and cross-checked with other inputs (like information from the World Bank (WB), the United Nations (UN) or the Council of Europe).

This first stage lasted until the publication in July 1997 by the Commission of the *Agenda 2000* and the subsequent new accession strategy prepared by the European Commission. The *Agenda 2000* consisted of a new financial package for 2000–2006 including proposals for reform of e.g. the Common Agricultural Policy (CAP) and the structural funds, as well as a detailed plan on how to proceed with enlargement. The proposals were originally based on the presumption that some candidate countries would join in 2002. The *Agenda 2000* contained provisions on pre-

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[6] On this, see *infra* Section C 'Assistance to Enlargement' and *infra* Section D 'The Negotiation Process'. See also S.S. Nello and K.E. Smith, *The European Union and Central and Eastern Europe* (Ashgate, 1997) at p. 66 and K. Inglis, *supra* note 3, at p. 1182.

accession aid for broad structural adjustment and specifically for adjustment of the agricultural sector. It was clear from the proposals that the future members could not expect the same levels of agricultural support as current members or transfers on the same scale as the present less economically advantaged members.[7]

The Commission's Opinions on each country were included in the Agenda 2000 and made public on 17 July 1997. The Commission then gave its view on opening negotiations with six countries, five CEECs and Cyprus. In December 1997 the Luxembourg European Council decided to launch negotiations with this first group of applicants and approved for each applicant state an accession partnership, which highlighted the weaknesses seen in the Opinion for each country. At the Vienna European Council of December 1998, the Commission was requested to produce regular follow-up reports. This has been carried out, with the most recent ones published in November 2000. Although the Commission gave assurances that the process would be inclusive and evaluative this selection, at the technical stage, was resented by those not selected for several reasons. There was an element of national pride in being among the 'ins' rather than the 'outs'. The recommendations made by the Commission were not always that clear. In particular the criteria for the final assessment (the conclusive recommendation) did not always look related to the rest of the report. Furthermore, the reports were partly already out of date when they were published.

C. Assistance to Enlargement

Another difference to other enlargements is that the EU provides specific help to the states applying to become members, in a way which has not been done in connection with previous enlargements. It could be argued that the relatively quick admittance of Greece, Spain and Portugal was another way of providing such assistance. For the CEECs, instead of speedy admittance, specific help was given to prepare the states for enlargement. This assistance started in the summer of 1989, well before enlargement was really on the agenda as a realistic option. It was in July 1989 that the Paris G-7 meeting entrusted the EC of a co-ordination role for the G–24 assistance to Poland and Hungary. This role was later extended to all the CEECs. The Poland Hungary Assistance Restructuring of the Economy (PHARE) programme started in December 1989, aimed at financing projects for economic restructuring. Its central objective was a transformation of a planned economy to a market economy. The aid started without an accession objective and also without specific human rights, or democracy or other political, objectives. Instead the

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[7] Helen and William Wallace, *Policy-making in the European Union* (Oxford University Press, 2000, 4th ed.) at pp. 228–240, especially at p. 238.

economic dimension prevailed, with assistance to privatization, development of the finance and banking sector, etc. A limited amount of humanitarian assistance was also granted.[8]

The year 1997 was a turning point for PHARE. After the publication of the Commission's Opinion on each applicant country and their readiness to join the EU, PHARE was adapted to be an operational tool for preparation of integration in the new pre-accession strategy with the accession partnerships. This constitutes the basis for the short and medium term priorities for PHARE. The accession partnership is a multi-annual and multi-sectoral document. The yearly budget is divided into assistance to administrative reforms (institution building) and financing of investments. The former takes about 30 per cent and the latter about 70 per cent of the yearly budget allocation. Each applicant country prepares a national programme for adopting the *acquis* (NPAA), which describes the means to adopt the *acquis*, the timing and internal organization and request for matched funding.

PHARE is thus no longer a demand-driven programme. Programming is no longer carried out by governments but priorities and orientations are given by the Commission. The budget does not mention allocation per sector, and thus avoids political bargain at government level. A system of conditionality is attached and funding for each accession partnership is conditioned by implementation of the partnership and the Europe Agreements as well as continued progress in the implementation of the *acquis*. The programme further emphasizes the preparation for membership of officials of administrations, for example by way of the twinning programmes, which consist of sending civil servants from a Member State to work with counterparts in applicant states. The PHARE programme also now has more emphasis on investments.

