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CHRISTEN BOYE JACOBSEN

Implementing the  
*acquis communautaire* -  
the fight over 80.000 pages

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### **About the author:**

**Christen Boye Jacobsen** works as a Deputy State Secretary (Danish Ministry of Business and Industry) and Chief Adviser under the Pre-Accession program for Central and Eastern Europe under the Danish Royal Ministry of Foreign Affairs. The points of view expressed here are entirely the author's own.

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## 1. The overall obligation to accept the *acquis communautaire*

I begin by observing that the title of this essay is somewhat misleading, for in a formal sense there is no “fight” about the *acquis*. Since the first round of accession talks with the UK and others in 1962-63, the EU always insisted upon acceptance of the *acquis* as a non-negotiable *préalable*.<sup>1</sup> It is important to stress that this is a political and practical must, and thus not just an ideological stance linked to supranationality. This was amply demonstrated in January 1963 by the famous veto of President de Gaulle.

Nobody can become a member of a club without subscribing, in law and in practise, to its rules, be they few or plentiful, and without demonstrating a capacity to become a constructive and loyal member. Therefore, all candidate countries begin their application for membership by formally accepting the *acquis communautaire*. But of course we see again and again that they get some surprises during negotiations as they discover how *strictu sensu* it is meant, and how much it implies. And this time it is true more than ever before, because this accession round differs qualitatively in comparison to all earlier accession rounds.

Let us just remind ourselves that the last round of extension 1993-94 concerned Austria, Finland, and Sweden. They are among the world’s most developed countries concerning administrative, economic, and legal infrastructures, and furthermore they had as members of the European Economic Area implemented most of the *acquis* outside the Common Agricultural Policy.

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<sup>1</sup> Christopher Preston: *Enlargement and integration in the European Union* (Routledge 1997).

## 2. The nature and size of the obligation to implement: the *acquis* is a wide notion, but implementation duties go beyond that

2.1. The *acquis* constantly increases quantitatively and qualitatively. Lord Denning famously compared it to an ever incoming and never receding tide. And the newer *acquis* has a tendency to be more sophisticated, and thus require a more developed national infrastructure in order to implement it meaningfully.

2.2. But equally important is that the *acquis* is much more than the sum of treaties, regulations and directives. This is a point which is easily underestimated.

"*Acquis*" is the past participial form of the French verb for acquire, *acquérir*, and "*acquis communautaire*" covers thus everything which the EU so far has realised ("acquired") in the legal or political sense. The best illustration of this is to look at the accession acts. The latest Accession Act (1994), like all other accession acts, detailed the *acquis*:

**Group 1:** "*provisions of the original Treaties*", Art. 2.

**Group 2:** "*acts adopted by the institutions*", Art. 2. (This comprises regulations, directives, decisions, and recommendations).

**Group 3:** "*decisions and agreements adopted by the Representatives of the Governments of the Member States meeting within the Council*", Art. 4(1) 1'.

**Group 4** "*declarations or resolutions of, or positions taken up by the European Council or the Council*", Art. 4(3).

**Group 5:** "*declarations or resolutions ... concerning the Communities or the Union adopted by common agreement of the Member States*", Art. 4 (3).

**Group 6:** "*conventions and instruments in the field of justice and home affairs which are inseparable from the attainment of the objectives of the E U Treaty*", Art. 3.

**Group 7:** "*conventions provided for in article [293] of the EC Treaty*", Art. 4(2).

**Group 8:** "*conventions ... that are inseparable from the attainment of the objectives of the EC Treaty*", Art. 4(2).

**Group 9:** "*agreements concluded by the present Member States related to the functioning of the Union*", Art. 4(1) 2'.

**Group 10:** "agreements concluded by the present Member States ... connected with the activities of [the Union]", Art. 4(1) 2'.

**Group 11:** "agreements and conventions concluded by any of the Communities, with one or more third States, with an international organization, or with a national of a third State", Art. 5 (1).

**Group 12:** "agreements and conventions concluded by the present Member States, and any of the Communities, acting jointly", Art. 5(2).

**Group 13:** "agreements concluded by [the present Member] States which are related to [agreements and conventions concluded by the present Member States, and any of the Communities, acting jointly]", Art. 5(2).

**Group 14:** "internal agreements concluded by the present Member States for the purpose of implementing [agreements and conventions concluded by the present Member States, and any of the Communities, acting jointly, and agreements concluded by [the present Member] States which are related to [agreements and conventions concluded by the present Member States, and any of the Communities, acting jointly]], Art. 5(3).

**Group 15:** "positions in relation to international organizations and those international agreements to which one of the Communities or to which other Member States are also parties", Art. 5 (4).

This is a broader, wider and much more diversified mass of *acquis* than often thought. And it is necessary to add that this *acquis* has to be accepted in the interpretation which the Court of Justice has given *or will in future give*, cf. 8 below. Thus, candidate countries also accept the dynamic nature of EU law, that EU law takes priority over national law (*lex superior*), and that EU law may be directly applicable in favour of EU citizens.<sup>2</sup>

It is also interesting to see that international negotiations and accession acts often give the "other" *acquis* a twist in the direction of being more binding.<sup>3</sup> An example of this is the Code of Conduct on taxation.<sup>4</sup> The Code limits the possibilities of tax measures which may distort competition. Some candidate countries tried - quite unsuccessfully - to argue that this was not part of the "real" *acquis*, or that this is not binding upon the member states. Conversely we saw the somewhat comical suggestion by the CAP-hostile Member States who unsuccessfully

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<sup>2</sup> See the Commission's Opinion 19 April 1994, OJ 1994 C 241/3.

<sup>3</sup> Many overlook that whether or not a measure is "directly applicable in a member state" may be rather immaterial to the fact that it is binding on member states. The accession treaties very often have the effect that the resolutions and recommendations of the Council and the communications of the Commission, on e.g. restrictions on anti-competitive measures, become anointed by the Council and thus more binding.

<sup>4</sup> Resolution of the Council and Member States, December 1, 1997, OJ 1998 C 2/2.

tried to postulate that some regulations on direct support of farmers fall outside the *acquis*.

2.3. When we shall see the Accession Act, the volume of adaptations may impress us. But the underlying truth is that initial *acquis*-acceptance by candidate countries meant that 90 % of the *acquis* was not up for discussion, and 90% of the adaptations of the *acquis* are purely technical, such as inserting the word for public and private companies in the official languages of new member states in the company law directives.

The overall guidelines for adapting the *acquis* are that only transitional measures can be discussed. Transitional measures are defined as exceptional, limited in time and scope, and accompanied by a plan with clearly defined stages for the application of the *acquis*. They must not involve amendments to the rules or policies of the EU, or disrupt their proper functioning, or lead to significant distortions of competition. To this we should add that the Commission basically denied that transitional measures are appropriate within the Single Market area.

We are not here going to discuss the transitional measures in any detail. But it may be useful to outline some features to illustrate how principles fare in practice.

