Drafting for Accession:

Bulgaria's Way to Success

Gergana Maneva*

With a view to the on-going and deepening processes of integration and enlargement of the European Union there is an ever increasing need to continuously transpose the *acquis communautaire* into the national legal systems of the member states and those of the countries aspiring for EU membership. In this context drafting of legislation for the purposes of membership and accession constitutes a task of high significance for the current and future member states of the Union in implementation of their obligations.

As the issue of drafting and the quality of the legislation which results from it are inextricably bound with the issue of full implementation and efficient enforcement of the provisions of the *acquis*, the necessity to outline the conditions which determine the success of this exercise and thus to aspire towards the creation of a fruitful environment for their fulfillment stands as a major task before the European Union itself.

Considering the above, the overall objective of the present analysis will be twofold. It will outline the peculiarities of legislative drafting for EU accession, in comparison both to drafting in general and drafting for EU membership. The impact of the European Constitution and the changes it introduces into the European legal order, in particular in terms of simplifying the legal framework of the Union, will be taken into account as they modify the nature and the scope of the task for transposition of the *acquis communautaire* into the domestic legal systems. The objective here will be to make a contribution towards defining the underlying determinants for the successful performance of the task for legislative drafting for EU accession. This will be achieved through a comparative survey of the common practices of the newly acceded and current accession states and the lessons they have derived during the process. The background data has been gathered through research and analyses of information that has become available in the course of working experience. The conclusions will be demonstrated with representative examples from the case study of Bulgaria. This country has been selected as it displays both positive achievements which are worth following[1], but also problems and weaknesses[2] which need to be studied in order to be avoided in the future by new accession countries.

* Legal researcher, Centre for European Programmes, American University in Bulgaria.

[1] These eventually led to the successful completion of the accession negotiations with the EU at the end of May 2004 and the signature of the Accession Treaty in April 2005.

[2] These resulted in the 'fall-out' of the country from the 'first wave' of countries to join the Union.

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Furthermore, the analysis will seek to demonstrate the convergence effect from EU integration and accession upon the administrations and the overall process of legislative drafting. This will be done in the light of the Europeanisation theory as a tool to describe and evaluate the changes into the drafting styles and administrative models of member states and candidate countries, which happen as a consequence from the process of legislative drafting for EU membership and accession.

A. Aspects of Legislating For EU Membership

Drafting for EU accession is an expression and a consequence of the country's political decision[3] to join the Union and to enjoy the rights and bear the obligations inherent to membership. Compliance with the Copenhagen legal criterion for accession[4] implies full harmonization of the internal legal system with the EU one even before[5] accession. EU legislation is not a self-implementing one and both member states and candidate countries need to undertake significant efforts to transpose and incorporate the *acquis* into their own legal system and thus create the formal basis for their implementation. And if member states can benefit from the direct effect of some EU legal texts, candidate countries, at the stage of carrying out negotiations with the Union, need to achieve this full transposition through adoption of national legislative instruments for all parts of the *acquis*. Drafting for accession has proven to be also an important tool to implement the necessary economic and social reforms required by the EU from the acceding countries. As a method to enact the national policies devised by the government of the state, drafting for accession in those countries falls within the general framework of legislating and is subject to the national provisions setting forth the conditions for creation of domestic legal norms.[6]

Nevertheless, compared to drafting in general and drafting for EU membership, drafting for EU accession has displayed distinct peculiarities, which define it as a

Furthermore, the country currently faces the risk of suspending the accession to the Union with one year if the implementation of the commitments undertaken is evaluated as insufficient in the October 2005 Regular Report.

[3] *See, for example*, for Bulgaria the Decision of the Higher National Assembly of Bulgaria of 22 December 1990; Declaration of the Government of the Republic of Bulgaria of 14 April 1994 confirming the resolution of the country to become a member; Decision of the Government and Decision of the National Assembly of 14 December 1995 to submit official application for membership.

[4] *See* SN 180/1/93, 22/6/1993.

[5] *See also* H. Xanthaki, *The Route to EU Accession, in* C. Stefanou (Ed.), Cyprus and the EU – The Road to Accession 11 (2005).

[6] *See* the Law on Normative Acts, promulgated, State Gazette, issue 27/ 73, amended, State Gazette, issue 65/1995 and 55/2003, and the Decree for its implementation; the Regulation on the organisation and the functioning of the National Assembly, promulgated, State Gazette, issue 69/2001, amended, State Gazette, issues 86/2001, 90/2002, 96/2002; Regulation on the Structure of the Council of Ministers and its Administration, promulgated, State Gazette, issue 103/1999, amended, State Gazette, issues 4/2000, 26/2000, 27/2000, 44/2001, 74/2001, 87/2001, 81/2002, 20/2003, 75/2003, 21/2004, 24/2004, 33/2004, 97/2004, 101/2004, 110/2004, 29/2005.

significantly specialized type of production of national legal texts. Awareness and consideration of those specifics and the early devising of national responses to them predetermines the success of the country in achieving its goal to conclude the negotiations with the EU and sign the Accession Treaty for full membership. Thus, legislating for accession is characterized by a very high degree of conditionality. This conditionality results from three main elements, namely external definition of the scope of the exercise; limited autonomy in decision-making; continuous assessment of the country's performance, in particular in terms of ensuring full implementation and enforcement of commitments undertaken, through on-going monitoring and evaluation. Moreover, translation of foreign legislation is an obligatory phase of the process. Furthermore, legislating for accession requires the establishment of an institutional framework specially for the execution of the task for transposition of the various parts of the *acquis*, application of a specific approach involving recruitment of external expertise in the framework of specifically designed instruments, such as twinning and technical assistance and impact analysis of the activities upon the national methods for drafting, i.e. the integration and 'Europeanisation' of the national drafting styles.

B. Conditionality of Drafting

The notion of conditionality from the point of view of this analysis implies the existence of a clearly established set of pre-conditions, which should be in place in order to start performing the tasks for drafting for EU accession. Applying the criteria of a) timeframe, which should be respected, and b) their preclusive character, the above conditions could be broken down into two main groups. First, conditions underlying the very launch of the EU accession 'project'. These can be described as the 'political conditionality'[7] of the EU. They come as an answer to the question 'why' legislate for accession. Second, conditions, both substantive and procedural, which moderate the legislating environment and bring about changes in the 'traditional' drafting process in a respective country once a decision for opening negotiations with the Union has been made. In technical terms these require to explain 'whether', 'what', 'when' and 'how' to legislate.

Leaving aside the straightforward geographical aspect,[8] the first group of conditions presupposes a certain level of political and economic development before a country is considered as a potential candidate for EU membership. It is up to this country to ensure that required minimal macroeconomic stability is achieved[9] and governance is exercised by respecting human rights and the rule

[7] W. Sadurski, *Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe*, 10 (4) European Law Journal 371-401 (2004).

[8] *See* Art. 49 EU.