Apart from PHARE, there are also the EU structural funds. These are the regional funds, social funds, the CAP and the cohesion funds for environment and transport, as well as common policies. Part of the pre-accession strategy is to prepare applicant states to participate in these funds and policies when they become Member States. This preparation work is mainly directed at the alignment of the infrastructure with the EU. The special funds are the Instrument for Structural Policies for Pre-Accession (ISPA), which finances major environmental and transport infrastructures, based on competition among candidate countries[9] and the Special Accession Programme for Agricultural and Rural Development (SAPARD), which started in January 2000.[10] The aim of SAPARD is preparation of applicant countries for implementation of the *acquis* for the CAP and structural adjustment in agriculture and rural development. There are also cross-border programmes and regional development programmes as well as other community

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[8] T. King, 'The European Community and Human Rights in Eastern Europe' in (1996) 2 *Legal Issues of European Integration* 93, at pp. 114–115.

[9] ISPA has a budget of 1 billion Euro per year for the period of 2000–2006.

[10] SAPARD has a budget of 520 million Euro per year.

programmes and agencies in different fields. Many such programmes, e.g. on public health, youth exchange and education, were opened to applicant states in 1993 and 1994. The aim of opening programmes, and also for example membership in the Environment Agency and the monitoring centre for drugs, was to familiarize candidates with the way community polices and instruments are prepared and work in practice. Participation is based on fees and candidates can obtain some funding (up to 10 per cent) by PHARE. It is up to each state which and how many programmes they want to join.

D. The Negotiation Process

The opening of accession negotiations per country was officially launched at a meeting of foreign ministers in London in March 1998 and started in November 1998. This process, on the basis of individual screening, is one more step towards a more individual approach from the EU point of view. It was a crucial step for the development of national EU accession strategies.

The Commission is currently conducting a very ambitious programme of screening the prospective members to assess their readiness for membership. This consists mainly of the evaluation of progress made on any of the 31 chapters of the *acquis communautaire* as identified by the Commission. The screening process was opened in March 1998 and completed in July 1999 for the First-Wave States. In November 1999 the substantive negotiations started in what is called the Accession Conference, which is a long process. In March 1999 the same kind of process was opened for the second wave states. The screening process for the Second-Wave States is to be speeded up. Since March 1999 the Commission has also organized a bilateral screening with each country on all the chapters of the *acquis*.

The screening process is organized as a multilateral phase with the Commission presenting the negotiating position of all the Member States and indicating necessary changes and adaptations expected from the candidate countries. But there is also a bilateral process, with each candidate. The candidates are asked:

1. whether they can accept the relevant chapter of the *acquis*;
2. whether they intend to ask for transitional arrangements;
3. whether they have already adopted the laws necessary to comply with the *acquis* and if not, when they intend to do so; and also
4. whether they possess the administrative structures and other capacity needed to implement and enforce EC law, and if not when such structures will be put in place.

The answers (both written and oral) help the Commission and the applicant country to identify which issues may arise during the negotiations. The Commission then reports to the Member States on such issues. The Commission report also contains

the Commission's comments on problems identified and on the information supplied by the applicant countries concerning their legislation and implementation capacity. Applicant countries make their negotiating positions on each chapter known to the Commission and the Presidency, which then in turn prepares the response of the Member States. The information is intended to facilitate a decision by the Member States to open detailed negotiations on particular chapters of the *acquis*.

E. The EU as a Road to Democracy and Stability?

Contrary to what happened in the 1980s with the accession of Greece (1981) and, to some extent, of Portugal and Spain (1986), where EU membership was considered a way to assist in the stabilization of the new democratic regimes, the new applicant countries of the CEECs are now required to establish democracy and rule of law first, before they can be considered for membership. The existence of political criteria is an attempt to promote political stability, through democratic institutions and the rule of law, in the CEECs after the break-up of communism.

