Why the Promotion of the *Acquis* Is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy Instead of Just Promoting the *Acquis*

- Some Lessons from the Fifth Enlargement

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...a system of mirrors created an illusion that this table was transparent from all sides. Actually, a little hunchback who was an expert chess player sat inside and guided the puppet's hand by means of strings...
Walter Benjamin 'Theses on the Philosophy of History', Thesis I[1]

I. Introduction

Ideally, to assure that the candidate countries join the Union 'on the basis of the same criteria and […] on an equal footing',[2] in the course of the pre-accession process[3] preceding the Eastern enlargement[4] the European Union (EU) monitored virtually all the aspects of the candidate countries' development, including the level of democratisation, the Rule of Law and the protection of human rights. All these elements of assessment are not only part of the Copenhagen political criteria of democracy, the Rule of Law and human rights,[5] they are also rooted in the legal system of the EU, most notably in Articles 6 and 7 TEU (as well as 49 TEU, making a reference to 6(1) TEU, talking about 'liberty, democracy, respect for human rights and fundamental freedoms…') and in important case-law of the European

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[1] Benjamin, Walter, 'Theses on the Philosophy of History', in Benjamin W, *Illuminations*, translated by H. Zohn (Harcourt, Brace & World Inc., New York, 1968), 255.

[2] Luxembourg European Council, Presidency Conclusions, 12–13 December 1997, § 10.

[3] On the concept of 'pre-accession' *see* Maresceau, Marc, 'Pre-Accession' in Cremona, M. (ed), *Enlargement of the European Union* (OUP, Oxford, 2003); Inglis, Kirstyn, 'The Pre-Accession Strategy and the APs', in Ott, A. and Inglis, K. (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press, The Hague, 2002).

[4] 2003 Treaty of Accession, [2003] OJ L 236. On this Treaty *see* Inglis, Kirstyn and Ott, Andrea, 'EU-uitbreiding en Toetreidingsverdrag: verzoening van droom en werkelijkheid', [2004] 52 (20) SEW 4, Inglis, Kirstyn, 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible', [2004] 41 CML Rev. 4, 937; Lannon, Erwan, 'Le traité d'adhésion d'Athènes: Les négociations, les conditions de l'admission et les principales adaptations des traits résultant de l'élargissement de l'UE à vingt-cinq Etats membres', [2004] 40 CDE 1, 15.

[5] Bull. EC 6-1993. On the criteria *see also* Hillion, Christophe, 'The Copenhagen Criteria and Their Progeny', in Hillion, Ch. (ed), *EU Enlargement: A Legal Approach* (Hart, Oxford, 2004); Kochenov, Dimitry, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', [2004] 8 EIoP 10, 1, available at <http://eiop.or.at/eiop/texte/2004-010.htm> (accessed on 10 December 2006).

Court of Justice (ECJ) which incorporates both certain democratic principles[6] and the protection of human rights.[7]

Following the path of Regular Reporting, the Commission assessed a number of elements of democracy and the Rule of Law, as well as human rights protection, whether those happened to be the elements of the *acquis* or not. However, the Commission's yearly Reports (together with other Copenhagen-related documents)[8] reveal a picture which is quite different from that which was initially planned.

An analysis of the Copenhagen-related documents demonstrates that the Commission tended to more strictly scrutinize the elements of the Copenhagen political criteria that make up part of the *acquis*, while some vital drawbacks, inherent in the candidate countries' legal systems which fell outside the scope of the *acquis*, passed virtually unnoticed and did not influence the pre-accession process at all. Based on all the body of the Copenhagen-related documents, it is possible to see what is more important for the Commission: democracy, the Rule of Law and protection of human rights in general, or those elements of the three, which make part of the *acquis* and which will have to be enforced as part of European law after accession.

The importance of any given development can be judged not only by its inclusion in the Regular Reports by the Commission, but also by the use of the mechanisms of enforcement, built in the pre-accession strategy, such as the inclusion of the issues among the priorities of the Accession Partnerships (APs).[9] Failure to meet them can have serious consequences for the countries' progress towards accession – from financial consequences up to the interruption of negotiations.

This article argues that the Regular Reporting, as applied during the course of the preparation of the Fifth enlargement of the EU,[10] appears not to be the general analysis of

[6] *E.g.* Case C-388/92 *European Parliament v Council* [1994] ECR I-2067; Case C-65/93 *European Parliament v Council* [1995] ECR I-643.

[7] *E.g.* Case 29/69 *Erich Stauder v City of Ulm - Sozialamt* [1969] ECR 419, § 7; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491. *See also* Wetzel, Joseph R., 'Improving Human Rights Protection in the European Union: Resolving the Conflict and Confusion between the Luxembourg and Strasbourg Courts', [2003] 71 Fordham L. Rev., 2823, 2834 ff.; Schermers, Henry G. and Waelbroeck, Denis F., *Judicial Protection in the European Communities*, 6th ed. (Kluwer Law International, The Hague /London /New York, 2001), 38–46; de Witte, Bruno, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Alston, Ph. (ed), *The EU and Human Rights* (OUP, Oxford, 1999); Lenaerts, Koen, 'Le respect des droits fondamentaux en tant que principe constitutionnel de l'Union européenne', in *Mélanges en homage à Michel Waelbroeck*, Vol. I (Bruylant, Bruxelles, 1999).

[8] For the discussion of the whole set of the Copenhagen-related documents *i. e.* the documents issued by the Council and the Commission in implementation of the Copenhagen criteria *see* Kochenov [2004] EIoP, 6 ff.

[9] On these pre-accession instruments *see e.g.* Maresceau, 'Pre-Accession' and Inglis, 'The Pre-Accession Strategy'.

[10] The same largely applies to the upcoming round of enlargement to include Bulgaria and Romania among the Member States of the EU. (2005 Treaty of Accession [2005] *OJ* L 157). Previous successful rounds of enlargement can be summarised as follows: initially the Communities consisted of six founding Member States: France, Germany, Italy and the Benelux countries and enlarged five times. Enlargement no. 1 - accession of the UK, Ireland and Denmark (1972 Treaty of Accession [1972] OJ L 73; Adaptation Decision [1973] OJ L 2); no. 2 – accession of Greece (1979 Treaty of Accession [1979] OJ L 291); no. 3 – accession of Spain and Portugal (1985 Treaty of Accession [1985] OJ L 302); no. 4 – accession of Austria, Sweden and Finland (1994 Treaty of Accession [1994] OJ C 241; Adaptation Decision [1995] OJ L 1). The last, fifth round marked the accession of Estonia, Latvia, Lithuania, Poland, The Czech Republic, Slovakia, Hungary, Slovenia, Cyprus and Malta (Treaty of Accession [2003]OJ L 236). The unification of Germany that *de facto* amounted to the enlargement of the Communities to include the territory of the former German Democratic Republic (DDR) is not counted as a

the state of democracy, human rights and the Rule of Law in the candidate countries (as was announced by the Union), but, almost exclusively, the analysis of the adaptation to the *acquis* of the candidate country in question. At the same time, the *acquis*, although including all the body of European Law as well as the case-law of the ECJ,[11] seems to be clearly insufficient of an instrument as far as the analysis of democracy and human rights is concerned – the introduction of the posts of ombudsmen, the equal rights for homosexuals,[12] the principle of fairness in restitution regulation, democratic lustration procedures – these are just a few examples of the issues which are not (or were not, when the pre-accession reporting commenced) part of the *acquis* and thus, although included in the Reports, were only partly assessed by the European Commission in the course of the pre-accession process).