[9] *See* Council of the European Union, Draft Joint Conclusions of the Ministerial Dialogue between the Economic and Finance Ministers of the EU and the acceding and candidate countries on 12 July 2005, Document No. 10816/05, http://register.consilium.eu.int/pdf/en/05/st10/st10816.en05.pdf.

of law.[10] Leaving aside also the psychological or emotional aspect, and searching for more pragmatic solutions to the question 'why' to legislate, we should look at the issue from both EU and accession countries' perspective. A country would apply for EU membership and, therefore, legislate for accession for a variety of reasons. For countries within Europe undergoing a fundamental political and economic change, it seems that there is no other sustainable and equally justifiable alternative for development except the EU membership. The processes for democratization and marketization fostered by the prospect of accession raise the political and economic profile of the country and improve its financial credibility and its 'investment index'. Membership to the EU gives national political leaders the proper justification to carry out the necessary reforms. After the start of the preparations for accession the country receives substantial external financial support from the EU under the form of pre-accession assistance to draft and implement the various parts of the *acquis* and development loans to build infrastructure and create market and credit culture.

But why would the EU want to accept a country's application for accession? Why would it support its legislative efforts to adopt and start implementing the *acquis*? Accepting a country's application would give it the needed impetus to go along the path of reforms and to perform legislative and institutional changes to build the foundations of democracy and market economy. And looking at the purely economic side of it, by expanding its borders the Union would get access to a larger market and a higher number of consumers and would benefit from increased competition and pressure for innovation. It has proven to be financially much cheaper for the Union in the long-run to work towards the integration of the countries instead of having to deal with the costs of a possible instability and crises just at the very end of its borders.[11]

This political conditionality of the drafting for EU accession displays common characteristics. First, it is not a static feature of the accession process but is quite dynamic and changes both as a consequence of the development of the Union itself and as a result of the acceleration of the reforms within the candidate countries. Second, 'gap-plugging' to reach the standards required is a dual process comprising the efforts both of the candidate countries and the EU. Third, it has a Europeanization effect visible in its direct practical implications. Considering in particular the depth of the changes happening in the countries in Central and Eastern Europe and the former Soviet Block, these conditions serve the purpose of a necessary filter, which should guarantee the appropriateness and feasibility of the efforts invested in associating a country to the EU 'club'. The substance and the preclusive character of this filter is complemented by time and financial dimensions. The screening for the presence of these conditions usually leads to different levels of intensity of the EU intervention aimed at fostering the processes of socio-economic transformation. Thus the achievement of the required minimum standards is a dual process. It is very much determined by

[10] *See* Article 49 and 6(1) from the TEU; and Article I-58 and I-2 from the Draft Constitution for Europe.

[11] *See* the speech of G. Amato before the 2005 Annual Meeting of the EBRD in Belgrade, Serbia, http://www.ebrd.com/news.

the country's commitment to plan and implement structural reforms on a long-term scale. It is also very much conditioned by the relevance, expedience and proportion of assistance received on behalf of the EU. This assistance comes to help sustain the results and impacts attained and transform them into coherent development strategies.[12]

From a global perspective, the ultimate effect of the first group of conditions is that it establishes the crucial role of the EU, fully in line with its objectives,[13] of a promoter of democracy, political and economic stability at the international scene. And this is so in terms of procedures, means deployed and volume of financial resources allocated to this purpose.[14] Thus the course of the world's evolution is much influenced by the transformative power of a body of fundamental values lying at the heart of an emerging 'EU regime'.[15] In the light of the recent constitutional developments,[16] "it presupposes also the EU ambition of giving diverse peoples the opportunity of joining …, irrespective of religious and cultural differences certainly unknown to EU past experience",[17] and thus challenging not only the religious but also the future geographical boundaries of Europe itself. From a country's point of view, though, the effects of conditionality upon enlargement and the continuous surveillance[18] of progress made with economic, budgetary and structural policies seem to be the main instruments through which that particular country is granted eligibility to embark on the road to drafting for EU accession. Furthermore, the relationship between conditionality and enlargement poses the important legal questions of certainty of the legal environment and integrity of the implementing activities undertaken by the national legislator in his pursuit to create the basis for the needed change. After Amsterdam, the establishment of the Union's founding principles on formal grounds by incorporating them into the legal text of the Treaty inserted an increased clarity into the nature and the scope of the task versus the pre-existent ambiguity of the 'unwritten and uncertain cluster of legal rights'[19] with much contested validity and obscure interpretation. The Constitutional Treaty made a further step ahead and in doing so affected deeply

[12] For a broader explanation of the types and objectives of the EU external assistance to the different categories of countries, i.e. candidate countries and potential candidate countries, see Commission of the European Communities, Proposal for a Council Regulation establishing an Instrument for Pre-Accession Assistance (IPA), COM (2004) 627 final, pp. 2 and 4. The EU assistance is complemented by the support for reforms provided by other donors such as the United Nations Development Programme, the World Bank, the USAID, and a number of bi-lateral governmental programmes and initiatives.

[13] *See* the Priorities for the UK presidency of the EU 2005, at 2 and 3, http://www.fco.gov.uk/Files/kfile/UKEUPresidency2005_PresidencyPriorities_EN,0.pdf.

[14] *See also* C. Pinelli, *Conditionality and Enlargement in Light of EU Constitutional Developments*, 10 (3) European Law Journal 355 (2004).

[15] Pinelly, *id.*, at 362.

[16] In particular the rejection to insert a reference to the Christian heritage of European peoples within the Constitutional Treaty draft. *See also* Pinelly, *supra* note 14, at 61.

[17] Pinelly, *supra* note 14, at 361.

[18] European Commission reports issued every six months on the progress made; ECOFIN conclusions and Joint Opinions issued on the Pre-Accession programmes (PEP) of the countries in question. *See, for example*, The Council of the European Union, *supra* note 9, at 2-4.

[19] P. Craig & G. de Būrca, G., EU Law: Text, Cases and Materials 338 (2003).

the roots of this particular type of conditionality, 'by reducing the longstanding uncertainty surrounding the identification of the human rights that are accorded protection in the EU'.[20]

The practical implications of the EU political conditionality include the varying amount of financial assistance made available to the country and the speed of economic restructuring come as a straight progression to the implementation of reforms. This calls for adoption of a market-oriented legislation enabling the absorption of the assistance and bridging the transition towards legislating for adoption of the *acquis* (a 'policy-led interdependence'[21] and Europeanization of the drafting agendas); early effects of a national capacity building – fostering the establishment of a political elite and creation of a pool of experts to devise and implement reforms; reforming the institutional framework and the judicial system in particular through setting up of obligatory standards for the implementation and enforcement of the *acquis*; change of mentality and overall modernization, understood as Europeanization of the state.[22] The drive towards Europe comes as a negation of the past regime and as a demonstration of the determination to perform changes in the economy and society. Furthermore, the image that Europe broadcasts of being a successful exercise creates positive attitudes and expectations for the peoples of the candidate countries inspired by the presumption that membership 'renders democratization irreversible'[23] and will lead to a better well-being of the society as a whole.

The implications of the EU political conditionality upon the internal legislative drafting process of a country are seen in the change of the political and, therefore, legislative agendas of the national legislatures. These legislatures are called upon to enable and streamline the pre-accession processes by creating the legal basis, both in the constitutional law and in the current legislation of the country, for their successful development. Thus the drafting capacity of the national legislators proves to be vital for the successful completion of the requirements. Ensuring that this capacity is there is a joint task of the legislators who have to learn from the experiences and practices of those states, which have concluded the negotiations with the Union, and of the EU itself through provision of targeted training of parliamentarians and transfer of know-how.