After amendments made in the Amsterdam Treaty, what is now Article 49 of the Treaty on European Union (TEU) (previous Article O) states that '*Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union*'. The reference to Article 6(1) was added at Amsterdam. Article 6(1) (the amended old Article F) states that '*The 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*'. There is thus now an explicit reference to certain values, whereas before it merely stated that any European state could apply for membership. This is not a change in practice, as the demands as expressed now through the reference to Article 6(1) were implicit before, but the fact this has now been made much clearer is not without significance.

The EU is thus clearly constituted around the understanding that Member States share certain common values. Apart from the market economic system, common values and respect for human rights are prerequisites for membership. Apart from the above-mentioned reference, this is seen also in other treaty amendments of Maastricht and Amsterdam, with explicit mention of the European Convention on Human Rights (ECHR). The Common Foreign and Security Policy (CFSP) also clearly reflects the importance of common values. In the proposed treaty amendments in Nice a clause was added making it possible to address recommendations to any state for which there is a clear risk of a serious breach of Article 6(1).[11] The fact that

[11] In the Amsterdam Treaty amendments, one novelty is the possibility of suspension of a member for serious violation of requirements of members, including human rights (Art. 7 TEU). This Art. is amended in the Nice proposals as stated, to allow for the 'Austrian situation'.

political demands are now put on candidate countries is consequently explainable, not just by looking at the candidates as such (where a certain hesitation from some to letting the 'East' in may well be at hand), but also from the viewpoint of the EU itself. The Union of today covers so many more issues, and it is consequently more important than ever, that there really is a common value basis of the Member States.

The reform of the state institutions and the establishment of rule of law in the former communist countries are seen as equally important priorities for accession as the economic transition from centrally-planned to market economy. The challenge is the establishment of stable and democratic institutions, of democratic principles and of the rule of law. In such countries as the Baltic States, formerly part of the USSR, the transition to democracy meant the formation of institutions from scratch. The political criterion put forward by the EU was an attempt to foster the changes. The attempt generated various reactions in the CEECs. In some cases the communist rulers (under various denominations) have managed to stay in power and to limit and/or delay the political reform process; in other cases the attempted democratic reform process has moved towards radical nationalistic and anti-European feelings. But despite this, the positive impact of a powerful incentive to rapidly undertake necessary reforms cannot be denied.

It must be recognized however that it is never unproblematic to 'import' laws and rules from the outside into a national legal system. Quite apart from the very special EC legal system, which forms an integral part of the legal system of the Member States, an ever-increasing number of international rules deeply influence national law. But popular acceptance of laws and rules is still relevant for the success of a legal system and its proper implementation. Therefore successful EU accession will not be possible without the basic acceptance of the populations of the Member States, new and current.

F. The Readiness of the EU

The readiness of the EU and its existing members for enlargement is a much-discussed issue, mainly from the viewpoint of the institutions of the EU and their suitability for a much larger Union. However, the EU, consisting of its current members, must be ready for enlargement also in other ways. *When* enlargement will happen remains primarily a political issue, with the different criteria for membership as benchmarks of progress but not as sole determining factors. Within the EU the result of enlargement could create a variety of sources of instability which present Member States should carefully address before commencing on the actual enlargement process. There are potential risks and sources of political tension within the EU that might arise from the enlargement process, and which could delay the accession of new members. The risk of importing disputes among applicant countries, or between applicant countries and neighbouring countries, needs to be

carefully checked at all stages of the enlargement process in order to avoid *intra* EU destabilization and risk of changing alliances amongst the Member States.

In this respect, forging a CFSP will become a much more challenging exercise when new Member States join. The consensus needed for such a common policy, given the differences of historical relations of Member States with the outside world, will be even more difficult to reach with a growing number of members. As was seen with the previous enlargements, new Member States bring with them their traditional international interests.[12] In the present prospective enlargement one may for example question the attitude of the Baltic States or Poland vis-à-vis Russia, and how it will affect the Union's foreign policy.

The cost of enlargement is growing and is expected to have more and more implications for the present Member States. The cost of assistance provided by the European Commission through notably its PHARE programme, and also by each Member State on a bilateral basis,[13] to prepare the applicant countries for the transition phase, is already very substantial. It will inevitably be multiplied by the cost of reform of the major structural funds and the CAP. The budgetary cost is not the only factor to be taken into consideration. By reducing the benefits taken by the present Member States out of the existing structural mechanisms, the reform will create political tensions amongst the members and may even generate civil unrest in some segments of the Member States' population. This may in turn effect the political agenda vis-à-vis the enlargement process and its timing, and open the way to more anti-European feelings in the Member States.