Let us first observe that the situation right now is very much as could be foreseen. The big problems are in such areas as *acquisition* of land, the Common Agricultural Policy, the regional funds, and the common labour market. Let us also note that the empathy of candidate countries and their grasp of their negotiation position have differed notably. This has had a direct bearing on the results so far, and also on the perception of the results in the various candidate countries.<sup>5</sup> The present candidate countries have little public culture of legal thinking, and many risk therefore being trapped by happily assuming that the fulfilment of their EU-law duties is a political problem "to be discussed later-on". It is hard to guess how

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<sup>5</sup> Some candidate countries overlook that their behaviour also is pondered and weighed in Brussels to estimate whether they will, one day, be a loyal and constructive member state, and that doubts here may induce the EU side to build legal guarantees into the Accession Act.

many fully realise that they may have to “negotiate”<sup>6</sup> before the European Court of Justice.

When we look at the various areas where we could foresee difficult negotiations, the land *acquisition* problem was foreseeable, as it is a very real one with fears from sky-rocketing of prices to unsolved legal *cum* psychological complications due to the forced exodus of Germans from Eastern Europe.<sup>7</sup> But seemingly and hopefully transitional periods can be accorded for agricultural lands and secondary residences combined with a fading away of the scars of WWII. We could also easily guess that closing of nuclear plants and the slashing of state aid for shipbuilding, coalmining, and steel-mills required protracted negotiations, and are to be sweetened by intervention from the structural funds.

But after all the high moralising from the EU side, it seems to have taken the candidate countries somewhat by surprise that the EU side would ask for transitional measures, and of such a magnitude, on the labour market and agriculture. Maybe they should have foreseen, but one of their problems at the outset was the absence of a modern civil service to which we return under 4 and 9.<sup>8</sup>

The result of all this is that so far we only have a solution traced out for transition into the common labour market: the rather complex and bizarre opting in and opting out system. For the regional funds and the CAP, where huge costs for the EU side appear, there are all kinds of disagreement. Much as the candidate countries here would like the application of the *acquis* as of day 1, everybody must know that it is inconceivable as nobody is ready to foot such a bill. But the core

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<sup>6</sup> In Danish you can make a joke out of this, as the verb for negotiate and plead is the same (“*forhandle*”).

<sup>7</sup> Denmark has a permanent exemption at formal treaty level, see Protocol no 16 to the Maastricht Treaty.

<sup>8</sup> One of the problems of candidate countries seems to have been that some never imagined that the total acceptance of the Copenhagen criteria was meant as seriously as stated (and not just at a Soviet surface value), and that they overlooked that they had to “pay for” their phasing in and economic support with transitional arrangements benefiting the old member states. The reason behind this is probably that they overlooked that the accession of Central and Eastern Europe may not be as popular with the general public as it is with the political, economic and intellectual strata in Western Europe.

problem is the need for radical CAP reform that the EU side internally cannot agree upon.<sup>9</sup>

Of course there is also a host of technical problems from protecting the *spratus spratus* swimming in Riga Bay *via* trademarks and on to environmental policy. It was always manifest that implementation in practice of the environmental *acquis* before 2004 is not materially possible, not even if huge amounts of money were to appear from nowhere, and it was always evident that this is a major EU concern. And here we see an area where unbridgeable differences have been overcome more easily than we could hope for a few years ago.<sup>10</sup>

Finally we should mention that one of the more imaginative features of an accession treaty is the creation of new *acquis*. The last accession round saw two such cases of inventiveness. One was the creation of a new objective 6 under the regional aid scheme for agriculture under the Arctic Circle.<sup>11</sup> The other was the Alpine transit regime to alleviate the practical and environmental problems which the huge transit traffic between north and south in Europe creates for Austria.<sup>12</sup>

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<sup>9</sup> This includes a WTO agreement on trade in agriculture which has worse prospects now than a year ago.

<sup>10</sup> Which, of course, imply some "benign neglect" e.g. on the part of the Nordic countries that are much exposed to the effects of the pollution of the Baltic Sea.

<sup>11</sup> OJ 1994 C 241/354 (Protocol no 6).

<sup>12</sup> OJ 1994 C 241/361 (Protocol no 9).

### 3. The overall approach of the European Union - the Copenhagen criteria

3.1. The EU reacted quickly to the new situation in Central and Eastern Europe after the collapse of the Soviet Union. But in contrast to NATO, the EU is a union built on law and the rule of law. The Central and Eastern European countries suffered from lack of a rule of law, of a sustainable market economy, of modern legal structures, and of fit and proper courts and civil services. This caused the EU - beginning with the Copenhagen European Council December 1993 - to formalise the qualifications of candidate countries beyond what had been earlier envisaged. These can be summarised under three headings:

- the Copenhagen criteria, and
- the implementation of most Copenhagen criteria requirements **prior** to membership, and
- massive support in expertise and money.

Each of these is in turn examined in the following.

It should be added that there are important preparatory legal steps, of which the most important are the Europe Agreements. These are concluded with all candidate countries, being in part free trade agreements, in part framework agreements in preparation for full membership. It is often overlooked that they contain a number of precise obligations whose timely fulfilment would advance the realising of the Copenhagen criteria.<sup>13</sup> Another important market adaptation is the accession of the Eastern and Central European countries to the WTO. Thus both sets of rules initiated total reform of intellectual and industrial property legislation.

3.2. The general conditions under which Eastern and Central Europe may accede to the EU are known as the **Copenhagen Criteria**.<sup>14</sup> The Copenhagen criteria are four:

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<sup>13</sup> Many of the provisions on free movement of industrial goods, competition, and industrial and intellectual rights have stringent duties, see 7.3 and 7.4.

<sup>14</sup> They were basically adopted by the European Council in Copenhagen, December 1993, and somewhat refined months later in Madrid.

1. Democracy, human rights, public honesty, and the rule of law be applied in theory and practice.
2. The existence of a functioning market economy that can sustain competitive pressures.
3. A total and legally correct implementation of the whole *acquis communautaire* (unless the accession treaty otherwise permits).
4. Honest, efficient, and well-functioning courts and civil services that recognize and enforce obligations under the other 3 criteria at the level which the union citizen has a formal right to expect.

In a formal sense this imposes conditions upon the Central and Eastern candidate countries that are not found in any earlier accession treaty.

To our earlier conclusion that *the acquis is much more than directives and regulations*, we can add a second: *That the Copenhagen criteria imply legislative and administrative obligations and actions that go beyond the acquis.*<sup>15</sup> The explanation of this is, of course, that the existing legal and social order of all earlier candidate countries made such requirements superfluous,<sup>16</sup> as they were already fulfilled.<sup>17</sup>

There are several reasons which necessitated this:

- The rule of law and human rights are in part based upon a number of international conventions.
- Administration and justice require, for courts and civil services, laws which codify requirements and procedures in order to ensure civilised standards for citizens and the "*effet utile*" of the *acquis*.
- The functioning of the EU, and especially the Single Market, requires a body of total and comprehensive legislation in order to function both

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<sup>15</sup> That an accession treaty deals with subjects outside the *acquis* is, however, not new. In the 1972 Accession Treaty, at French insistence and intransigence, the UK agreed to reduce the role of the UK£ as a reserve currency, Preston op.cit. (note 2) p. 34 f.