C. The Conditionality of Drafting for EU Accession

In technical terms the decision to legislate is preceded by the answer to the following questions: whether to legislate; what will be the subject of legislation; what will be the scope of the drafting interventions; when should legislating take place; and how the achievement of a guaranteed result will be ensured. When

[20] Pinelly, *supra* note 14, at 360.

[21] W. Wessels & D. Rometsch, *German Administrative Interaction and European Union*, *in* Y. Mény, P. Muller & J.L. Quermonne (Eds.), Adjusting to Europe: The Impact of the European Union on National Institutions and Policies 76 (1996).

[22] Sadurski, *supra* note 7, at 372.

[23] *See id.*, at 10.

compared to the common case of national legislating, each one of these elements of drafting for EU accession displays considerable levels of conditionality and is subject to constraints, formulated externally, outside the boundaries of the national government and legislature, which effectively limit their autonomy and the available decision options in the process of making the drafting decision.

In the general case the will of the government to enact a piece of legislation and thus to transform a certain policy (either as an expression of a political will to introduce reforms or as a response to an existent social need) into a set of legal norms is enough to commence the drafting exercise. Drafting for EU accession, though, is pre-conditioned by the acceptance of this national will by the Union institutions, i.e. there must be an agreement between the EU and the national government of the candidate country as an official start of the process for legislative drafting for EU accession and membership.[24] This conditionality sustains after obtaining membership in the EU. The decision of national legislators to venture for a bill is again to a large extent predetermined by their obligation to integrate the *acquis* into the domestic legal system. The conditionality preserves its dynamic nature in the sense that it is enriched in substance and deepens its focus to respond to two issues which have been gaining increasing importance in the EU law system, namely the issues of quality of legislation and achieving good governance through legal action.

Influenced by the solid common law traditions, EU law conceptualized the necessity to ensure quality of the legislative acts, in particular after being faced with the problem of the growing body of legislative measures adopted at the EU level and the risk for 'inflation of legislation'. On the national level, the matter demanded even more attention in view of the increasing number of fields affected by European law and the introduction and further development of the principle of direct effect. Clarity, coherence and lack of ambiguity of legal texts is seen not only as a pre-requisite for making EC legislation more understandable for its addressees, more accessible and accountable[25] but also as a tool to overcome the existing disparities and create additional guarantees for effective and univocal implementation of the *acquis* in all the member states. Thus, the question whether to legislate has been given a 'minimalist' interpretation on the EU level affecting the national jurisdictions of the member states as well, demanding to regulate less but regulate better. This approach has been inspired by the strong emphasis laid upon the efficiency of policy-making within the Union and the need for strategic planning, policy-analysis and evaluation at all levels of decision-making.

This new line of thinking about law-drafting has been implemented in practice both through formal institutional measures[26] for enhanced inter-institutional co-ordination and through the implementation of the regulatory impact assessment (RIA) methodology to estimate the financial and institutional effects of new legislation. The RIA contributed towards the efforts to have a transparent,

[24] *See also* Xanthaki, *supra* note 5, at 13.

[25] *See* Commission's Action Plan for Better Regulation.

[26] Such as the elaboration and implementation of the Joint Practical Guide of the European Parliament, the Council, and the Commission for persons involved in the drafting of legislation within the Community institutions, http://www.europa.eu.int/eur-lex/lex/en/techleg/index.htm.

accountable and efficient legal environment versus the criticisms for democratic deficit, bureaucracy and lack of openness in the EU legislative process.

The issue of quality of legislation is further signified by its direct implications upon the improvement of the way institutions and governments use their regulatory powers and the way it modifies, in part, the pattern of governance. In the acceding and candidate countries this process has been coupled by the dual challenge of a fundamental social transformation and transition to market economy combined with the specific requirements for EU accession, including the adoption and implementation of the *acquis*, a challenge that none of the 'old' member stated had been presented with. In these countries the pressure of adopting the EU *acquis* and its sheer volume, combined often with the scarcity of administrative resources, make it an absolute must to carefully prioritise cases where impact assessment is desirable. For them it is even more important to learn from the experiences of others, both EU members and accession countries and build cross-national responses to common challenges.

From a drafter's point of view, the notion of RIA implies not only a change in the process but also in the culture of law drafting. The integration of impact assessment and consultation in the very process of law making is done in application of the principles of effectiveness, efficiency, legitimacy, accountability and transparency of policy-making.

In the context of European integration impact assessment serves the achievement of many objectives. The first objective refers to assessing the most cost-effective way to implement EU directives and considering alternative decisions, including 'doing nothing'. This means that where regulation is required, it should be well designed, targeted, simple to understand and proportionate to risk. The second objective relates to the identifying, quantifying and calculating implied costs and assessing their relevance to mid-term budgeting. The third objective is the choice of a basis. All costs and benefits should refer to the same time moment, which allows comparability. The fourth objective is to facilitate the formulation and justification of a particular policy or negotiating position. The fifth objective is the provision of information for businesses, NGOs and other social groups on the costs likely to be incurred when enforcing a given EU regulation. In many cases already adopted normative acts have to be amended or abolished. In addition to uncertainty, this causes new expenses for all present commercial actors and future investors.

In many cases making an impact assessment is avoided with the argument that it is too expensive and, therefore, hard to finance. From a short-term budget perspective this might be an acceptable argument but in the long run it proves to be untrue. It creates the risk of subsequent amendments of adopted legislation, which increases the cost of making business on a given territory and leads to less investments and economic growth. This observation is even more applicable to acceding and candidate countries, which have to accomplish the transition to market economy fully. The existence of a significant share of 'grey' economy in most of them is a signal that companies disregard legislation. This phenomenon is caused, in part, by the high expenses and bureaucratic obstacles plaguing the business-government relationship. Impact assessment and regular consultations

can limit the scale of this negative event, boost economic performance and help the country meet the EU economic requirements.

Apart from its relevance for EU accession as such, regulatory impact analysis has a broader public policy relevance, which marks the transformative nature of the preparation for accession. It should be seen as an intrinsic part of the process of good, open and predictable governance. It is a way of involving particular segments of society in the process of making informed choices, thus bringing legislative drafting in general away from the technocrats and towards the citizen. Therefore, for the drafter it is crucial to develop specific skills in implementation of modern techniques for extensive bottom-up ex-ante consultation with stakeholders, to establish conditions for continuous dialogue and co-operation and enhance the commitment of decision-makers to simplify regulation in order to reduce the cost of doing business in Europe and increase legal certainty for citizens.

Consultations with the interested parties could be performed either directly – by a direct invitation for participation in a discussion, or indirectly – by publishing the analyses on the Internet so that any one can examine them and give an opinion or counter-position.[27] In practice, the implementation of the RIA process has an institutional and a methodological aspect. The first aspect requires special agency and procedure, established by rules and regulations. Methods related to cost-benefit analysis have been always used in some form.[28] On the analytical level the generally used methodology is a combination of budgeting, cost-benefit analysis and surveys of provisional affected parties and fiscal sources to identify financial and non-financial aspects that could be associated with a given draft regulation, most often with regard to bills. The institutional level, though, is of principal importance. It necessary includes mostly government institutions as initiators of regulations and analytical reviews. The choice of methodology is largely dependable on the established institutional set. From this point of view, an environment that misses such institutions and procedures could hardly be considered mature and does not enable state of the art methodology.