There exist numerous contributions discussing the EU democratic deficit[13] – and the *acquis*, as the whole body of law of an entity criticised for the lack of democratic legitimation inherent in its design,[14] reflects this deficit better than anything else. The EU itself has recognised that something should be done in this field, as follows from the Laeken Declaration.[15] It is striking that, during the pre-accession process, the Union was assessing the level of democracy in the candidate countries based on the elements of the Union *acquis*, which is, by itself a great example of the lack of democracy.

Since the Copenhagen criteria are here to stay – and will be an instrument of the regulation of enlargements to come (and certainly of the one to see the accession of the present candidate countries, *i. e.* Croatia, Macedonia (FYROM) and Turkey to the EU[16]) it is vital

separate round since it was regulated by German law, not by the EU enlargement instruments: Bothe, Michael, 'The German Experience to Meet the Challenges of Reunification', in Kellerman, A.E., de Zwaan, J.W. and Czuczai, J. (eds), *EU Enlargement: The Constitutional Impact at EU and National Level* (T.M.C. Asser Press, The Hague, 2001).

[11] On the scope of the *acquis see* Delcourt, Christine, 'The *Acquis Communautaire:* Has the Concept Had Its Day?', [2001] 38 CML Rev. 4, 829.

[12] *See* Kochenov, Dimitry, 'Democracy and Human Rights – Not for Gay People? EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities', forthcoming in Tex. Wesleyan L. Rev.

[13] *See e. g.* Bellamy, Richard and Castiglione, Dario, 'The Uses of Democracy: Reflections on the European Democratic Deficit', in Eriksen, E. O. and Fossum, J. E. (eds), *Democracy in the European Union: Integration through Deliberation?* (Routledge, London /New York, 2000); Majone, Giandomenico, 'Europe's Democratic Deficit: The Question of Standards', [1998] 4 ELJ 1, 5; Neunreither, Karlheinz, 'The Democratic Deficit of the European Union: Towards Closer Cooperation between the European Parliament and the National Governments', [1994] 29 *Government and Opposition* 2, 299; Featherstone, Kevin, 'Jean Monnet and the "Democratic Deficit" in the European Union', [1994] 32 JCMS 2, 149.

[14] *But see* Moravcsik, Andrew, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union', [2002] 40 JCMS 4, 603. For critique of Moravcsik's arguments *see* Halberstam, Daniel, 'The Bride of Messina: Constitutionalism and Democracy in Europe', [2005] 30 ELRev. 6, 775.

[15] Laeken Declaration on the Future of the European Union of 15 December 2001, available at <http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm> (accessed on 10 December 2006). It has been convincingly demonstrated that the priorities set by the Declaration have not been met by the Treaty Establishing a Constitution for Europe: Amtenbrink, Fabian, 'Europa; democratischer, transparenter en efficiënter? De Europese grondwet in het licht van de doelstellingen van de Verklaring van Laeken', in Amtenbrink, F. and van Baalen, S.B. (eds), *Europa; Eenheid in verscheidenheid?: Groningse beschouwingen over de Europese Grondwet* (BJu, The Hague, 2005); Kokott, Juliane and Rüth, Alexandra, 'The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to Laeken Questions?', [2003] 40 CML Rev. 6, 1315.

[16] A number of other countries articulated their wish to join the EU in the future. These include Albania, Armenia, Bosnia i Herzegovina, Cape Verde (*See* 'Government to Request EU Membership for Cape Verde', *World Markets Analysis*, 9 May 2005 (available though Lexis-Nexis)), Georgia, Montenegro, Moldova, Serbia, and Ukraine (*See* Ministerstvo Zakordonnykh Sprav Ukraïny, *Strategija intehratziï Ukraïny do Jevropejs'koho Sojuzu*,

at this stage to see how the existing lack of objective analysis of the development of democracy, the Rule of Law and human rights in the candidate countries can be remedied in the EU. In this respect, the unfortunate Treaty Establishing a Constitution for Europe (TCE)[17] has clearly missed a unique opportunity, since it does not contain any important enlargement regulation reform.[18]
The analysis of democracy, human rights and the Rule of Law and not the analysis of their elements to be found in the *acquis communautaire* should become a priority in the pre-accession process both on paper and as applied.

II. Structure of the argument

The article will proceed as follows. It will clarify why the promotion of the *acquis* is not the same as the promotion of democracy, human rights, minority protection and the Rule of Law (**III**.). Based on the substantive and structural analyses of the Copenhagen-related documents, it will assess the actual role played by the *acquis* in the pre-accession process, demonstrating that the scope of the Copenhagen political criteria is much broader than that of the *acquis communautaire* (**IV.**). Although the components of the Copenhagen political criteria were not initially meant to constitute a hierarchical structure and had to be applied equally *vis-à-vis* both other elements of the Copenhagen criteria and all the candidate countries alike, the Copenhagen-related documents demonstrate that not all the elements of the criteria are promoted by the Commission in the same way. To illustrate the difference in the ways diverse elements of the Copenhagen political criteria are promoted by the EU, the article will proceed by formulating the notion of 'pre-accession influence tools', *i. e.* the tools employed by the Union to influence the democratic reforms in the candidate countries.[19] Placing these tools in a hierarchical order based on the expected effect of their application on the reforms going on in the candidate countries allows drafting a hierarchy of the elements of the Copenhagen-related documents. The comparison between different levels of this hierarchy and the scope of the *acquis communautaire* reveals that the application by the Commission of certain pre-accession influence tools might be dependent *inter alia* on the fact whether the issue in question lies within the scope of the *acquis* or not (**V.**). Lastly, the article briefly discusses the actual influence of the application of different pre-accession influence tools on the reform in the candidate countries and, what might appear surprising to some, largely finds no correlation between the results of the reforms promoted and the pre-accession tools applied. However, those elements of the Copenhagen political criteria which also happen to lie within the scope of the *acquis* generally seem to be promoted more effectively (**VI.**). Since any complete overview of all these issues does not seem feasible in a short note like this, the article does not aim at producing an

of 08 June 1998, available at <http://www.mfa.govua/mfa/ua/publication/content/2823.htm> (accessed on 10 December 2006).
[17] [2004] OJ C 310.
[18] Art. I-58 TCE. *Cf.* Kochenov, Dimitry, 'EU Enlargement Law: History and Recent Developments. Treaty – Custom Concubinage?', [2005] 9 EIoP 6, 1, 19, 20, available at <http://eiop.or.at/eiop/texte/2005-006.htm> (accessed on 10 December 2006).
[19] For the first steps in formulation of this idea *see* Kochenov, Dimitry, 'EU Enlargement: Flexible Compliance with the Commission's Pre-Accession Demands and Schnittke's Ideas on Music', [2005] *Working Papers of the Centre for the Study of European Politics and Society, Ben-Gurion University of the Negev*, 1, available at <http://hsf.bgu.ac.il/europe/index.aspx?pgid=pg_12784265197461537 6> (accessed on 10 December 2006).