<sup>16</sup> But a consequence of the new accession treaty may be that the Copenhagen criteria will also be legally binding upon the old 15 member states.

<sup>17</sup> As they indeed also are for Cyprus and Malta.

properly and honestly. This is the concept of the legislator as a service organ for the well-functioning market.

- The *acquis* is in several cases linked to, built upon, or supplements international conventions applied in all Member states.
- The *acquis* regulates in most cases, e.g. company law or financial services, only part of the legal area. It supposes that there is a legal framework for the area as a whole ensuring the good functioning and good governance of the area.

Should we restate it in short, we can say that anything less would endanger the whole idea and working of the EU and thus risk squandering the whole *acquis* and reduce the EU to just another (inefficient) international organisation.

We will in the following examine how these requirements affect the implementation of the *acquis* and the real extent of the implementation duties of candidate states for each of the four Copenhagen criteria. But before that we have to look into two “institutional” problems, which EU membership and the *acquis* directly and indirectly require to be repaired and improved: the state of legal theory and law studies, and the structure of legislation. For trying to rapidly inculcate good legal training and an organized structure of laws and legal sources is one of the great charges.

## 4. The role of the legal “system”, lawyers, the courts, and law faculties

4.1. At the beginning of the 1990s, the administration and the politicians of Central and Eastern Europe grappled with the political and principal problems of a new state. This was a period where the support of the EU was not yet streamlined for efficient assistance. During that period, the laws were a mixture of laws of the socialist period with amendments, some revived rules from the period before WWII, and a mass of rapidly produced rules that were either compilations of detailed rules or statements of political principles and declarations of symbolic value rather than material regulation.<sup>18</sup>

It rapidly became evident that all these rules had to be reformed within a short period. The “evidence” came in part from radically different EU obligations, but in part from the manifest failure of the rules to work in practice, or to meet the needs of a modern society or a market economy.

A further consequence of this legislative failure was a kind of stalled development or bottleneck problem. During 1997-99, this had a noticeable brake effect upon the realisation of the Copenhagen criteria.

Were there no other challenges, this would be a manageable problem. But it was part of a bigger problem, in that everything in these countries needed reform: The transition to democracy and a market economy, integration of minorities, the defusing of a heavy and incompetent bureaucracy, privatisation, and adaptation to the Copenhagen criteria.

4.2. The rule of law requires a transparent legal system. And the market economy requires the kind of services which good legislation and governance represent. This includes non-mandatory rules, which apply “unless otherwise

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<sup>18</sup> This can be illustrated by the Latvian commercial law “system” anno 1995:

- ◆ a resurrected civil law of 1937 which was largely a Latvian version of *das Baltische Gesetzbuch* [1862],
- ◆ a criminal code from the days of Stalin with a lot of hasty amendments,
- ◆ at least 15 company law statutes, amended at least 40 times,
- ◆ a competition law, a bankruptcy law, and a consumer protection law that stated general principles of the nature which Eastern Europeans in the early 1990s thought should be the laws of a market economy.

stipulated in the contract". Examples of such rules are found in company law, contract law, inheritance law, and sale of goods acts. Such laws, of course, do exist. But the reasons are more likely to be old-fashioned ideas of the state as the source of law than any advanced thinking behind legal economy, which is not so natural for those who grew up in the *Obrigkeitsstaat* - system where the law was supposed to be an emanation of the will of abstractions such as the "people" or the "nation".

The *acquis* increasingly puts citizens - not the state and its bureaucracy - at centre stage. But most implementation thinking in the candidate countries focuses around the point of view of the public administration. This is even truer when it comes to legal consequences: invalidity, civil compensation, cancellation etc. Only administrative and penal sanctions are well developed.

For those who have not had a close look at it, it can be hard to conceive how outdated, insufficient, and qualitatively poor major parts of socialist law were. Even forgetting the absence of rule of law - due to the supremacy of the party's leading and guiding role - it could in part not be described as a "functioning legal system". A striking feature was its sheer size, and the amounts of uncoordinated and/or detailed technical rules in some areas, and the virtual absence of rules in other areas.<sup>19</sup> That property, contract, and commercial law were not well developed can hardly be surprising. But also the rules on technical norms and standards were inadequate. This constituted barriers not only for the adaptation of industry to the world market, but also for ensuring adequate protection of the lives, health, safety, and economy of citizens.

In Leninist thinking, a modest place was accorded to lawyers, and the production thereof was relatively small. Worse, both students and teachers were "security"-controlled. The focus was on public law, criminal law, and on general and classical learning. Modernising it requires major reforms of curricula, study plans, materials, etc., and a radical change in the mentality of university teachers and judges, including honest and meaningful examinations. Teaching methods are

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<sup>19</sup> One of the best analyses is Rene David: *Les grands systemes de droit contemporains* (Dalloz, several ed. 1964 ff).

still generations behind the Nordic universities. It also requires large-scale production of textbooks, which are still rare.

**4.3.** A major task is to accustom lawyers to the proper handling of legal sources and the kind of thinking bound to this. When lawyers from Western Europe discuss the rules on free movement of goods, persons and services, they first consider the principles laid down by the jurisprudence of the Court of Justice. When reading the European literature, especially on establishment and services, the major flaw is insufficient knowledge of secondary EU law and the national legal systems. In most candidate countries, the inverse situation prevails. Discussions would concentrate on the various directives. It is not so difficult to take a directive and demonstrate that its wording requires certain amendments to national law. But the stumbling block will often be the notions of directives and judgements that form part of the general legal system. Many find it difficult to combine written with non-written sources of law such as the interpretation methods of the Court of Justice.<sup>20</sup>

For the same reasons, many civil servants find it difficult to perform the opposite operation: to take a national law and relate it to the EU legal *system*. But that is, basically, the intellectual operation to be performed in order to correctly implement the *acquis*.

Part of this problem and task is that the legal system needs new terms, notions, and definitions. These only slowly seep into the system. The speed depends much upon reforms in legal studies and law faculties. And reforms here are not forthcoming very rapidly.

Presently, candidate countries stand the risk of implementation errors that will require (frequent) changes to the rules, because the first implementation(s) only implemented what could be seen from the textual meaning of the words. When there is no legal "system", and when nobody has an overview of the law, there is the risk of production of contradictory rules. (And that risk cannot be avoided by the use of often highly specialised EU experts).

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<sup>20</sup> This is even to-day a problem, because the Europe Agreements contain rules corresponding to Articles 28, 43 and 49. This is often overlooked.

4.4. If legal theory is weak, it is a safe guess that the drafting and preparation of normative acts also face problems. Only a minority of civil servants have a legal education at all. Draft laws are submitted to parliament without the detailed annotations used in Western Europe. These problems are aggravated, because the demand for lawyers very much exceeds the supply. As many young civil servants only stay a few years in a job, there is also an imperfect track record.<sup>21</sup>

There is also little tradition of the art of a careful law drafting technique, combined with less tradition for consulting or co-operation with interested parties and NGOs. And often the NGOs, e.g. trade unions and associations of industries, do not appear to be very interested, nor staffed to enter into such dialogue.