With the proposed new enlargement, the EU would change in character. Not only would it be larger and more heterogeneous in cultural values and other interests, but it would also become more agricultural, relatively poorer and with a more Eastward political centre of gravity.[14]

However, in the debate it is the institutional implications of enlargement, which dominate. Given the urgent need for institutional reform of the EU before any enlargement can be seriously contemplated this is not to be criticized, even if all other issues should not be left totally to one side. At the Helsinki European Council in December 1999, the Member States launched another Inter Government Conference (IGC) whose role was to review the institutional reforms needed to prepare the Member States and the European institutions for the enlargement. The necessity of reforming the Union before any enlargement can take place was foreseen in the 1993 Copenhagen Council as one of the criteria. The internal institutional reform process is considered to be a test of the Member States' political will and of the institutions' flexibility.

Up until the mid-1980s, there were very few amendments to the EC treaties. The process for amending the treaties is cumbersome, with the need for an IGC and

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[12] S.S. Nello and K.E. Smith, *supra* note 6, at pp. 56–57.
[13] See *supra* Section D, 'The Negotiation Process'.
[14] M. Baun, *supra* note 3, at p. 283.

subsequent ratification by all Member States. In 1985 an IGC was appointed to look into various changes to the EC treaty, proposing what became the Single European Act, which entered into force in July 1987. Soon after this a working group on economic and monetary union was set up, which eventually produced a proposal for what became – after the next IGC – the Maastricht Treaty. More or less immediately after this, work continued with issues left aside at Maastricht, and certain new issues, leading up to the Amsterdam Treaty. In Amsterdam it was even clearer that several issues had been left to one side, so a new IGC started work immediately. The main tasks of this IGC were the size and composition of the Commission, weighing of votes in the Council and the possible extension of majority voting. At the 1999 Helsinki European Council it was decided that the Presidency may also propose other issues than these Amsterdam left-overs for the IGC to consider. One other such issue is the flexible integration.

The IGC came to an end with the European Council meeting in Nice on 7–9 December 2000. As shown, the main task of the IGC was to deal with the capacity of the EU to manage the enlargement from the viewpoint of the institutional structure and set-up. There were four main issues discussed during the ICG; namely the size of the Commission, the balance of votes in the Council, the use of qualified majority voting and reinforced co-operation. As the President of the Commission, Romano Prodi, said in his pre-Summit statement on 29 November 2000, the Summit was a historic opportunity, to ensure that the Union can continue to function after enlargement. 'Our road must not be blocked by any left-overs from Nice' he further said – probably wishful thinking even when he said it.[15]

The tensions in EU Member States in the period leading up to the Nice Summit, due to the continuous spreading of mad cow disease (BSE) as well as the failed climate talks in The Hague in November 2000, show that the coherence of the Union and the willingness of all its members to work toward common goals is under strain already, even without further strains being caused by the costs and changes related to the enlargement process. During the Autumn of 2000, leading up to Nice, several statements have been made by politicians, showing that the willingness to allow for the enlargement is weak at best. The fact that the Swedish presidency (for the first half of 2001) pledged enlargement as a priority does not mean that it is a guaranteed success.

The Nice Summit did not turn out to be the total failure feared by some commentators. However at the same time the Summit brought to light the tensions between the Member States, and the Treaty which resulted from it, lacks vision, even if it managed to deal with the necessary institutional issues to pave the way for enlargement. The Nice Treaty proposes for example one Commissioner *per* state, but a rotation system once the EU has 27 members. There is also a redistribution of places in the Parliament as well as votes in the Council and some amendments as to when qualified majority voting is needed. The Nice Summit at least managed to

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[15] See the EU official web page at <www.europa.eu.int>.

make a clear statement about enlargement, by also stating votes and places for candidate countries.

G. The Readiness of the Candidates

There has been remarkable progress in most of the applicant countries. The reform process, both economical and political, is well under way. The screening and negotiation processes are also well under way, but it is difficult to say exactly how far forward they have come.