Generally, governments act on demand in introducing RIA techniques and processes that involve public dialogue as an intrinsic element of the process. This demand emerges from and is driven by diverse societal interests, which apply available analytical methods. The two major instruments used to foster this demand and to initiate the desired institutional change are publicity and regular monitoring (in particular of the business environment). For countries in a process of transition this demand is fostered by the forces of external pressure and the good examples of the countries which have successfully established structures and implement the RIA principles in their drafting activities.

The comparison between EU member states and acceding countries shows in general the following peculiarities of regulatory impact assessment. Both group

[27] *See, for example,* http://www.cabinetoffice.gov.uk/regulation/ria/regulatory_reporting/2004/index.asp. The European Parliament, under 'Hearings', also publishes studies and impact assessments of Commission's proposals for new legislation.

[28] Such methods are applied for example by politicians and political observers, media and businesses, trade unions and representatives of the civil society.

of countries face the requirement to implement and enforce legislation externally imposed upon them by the EU. Acceding countries often do not have enough developed industries that would be affected by a provisional transposition of laws and standards, while consumers who could afford given standard are insignificant in number. In acceding countries the transposition of laws and standards creates larger compliance costs than it is the case in the member states. The average annual number of laws and regulations is higher than in EU member states. These countries encounter bigger challenges due to greater dynamics of organized interests, resulting from the transition from central planning to market-based economies. The competition for faster accession often reduces the application of available expertise or creates additional lack of expertise.

These peculiarities need to be taken into account by countries beginning their preparation for accession to the EU at an early stage in order to avoid risks and offset possible drawbacks.

After a positive answer, the question of 'whether' to legislate leads to the questions of 'what' and 'how much' to legislate. When legislating for accession, a country's autonomy is very restricted in terms of choosing the subject[29] and the scope[30] of the drafting activities. This is especially true for the accession countries as for them their ability to transpose and fully comply with the *acquis* even prior to membership is one of the basic conditions for their entry into the Union. For these countries "the content of the *acquis* [is] non-negotiable, and with the EU's expressed determination to allow minimal transitional periods for its full implementation, the scope for the accession applicants' ability to influence the terms of their accession to the EU has been extremely limited".[31] Nevertheless, the country is granted the possibility to choose the type of the national implementing measures for the transposition of the *acquis* and enjoys relative flexibility in terms of defining the exact timing for adoption and enactment of the relevant national legal texts.[32] This autonomy is granted on the basis of the fact that national implementing measures display high levels of diversity and EU *acquis* can be effectively transposed through a variety of instruments available in the domestic legal order.

However, if the question of 'what' receives a more or less straightforward answer by theory and facilitates its practical implementation into the domestic legal systems, the question of 'how much' creates risks both for the national drafter and the EU legislator. This is so because the main bulk of the legislative drafting responsibilities remain with the countries, no matter whether they are

[29] The aim of the drafting for accession is to transpose the EU *acquis*. See more on the nature and scope of the *acquis* Xanthaki, *supra* note 5, at 13.

[30] Drafting for transposition of the *acquis* is not done in general but only in the areas, which, as a result from the evaluation of the legislation of the country undertaken by the European Commission before the start of the official negotiations on the negotiation chapters, are defined as 'areas of discrepancy', i.e. areas in the domestic legal system, where legislation does not exist or the existing one is non-compliant to the EU one.

[31] *See* D. Papadimitriou & D. Phinnemore, *The Twinning Exercise and Administrative Reform in Romania*, 42 (3) Journal of Common Market Studies 623 (2004).

[32] This autonomy is expressed in the elaboration and adoption by the country of its own National Programme for the Adoption of the Acquis (NPAA).

member states or candidate countries. EU legal texts have minimum requirements for transposition but they do not impose a 'ceiling' for that. As a result, there are numerous cases when the national implementing measure over-does its task – it contains more provisions and establishes more obligations and standards to be observed, thus unnecessarily and unjustifiably broadening the scope of the respective legal regulation.

Gold-plating has become an issue of a major concern for the EU, in particular for the Commission[33] as the institution holding the right to legislative initiative and as the one who is responsible to ensure the full and efficient implementation and enforcement of the primary and secondary legislation of the Union. The issue has been consistently addressed on the EU level by enforcing the principles and practices of the regulatory impact assessment for every piece of draft legislation. The Commission's endeavours reach out to the national level by streamlining and monitoring the domestic practices of the member states and providing recommendations to them and to their administrations. The early involvement of countries preparing for accession into this process would help them avoid the mistakes and weaknesses of the current member states when transposing directives into their internal legal systems. At the same time, it will be beneficial for the Union' institutions and citizens as well as it will create additional guarantees that the rights and obligations stemming from the *acquis* provisions will be effectively and, moreover, equally implemented. This involvement can be realized both by provision of methodological guidance and tools (such as manuals for drafting, manuals and checklists for carrying out of RIA, codes or studies of best practices and lessons learnt, etc.) and through transfer of know-how and exchange of best practices in the framework of the twinning exercise.

Knowing 'what' to draft, an accession country can further determine the speed with which it will perform its drafting activities for the transposition of the *acquis*. This is not the case for the member states for which the Directives set forth the temporal parameters for their incorporation into the national legal system. Moreover, the compliance with this requirement is ensured by additional procedural guarantees in the form of fines. For accession countries, though, the Copenhagen European Council in 1993 stated that a country will join the Union 'when it is ready' to do so[34]. That is why the Commission does not provide fixed dates for the adoption of legislation but gives the country the possibility to initially define at its own discretion its timetable for the execution of the legislating tasks. This 'freedom', though, is not an absolute but a relative one. Once stated in the NPAA or the position papers on the negotiation chapters, the time frame becomes binding for the country, its observance is compulsory and is subject to regular review by the Commission.[35] Drafting for legislative alignment should be carried

[33] *See* the Commission's Action Plan for Better Regulation.

[34] *See* SN 180/1/93, 22/6/1993 for the Council's decision.

[35] The NPAA is an internal document adopted by the government of the country. Nevertheless, it is reviewed by the Commission services and the progress in its implementation is reported in the yearly Regular reports. See for example the 2004 Regular Report on Bulgaria's Progress towards Accession, SEC (2004) 1199, at 145.

out in accordance with the priorities defined in the Accession Partnership[36] and further elaborated in the roadmaps given by the Union to the accession countries and the internal strategic documents adopted by those countries.

The instrument which ensures the timely performance of the drafting activities is the fact that failure to implement the necessary legislating activities in the agreed time-frame might result in postponing the start of the official negotiations between the country and the EU, re-opening of negotiation chapters that have been already provisionally closed or negotiation of less beneficial transitional periods or periods of grace, and, ultimately, delay of accession.[37] The biggest risk arising from the necessity to abide by stringent timeframes is possible failure of executives to perform preliminary consultations with stakeholders and interest groups, in other words, 'to combine the conflicting requirements of efficiency and democratic legitimacy'[38] of legislation produced. Awareness is raised and information is provided on an ex-post basis after passing of legislation rather than as a normal and obligatory step of the decision-making process.