Thus, the torrent of legislation contains the risk of creating an incoherent legislation that hampers efforts to create a legal system. In Central and Eastern Europe it may for example be difficult to explain how consumer law and civil law relate to securities or insurance contract law. For a Western European lawyer, the "system" will ultimately provide an answer.

4.5. A question for most Western lawyers would be how the courts could contribute to developments here. But experience suggests that within this decade they will not contribute very much. The reform of court systems is one of the heaviest and most demanding reforms.

Thus a part of the torrential implementation legislation becomes an "*ersatz*" for the absence of a high quality and well-functioning system of civil services, courts of law, and legal theory.

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<sup>21</sup> Therefore, the European Commission's requests for documentation and explanation, as well as plans such as the EU-required NPAA (=National Program for Adoption of the *Acquis*) attract increased importance, because they enforce the creation of track records.

## 5. The requirement of a legal structure

5.1. A major conceptual difficulty, especially during the earlier phases of accession negotiations, was to create a general understanding that legislating is not just issuing a stream of rules, but also the creation and emanation of a coherent system and order in the legislation. Therefore the EU may insist on a total reform of the laws on the police, on administrative, civil and criminal procedures, on the civil service etc., and even the civil and penal codes, albeit there is no *acquis* requiring it.

But unless a country does have such laws, complete and modern, it does not fulfil the 1<sup>st</sup> and 2<sup>nd</sup> Copenhagen criteria, and hardly the 4<sup>th</sup>. And it would furthermore be difficult to see how there will otherwise be a proper framework into which the *acquis* can be inserted. One should remember that the *acquis* rarely concerns a whole area of law, but rather part of it. Thus, when the Commission tabled the draft 2<sup>nd</sup> and 3<sup>rd</sup> company law directives in 1970, it settled a decade of dispute in Denmark on the need for total company law reform as opposed to just some repairs to the old 1930 act. The answer was that without the framework of a new, more comprehensive law, the draft directives could not meaningfully be translated into Danish law.

Within the Single market legislation, this means that member states must have a system that *grosso modo* follows the following scheme:

CIRCLE	SUBJECTS
1 <sup>st</sup> (inner)	<ul style="list-style-type: none"> <li>• Contract, tort, and property law, incl. mortgage law</li> <li>• Bankruptcy law and parts of enforcement procedures</li> <li>• Criminal Code</li> <li>• Intellectual and industrial property law</li> </ul>
2 <sup>nd</sup> (middle)	<ul style="list-style-type: none"> <li>• Company law</li> <li>• Competition Law</li> <li>• Marketing and Consumer protection law</li> <li>• General rules on recognition of professional qualifications</li> </ul>
3 <sup>rd</sup> (outer)	<p><i>Special Legislation</i> e.g.</p> <ul style="list-style-type: none"> <li>• Financial sector &amp; supervision law</li> <li>• Special contracts (e.g. insurance, securities, labour, transport, rent and con-dominium)</li> <li>• Special protection rules (e.g. advertising, product liability and safety)</li> <li>• Standardisation, conformity assessment &amp; accreditation</li> </ul> <p><i>Institution Building</i>, e.g.</p> <ul style="list-style-type: none"> <li>• Bankruptcy courts</li> <li>• Competition Enforcement Agency</li> <li>• Consumer protection agency</li> <li>• Financial Supervision</li> <li>• Land Book service</li> <li>• Standardisation, accreditation and certification bodies</li> </ul>

The good functioning of a normative act depends upon the inner circle(s) being equally or better functioning. Thus the isolated implementation of directives may be an empty gesture, because - in legal terms - they contain too many empty *renvois* to a non-existent inner "core law area". Examples of this are the rules on banks' own funds and solvency ratio.<sup>22</sup> They list various categories of assets and obligations which credit institutions may have, and contain an unusually high density of civil and commercial law notions. Most candidate countries have implemented the directives as they stand. But in many cases the notions used were not defined in civil or commercial law.

5.2. To avoid any misunderstanding, it is nowhere suggested that a candidate country must adhere to the Roman law tradition of big codes. But in a confused legal climate, a code may create transparency and unity of terminology, which would not otherwise so easily be brought about. The problem with codes is of course that if they are to have the desired quality, they may be a time consuming affair, and that may bottleneck other required developments in legislation and EU implementation.<sup>23</sup> Considerable energy and resources may be lost in bureaucratic manoeuvres around drafting codes.

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<sup>22</sup> Directive 2000/12, 20 March 2000, art. 34-47, OJ 2000 L 126/1.

<sup>23</sup> Thus, in the Baltic States civil code problems caused great delays in implementing directives on consumer protection, insurance contracts, labour contracts, product responsibility, and securities trade.

## 6. The requirements of the first Copenhagen criterion on democracy, human rights, fairness and due process of law

In 1993, there were only few rules on democracy, human rights, and due process of law formulated in EU law.

But whatever there was, was fairly fundamental to governments and citizens, and the whole idea of accepting the Central and Eastern European states was to ensure them the EU level, not to dilute the EU's *acquis*. Indeed, Articles 2, 6, and 49 of the EU Treaty confirm the attachment to the democratic values for present and future member states.

This is also an area where the *acquis* has increased manifold during the last 10 years, especially under the "third pillar" on justice and home affairs. But many of the rules on these subjects were and are found in international conventions and agreed documents, emanating under the auspices of the UN, the Council of Europe, and the OSCE, to all of which the candidate countries have become members. Centrally stands here the European Convention on Human Rights, including the Human Rights Court.<sup>24</sup> Another important normative act is the Geneva Convention on refugees and asylum.

It is not disputed that all candidate countries do presently<sup>25</sup> have political democracy. But the candidate countries have had to answer in much detail to their systemic problems on practical issues relating to access to speedy, efficient, and honest justice, enforcement of justice, prison conditions, and the fight against endemic corruption.

Under the system of annual progress reporting and Accession Partnership<sup>26</sup>, the candidate countries have had to engage themselves to produce good and decent

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<sup>24</sup> The exact legal nature of the EU's own 2000 Charter of Human Rights (OJ 200 C 364/1) was left deliberately vague.

<sup>25</sup> After the Slovak election in September 2002, there should be no more question marks here.

<sup>26</sup> The major component in the planning of prior adapting to the EU and the Copenhagen criteria is the National Program for the Adoption of the *Acquis* (NPAA), which each candidate country must annually submit to the Commission. This is prepared in collaboration with the European Commission under an "Accession Partnership" agreement which sets out the priorities, timing, and financial resources.

penal codes, laws on administrative, civil, and criminal procedures, on enforcement of judgements, and prisons. This includes adherence to a substantial number of conventions under the UN, the Council of Europe, and the Hague Institute.

They have also had to introduce fundamental reforms on the practical working of courts, state administrations, and prisons, and on the training and remuneration of their personnel.