The approximation of legislation, the necessity to have a very good technical basis and co-ordination and institutional and technical reform are seen as key issues for candidate countries. The reform of public administration may be the most difficult issue for the candidate countries, however the reform of the civil service to a merit-based system, providing an unbiased and ethical service to the public, is a key issue. In addition, candidates must specifically prepare for membership though establishing institutional mechanisms. The special nature of EC law as an integral part of the law of Member States, usually to be implemented by Member State institutions, emphasizes the importance of functioning national institutions.[16]

As for volume of work, the approximation of laws takes first place. The vastness of the *acquis communautaire* and the sheer number of reforms this entails for CEECs are not the only legal problems facing the candidates. The candidate states must adapt their legal systems including the constitutions to the EC/EU treaties before their ratification and must deal with approximation without the key elements of EC law, such as supremacy and direct effect, being in place. Evgeni Tantchev compares this to the transplantation of foreign standards in national legislation and implementation of international law in the domestic legal order in a dualist system.[17]

However, being ready for membership is not just a question of carrying out reforms and adopting the *acquis communautaire*. Generally there is a growing scepticism amongst the CEECs about joining the EU. With the economic transition coinciding with the prospect of European integration, the socially adverse effects on peoples' lives has generated confusion concerning the causes for growing unemployment and social instability. Europe and the European integration process are seen by a growing proportion of the population, in some applicant countries, as the main responsible factor for the worsening social situation. This generates

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[16] On this, see also P. Nicolaides, *Enlargement of the European Union and Effective Implementation of its Rules* (Current European Issues, European Institute of Public Administration, 2000).

[17] E. Tantchev 'National Constitutions and EU Law: Adapting the 1991 Bulgarian Constitution in the Accession to the European Union' in (2000) 6:2 *European Public Law*, at pp. 229–241.

growing discontent and the rise of anti-European feelings, or at least a drop in popular endorsement of the European integration process as a political priority. However, opinion polls vary and reflect fluctuating views, which makes it difficult to know whether this is due to different ways of conducting the surveys or due to instability of public opinion. For example, in Lithuania there was a dramatic loss of the public's support for the European integration process in 1999: 30 per cent expressed their support for, and 31 per cent against, the European integration in 1999; while in 1998 the figures were 42 per cent for versus 20 per cent against. In 2000 there was an upward trend again, with 47.3 per cent in favour and only 20.9 per cent against.[18]

In a seminar for Baltic lawyers at the masters level, held jointly by the authors of this article at the Riga Graduate School of Law in Latvia in October 2000, it was interesting to note that many of the participants expressed different concerns about EU membership. The general view on EU membership was still overwhelmingly positive, as it is in most countries among that category of persons, namely the young, well-educated, fluent in languages. But there was a general recognition of the need for reforms in the countries before they would be ready for membership and a certain fear that the reforms would not be complete near enough in the foreseeable future for the states to be able to take on the obligations of membership. The reduction of the influence of small countries also concerned the participants, as well as doubts concerning the ability of domestic products to compete on a totally liberalized market. In the main, many participants felt that it would be long time still until the Baltic countries and most of the other CEECs would be ready for EU membership, and anything else was just an illusion. The two parts of Europe are still perceived as too different.

On a slightly different note, Andrei Plesu reflects upon the thoughts of many of the CEECS, when he feels that Westerners view things too simplistically and that the process of enlargement of the EU is an example of how everything is reduced to a problem of economics or administration. The emphasis, in his view, on legal and fiscal integration transforms Europe into a scheme, a technical framework. Europe becomes a set of criteria and looses the aura as an attractive model.[19]

In fact, the current enlargement process shows that the EU and the current members are putting emphasis on other things than just the technical requirements. And those requirements (especially in relation to the administrative capacity) are also a means of pushing the states to reach the attractive model of democracy of Western Europe. The study of the technical aspects of preparation for membership must not cloud the view of the underlying requirements set out in the Copenhagen criteria. The issue of protection for minorities is one of the key issues. For example, its 1997 evaluation, the Commission found that Slovakia and Romania were unable

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[18] *The Baltic Times*, 9–15 December 1999 and 9–15 November 2000.