One of the greatest specifics of the legislative drafting for EU membership is that the progress that the country makes is subject to continuous very close monitoring and assessment by an authority, which is external to the national government and legislature.[39] The full alignment of the domestic legislation with the EU *acquis* is a task equally important for the candidate countries and for the Union itself. That is why mechanisms for monitoring and reporting at regular intervals have been set up, both at national and EU level,[40] with the aim to ensure the achievement of the agreed objectives. The performance of the country is monitored against the benchmarks provided for in the Roadmap for accession, covering both alignment of legislation and development of administrative capacity for its implementation and enforcement. It is reported in the regular annual reports

[36] The Accession Partnership was the main tool guiding Bulgaria's preparation for accession. Its successful implementation was enabled by the necessary political attention that it was given in the government's legislative and institution-building agenda, especially after the decision of the present government to conclude the negotiations by mid-June 2004.

[37] Bulgaria is a clear example of the negative consequences of the failure to prepare and perform in time. Bulgaria submitted an application for membership in December 1995. In its Agenda 2000 the Commission assessed the country as being insufficiently prepared to start negotiations. Moreover, Bulgaria began officially the negotiations in December 1999, after the decision of the Helsinki European Council, together with Latvia, Lithuania, Slovakia, Romania and Malta. Three years later, Bulgaria was lagging behind even Malta (who applied for membership after Bulgaria) and its accession was postponed for the 'second wave' of enlargement. The negative effect will be experienced in the increased difficulty for the country by the additional effort it has to make to negotiate the Accession Treaty with 25 instead of 15 member states.

[38] Y. Mény & J.L. Quermonne (Eds.), Adjusting to Europe: The Impact of the European Union on National Institutions and Policies, 1 (1996).

[39] In this case this is the European Commission as the EU institution, given the mandate to carry out the negotiations with the acceding countries.

[40] The monitoring mechanisms for the country was established in 2000 with a Decision of the Council of Ministers 802/2000 and consists of the Joint EC-Bulgaria Monitoring Committee and sectoral monitoring committees.

of the Commission on the progress of the country towards meeting the criteria for accession, in sectoral and thematic monitoring and evaluation reports and in the context of peer reviews.

D. Translation of Legislation

Applicant countries are required by the European Commission to translate the various legal texts constituting the *acquis* into their national languages by the time of their accession. This is a huge task as primary and secondary legislation alone represents a considerable volume of texts, roughly estimated at 90,000 pages of the Official Journal. In the framework of the translation of the *acquis*, the Court of Justice has defined a set of key judgements to be translated as a priority (representing about 15,000 pages).

To help candidate countries in this process, the European Commission has been providing targeted assistance under the Phare programme. With the help of TAIEX, the countries who have performed negotiations for accession, were helped to set up one centralized database to act as a repository of all translated acts and as the institutional counterpart through which those countries forward their translations to the Commission and the Council. The legal revisers of the Commission and the Council vet the submitted texts. They also meet regularly and liaise to exchange views and experiences with representatives of the abovementioned centralised Translation Co-ordination Units (TCU) in each country.

Analysis of the existent practices for establishment and development of the activities in the field shows that the continuous achievement of very good results is in general due to the establishment of very good relations in the field with the European Commission and maximum utilization of the assistance provided by TAIEX in the very early stages of the preparation of the countries for accession and even before the actual start of the negotiations. This allows the national administrations to quickly achieve the standards set by the EU and to avoid mistakes or incompliance in performing the task. Three particular types of activities prove to be very important in terms of national efforts and they deserve particular attention as a leading example for countries embarking on the path for accession to the Union, namely systematic collection of the 'European' terminology specific for accession negotiations and make it available and usable for the public in one single manual or dictionary;[41] establishment of a centralized Translation and Revision Center (TRC).[42] The effective functioning of such a

[41] *See, for example,* the Bulgarian Dictionary of the European legal terms (A. Velev, D. Valchev, N. Kutskova, Ch. Popov & Z. Popova, Dictionary on the Law of the European Communities (1998). The Dictionary was elaborated in the framework of a 1997 PHARE project 'Approximation of Bulgarian legislation with the EC law' and is the first and still the only one official reference tool for EU legal terminology. It provides official translations of EU legal terms in 5 EU languages – English, French, German, Italian and Spanish.

[42] The Translation and Revision Centre in Bulgaria was first established as National Documentation Centre under the Ministry of Justice in 1997. The Central Translation Unit was established in 1998, with the active participation and support of the European Commission TAIEX office.

The basic task of the Central Translation Unit and the Documentation Centre was to prepare a

center calls for its setting up as a governmental institution within the central administration. Such center is best positioned as a body directly responsible to the Council of Ministers or as an agency under the Ministry of Justice or the Ministry of the State Administration.

The mandate of the TRC should be to meet the legislative translation needs of the country during and after the accession process to the EU in a highly professional and efficient manner. This mandate is fulfilled by the translation of the *acquis* into the native language of the host country; translation of internal domestic legislation into the Community languages; creation and administration of a full-text database of EU primary and secondary legislation translations and of a terminology database, making such databases available to the public; and development and maintenance of a web page of the TRC. Such a database is most useful if it is at least bilingual – in both the native language of the host country and in English and if it provides quick, easy and free access to the huge databases of translated EU legal texts usually maintained by those TRC.[43]

Countries that understood the crucial importance of the implementation of their obligations as acceding countries with respect to translation of legislation manage to ensure and maintain a high level of quality of these translations as per the EU standards. This is achieved not without substantial and permanent efforts. All translations produced by the TRCs must pass through linguistic and legal revision. Language usage needs to be standardized through the development of huge but necessary databases and entries in those databases need to be made after consultations with the most recognized linguistic and legal experts in the relevant fields of the *acquis*.

E. Institutional Framework

Theory does not share a common understanding[44] about the nature of the Europeanization effect of EU membership and accession upon the national institutional framework[45] of the respective countries. Nevertheless, it acknowledges the changes that European integration brings about to and within domestic actors and the transformations of the existing inter-institutional relationships. The importance of the institutional framework from the point of view of legislative

unified terminologically official translation of the EU *acquis*. The Unit also had the task to create database of all existing translations of the EU legal acts, which were at disposal of all Bulgarian public institutions. The Unit was also involved in the elaboration and periodical updating of specialised glossaries with EU legal terms.

Along with the progress of the Bulgaria – EU accession negotiations more directed efforts for harmonisation of the Bulgarian legislation to the *acquis communautaire* were needed. Thus in 2001, with the Council of Ministers Decree N 105/25.04.2001 the activity of the Central Translation Unit and the National Documentation Centre was overtaken by the newly established Translation and Revision Centre (TRC) under the Minister of the State Administration.

[43] *See, for example,* http://www.trc.government.bg.

[44] *See* in this sense also T. Börzel, *Towards Convergence in Europe? Institutional Adaptation to Europeanization in Germany and Spain*, 37 (4) Journal of Common Market Studies 574 (1999).

[45] Both in general and with respect to legislative drafting.

drafting increases due to its close link to the question of European governance and establishing models and tendencies for enhancing its efficiency and impact not only within Europe but also far beyond its boundaries. From a legislating point of view, this paper identifies when and how these changes in the domestic institutional framework take place; what is the nature of the national responses to these changes, and what is the combined effect of a) and b) on the successful adoption and implementation of the *acquis*.