And finally, the EU has directly and openly required measures against the often rampant corruption, requiring and supporting anti-corruption action plans. This also requires legislation, administrative reforms, and adherence to a number of conventions of the OECD, the Council of Europe, and of other bodies such as the FATF on money laundering. During recent years, increasing focus has been placed on (anti-) corruption, as its dangers for EU citizens become more apparent, especially concerning control of the common external border which will mostly belong to the present candidate countries. They thus become responsible for sending food, non-food and persons into free circulation in the EU and certifying that the conditions therefor are fulfilled.<sup>27</sup>

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<sup>27</sup> Nobody has dealt with the very practical problem of member state civil liability for losses in other member states. See art. 1(1) of Regulation 44/2001, 22 December 2000, OJ 2001 L 12/1.

## 7. The 2<sup>nd</sup> Copenhagen criterion on a well-functioning market economy which can sustain competitive pressures has deep implications for the legal systems

7.1. To-day we take the 2<sup>nd</sup> criterion on a well-functioning market as an evident requirement. But this is witness to the magnitude of ideological changes during the post-Soviet era. For when the Copenhagen criteria were adopted in 1993, the EU's own legal admission of the principle of an "open market economy with free competition" was just one year old.<sup>28</sup>

But new as it was, it was part of the *acquis*, and thus had to be accepted. And no doubt all candidate countries whole-heartedly embraced it in 1992. But whether they or the EU then visualized the Eastern and Central European societies' wounds and worries sufficiently well to have an idea of how and how much it would change their societies, only future historians can tell.

The criterion contains not just an ideological, but also a qualitative target: The market economy should be "well-functioning" and should "be able to sustain competitive pressures" from the other member states which inevitably follow from joining the EU. If this is not fulfilled, the candidate countries would not be able to be satisfied members of the Union, and they would become permanent burdens for the Union.

7.2. It could of course be guessed at the outset that the 2<sup>nd</sup> criterion meant the abolition of all kinds of barriers to the market. Many candidate countries have thus reduced drastically the number of "regulated professions", or a number of other permits that have no rational meaning in a market economy.<sup>29</sup> It also became evident that part of the reasons for the explicit 4<sup>th</sup> criterion are found here, as a

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<sup>28</sup> It arrived in the present art. 4 of the EU Treaty with the Maastricht Treaty 1992. Only then had the advantages of market economy become openly accepted by the political left and by the *etatistes* on the right wing in Southern Europe. These were the years of market economy triumphant as witnessed by Francis Fukuyama: *The End of History and the Last Man* (1992).

<sup>29</sup> This includes all the rules which give the administration discretion "to feel its powers", or even worse: to enable corruption, which seems to have been the *ratio legis* of quite a number of rules.

grinding bureaucracy is one of the worst enemies of business, and especially of attracting foreign direct investment (FDI). Contrary to already established enterprises, the local administration has no powers over potential FDIs. And multinationals furthermore include the findings of organizations such as Transparency International in their investment planning.

It was also foreseeable that the criterion implies adherence to some very important international conventions and bodies, such as the IMF and the WTO.<sup>30</sup> Also a number of conventions and organizations combating corrupt business practices and money-laundering had to be adhered to.<sup>31</sup> But only with annual progress reporting from 1997 and onwards did it become quite clear what the legislative impacts of the 2<sup>nd</sup> criterion were.

**7.3.** A market economy presupposes that private property is recognized and is widespread in practice. The EU legal system takes care not to favour private or public property, see Art. 295 of the EC Treaty. But the early 1990s were the high tide of privatization also in the present EU. And the EU was most insistent upon a planned and extensive privatization that should be accomplished before the date of actual membership. This inevitably implied complex legislation and administrative setup, which became even more complicated by the policy of restoration of property confiscated during the socialist period.

Property rights need a solid legal and administrative basis. This led the EU to take a strong interest in land registers, and thus also in land registration and surveys and legislation on land registers. But these, in turn, also led to insistence on functioning rules on transfer of property in the civil codes, and also on a modern company register system.

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<sup>30</sup> The candidate countries adhered in their own interest to the World Bank. It can, however, be pointed out that not all the legislative interventions of the World Bank have been beneficial. Often they tried to impose a model taken from the Americas rather than the *acquis*, and some of the support was short of qualified lawyers.

<sup>31</sup> The biggest miss is that the EU has not insisted on OECD membership, cf. Art. 304 of the EU Treaty. Only 4 candidate countries are members. But all must adhere to a number of OECD conventions.

7.4. When we read the annual progress reports, we see that the Commission's interest and support descend further into the functionality of the parts of the legal system that are of special interest to the business world. One such area is company law. The EU has therefore urged the candidate countries to introduce a modern and coherent company law, and not just to introduce company and accounting directives.<sup>32</sup> But even more the EU has been insistent upon a well-functioning legislation on bankruptcy and reconstruction. In the 90s this was an area where the insufficiencies of the candidate countries' legal systems were very much tested.

Another area of great importance for the good functioning of enterprises and the economy is the financial sectors. In the Commission's progress reports the financial services *acquis* is partly dealt with under the 2<sup>nd</sup> criterion. Indeed, the organization of capital markets has required much attention and support. This has also included support for establishing second tier pension reform.

But two areas have been deemed of special importance to the well-functioning market: competition law, and industrial and intellectual property rights. Here EU law has been introduced in candidate countries by the Europe Agreements.

7.5. That a well-functioning market requires efficient competition and thus a competition law system like that of the EU, is uncontested. But there is not much *acquis* to implement in competition law. All rules are regulations, addressed directly to market participants and competition authorities, notably to the Commission's DG Competition.

The Europe Agreements impose obligations upon candidate countries which the Member states never accepted. Concerning restrictive business agreements, abuse of dominant influence, merger control, public enterprises, and state aid,

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<sup>32</sup> On the other hand, no candidate country has so far introduced the two types of supranational companies: The Economic Interest Group (Reg. 2137/85), and the European Company (SE) (Reg. 2152/2001).

their laws should correspond to the EU rules,<sup>33</sup> and the national competition authorities should apply these rules in accordance with principles developed upon the basis of EU law, which in clear text means that they accept the Commission's and the Court of Justice's legal interpretations as *res judicata*.<sup>34</sup>

On public procurement, the Europe Agreement contains only a non-discrimination requirement. But the Accession Partnerships long ago transformed this into a duty to implement the procurement directives.

**7.6.** The kind of exclusive rights granted by industrial and intellectual rights legislation were anathema to the ideology of socialist states. In return inventors and artists were granted other kinds of advantages.

With the crash of socialism, one might think that it required hardly any incitement to change this. And at a superficial level this was true. At first, persuasion was left to the market and the soft persuasion of the WIPO. Then came the WTO negotiations where especially the USA insisted upon the protection of such rights, including counterfeit.<sup>35</sup> But the EU ended up with a very stringent set of obligations. The Europe Agreements require that each candidate state within 5 years of the entry into force of that agreement:

- Ensures a level of protection equal to that found in the Union, i.e. not just in the *acquis* but also in the best practice of member states. And the text makes it clear that this extends to practical rights enforcement.
- Applies for membership of the European Patent Organization.
- Accedes to most multilateral conventions on intellectual, industrial, and commercial property.

It seems correct to say that candidate countries' freedom of choice is only at the level of details. It should also be added that candidate countries have been given substantial support in these tasks.