exhaustive analysis of these issues, focusing on the most important trends and building on the most telling examples.
The article will conclude stating that the *acquis* played a much more important role in the pre-accession process and in the promotion of the Copenhagen political criteria than could reasonably be expected. Thus, a certain reform of the EU enlargement law is needed in order to reaffirm the importance of those elements of the Copenhagen political criteria which fall *outside* the scope of the *acquis communautaire*, since the issues they raise are often crucial for the success of the democratisation process and thus cannot be ignored in the course of pre-accession. This becomes especially acute in the light of the present candidate countries' limited achievements in the fields of democracy, the Rule of Law and human rights protection.

III. Why the promotion of the *acquis* is not the same as the promotion of democracy, human rights, minority protection and the Rule of Law

To some, it might appear surprising that over 80.000 pages of the *acquis communautaire* do not cover all the possible spheres of regulation. However blurred its competence, the Union is still a body built on the principle of enumerated powers. The Union is generally characterised as a polity *sui generis*[20] embarking on a journey to an unknown destination.[21] There is one thing, however, everybody agrees on: the limited scope of the Union powers.[22] The nature of these powers is another issue not to enjoy popular scholarly agreement and will not be discussed here, to avoid summarising an old debate.[23] Does this limitation of powers apply to the promotion of democracy, human rights and the Rule of Law in the context of enlargement?
'Limitation' is always a key word while talking about the competences of the EU and the nature and scope of the *acquis communautaire*.[24] Apart from being simply set in the Treaties,[25] the discussion of such limitation entered the legal doctrine and the case-law of the ECJ[26] at the very early stages of the development of the Communities.
So what exactly does 'limitation' mean in the context of EU law? Simply put, it reflects the nature of the Union and helps realise that the *acquis*, although composed of thousands of

[20] *See e.g.* Burghardt, Guenter, 'The Future of the European Union', [2001] 25 *Fletcher Forum of World Affairs* 2, 67.
[21] Weiler, Joseph H. H., 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', [1993] 31 JCMS 4, 417.
[22] Art. 5(1) EC. *Cf.* von Bogdandy, Armin, Bast, Jurgen, 'The European Union's Vertical Order of Competences: the Current Law and Proposals for Its Reform', [2002] 39 CML Rev. 2, 227.
[23] *See* Obradović, Daniela, 'Community Law and the Doctrine of Divisible Sovereignty', [1993] 1 LIEI 1, 1; Hay, Peter, *Federalism and Supranational Organisations. Patterns for new legal structures* (University of Illinois Press, Urbana, 1966). For a summary of the debate *see* Kochenov, Dimitry, 'The Case of the EC: Peaceful Coexistence of an Ever Powerful Community and Sovereign Member States?', in Snyder, F., (ed) *L'Union européenne et la gouvernance* (Bruylant, Brussels, 2003), 258 ff.
[24] Compare with the thoughts of Alexander Hamilton in 'Federalist No. 32 (Concerning the General Power of Taxation)', [1788] *The Independent Journal*, 2 January, also available at <http://www.federalistpapers.com/federalist32.html>, 1 (accessed on 10 December 2006); and James Madison in 'Federalist No. 45 (The Alleged Danger from the Powers of the Union to the State Government Considered)', [1788] *The Independent Journal*, 26 January, also available at <http://www.federalistpapers.com/federalist45.html>, 3 (accessed on 10 December 2006).
[25] Art. 5 EC.
[26] Case 111/63 *Lemmerz-Werke v High Authority* [1965] ECR 893.

documents, does not cover everything. Of course there are exceptions from this principle. What is a policy *sui generis* without such exceptions?

A very important exception and the one which is vital for the understanding of the nature of the enlargement process is that *de jure* the demands that the Union can put forward are virtually unlimited once it deals with the third countries (especially if those 3rd countries have applied for the membership of the Union). Not being the signatories of the Treaties, the 3rd countries' status *vis-à-vis* the Union is not governed by the EU law principles, which is a normal practice in international law: the third countries are not bound by the Treaties they did not sign. The EU, in turn, is not generally bound by the limitations of competences built in the Treaties as long as it respects the powers of the Member States. In other words, the external competences of the Union are potentially (and practically also) much broader than the internal ones.[27] Certainly being two sides of one coin, to agree with Alston and Weiler, the gap between external and internal competences (especially in the field of democracy and human rights protection) has far-reaching consequences and is felt both in the Union and in the 3rd countries alike.[28]

This gap becomes especially obvious from the wording of the ECJ ruling in *Grant* case, in which the Court asserted (concerning internal competences of the Community) that 'human rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community'.[29] In contrast, as far as the external dimension of human rights protection is concerned, the ECJ approved the legality of the human rights clauses in the external agreements concluded with the third countries.[30] In other words, while the limitation of the scope of the internal Community powers seems to be very strict (even though it has been unable to block the development of the 'creeping competences' of the Community[31]), the situation with the external powers provides a contrasting picture.

A special case in which the issue of the (lack of) limitation of powers plays an extremely important role is EU enlargement and, particularly, the pre-accession process.[32] Much has been written about the Union enlargements recently; scholarly literature explores almost all the aspects of its legal regulation.[33] Without going into detail, it is instrumental to outline the essence of the enlargement law as applied in the course of the Fifth enlargement.[34]

[27] See *e. g.* Duparc, Christiane, *De Europese Gemeenschap en de rechten van de mens*, (Office of Official Publications of the European Communities, Luxembourg, 1993); Clapham, Andrew, 'A Human Rights Policy of the European Community', [1991] 10 YbEL, 97, on the difference between internal and external EU competences in the field of human rights. *Cf.* McGoldrick, Dominic, 'The EU after Amsterdam: An Organisation with General Human Rights Competence?' in O'Keeffe, D. and Twomey, P. (eds), *Legal Issues of the Amsterdam Treaty* (Hart, Oxford, 1999), on the difference between internal and external EU competences in the field of human rights.

[28] Alston, Philip and Weiler, Joseph H. H., 'An 'Ever Closer Union', in Alston, Ph. (ed), *The EU and Human Rights* (OUP, Oxford, 1999), 8.