The harmonization of the national legal systems and the full adoption and effective implementation of the EU *acquis* have been acknowledged as one of the main instruments used to advance and deepen the processes of EU integration. This statement is equally valid for both EU member states and for the countries aspiring for membership. Considering this, the EU has established common standards for quality of legislation and has created mechanisms to ensure its timely transposition. It hasn't, though, created obligatory institutional designs and frameworks for production of legal texts and these remain largely up to the discretion of national governments. From EU perspective, the importance, which is given to domestic institutions, aims at assessing and ensuring the country's administrative capacity for the effective implementation and enforcement of the *acquis*. This observation is supported by the analysis of the wording of the legal criterion for accession introduced by the Copenhagen European Council in 1993. It concentrates on delivering of the result (full adoption of the *acquis*) but refrains from dealing with the process (the technical tasks falling within the scope of drafting for accession). Indeed, the 1995 Madrid European Council set forth demands for administrative structures[46] but again the focus was on ensuring the effective implementation and enforcement of the obligations arising from membership.

As a result, drafting capacity has somehow remained outside the scope of concern of the Union and the institutional framework established on the national level for making of legislation is not subject to formal requirements. One possible explanation for this is that legislating remains a sovereign function of the state and it is up to the discretion of the country to determine how it will be institutionally structured, following its own legislative history, drafting traditions, and particularities of the national system of legal education. The role of the EU in the process is to provide quality standards, methodological guidance, and, in the case of the accession countries, export of expertise and know-how and financial support for consultancy and training.

As a consequence from the lack of unified institutional requirements, the countries have been displaying differences in the process, speed, method, form and type of national implementing measures used by the national legislatures. The relevant parts of the *acquis* have been incorporated by the European legislators into the legal systems of the member states using a variety of approaches, 'characterised by specific differentiated organizational and procedural features'.[47]

[46] *See* SN 400/95 as of 16 December 1995. For a in-depth analysis *see also* Xanthaki, *supra* note 5, at 11.

[47] E. Chiti, *Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies*, 10 (4) European Law Journal 402-438, at 402 (2004).

The Commission has also been aware of the practical impact of the above differences, namely that they create diversity in the reception of EU laws and, ultimately, differences in the level of effectiveness of EU legal texts and realization of EU policy on the national level. Still, its involvement in the process has remained to a large extent confined to the establishment of mechanism for monitoring and control to minimize the risk at the implementation and enforcement stages rather than at the drafting one. The same tendency is followed in the existing academic literature. The level of research devoted to the subject of the approximation and convergence of the patterns of legislative drafting as a result from the European integration remains rather low despite the general understanding of the importance of making legislation for the purpose of carrying out Community policies and fulfilling Community objectives. Clearly, in law-making the relationship between the institutional frameworks existing in the European hemisphere display peculiarities, which vary both between the different stages of the process and between the different groups of states, i.e. member states and candidate countries. Within member states the Europeanization effect concentrates largely on the implementation and enforcement phase first because they (with the exception of the ten newly acceded states from Central and Eastern Europe) were not faced with the requirement to fully adopt the *acquis* before membership. This reduced both the conditionality and the adaptation pressure exercised upon their institution as a result from accession to the Union. Moreover, the principle of direct effect means that the amount of EU legal texts, which have to be incorporated into the domestic legal systems of these states, is significantly reduced with the effect of alleviating the legislating burden and streamlining the resources into safeguarding implementation.

At the stage of rule application the institutional change within the member states is characterized with a higher degree of conditionality. One cause for this is the 'agencification process in Europe'.[48] The collaboration between administrations in the exercise of Community functions performs along two axes, namely between national administrations on one hand, and between the latter and supranational ones. The establishment of this 'co-administration model',[49] involving 'the division of responsibilities and powers between different levels of governance'[50] leads to integration of administrative models through both exchange of know-how and best practices and adapting national systems to a center established at the European level executing a Europe-wide function.

The continuity of these institutional developments has been deepened by the adoption of the constitutional draft, which takes to a new level the Europeanization of the institutions of governance in Europe, leading to an increased coordination and coherence by creating a single legal framework for the constitutive principles and existing structures. At the drafting stage, though, the changes happening as a result from European integration can be seen in the adaptation of national policy-making and policy formation towards achievement of goals and objectives set on the European stage. The need to ensure the implementation of common

[48] *Id.*, at 403.
[49] *Id.*, at. 410.
[50] J. P. Olsen, *The Many Faces of Europeanisation*, ARENA Working Papers, ARENA 2001.

Community policies into the national domain entails the Europeanization and convergence of national drafting agendas. Furthermore, there is an adaptation of domestic institution towards a common 'European' model emerging from the joint 'informal understandings about appropriate behaviour within a given formal rule structure';[51] in other words, the existing co-operation and exchange of practices leads to collective 'institutional 'culture'[52] about the nature of the task and the means with which it should be performed.

Lastly, European integration leads to re-distribution of competencies between the national and territorial institutions of the member states. Indeed, the nature of European policy-making does give to regional actors increased possibilities for direct access to the supra level. At the same time, though, 'the formal rules and procedures of EU policy-making concentrate the decision powers in the hands of national executives'[53] thus reducing the legislative competencies of the territorial institutions. Thus, in spite of the various forms it takes and the different national responses it receives throughout the member states depending on their administrative organization and governance traditions, the ultimate effect of Europeanization is a shift and concentration of legislative power from the regions to the central institutions of a country.

An approach similar to the one described above has been adopted towards the countries preparing for accession. Indeed, the political documents containing the provisions for the accession negotiations emphasize on the necessity to strengthen institutions and to build up administrative capacity but in terms of implementation and enforcement of the *acquis*.[54] The Europeanization effect of the accession to the EU in these countries upon their institutional framework is a result not so much by a requirement for setting up a specific institutional design imposed by Europe but rather through the pressure exercise from within by national elite groups or in the context of the twinning exercise. This diversity creates the need for extreme caution and careful adjustment of the instruments, provided by the Commission, to assist the countries in transposition of EU legislation. The effectiveness of a technical assistance or the success of a twinning exercise is very much dependent on the awareness of the peculiarities of the domestic institutional structures.

Despite the specifics, which each one of the countries successfully concluded the accession negotiations with the EU has, they have one thing in common. They chose to carry out the task for approximation of its national legislation with the EU *acquis* throughout an institutional framework especially created by the national governments for this very purpose. And while the preparation and the enactment of legal acts has been following the common procedure required by the domestic laws of the countries, the drafting itself was performed by units in the central state administration with this special mandate, organized in a relatively independent, autonomously functioning system. The setting up

[51] Börzel, *supra* note 44, at 575.
[52] *Id.*, at 575.
[53] Börzel, *supra* note 44, at 577.
[54] One possible explanation of this is that the Commission has created the instruments, i.e. technical assistance and twinning, and provided for the financial assistance for the performance of legislative drafting for accession in the framework of the PHARE programme.

of such a specialized institutional structure proved to be one of the factors for the success of the exercise. The reasons for this include the fact that such an institutional network was established provided the necessary counterpart for co-operation with the partner administrations from the EU member states and created the framework for the transfer of best practices and know-how. It also served as the bases for building up of national expertise for legislative drafting needed both before and after accession for the fulfillment of the membership obligations. Moreover, this framework was established with an official act of the government. This demonstrated the will and long-term commitment of the political leaders to carry out and conclude the negotiations successfully. This formalization of the network served as an additional guarantee for its relative stability despite its evolution and refinement in accordance with the developments of the negotiations. Furthermore, the positive effect from the establishment of this specialized institutional framework was fortified by the fact that it has been set up very early in the process of drafting for EU accession, actually before the official start of the negotiations. Thus the necessary adaptation and gain of credibility was performed.