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<sup>33</sup> As late as 1989 Denmark introduced competition law reform building upon principles different from those of the EU Treaty Arts. 81 and 82, and with no merger control. (That this experiment only lasted till 1995 is another story.)

<sup>34</sup> In a regulatorily interesting development, Latvian law has merged all regulators of all Art. 86 - undertakings into one common regulator.

<sup>35</sup> The USA even for some time held Latvia hostage to some WTO industrial rights disputes.

## 8. The easiest criterion to manage: the 3<sup>rd</sup> criterion on full *acquis* implementation

8.1. When you arrive at the 3<sup>rd</sup> criterion, you might think that you arrive at the biggest and heaviest chapters of this essay. But this need not be so, because there are two ways of approaching it. One is to descend into details as the Commission does in its regular progress reports. This requires you to go through each of the 31 negotiation chapters,<sup>36</sup> and to discuss a mass of technical and legal subjects. But this would by-pass the reasonable space of a paper such as this, and there are no reasons to compete with the Commission's annual reports.<sup>37</sup>

The other approach, to be followed here, is to highlight some horizontal issues and pick up a few examples.

8.2. The headline "the easiest criterion to manage" does not imply that 100% correct implementation (unless transitional measures are granted by the accession treaty) of 100% of the *acquis communautaire* is a quantitatively small task. For it is the most massive task that ever confronted any civil service or legislator in so short a time. Neither does the headline imply that it is technically or legally easy. Nor does it underestimate the political difficulties of such a "guided reorientation", nor the cost to the national budget of the requirements for an enhanced civil service or infrastructure or of the requirements of such costly sectors as the *acquis* on environment or social benefits.

But the 3<sup>rd</sup> criterion is the easiest to manage in the sense that we know - from theory, practise, and accession negotiations - what the *acquis* is. That is the very meaning of EU-law being a functioning legal system. And controlling the correct implementation of the *acquis* - albeit a huge task - is one of the core tasks of the Commission's legal service. This also applies to parts of the unwritten *acquis*. As mentioned under 4 above, there is a very considerable jurisprudence on the free

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<sup>36</sup> The chapters are listed in the annex.

<sup>37</sup> The reports are found on the Commission's home page: <http://europa.eu.int/comm/enlargement/report2001/index.htm#Regular%20%20Reports>. The problems are discussed at some length in Christen Boye Jacobsen: Adaptation of the legal system of candidate countries - the case of the Baltic States, DUPI Working Paper 2001/8 (Copenhagen 2001), p. 11 ff.

movement of goods and services, and the freedom of establishment.<sup>38</sup> And one Court decision, the *Gravier* case on equal rights to higher studies and study benefits,<sup>39</sup> has a heading of its own in the negotiation documents.

**8.3.** Much of the implementation is closely linked to the 4<sup>th</sup> criterion on institution building, and to PHARE support, see 9 and 11 below. Experts assist in planning and executing many of the tasks. As time went on, and formal laws were adopted by parliaments, legislation at the secondary level got heavily intertwined with institution building, training etc.

As everything cannot be accomplished at the same time, a strong system of priorities has been established through the NPAA and Accession Partnership.<sup>40</sup> In 1998, the Council pointed to the Single Market, state aid, environment, nuclear security, and justice and home affairs ("pillar 3") as priority areas. The Commission also had some priorities of its own, including the Competition law area.

Over the years there have inevitably been some changes or additions, e.g. in transport safety and equal treatment of men and women. But today where a considerable part of the EU system wants the EU to be a haven of safety and quality, every subject linked to control of the common external border has come into the centre of attention.

**8.4.** In the chapter on implementing the *acquis*, it might sound somewhat bizarre to postulate that there is more to implement than the *acquis*. But this is nevertheless very much the case. International obligations play a role in regulating EU law, either as the fundament on which the EU builds, or as *lex speciales* for international relations. As an illustration can be cited the data protection directive whose proper functioning in member states supposes that they implemented the Council of Europe convention on the same subject.<sup>41</sup>

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<sup>38</sup> A very important point here is that the various options under these rules are choices to be exercised by citizens and companies, even if this implies inconvenience for member states.

<sup>39</sup> Case 298/83, *Gravier*, ECJ 1986 p. 610.

<sup>40</sup> Cf. foot-notes 22 and 27. The first list of priorities was the three stages into which the White Book (1996) divided the *acquis*. The two first should be implemented by now.

<sup>41</sup> Convention for the protection of individuals with regard to automatic processing of personal data, 28 January 1981, cf. preamble no 11 of Dir. 95/46, 24 October 1995, OJ 1995 281/31.

A main provider of such conventions is the Council of Europe. Its list of conventions contains 17 heads on social protection, 6 on education,<sup>42</sup> 22 on patents and medicine, and 27 in the area of free movement.

But also the OECD produces conventions to adhere to (export credit, shipbuilding, and bribery). From various parts of the UN system (ECE, IMO, WIPO, WTO) come a number of conventions on international transport and industrial and intellectual rights.

Many of these international instruments have been imposed upon candidate countries during the accession negotiations.<sup>43</sup>

To that can be added that in some parts of EU law, the national supervisory authorities come together outside the EU framework and supplement the practical working of directives by administrative agreements. In insurance these arrangements are as voluminous as the directives.<sup>44</sup> Candidate countries will also have to adhere to them.

#### 8.5. Has the *acquis* implementation been attained, and will it be attained?

At the formal level - as much as is in the law gazette - much has been accomplished. We do not yet have an assessment on how well it has been done qualitatively or in the details, but nevertheless overall optimism is allowed. Uncertainties relate to the fact that negotiations are a mixture of *sein* and *sollen*. In many cases, one of the 31 negotiation chapters (see the annex) has been closed because the candidate country accepted the *acquis* and no major problems were foreseen, i.e. the candidate country could demonstrate with a reasonable degree of certainty that either it was already implemented or that it would be so on day 1 of actual membership.<sup>45</sup>

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<sup>42</sup> To which must be added the Bologna Declarations which form the overall structure of all higher education in Europe.

<sup>43</sup> The obligations under the 2<sup>nd</sup> Pillar (Common Foreign and Security Policy) are not discussed in this paper.

<sup>44</sup> There are also international organizations in financial supervision (BIS, IAIS, and IOSCO). But as the EU is not represented in conformity with the AETR doctrine (by the Commission) their rules do not bind the EU or Member States.

<sup>45</sup> In a few cases a chapter was closed as the candidate country declared that albeit it considered all the *acquis* already implemented, it promised to implement any further *acquis* duties identified by the EU side.

Where are we then on day 1 of actual membership? Given the deficiencies of the candidate countries, it is politically accepted that not all will be *in optima forme*. In a formal sense, most *acquis* will be implemented, because that is what is required. But for some years effective *acquis* implementation will go on.<sup>46</sup> The greatest tests will come in areas related to the common external border (corruption, food-safety, immigration control).

The new member states will face an interesting problem concerning the increasing part of the *acquis* which under the doctrine of direct applicability does enter into force on day 1 of actual membership. Court decisions stating this are sure to constitute both legal chaos and a healthy lesson to some foot-dragging parts of and in the candidate countries.