[19] A. Plesu, 'Towards a European Patriotism: Obstacles seen from the East' in (1997) *East-European Constitutional Review* 53, at p 54.

to achieve the standards required concerning the protection of minorities. There has not been any noticeable progress, notably in Romania in this field (and the result of the elections held in November 2000 do not give rise for optimism). The institutional framework of applicant states for observing the needs of democracy as well as economic development is also lacking in other ways in different states.[20]

H. Reinforced Co-operation

Reinforced co-operation, or flexible integration, means that a reduced number of countries implement some policies and projects without the participation of all. The Social Charter and the European Monetary Union (EMU) were examples of such co-operation. Also outside of these specific topics, the issue of reinforced or differentiated co-operation has been on the agenda for some time. There are different possibilities for such co-operation. A 'multi-speed' Europe can be seen as nothing more than a recognition of the fact that not all Member States achieve the same objectives at the same time, even if the objectives as such are mutually agreed. This is contrary to the principle that EC law should be the same in all states, but is on the other hand just recognition of an actual situation, which is perhaps inevitable. As there are transitional periods given to states, this recognition also exists at a more formalized level.[21] Shaw says that there is nothing 'constitutionally disruptive' about this.[22] Such disruption may on the other hand be the case for variable geometry, with a more or less permanent division within the EU of a hard core and a soft periphery. This already exists in the form of the EMU and the Schengen system.[23] However it is interesting to note that the Schengen system when it was introduced was created in a separate treaty, based on the idea that non-inclusive co-operation was not seen as compatible with the idea of the same union for all. When it was incorporated into the EU Treaty, through the Amsterdam Treaty, the exceptions for the UK, Denmark and Ireland were stipulated in protocols, the same way all the (few) exceptions granted to Member States have been previously handled. A version of the variable geometry is what is called Europe *à la carte*, where members pick and chose between

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[20] K. Kecsmar, 'Elargissement: Conséquences Possibles de l'Adoption de la Proposition de la Commission' in (2000) 434 *Revue de la Marché Commun et de l'Union Européenne*, at pp. 14–18.

[21] The different periods given for achieving liberalization of telecommunications is one example.

[22] J. Shaw, *Law of the European Union* (Macmillan, 1996, 2nd ed.).

[23] The Schengen system abolishes border controls on internal EU borders for all its members as well as sets out rules for how the border controls are to be handled at the EU external borders. The Schengen system also includes rules on other related matters, such as certain immigration and policing issues. There are also common visas to the whole Schengen area for non-EU nationals.

different issues. How this is compatible with the fundamental nature of EC law is debatable. The IGC, which came to an end with the European Council meeting in Nice on 7–9 December 2000, opted for a clarification of the so-called enhanced co-operation. The requirements for it are set out in the Treaty and include that it must further the objectives of the EU, respect the treaties as well as the *acquis communautaire* and be open for all Member States. It will not be possible to know, for some time yet, what this in reality means for the members and for the principles of EC law.

Since the 1973 enlargement of the then EC, and perhaps, before then, the issue of flexible integration and the notion of a 'core Europe' have in one way or another been on the agenda. In September 1994 the idea was more formally launched by the German Christian Democratic Union/Christian Social Union conference. The economically able and politically willing states, led by Germany and France would press ahead on certain issues, leaving the others to catch up. This could be a way of achieving greater integration not just amongst the states taking part in the reinforced co-operation, but also overall as the process would be generally beneficial to integration.[24]

For the first time, the Amsterdam Treaty introduced a general flexibility clause. This general clause in Article 43 of the EU Treaty is coupled with similar provisions in the EC Treaty (Article 11) and the title on immigration. The Nice Treaty contains clauses for basically all different fields of co-operation in the EC/EU framework, as long as it does not conflict with other provisions. In the editorial comments of the *Common Market Law Review*[25] this is described as 'secondary flexibility', which allows new fields of activity to be opened up, within certain limits to meet with the principle of legality. An existing legal basis thus has to be found for closer co-operation proposals.[26] With Article 43 of the TEU and Article 11 of the EC Treaty differentiated integration or flexibility is no longer, as Craig and de Burca put it, to be seen as an aberration within the EC and EU legal order. It is no longer just a temporary solution or a way of getting all states to eventually be eased into a uniform system. There is already since Amsterdam a legal basis for differentiated integration, which before was something that had to be negotiated separately.[27]

Certain commentators see enlargement and the ensuing dramatic increase in the size of the EU as inevitably leading to a looser and more inter-governmental EU. It will not be possible to forge ahead to the 'ever closer Union' as envisaged in the Maastricht preamble with so many and such diverse Member States. Even if previous enlargements may have actually lead to further integration for states on some issues, the now proposed enlargement with the generally less-developed

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[24] M. Baun, *supra* note 3, at pp. 284, 285.