[29] Case C-249/96 *Lisa Jacqueline Grant v South-West Trains Ltd.* [1998] ECR I-621, § 45. This wording is generally in line with Opinion 2/94 [1996] ECR I-1759.

[30] Case C-286/94 *Portugal v Council* [1996] I-06177. *Cf.* Hillion, Christophe, *The Evolving System of European Union External Relations as Evidenced in the EU Partnerships with Russia and Ukraine*, doctoral thesis defended at the University of Leiden, 22 February 2005 (unpublished, copy available at the library of the Leiden University).

[31] *Cf.* Pollack, Mark A., 'The End of Creeping Competence? EU Policy-Making since Maastricht', [2000] 38 JCMS 3, 519.

[32] On the human rights aspect of this *see* Williams, Andrew, 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction?', [2000] 25 ELRev. 6, 602.

[33] See, most importantly Ott, Andrea and Inglis, Kirstyn (eds), *Handbook on European Enlargement*, (T.M.C. Asser Press, The Hague, 2002). *See also.* Kundera, Jarosław (ed), *Rozszerzenie Unii Europejskiej: Korzyści i koszty dla nowych krajów członkowskich* (Wydawnictwo Uniwersitetu Wrocławskiego, Wrocław, 2005); Hillion,

In addition to Articles 49 and 6(1) TEU, the Fifth enlargement of the Union was regulated by a large number of the Copenhagen-related documents adopted by the Commission and the Council in the course of a so-called pre-accession process and implementing the principle of conditionality. A *nouvauté* in enlargement law of the EU introduced in the course of the 5th enlargement, the principle of conditionality made the reception of Community funding[35] and, ultimately, the accession to the Union by the candidate countries dependant of the fulfillment of certain conditions elaborated by the EU and aimed at boosting the economic, legal and political reforms in the candidate countries, to help these states step over the negative consequences of the totalitarian Communist past.[36] The essence of the principle was formulated more than ten years ago by the Copenhagen European Council (1993) and first found its way into enlargement law in the form of the famous Copenhagen criteria. Starting as a mostly 'soft law' instrument of regulation, the nature of the criteria changed considerably after the introduction of the 'enhanced pre-accession strategy' by the Luxembourg European Council (1997), which recommended implementing conditionality *stricto sensu*, involving the monitoring of the candidate countries' progress and making their future membership of the Union dependant on the meeting of concrete priorities outlined in the APs and rooted in the Copenhagen criteria.[37] This development made the criteria an important legal instrument of EU enlargement law. The Copenhagen criteria include the following elements:

- Stability of institutions guaranteeing democracy, the Rule of Law, human rights and respect for and protection of minorities;
- The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces of the Union;

Christophe (ed), *EU Enlargement: A Legal Approach* (Hart, Oxford, 2004); Chavance, Bernard (ed), *Les incertitudes du grand élargissement: L'Europe centrale et balte dans l'intégration européenne* (L'Harmattan, Paris /Budapest /Torino, 2004); Drevet, Jean-François, *L'élargissement de l'Union européenne, jusque'où?*, 2nd ed. (L'Harmattan, Paris /Budapest /Torino, 2004); Cremona, Marise (ed), *The Enlargement of the European Union* (OUP, Oxford, 2003); Beurdeley, Laurent, *L'élargissement de l'Union européenne aux pays d'Europe centrale et orientale et aux îles du bassin méditerranéen* (L'Harmattan, Paris /Montréal, 2003); Maresceau, Marc and Lannon, Erwan (eds), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis* (Palgrave, Basingstoke, 2001); Tucny, Edwige, *L'élargissement de l'union européenne aux pays d'Europe centrale et orientale: La conditionnalité politique* (L'Harmattan, Paris /Montréal, 2000); Avery, Graham and Cameron, Fraser, *The Enlargement of the European Union* (Sheffield Academic Press, Sheffield 1998); Preston, Christopher, *Enlargement and Integration in the European Union* (Routledge, London /New York, 1997); Telò, Mario (ed), *L'Union européenne et les défis de l'élargissement* (Editions de l'Université de Bruxelles, Bruxelles, 1994); Puissochet, Jean-Pierre, *The Enlargement of the European Communities. A Commentary on the Treaty and the Acts Concerning the Accession of Denmark, Ireland and the United Kingdom* (A.W. Sijthoff, Leyden, 1975).

[34] For an overview *see* Kochenov [2005] EIoP.

[35] Mainly PHARE programme (applying to Poland, Hungary (Council Regulation 3906/89 [1989] OJ L 375/11), GDR, Czechoslovakia, Bulgaria, Romania, Yugoslavia (Council Regulation 2698/89 [1990] OJ L 257/1), Albania, Estonia, Lithuania, Latvia (Council Regulation 3800/91 [1991] OJ L 357/10), Slovenia (Council Regulation 2334/92 [1992] L 227/1), Croatia (Council Regulation 1366/95 [1995] OJ L 133/1, suspended in 1995) and FYROM (Council Regulation 463/96 [1996] L 65/3)); SAPARD programme, providing assistance in the agricultural sector (Council Regulation 1268/1999 [1999] OJ L 161/87) and ISPA programme, providing assistance in the fields of transport and environment (Council Regulation 1267/1999 [1999] OJ L 161/73). PHARE, SAPARD and ISPA are united in a single legal framework: Council Regulation 1266/1999 [1999] OJ L 161/68.

[36] *Cf.* Kochenov, Dimitry, 'Walking a Long Path: Enlargement and Exigency of Overwhelming Change', essay reviewing Alfred E. Kellermann *et al.* (eds.), The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries: Hopes and Fears (2006), [2006] *European Law Books*, <http://www.europeanlawbooks.org/reviews/detail.asp?id=281> (accessed on 10 December 2006).

[37] Art. 4 of Regulation 622/98 [1998] OJ L 85/1.

- The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Mostly the first – 'political' – block of the Copenhagen criteria is of interest for this paper. It is clear from the text of the criteria that they have much broader a scope than that of the *acquis communautaire*. Moreover, the requirement to transpose the *acquis* proper can be derived from the third, not the first, block of the Copenhagen criteria. In other words, the Copenhagen political criteria are not limited to the *acquis* and presuppose a much more inclusive approach to pre-accession monitoring, compared to what the *acquis* may offer.

The mere fact that criteria of such broad and all-encompassing nature were adopted as a tool to be used in the course of the enlargement process is in itself a good example of an immense difference that exists between the internal and external competences of the Union. While the Copenhagen political criteria were applied to the candidate countries, its application to the Member States is impossible; moreover, it is absolutely clear that the majority of the 'old' Member States as well as the Union itself, in case asked to meet the criteria, might certainly have difficulties trying to do so.

By stating that the Copenhagen political criteria are broader than the *acquis*, one does not make any discovery. The discrepancy between the scope of the Copenhagen criteria and that of the *acquis* is reflected in the structure of the Copenhagen-related documents. Moreover, this structure reveals that the Commission itself was not aiming at creating any strict link between the *acquis* and the promotion of democracy, the Rule of Law and human rights.