**8.6.** And then a last question: Why does *acquis* implementation matter so much.

The best and simplest answer is that this is what the EU is about. Success or breakdown of the *acquis* is also the success or breakdown of the EU.

The additional answer is that the *acquis* is also a technical way to express the ideal of a society that is well functioning, civilised and humane.

And in practical terms good and enforced laws give a better society. You may even get a Nobel Prize in economy for explaining this. Of course, society does not get rich and honest *just because* of good laws. But experience from to-day's world overwhelmingly relates the sadness of the opposite situation: That without good laws, a society easily becomes dysfunctional, and most likely corrupt and dishonest.

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<sup>46</sup> And so will the PHARE program in disguise, cf. 11 below. The Commission Legal service will also need quite a number of years to digest the laws of 10 new member states.

## 9. The 4<sup>th</sup> criterion on institution building. Part of the solution or the problem?

9.1. A problem area for accession is the nature of the civil services of Central and Eastern Europe.

The adoption of the *acquis* means that the candidate countries have to adapt their public infrastructure to respect EU law and standards as soon as possible. This requires considerable changes in existing public services, the establishment of new ones, retraining, and investment. This is particularly the case concerning the Common Agricultural Policy, because the CAP cannot function without a solid administrative infrastructure. But it also applies to many other areas such as environment, nuclear safety, transport safety, working conditions, marketing of food products, consumer information, and control of production processes.

This is the normal meaning of the term "institution building", which also covers the financing of investment in the regulatory framework, such as e.g. for testing and measuring equipment related to the internal market, or for laboratories and control equipment in the field of consumer protection.

The starting point of the candidate countries was feeble. We have to remember that formally the Soviet system did not adhere to the rule of law, but to the supreme guiding role of the Communist party. Consequently the administrative system could be technically inadequate, intransparent, and complex, in some areas enormous, in others quasi-non-existent, often corrupt, and with a bureaucratic tradition of avoiding personal responsibility and initiatives, and for the purposes of a modern state mostly with inadequate theoretical training. And the same applied - maybe even more - to the court system. In both cases salaries during the early 1990s grew rather obsolete. The Commission's official analysis of the candidate countries' administrative capabilities is hardly flattering:<sup>47</sup>

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<sup>47</sup> The following is quoted from Part 2 of the Commission's general policy paper, <http://europa.eu.int/comm/enlargement/pas/phare/focus.htm>.

“Institution building means adapting and strengthening democratic institutions, public administration and organisations that have a responsibility in implementing and enforcing Community legislation. The integration process is not simply a question of approximating candidate countries' legislation to that of the Community; it is also one of ensuring the effective and efficient implementation of the texts. It includes the development of relevant structures, human resources and management skills.

Institution building means designing management systems and training and equipping a wide range of civil servants, public officials, professionals and relevant private sector actors: from judges and financial controllers to environmental inspectors and statisticians, to name but a few. ....

Public administration reform is a key determinant as to whether new member states can function within the Union. However, much remains to be done before accession to develop a suitable public service culture, to reduce the opportunities for widespread corruption and increase the results from current anti-corruption programmes, to develop inter-ministerial co-ordination and to ensure that the many talented people who work in public administrations have the resources, remuneration and motivation to do the jobs that accession will demand and the public increasingly expects.

The instruments used in the PHARE programme risk being undermined by systemic failings in national administrations. There will be no improvement without strong political commitment by candidate countries. The EU needs to develop with the Member States and other donors a stronger collective voice so that candidate countries' commitment to better public administration can be fostered and built on.”

An inefficient and dishonest civil service is unacceptable to the EU side, not just in principle, but also because the doctrine of "*effet utile*" implies that the *acquis* is not only correctly implemented into national law as the supreme law of the land, but that the *acquis* is also efficiently and effectively applied and enforced by the courts and the civil services.<sup>48</sup> And that this happens in practice is under EU law a fundamental right of the union citizen.

That the law is a living reality, and to the benefit of citizens, is maybe the biggest difference between Western Europe and North America, and the rest of the

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<sup>48</sup> See Art. 41 of the EU charter on human rights, OJ 2000 C 364/1.

world. And it is one of the major explanations of the wealth and stability of the market economy of these regions.<sup>49</sup>

The consequence thereof means explicit and implicit requirements upon civil services and courts of Central and Eastern Europe that are quite outside what they were accustomed to. The EU side requires quantitatively an efficient and rapid performance, and qualitatively honesty and competencies, e.g. a border control that without corruption or undue delay and with competencies up to modern standards verifies that food and non-food goods can legally be put in free circulation in a EU of 25 states.

But let us not forget that the civil services of Central and Eastern Europe are being put to a task so vast that no civil service before was faced with anything like it: Within a decade they should modernise themselves, put all the *acquis* - as well as all other reforms required by the rule of law, market economy and the Copenhagen criteria - into the statute book, restructure themselves according to the new law, and enforce it efficiently and honestly.

**9.2.** The 4<sup>th</sup> criterion targets primarily practical action plus secondary law. But even here there are some international obligations to be adhered to. Thus the Council of Europe has a number of conventions on administrative co-operation, and both the UN, the Council of Europe and the OECD have recently come up with some instruments on public honesty.

The regulatory framework for public administration has been very much in the focus. The general framework of public administration would most likely have been reformed even without the EU, but both through pressure and support the EU has seen to it that all framework laws on public administration, on civil servants and their training, and on the pay structure were put in place or modernised. Also many of the sectoral administrative acts had to be reformed, especially on agriculture and fisheries, and border control.

The EU has taken a special interest in administration of public means, payment agencies and auditing. There are two obvious reasons for this. First, this is

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<sup>49</sup> I refer here especially to the writings of the Peruvian economist Hernando de Soto.

after all where it is most easy to commit fraud. But it also relates to the fact that most administration of EU funds is decentralised to member state agencies. The EU thus insisted on regulations on public audit, including internal audit in each public agency. One of the latest EU inventions was that every candidate country must have a central unit to fight corruption.

**9.3.** Will the 4<sup>th</sup> criterion be fulfilled at the date of accession? That question we cannot answer today, because administrative reforms only really can begin when parliament has adopted all the necessary laws. But we can say that as the laws are being adopted, the EU switches its attention to the regulatory systems. And it will continue scrutinizing right up till actual membership.

There is, however, a problem as to whom we are to compare the candidate countries. Is it the Nordic countries or the Mediterranean countries? In the latter case I do not doubt that they will *grosso modo* arrive at a level at which a majority of the present member states cannot disapprove.

What we can tell, already to-day, is that adaptations and reforms are going on *en masse* and fairly rapidly. Mostly, the Commission deems the reform rate satisfactory.

## 10. An additional condition on timing: the prior implementation condition & the track record requirement

In 1998, the Commission practically added a further criterion, “the track record”: “the irreversible, sustained and verifiable implementation of reform and policies for a long enough period to allow for a permanent change in the expectations and behaviour of economic agents and for judging that the achievements will be lasting.” This was most likely a reaction to the slowing down of the implementation around that year. To minimise problems later on, and to gauge the preparedness of candidate countries, it basically requires that the *acquis* should be implemented **before** membership, - in certain cases “well before accession” -, and for some core legislation even before substantive accession negotiations can begin.<sup>50</sup>

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<sup>50</sup> For regulations there applies the somewhat bizarre situation that many will have to be implemented in national law **before accession**. And under the general principles of EU law most will have to be repealed at the date of accession.