[25] 'Editorial Comments: The Treaty of Amsterdam: Neither a Bang nor a Whimper' in (1997) 34 *Common Market law Review* 767, at pp. 768–769.

[26] Ibid.

[27] See Craig and de Burca *EU Law* (Oxford University Press, 1999, 2nd ed.)

CEECs, at the time when the *acquis communautaire* is so vast, raises the question can enlargement go ahead without first rethinking some of the old concepts? The old concepts include the idea that all members of the Union, once in, should be full members on the same terms as any other. Baun discusses accession in stages as a variant of the variable geometry, but points out that this has so far been rejected by the applicant states, as they fear to be given second-class status.[28]

At the December 1999 Helsinki European Council, where flexible integration was discussed, there was considerable opposition from many Member States. Many states felt it was premature, as well as potentially dangerous and disruptive, for the Union to go down this path. Since then attitudes have changed, with the June 2000 Feira European Council deciding to put the issue on the agenda of the IGC. It was propounded by some as a choice between unregulated co-operation outside the treaties or regulated but workable co-operation within.[29] In Nice the issue was discussed and the provisions expanded and amended, but the basic ideas concerning the need to try to prevent this from becoming a disruption of the 'normal' co-operation remain.

I. Some Concluding Remarks

The regatta has started; the ships are well on their way. The winds are not too favourable all the time. But the main problem still appears to be the moving goal. Not only was it set far and at a difficult course from the start, but it now appears to move with the winds and waves. So maybe it is not surprising that the crews of the ships may appear reluctant. Is there one Union to join, as equal partners with rights and obligations? Or is there an inevitable A and B team? Will the will of some states to go further to avoid the laggards mean that also those who have the will but may lack the immediate means are left behind rather than being encouraged on?

The fact that it is the applicant, who wants to join an organization that has to meet the criteria for membership and has to prove this, is nothing strange in itself. In the context of the EU this has also always been the case for new members in all the enlargements. Before being allowed into the club the opportunities of influencing the debate within are limited. What makes the present actual situation for the CEECs difficult is not this basic strategy in itself and not even the fact that the criteria as such are so encompassing. But it is the constant change and evolution of the criteria and the ensuing difficulty in determining not just what is expected of the states, but

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[28] M. Baun, *supra* note 3 at pp. 284, 285. See also F. de La Serre and C. Lesquesne, 'Enlargement to the CEECs: Which Differentiation?' in M. Maresceau, *supra* note 5, pp. 349–357.

[29] P. De Schoutheete 'Guest Editorial: The Intergovernmental Conference' in (2000) 37:4 *Common Market Law Review*, at pp. 845–852, especially at p. 849.

also if they will ever have a realistic chance of meeting these demands. Furthermore, even if they do meet the high demands, the club itself may change so what the CEECs finally join is not what they applied for in the first place.

There is clearly a need for new thinking in the EU, in relation to institutional issues as well as to more fundamental matters of principle, which are relevant not just for enlargement. But to let go of the fundamental principles on which the EU is built in order to expedite enlargement may be equally dangerous as it drags out the process for too long. Fundamental reforms of the CAP and structural funds are long overdue and this is what current members should start concentrating upon. The new members should not have to fear to become a B team. The EU can accommodate all European states that meet its criteria. It is thus right to insist on these criteria, but they should be reasonable and assessed in a just manner.

There is a huge process going on in Europe, of certain countries helping, teaching, forcing or coercing the others to live their way. It may be asked if this is merely a process to prepare for membership to an organization, or if that goal may be illusive – like the toy moved further and further away to encourage the child to crawl. A process without any rewards ceases to be an attractive one. If the incentive to maintain the momentum and pace of reform is to continue the CEECs must feel that they will have the possibility of becoming full members in an attractive EU.