The Commission's Opinions and Regular Reports, as well as the APs are structured in a way that allows for a strict separation between the criteria. As a consequence, a number of issues are mentioned in these documents several times. This especially concerns the issues making part of the *acquis* included into the Copenhagen political criteria. Discussing equality between women and men, for example, the Reports address this issue both among the questions related to the first (political) and the third (*acquis*) Copenhagen criteria. A similar picture can be observed regarding the structuring of the APs. In other words, the very structure of the Copenhagen criteria (separating political criteria from *acquis*-related criteria) as well as the reflection of this structure in the Copenhagen-related documents, are reasons to believe that the EU understood very well what the limitations of the *acquis* are, when applied to monitor the candidates' progress related to the Copenhagen political criteria.

Thus, officially, the *acquis* was *not* the most important guideline for the fulfillment of the Copenhagen political criteria.

While, theoretically speaking, the promotion of democracy, the Rule of Law and human rights in the course of the pre-accession was not exclusively guided by the *acquis* and had a very inclusive application, in practice the implementation of the Copenhagen criteria appears to be somewhat different from what is officially stated. It is more *acquis*-oriented than could reasonably be expected given the wording of the Criteria and the general structure of the Copenhagen-related documents.

Three important issues should be considered in order to assess the way the Copenhagen political criteria were implemented in the course of the pre-accession and examine the role played by the *acquis communautaire* in their implementation.

Firstly, it is worth looking into the structure of the criteria and the Copenhagen-related documents in order to be able to compare the array of issues discussed in the context of implementation of the Copenhagen political criterion with the scope of the *acquis*.

Secondly, since the accents put by the Commission on the importance of the implementation of different elements of the Copenhagen criteria may vary, it is necessary to assess the role played by certain elements of the Copenhagen political criteria in the course of the pre-accession. Comparing those elements of the Copenhagen political criteria that played the most important role in the pre-accession those of the *acquis* might likely be even more instrumental for the understanding of the role played by the *acquis* in the pre-accession, than outlining the line of issues both falling within the scope of the *acquis* and playing a role in the pre-accession as elements of the Copenhagen political criteria.
Thirdly, it is necessary to compare the results of the promotion of the different elements of the Copenhagen political criteria. Both the information contained in the Copenhagen-related documents and in the independent assessments can shed some light on what was more a success: the promotion of the *acquis*-related or the promotion of non-*acquis*-related issues.
Of course, while dealing with democracy, human rights, the Rule of Law and minority protection, one walks on a somewhat unstable terrain of blurred definitions and somewhat vague notions. It does not, however, make the quest for the real role played by the *acquis* in the promotion of the Copenhagen political criterion by the Commission impossible. To avoid the negative consequences of the vagueness and variation in views on democracy, the Rule of Law and other elements of the Copenhagen political criteria it is instrumental to adopt the terminology and the method of assessment used by the European Commission itself as they appear in the Copenhagen-related documents, thus introducing some consistency and clarity into the assessment that follows.

IV. Structure of the Copenhagen political criteria. Are the criteria broader than the *acquis communautaire*?

Already from the text of the Copenhagen criteria alone (even when considered without the Copenhagen-related documents) it is clear that the scope of the Copenhagen political criteria is broader than that of the *acquis communautaire*. First of all, this is due to the absence of minority protection requirements from EU law.[38] While the Rule of Law, the protection of human rights and democracy (to a certain extent) are all included in the Treaty text by way of of Article 6 TEU, minority protection is nowhere to be found in the Treaties. An entire body of literature deals with the relation between EU law and minority protection as a criterion used in the pre-accession.[39] When Article 49 TEU was amended at

[38] Discrimination on the grounds of ethnic origin is, however, prohibited in EC law: Council Directive 2000/43/EC [2000] OJ L 180/22 (the 'Race Directive') adopted on the basis of Art. 13 EC.
[39] Among the recent ones *see e.g.* von Toggenburg, Gabriel, 'A Remaining Share or a New Part? The Union's Role *vis-à-vis* Minorities after the Enlargement Decade', [2006] *EUI Working Papers*, Law No. 2006/15, available at <http://cadmus.iue.it/dspace/bitstream/1814/4428/1/LAW+2006.15.pdf> (accessed on 10 December 2006); Hillion, Christophe, 'Enlargement of the European Union: The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities', [2004] 27 Fordham Int'l L.J. 2, 715; Wiener, Antje and Schwellnus, Guido, 'Contested Norms in the Process of EU Enlargement: Non-Discrimination and Minority Rights', [2004] ConWEB, No. 2/2004, available at <http://les1.man.ac.uk/conweb/> (accessed on 10 December 2006); von Toggenburg, Gabriel, 'Minorities (…) The European Union: Is the Missing Link an "Of" or a "Within"?', [2003] 25 J. Eur. Integration 3, 273; van der Meulen, J. W., *Bescherming van minderheiden als criterium bij EU-uitbreiding: de Europese Commissie en Midden-Europa*, Nederlands Instituut voor Internationale Betrekkingen 'Clingendael', The Hague, 2003; Hughes, James and Sasse, Gwendolyn, 'Monitoring the Monitors. EU Enlargement Conditionality and Minority Protection in the CEECs', [2003] JEMIE, 1, available at

Amsterdam it was expected that all the Copenhagen criteria would be incorporated into the primary law of the Union, but this was only partly done by way of reference from Article 49 TEU to Article 6(1) TEU, which does not contain minority protection requirements. Moreover, the role of 'special significance'[40] played in the EU law by the European Convention on Human Rights (ECHR), which serves, when interpreted in conjunction with the Treaties and Community legislation, as a source of principles of European Law,[41] does not list minority rights among its provisions,[42] living all the issues of minority protection to the Framework Convention on the Protection of Minorities.[43] The later document, apart from playing no special role comparable to that played by the ECHR in the European law system, is ratified by the EU Member States with reservations undermining its very essence.[44] Strikingly, this did not prevent the Union from requiring the candidate countries in the context of pre-accession to ratify the Convention,[45] being one of the signs of the growing cooperation between the EU and the CoE in this particular field.[46] In other words, the issue of minority protection lies absolutely outside the scope of the *acquis communautaire*.

Other issues appearing in the criterion include democracy, the Rule of Law and protection of human rights. Lying (at least partly) within the scope of the system of European law, all these issues, allowing for multiple contradictory interpretations, were clarified in the Copenhagen-related documents. It was mostly done in the Commission's Opinions on the Eastern European Countries' applications for the membership of the Union, Regular Reports on the CEECs progress annually drafted by the Commission, Composite and Strategy Papers drafted by the Commission and summarizing the main findings of the

<http://www.ecmi.de/jemie/> (accessed on 10 December 2006); Vermeersch, Peter, 'EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in the Czech Republic, Hungary and Poland', [2003] JEMIE, available at <http://www.ecmi.de/jemie/> (accessed on 10 December 2006); von Toggenburg, Gabriel, 'A Rough Orientation through a Delicate Relationship: The European Union's Endeavours for (Its) Minorities', [2000] 4 EIoP 16, 1, available at <http://eiop.or.at/eiop/texte/2000-016.htm> (accessed on 10 December 2006).