## 11. Support and control: pre-accession assistance from the EU and its Member States

**11.1.** Bridging 50 lost years within a decade would not be materially possible without substantial economic and expertise transfer from the West. During the second half of the 1990s a support system was put into place, whose main guidelines embraced the whole public sector and often the whole society of candidate countries. EU economic support for the years 2000-06 will amount to around 3 bill. EURO annually. This falls into three categories: ISPA for transport and environmental infrastructure, PHARE for institution building and investment, and SAPARD for agricultural and rural development.

The relevant fund here is PHARE, whose aims are described by the Commission in the textbox in 9 above.

In addition to that, many Member States, the European Bank for Reconstruction, and the World Bank grant support, loans, and expertise of many kinds. Danish support for many years has amounted to more than 1 billion DKR annually. Many of the Danish projects aim at *acquis* implementation in the wider sense. Among the projects is the Continuous Professional Training concept for civil servants, the Master of European Public Administration programs, and assistance to reform of the law faculties.<sup>51</sup>

**11.2.** It is of course difficult to quantify the effects of this massive support. It is clear that for many years after actual membership the present candidate countries still have to undertake far-reaching reforms. But it is also clear that what has so far been accomplished, could not have been realised in such a relative short span of time without foreign support. And it appears equally clear that in some form or another the PHARE program must be continued during the first years of actual membership.

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<sup>51</sup> Other targeted law reform activities are the Danish training of Latvian lawyers for Masters of European Law, and the Swedish initiated Riga Graduate School of Law, that gives a master's degree in (i.a.) European (business) law.

**11.3.** The carrot of support is linked to the stick of control.

Under the Europe Agreements and the accession preparation arrangements, implementation of the *acquis* is prepared through various programs. The candidate country should establish a National Program for Adoption of the *Acquis* (NPAA), see footnotes 22 and 27. Mixed commissions and sub-committees under the Association Councils ensure that candidate countries in reality adapt their legal systems and public administration to EU requirements. And each summer, all candidate countries are to present the progress realised during the last year in a report in accordance with a format prescribed by the Commission. This report is part of the material for the Commission's Regular Progress Report to the European Council in December in which the Commission appraises progress and the capability of each candidate country to assume membership, and problems are highlighted.

It has been decided that the screening continues right up till actual membership. And as an introduction to the last phase of negotiations, the Commission is to undertake a screening of the administrative capabilities of each candidate country for each of the 31 chapters (see Annex).

## 12. Do the Copenhagen criteria and their implicit terms form a just and equitable solution?

We regularly hear some who describe the basic conditions in the Copenhagen criteria as too harsh or cumbersome. But I submit that this be due to insufficient understanding or acceptance of the objects of the EU, or of ignorance of the mechanisms which render such co-operation successful over the long term. For experience - the least fallible guide to human experiences<sup>52</sup> - tells us that an undemanding or undynamic co-operation stands no long-term chances.

We might also as a *préalable* underline that where there are real problems, there will also be a solution, be it transition, be it a new *acquis*, or be it support in experts and money to overcome problems. Indeed, my experience of a generation of negotiations is that those who come to Brussels with a good case, and who know how to advocate it properly, do not return empty-handed. (And the sad fate (?) of the Common Agricultural Policy, from which otherwise many lessons can be drawn, is too many-faced to contradict this point.)

If we stick to the principles, let us first remind ourselves that he who wants to join a club or an association, must abide by its rules. This universal requirement is the core of all accession negotiations since 1962, and all applicants knew and accepted it in advance. And it is by all standards of law and politics just and justifiable - here more than ever before. For the whole purpose of accession is to lift candidate countries up to EU standards, not to dilute the accomplishments of the EU during two generations.

This leads us right to a second point. Membership or not, the EU *acquis* represents the legislative level required for obtaining and maintaining a modern market economy with the rule of law. Thus even states which will not apply for membership, from Switzerland to the Far East, but in quest for success, have introduced - or are introducing - rules whose substance mirrors the *acquis*. This is most clearly reflected in the WTO accession conditions.

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<sup>52</sup> Alexander Hamilton in The Federalist Papers No 6.

But the Copenhagen criteria may have saved the candidate countries from a much worse fate. Look at all the countries which have had major economic crises since 1997. They have some common characteristics: corruption and a low-quality and disfunctional legal system - that is, the very opposite of the Copenhagen criteria. And regard then the fate that befell Russia. Economists debate hotly whether other economists, including the World Bank and the IMF, gave sound advice in the early 1990s, or whether different economic advice ought to have been given. But they do not discuss whether economists have respected a couple of basic assumptions of their own science: First, the rationale for the division of labour, and second, that a good legal system is a condition for a well functioning market economy.<sup>53</sup> Had they followed these and called in others who were better equipped for legislative and regulatory tasks, much would have looked better in Russia. Look to the careful timing aspects of the White Book, Accession Partnership and the NPAA *versus* the hasty reforms in Russia. You do not give a long-term patient all the drugs in one day! How *fortunater* were then the candidate countries in receiving the meticulously elaborated EU requirements with their gradual approach accompanied by large-scale support and full-scale expertise.

We can with a good empirical basis conclude by saying about the EU and the Copenhagen criteria, what Sir Winston Churchill said about democracy: It is certainly not (yet) infallible, but it has proved superior to anything so far seen. The well-conditioned EU membership procedure for Central and Eastern Europe is the best chance for a better future which Europe can give itself. That the task sometimes may look like a superhuman one to accomplish, even at the technical level, is in the long-term context no more than ripples on the surface.

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<sup>53</sup> See e.g. The new Russia, Transition gone awry, ed. Lawrence R. Klein & Marshall Pomer (Stanford UP 2001).

## ANNEX

## The 31 Negotiation Chapters

CHAPTERS	C	H	PL	EE	CZ	SI	M	SK	LV	LT	BG	RO
1. Free Movement of Goods												
2. Free Movement of Persons												
3. Freedom for Services												
4. Free Movement of Capital												
5. Company Law												
6. Competition Policy												
7. Agriculture												
8. Fisheries												
9. Transport Policy												
10. Taxation												
11. EMU												
12. Statistics												
13. Social Policy & Employment												
14. Energy												
15. Industrial Policy												
16. Small & Medium Enterprises												
17. Science + Research												
18. Education + Training												
19. Telecommunications & Info												
20. Culture + Audiovisual Policy												
21. Regional Pol. & Coordination												
22. Environment												
23. Consumers & Health												
24. Justice & Home Affairs												
25. Customs Union												
26. External Relations												
27. Foreign & Security Policy												
28. Financial Control												
29. Financial & Budgetary												
30. Institutions												
31. Other												

NOTE 1: Chapter 5, Company law, also covers industrial and intellectual rights.

NOTE 2: The medium grey boxes are chapters where negotiations were closed by July 2002.