From the perspective of legislative drafting the characteristics and functions of this specialized institutional framework had several implications. It operates as relatively autonomous system of divisions and units functioning under a common overarching supervisory body. It does not substitute the 'traditional' legal divisions in the central administration, which continue to exist in parallel. The framework demonstrates the negotiation powers of the country and serves for building of trust and confidence from external counterparts in the abilities of the national administration to undertake the preparation work for accession. Its main task is to perform impact assessments and compliance analyses of draft legislation in terms of completion of substantive requirements and proper choice of the national implementing measure. It also has to ensure that the political commitments undertaken in the negotiation process are transformed into legally binding internal regulations. But once the national implementing measure is confirmed, it is up to the legal divisions to perform scrutiny of the form and to process the text for adoption as per the procedure established in the country. It is subject to gradual evolution and adjustment to the needs of the negotiation process. With time the framework usually becomes more refined but also more elaborate.[55] This affects the speed with which an internal act is processed and, finally, adopted. The time aspect is always an issue in the legislative drafting process but during the last stages of concluding the negotiations with the EU it could prove crucial for their success. In this environment, the performance of the system depends on two additional factors, which are the level of internal co-ordination and cooperation between the different sub-units and the stability and continuity of the system as a whole.

[55] *See, for example,* Regulation No. 47 of 10 March 1995 of the Council of Ministers of Republic of Bulgaria, establishing a Governmental Committee, Coordination commission and a Secretariat on European integration within the Council of Ministers with the mandate to perform the initial preparations of the country for the start of the negotiations; further elaborated by Regulation of the Council of Ministers No. 66 of 22 March 1995.

A demonstration of the above can be seen in the case of Bulgaria where the initial framework included a Governmental Committee, Coordination commission and a Secretariat on European integration. The official start of the negotiations was marked by the creation of a Council on European Integration as the supreme political body entrusted to make decisions with regard to European integration matters, and thematic working groups to coordinate the process of drafting of legislation and perform the negotiations under the various *acquis* chapters. Further on, the designation of a Chief negotiator and a core negotiation team ensured that the Bulgarian administration speaks with a 'single voice' and there is a clear institutional responsibility in interacting with the Commission services.

This institutional framework, nevertheless a very positive national response to the challenges of accession, in reverse demonstrated a number of deficiencies. They are estimated as clear drawbacks and require the increased awareness of the countries embarking on the road to accession. This deficiency is that the institutional framework displayed instability and risk to maintain continuity because of the high levels of turnover of staff. Again, as analyses demonstrate, the very large amount of workload to be done within a very stringent timeframe combined with extremely high demands for quality of the result created pressure, which was very difficultly sustained without additional guarantees and benefits for the state officials. This has been repeatedly pointed out and criticized by the Commission as detrimental to both the successful completion of the negotiations and the effective and efficient utilization of the targeted training and other capacity building activities carried out with the assistance provided by the Commission. The available resources of a country are wasted in duplication of effort to create the skills for those civil servants who have replaced the ones who have left. Furthermore, the Commission has strongly advised the candidate countries to provide for the necessary safeguarding provisions in their national legislation with regard to the civil service as a pre-condition for the continuation of the EU pre-accession financial assistance.

Practice shows that there could be at least two possible successful national responses to the recommendations of the Commission. First, the introduction of changes in the internal act governing the civil service and creation of stronger guarantees for the employees within the state administration by enlarging the scope of the civil service and improving the range and quantity of the employment and social benefits provided for civil servants and their families. Second, provision of additional financial incentives for the civil servants working in those directorates of the central government responsible for the EU integration and the management of the EU funds. In order to be effective and serve their purpose these incentives should be set forth in legally binding regulations. Furthermore, they should be structured as a mechanism based on an elaborate system for regular (quarterly and annual) performance assessment. The system must be subject to confidentiality rules as a protection against inspiring unnecessary competition amongst the civil servants but nevertheless should be open for external audits (at least by the national Court of Auditors and the Commission evaluation and auditing services) as an additional guarantee against arbitrariness of decisions.

These steps create additional conditions for sustainability and further prepare the country's administration to successfully undertake and fulfill its responsibilities upon membership as a part of the enlarged 'family' of European administrations.

F. Drafting Approach

The transposition of the *acquis* in the candidate countries for the purposes of the EU accession differs significantly from the way in which national legislation is elaborated in general in the methodology, which has been followed through recruiting of external technical assistance and in the framework of the twinning exercise. These specific instruments are an expression of the specialized character of the drafting for EU accession and the understanding that the alignment of the country's legislation with the *acquis* is a process of cooperation and partnership and efforts should be made on both sides. The Commission has been providing special assistance through the PHARE programme to help candidate countries meet the legal criterion for accession. This is how the initial lack of drafting capacity and 'in-house' expertise are overcome.

The partnership approach and the change in the focus of the assistance[56] are especially visible in the increasing application of twinning (usually upon recommendations from the Commission) as a preferred instrument of delivering support. This is not only because it was created as such after the strategic re-orientation of PHARE in 1997 towards the needs of accession but mostly because it represents the joint effort required and its success is based on the mutual cooperation of the parties. The core function of twinning is not simply to assist in the analysis and drafting of a certain piece of legislation but to transfer knowledge and *acquis*-related skills from the administrations of the member states to the ones of the candidate countries. This is also the big advantage of twinning in comparison to the consultancy-based service contracts for technical assistance that it is an instrument for introducing a change in the working mentality of the recipient administration through transposition of administrative models. It fosters the creation and operation of efficient networks between the collaborating administrations, which is especially desired and necessary after accession. Despite the lack of formal requirements towards the institutional framework for alignment of legislation as discussed above, the twinning exercise created the environment for convergence and integration of national administrations and the informal 'Europeanization' of the administration of the candidate country.[57]

At the same time these instruments represent also a conditionality of the process as they are designed as such by the Commission and provided for as a working framework in the legal documents granting the EU financial assistance.[58]

[56] From 'demand-driven' in the early years of PHARE implementation to 'accession-driven' after the reforms of the instrument in 1998.

[57] *See* in this respect also K Papadoulis, *EU Integration, Europeanization and Administrative Convergence: The Greek Case*, 43(2) Journal of Common Market Studies 349-370 (2005).

[58] Financing memoranda and project fiches.

The rules and procedures for their contracting are also externally established[59] and the results from their implementation are subject to monitoring and external interim and ex-post evaluation.[60] Transposition of the *acquis* is effectively carried out also by utilizing the country's own resources, especially after building-up of sufficient national expertise. Additional factors which could necessitate the increased deploying by the country of this method, in particular towards the end of the negotiations, include a political decision of the government to conclude accession negotiations and sign an Accession Treaty with the Union before a particular date; and performing of negotiations under the most difficult chapters, namely those involving significant financial implications for the country after accession.[61] The successful combination of all above methods help forge the way of candidate countries towards achievement of their commitments to complete the negotiations and enjoy the benefits of the full membership to the European Union.

G. 'Europeanization' of Drafting

I. Choice of National Implementing Measures – Conditionality and Europeanization

One of the direct, though unintended, results from the process of drafting for EU accession is that it creates informal pressure for changing the existing national styles and practices for elaboration of legislation both in the member states and in the accession countries. The transposition of EU legal acts results in the introduction and promotion of new patterns and methodologies for legislative drafting. The importance of the issue rises from the fact that the question about the form of the legal acts is a question about the accessibility and readability of their provisions and, ultimately, about the implementation of the rights and obligations stemming from them.