[40] Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, § 14; Opinion 2/94 *on Accession by the Community to the ECHR* [1996] ECR I-1759, § 33; Case C-260/89 *ERT v DEP* [1991] ECR I-2925, § 41.

[40] *E.g.* Case C-185/97 *Coote v Granada Hospitality Ltd.* [1998] ECR 5199, §§ 21-23; Case C-13/94 *P v S* [1996] ECR I-2143, § 18; Case 22/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, § 18.

[41] Case C-185/97 *Goote v Granada Hospitality* [1998] ECR I-5199; Case C-13/94 *P v S* [1996] ECR I-2143; Case 222/84 *Johnston* [1986] ECR 1651; Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

[42] The only exception is probably Art. 14 ECHR – a non-discrimination provision which, although acquired new importance after the entry into force of the Protocol No. 12 to the ECHR, fails to promote minority rights proper in the sense of the *Albanian Schools* Case. *See* PCIJ, *Advisory Opinion regarding Minority Schools in Albania* [1935], PCIJ Rep., S. A/B No. 64, 1935, 17.

[43] Council of Europe, Framework Convention for the Protection of National Minorities [1995] CETS No. 157. *See also* Gál, Kinga, 'The Council of Europe Framework Convention for the Protection of National Minorities and Its Impact on Central and Eastern Europe', [2000] JEMIE, available at <http://www.ecmi.de/jemie/> (accessed on 10 December 2006).

[44] Consider the example of France, which submitted a reservation stating that there are no minorities present on her territory.

[45] The document was included on the list of documents to be ratified by the candidate countries. See European Commission's 1999 Composite Paper, Annex 3 'Human Rights Conventions Ratified by the Candidate Countries'; 2000 Strategy Paper, Annex 3; 2001 Paper, Annex 4, 2002 Paper, Annex 3 and 2003 Paper, Annex 3.

[46] *Cf.* von Toggenburg [2006] EUI Working Papers, 23; Kochenov, Dimitry, 'An Argument for Closer Co-operation between the European Union and the Council of Europe in the Field of EU Enlargement Regulation', [2006] 2 Croatian Yearbook Eur. L. & Pol'y (forthcoming).

Reports and a number of other documents, including, APs and Comprehensive Monitoring Reports.

No literature outlining the scope and structure of the Copenhagen political criteria in full exists to date.[47] At the same time, the set of issues included by the Commission among the components of the criteria is quite specific and does not usually coincide with the theoretical approaches to democracy, human rights and the Rule of Law.[48]

First of all, the number of elements included into the Copenhagen political criteria by the Copenhagen European Council (1993) and the number of main subject-lines the Copenhagen-related documents address do not perfectly coincide. The Commission has united the assessment of democracy and the Rule of Law (included separately among the Copenhagen political criteria) into one block of assessment[49] and placed a strong emphasis on the assessment of the issues related to the establishment of the Rule of Law in the candidate countries. The main structure of the Copenhagen political criteria stemming from the texts of the Copenhagen-related documents is thus three-fold, including democracy and the Rule of Law; human rights protection and respect for and protection of minorities.

The internal structure of each of the elements of the Copenhagen political criteria demonstrates that the scope of analysis exercised by the Commission in the course of the pre-accession is much broader than that of the *acquis*.

Based on the Copenhagen-related documents, the Copenhagen political criteria include the following elements:

I. Democracy and the Rule of Law
- a. Free and fair elections
- b. Functioning of the judiciary, including the assessment of the level of independence of the judiciary, training of judges, filling in the judicial vacancies, access to justice, handling of cases and effective and timely enforcement of court decisions;
- c. Functioning of the executive, including its decentralisation and structural reform, effective consultation with the interested parties, the creation of the unified system of civil service, accountability of the administration;
- d. Functioning of the legislature, including the satisfactory operation of parliament, respecting the powers of parliament, the role played by the opposition in the parliament and the role played by the minorities;
- e. Assessment of effectiveness of anti-corruption measures;

II. Human rights protection
- a. Ratification of necessary international instruments
- b. Civil and political rights, including, most importantly, freedom of expression and independence of the media; combating police violence; combating trafficking in human beings; problems related to pre-trial detention and situation in prisons; access to a lawyer; asylum and refugees; discrimination on the grounds of sexual orientation; the establishment and effective functioning of an ombudsman's office; the assessment of the role played by the NGOs.

[47] For the structure of the Copenhagen political criterion of democracy and the Rule of Law see Kochenov [2004] EIoP.
[48] Kochenov [2004] EIoP.
[49] *Id.*, 23.

c. Economic, social and cultural rights, including gender equality; trade unions; right to strike; integration of the disabled and socially vulnerable people's rights; child protection; social security rights;

III. Minority protection[50]

Because of the scope of this article, it seems unreasonable to provide detailed analysis of the Copenhagen-related documents' structures used as a foundation for this list. Suffice it to say that the list was created based on a combination of structural and textual analyses of the Copenhagen-related documents following the methodology and general approach tried out elsewhere.[51] An emphasis was made on the Regular Reports of the Commission, since they provide the most inclusive structure of issues acute in the context of democratic reforms going on in the candidate countries.

Considering the structure of the elements of the Copenhagen political criteria, it is necessary to take into account that the structure of the relevant Copenhagen-related documents is not always consistent and the derogations from it are plenty. To provide some examples, the Commission demonstrated a degree of hesitation regarding where to include the assessment of the freedom of religion: among civil and political or among economic social and cultural rights. As a result, based on the classification of the assessment of this right, all the reports can be divided into two more or less equal parts. Similar derogations from the main framework of assessment can also be found *inter alia* among citizenship rights (the assessment of the deprivation of some former Czechoslovak citizens living in the Czech Republic of their Czech citizenship was included in the civil and political rights section and the same issue concerning the deprivation of former Soviet Union citizens living in Estonia and Latvia of their citizenship of these Baltic states was assessed in the minority rights sections of the Reports[52]). An analogous situation can be observed with regard to children's rights: in the context of the Romanian application for the membership of the Union, children's rights were assessed among civil and political rights, while the Reports concerning all other countries' progress towards accession contain the assessment of this issue in the economic, social and cultural rights sections.

As the list of the elements of the Copenhagen political criteria outlined above suggests, notwithstanding certain structural irregularities, the assessment of the Copenhagen political criteria contained in the Copenhagen-related documents represents a complex picture of monitoring, including both the elements included in the *acquis*, (like the equality between women and men and asylum rights) and falling outside the scope of the *acquis* (like, for example, the promotion of the posts of Ombudsmen, minority protection or the promotion of a right to restitution of properties seized by the Communist and Nazi régimes).

In other words, as the structure and the scope of the Copenhagen-related documents demonstrate, the Commission was trying to use the Copenhagen criteria as a tool of effective preparation of the candidate countries for their membership of the EU. While outlining the number of issues for analysis, the Commission was not constrained by the

[50] The structure of the Minority protection criterion is not included since the criterion lies completely outside the scope of the *acquis*.

[51] *See* Kochenov [2004] EIoP.

[52] For details *see* Kochenov, Dimitry, 'Pre-accession, Naturalization, and "Due regard to Community Law": The European Union's "Steering" of National Citizenship Policies in Candidate Countries during the Fifth Enlargement', [2004] 4 Romanian J. Pol. Sci 2, 71, also available at SSRN: <http://ssrn.com/abstract=926851> (accessed on 10 December 2006).

limited scope of the *acquis communautaire*. In drafting the structure of the Copenhagen-related documents the Commission acted in line with the concept of the pre-accession and thus reinforced the division between internal and external competences of the Union.

V. The pre-accession influence tools, applied by the European Union. The hierarchical order of the elements of the Copenhagen political criteria

In what order are the elements of the Copenhagen political criteria placed *vis-à-vis* each other? Are they all of equal importance? Considering that each of the Copenhagen criteria seem to have a different effect on the pre-accession it would be reasonable to suppose that among the elements of each block of criteria a certain hierarchy might also exist. It is notable that no indication of any hierarchy of the Copenhagen criteria was given in the 1993 Copenhagen European Council Presidency Conclusions.

Indeed, meeting only one set of criteria, namely the Copenhagen political criteria, is enough, for example, for the opening of the accession negotiations, which puts this block of criteria in a preferable position compared to two other blocks, outlined by the Copenhagen European Council (1993). This hierarchical order of the Copenhagen criteria was introduced by the Luxembourg European Council (12-13 December 1997), which held that 'compliance with the Copenhagen political criteria is a prerequisite for opening of any accession negotiations',[53] and the 1999 Commission Composite Paper, which made an important step towards 'striking the right balance of keeping up speed [of enlargement] without sacrificing quality'.[54] In the Paper, the Commission followed the European Council in *de facto* altering the conditionality principle based on the Copenhagen criteria. From that time on it was recommended to open negotiations with all the countries, satisfying only the Copenhagen political criteria, thus giving them priority over two other groups of criteria adopted by the 1993 Copenhagen European Council.[55] The Commission recommended stressing 'the absolute priority of the Copenhagen political criteria before beginning and continuing the accession negotiations with any candidate country'.[56]

A similar hierarchy, although less formally articulated, seems to exist also among the elements of the particular Copenhagen criteria. This makes it clear that just looking at the number of issues assessed in the course of pre-accession and their relationship to the *acquis communautaire* is not sufficient in order to understand the role played by the *acquis* in the implementation of the Copenhagen criteria. The elements of the Copenhagen political criteria included in the Copenhagen-related documents and assessed by the Commission in the course of the pre-accession process were not promoted by the European Commission equally. While some of them were just occasionally mentioned among the areas of concern, others were included in the Copenhagen-related documents on a constant basis and their implementation certainly enjoyed more attention of the Commission compared to the first group. Moreover, another set of issues in the course of the analysis of the Copenhagen-related documents is composed of those matters which are not only constantly included in

[53] Presidency Conclusions of the Luxembourg European Council, 12–13 December1997, § 25.
[54] European Commission, 1999 Composite Paper, 4. All the pre-accession Copenhagen-related documents are available on-line at <http://europa.eu/pol/enlarg/index_en.htm> (accessed on 10 December 2006).
[55] At the same time the actual accession was stated to be only possible upon meeting of the whole set of criteria.
[56] European Commission, 1999 Composite Paper, 30.

the Regular Reports, but also made their way to the APs, thus gaining unprecedented importance in the course of the pre-accession. In case the priorities set in the APs are not met, the whole accession process can potentially come to an end, thus disqualifying a country from the accession race, although in practice the Commission usually confined itself to stating in the Regular Reports that the priorities set out in the APs were not met without demanding to stop negotiations or strip a country in question of its candidate status.
To summarise, the EU had several tools to influence the candidate countries' reforms and to push the candidates to meet the Copenhagen political criteria during the course of pre-accession process (pre-accession influence tools).[57] These varied from an absolute imperative to perform, when the need to deliver was articulated at the highest political level and the progress of the country on the way to accession was made directly dependant on this country's performance; the inclusion of the same issue into all the types of the Copenhagen-related documents and recognition in these documents that a failure to perform might have consequences for the prospects of accession for the country in question; articulation that a reform is of importance in the Regular Reports and listing the issue in question among the short term priorities of the Accession Partnership with the candidate country in question; including the issue into the Reports and among the mid-term priorities of the accession partnership; including the issue into the Regular Reports on a constant basis without, however, placing it among the priorities of the Accession Partnership with the country in question; occasionally mention the issue in the Regular Reports. These tools are placed in a hierarchical order of diminishing importance. All of them were employed during the Fifth enlargement.
Following the hierarchy of the Copenhagen pre-accession tools applied by the Union, it is possible to make a relative assessment of importance of the elements of the Copenhagen political criteria that appear in the Copenhagen-related documents. Hypothetically, the fact that the tools of 'higher order' are applied to pressure the candidate countries to conduct reform in a certain sphere can be taken as a proof of this issue's higher importance, compared to other elements of the Copenhagen political criteria assessed in the course of the pre-accession with regard to which the influence tools of 'lower order' were applied.

The pre-accession influence tools used by the EU
(In the order of the rising level of influence)

6. Demand to conduct reform stemming from the European Council, on which the accession prospect if directly dependent;
5. The inclusion of the issue into the Regular Reports, Composite/ Progress Papers and APs and making it clear in these documents that a failure to perform might have consequences on the future progress towards accession of the country in question;
4. The inclusion of the issue into the Regular Reports and among the short term priorities of the Accession Partnership with the candidate country in question;
3. The inclusion of the issue into the Regular Reports and among the mid-term priorities of the accession partnership;
2. The inclusion of the issue into the Regular Reports on a constant basis without, however, placing it among the priorities of the Accession Partnership with the country in question;
1. Occasional mentioning of the issue in the Reports.

[57] Using such wording probably does not reflect the realities of pre-accession, where all the applicants were announced to have met the Copenhagen political criteria during the first year of Regular Reporting. *Cf.* VI, *infra*.

Of course, the choice of the tool of influence by the EU cannot be explained solely by the principle importance of the issue in question in the course of the pre-accession process. There are certainly other factors, influencing the choice made by the Commission and other institutions, such as, for example, the need to resolve specific problems of the country in question. This is not to say, however that these other factors prevail over the main pre-accession priorities.