Comparison between the legal system of both the EU member states and the candidate countries shows that most of them follow the civil law approach and style of legislative drafting. This affects also the form of their internal legal acts and as a result they display important differences in their structure compared to the EU ones (which tend to use the common law pattern). This is most obvious in the cases of legal definitions: in the EU legal acts definitions are presented in the very beginning, while in the internal legal acts of the countries from the civil law family they tend to be presented at the end of the text as an integral part of its final and transitional provisions. Another case refers to the rationale and legal

[59] In the Practical Guide for contracting of the assistance under PHARE, ISPA and SAPARD and in the Twinning Manual.

[60] In the framework of monitoring and evaluation of PHARE projects.

[61] These include Chapter 6 Competition Policy, Chapter 7 Agriculture, Chapter 21 Regional Policy and the coordination of the structural policy, Chapter 28 Financial Control, Chapter 29 Financial and Budgetary Matters. The early definition of a financial framework which will be applied towards the country after accession helps in this process.

and social background for the adoption of the text: in the EU texts it is explained in a preamble or introductory provisions. In the internal systems of member states and candidate countries, 'the motives' are submitted to the legislator as a separate document[62] apart from the main body of legal provisions. As a general rule EU legal texts come with headings. Moreover, the more extensive texts (i.e. the Treaties) have a table of contents. This rule is not always followed by the national legislator. These peculiarities entail the application of a different approach towards drafting, interpretation and implementation of legislation.[63] The need to change and adjust the approach every time an EU act is transposed into the domestic national legal system impacts negatively the process of harmonization of legislation as it increases the amount of time and effort required by the drafter, slows down the process and lowers the levels of effectiveness and productivity.

The described effect, in particular in the case of candidate countries, is viewed by both academics and practitioners as a major risk for the full and timely transposition of the *acquis*. This has been a valid consideration during the process of legislative drafting for EU accession but will also remain as such after the membership of the country. This is even more the case having in mind the number and diversity of the EU legal texts. The solution suggested as a possible way to overcome this problem is that countries adopt the European model of constructing legislative acts. It is claimed that by introducing uniformity of approach the pressure that drafters currently experience will be reduced, ambiguities in interpretation will be avoided and, ultimately, high levels of coherence and consistency will be achieved. The practical implementation of this proposed solution could also lead to the informal convergence of existing patterns and methodologies for drafting legal texts, a phenomenon which can also be described as 'Europeanization' of legislative drafting of the domestic legal systems.

H. Conclusion

This analysis looked at the process of transposition of the European legislation into the national legal systems of candidate countries and their efforts to fully align their legislation with the provisions of the *acquis*. This was done in comparison to the legislative drafting performed by the EU member states with the aim to point

[62] *See, for example,* Article 28 from the Bulgarian Law on Normative Acts which requires that the so called 'motives' are drafted and submitted to the Council of Ministers and the Parliament (the National Assembly) as a separate document attached to the bill. The motives are an internal document, which serves presentation and discussion purposes. It is not published and in the common case is not available to the public.

[63] The clear and correct interpretation of legal texts often require knowledge about their structure as well as specific skills with regard to reading and understanding their internal logic. For example, one has to be aware that the reading of a Bulgarian law should always start from its end as there one has to find the definitions of all terms contained in the law or relevant for its interpretation, as well as provisions concerning its entry into force, whether it amends or repeals other laws, etc. The lack of table of contents (especially in the case of large and exhaustive legal acts, like codes or basic laws) and the inconsistent approach towards headings of articles do not in any case increase the level of accessibility or 'readability' of the text by its addressees.

out the peculiarities and conditionalities of legislative drafting for EU accession. This was undertaken with the understanding of the importance of legislation as a major tool to advance and deepen the processes of EU integration. In view of the continuing enlargement of the Union and the expected application for membership of new countries studying the specifics of this type of legislative drafting and the experiences of different states which have already successfully concluded the accession negotiations is an important instrument to foster and maximize the efficiency of the process of legislative drafting for EU accession and membership.

Examination and comparative analysis of the existing practices should enable drawing of conclusions about the relevance of the approach undertaken by a country and the need for its possible adjustment, especially in view of the changing legal environment of the Union. The incorporation of the lessons learnt from previous attempts into the design and performance of future activities will help the aspiring countries to enhance the levels of effectiveness and efficiency in the use of their resources and better plan and utilize the available external advice and financial support of the Union. The countries should seek to ensure both quality and sustainability of the results achieved even during the early stages of their preparation to begin the negotiations with the EU. This will create the necessary ground that the administration, the society and the citizens of those countries feel more quickly the impact from the introduction of the European legislation and institutional practices as a tool to promote economic and social reform and to foster the processes of democratization. The informal convergence, integration and, ultimately, 'Europeanization' of drafting and administrative models will be an additional guarantee for institutional stability and governance based on the rule of law.

Following these considerations, the analysis aimed at making a contribution to the definition of the conditions or the framework for success of the legislative drafting exercise in EU accession countries and for the conclusion of the pre-accession negotiations. The paper focused on drafting of legislation both because it is believed that the issue has not been yet extensively explored and also following the understanding that drafting creates the basis for efficient implementation and enforcement of regulation. Legislative drafting for EU membership and accession is a specific type of legislative drafting in general. As such, it should be performed with observance of the national regulations introduced to govern the process and should follow the historical traditions, practices and educational models existing in the country. Sharing and exchanging information about these contributes to the unique diversity of Europe and enriches its legal environment with a larger spectrum of possible choices.

Nevertheless, the process is highly conditioned by requirements established externally, outside the scope of the national jurisdictions. These combined with the national diversities hide risks for the efficient transposition of the EU law, which, together with the peculiarities of the legislative drafting for EU accession as a process itself, should be borne into mind in order to avoid discrepancies and achieve the desired objective.

Two factors stimulate the success of the country. First, the early understanding of the above peculiarities and constraints and the elaboration of an adequate national response to them in the very initial stages of the preparation of the country for EU accession and even before the official start of the negotiations as such. The legal foundations of Europe are in a process of change with the elaboration of the draft Constitution. Its coming into force will lead to considerable simplification of the *acquis* and 'will assist candidate countries in their understanding of the task laid before them'[64]. In other words, the simplification that the Constitution upon its eventual entry into force will introduce into the European legal system will ease the task by making it more clear and 'approachable'. Nevertheless, this does not change the core nature and, more important, the methodology for performing the negotiations so the new aspiring countries know early in advance what are the challenges and expectations and can take the advantage of using the already available know-how and start investing in themselves. Second, maximum utilization of the assistance provided by the Commission in the framework of the pre-accession programmes. The legislative drafting activities should be carried out in an environment of active participation of the candidate country and in cooperation and mutuality with the services of the Commission and the member states. Europe in itself is a partnership exercise created by joint effort and based on the mutual understanding that sharing of the risk minimizes the cost of development and increases the benefits for the countries and for their societies. The awareness of a country of these factors will help measuring of its chances for success and will enable offsetting obstacles and risks in the way to the objective of accession and full membership.

[64] *See* Xanthaki, *supra* note 5, at 12.