For example, the choice of tool 5 in the promotion of the reform of orphanages and pushing Romania to improve the situation of orphaned children in state care can be linked to the specificity of the Ceauşescu's heritage in the sphere of women's rights and family law.[58] In one of his 1986 speeches Nicolae Ceauşescu declared that every fœtus is 'the socialist property of the whole society, [that] giving birth is a patriotic duty [and that] those who refuse to have children are deserters, escaping the law of natural continuity'.[59] Hence Romania was the only candidate country where such importance was given to the rights of the child not due to the relatively higher placement of the rights of orphaned children on the Union's agenda compared to other elements of the Copenhagen political criteria, but mostly due to the specificity of the overthrown Romanian dictatorship, aimed, literally, at multiplying the quantity of communists, a policy, which had terrible consequences.

Theoretically, a chart can be created, grouping all the issues discussed by the Commission in the course of pre-accession according to the type of influence the Union chose to exercise. This paper will not focus on it further, however, leaving it open for further research. While such chart would certainly be interesting to discuss, upon reading the Copenhagen documents it is clear that it would not be really diversified. The majority of the components of the Copenhagen political criteria would be places next to tool 2 applied by the Commission – regular mentioning in the Regular Reports.

In the case of the majority of the new Member States, the Regular Reporting lasted six years (if one starts counting with the Commission's Opinions on the application for the membership of the EU filed by these countries[60]). Thus the influence exercised by the EU explainably varies not only depending on the choice of a particular tool by the Commission while dealing with a certain group of issues, but also increasing or softening the influence, by applying different tools to the promotion of the same element of the Copenhagen political criteria through time. In other words, the application of the pre-accession tools is a dynamic process and should be analysed as such. The varying use of the tools can lead to the increase or lowering the pressure on the candidate countries throughout the years of reporting.

In some instances the varying use of the pre-accession influence tools by the EU is related to the evolution of the *acquis*. A telling example of how the Commission's attitude to one issue might change is the treatment by the Commission of the discrimination on the grounds of sexual orientation that existed in several candidate countries.[61] First barely

[58] On the Ceauşescu's policy in these areas *see e. g* Kligman, Gail, *The Politics of Duplicity: Controlling Reproduction in Ceauşescu's Romania* (University of California Press, Berkley, 1998).

[59] Harsanyi, Doina P., 'Women in Romania', in Funk, N. and Müller, M. (eds), *Gender Politics and Post-Communism: Reflections from Eastern Europe and the Former Soviet Union* (Routledge: New York, 1993), 46.

[60] The Comprehensive Monitoring Reports released in 2003 to monitor the situation in the 10 countries that signed the Accession Treaty should not be considered here, since they deal almost exclusively with the *acquis* and thus do not include the majority of issues discussed in the Regular Reports before these countries signed the Treaty of Accession.

[61] For more on this issue *see* Kochenov, Tex. Wesleyan L. Rev.

mentioning the issue in the Opinions and Regular Reports dealing with a very limited number of candidate countries and thus applying tool 1,[62] the Commission switched to tool 2 in the Reports released in the years 2000 – 2001, making discrimination on the grounds of sexual orientation an important element of pre-accession.[63] The principle position taken by the Commission on this issue can also be illustrated by the view of Commissioner Verheugen, who stated that 'the Commission is fully committed to ensuring that this condition for accession is respected'.[64]

The link between the change of the Commission's attitude and the development of EU law is evident. This issue was largely lying outside the scope of the *acquis* before Amsterdam,[65] when the Community was granted powers to combat discrimination on this ground by Article 13 EC. Council Directive 2000/78/EC,[66] adopted in implementation of this Article expressly prohibits any discrimination based *inter alia* on sexual orientation,[67] recognising that 'discrimination based on […] sexual orientation may undermine the achievement of the objectives of the Treaty'.[68] Later, sexual orientation also became one of the grounds on which discrimination is prohibited by Article 21 of the Union Charter of Fundamental Rights.[69]

In other words, the scope of the *acquis* has expanded during the pre-accession process. Accordingly, the Commission changed its attitude to the level of importance of this issue in the pre-accession *unison* with the reform of the EU law and the growth of the scope of the *acquis*. The Commission's attitude towards the promotion of the fight against discrimination on the ground of sexual orientation can certainly suggest that the question whether a certain element of the Copenhagen political criteria is part of the *acquis* is of

[62] Initially, the accent was put by the Commission on the situation with the rights of the homosexuals in Romania, where the issue appears in the first Regular Reports released by the Commission. At the same time, as the assessment done by the European Parliament shows, such an approach by the Commission was not consistent, since discrimination on the basis of sexual orientation, mostly in the form of the difference in the minimal age of consent in the Criminal Codes of the candidate countries, existed also in Bulgaria, Estonia, Hungary and Lithuania, a fact not mentioned by the Commission in the respective Regular Reports. *Cf.* European Parliament, Resolution on Respect for Human Rights in the European Union (1998 – 1999) [2000] OJ C 377/344 § 76.

[63] The rise in importance of the role played by the combating of discrimination on the basis of sexual orientation is mostly demonstrated by the inclusion of the assessment of this question into a considerable number of the post-2000 Regular Reports released by the Commission. See *e. g.* 2001 Romanian, Estonian and Hungarian Reports. *Cf.* Langenkamp, Travis L., 'Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law', [2003] 4 San Diego Int'l L.J., 2003, 437, 442.

[64] Answer given by Mr. Verheugen on behalf of the Commission to Written Question E-4142/00 by L. van der Laan to the Commission: Protection of Homosexuals in Romania [2001] OJ C 235/78-79 E.

[65] Consider the pre-Amsterdam situation: 'at present the Treaty on European Union does not confer specific powers on the institutions to eradicate discrimination on grounds of sexual orientation', Answer given by Mr. Flynn of behalf of the Commission to the Written Question No. 2224/96 by N. van Dijk to the Commission: Coordination of Policy on Homosexual Men and Lesbian Women [1996] OJ C 356/95. *Cf.* answers to Written Questions No. 2133/83 (to the Council) and No. 2134/83 (to the Commission) by Mrs. I. van den Heuvel: Homosexuality [1984] OJ C 173/9 and [1984] OJ C 152/25. *See also* Williams, Adrian, 'An Evaluation of the Historical Development of the Judicial Approach to Affording Employees Protection against Discrimination on the Basis of Their Sexual Orientation', [2004] 25 Business L. Rev. 2, 32; Canor, Iris, 'Equality for Lesbians and Gay Men in the European Community Legal Order – "They Shall Be Male and Female"?', [2000] 7 MJ 3.

[66] Directive 2000/78/EC [2000] OJ L 303/16.

[67] Art. 1 of Directive 2000/78/EC.

[68] Recital 11, Preamble to Directive 2000/78/EC.

[69] [2000] OJ C 364/01. The Charter is a 'proclaimed document' having no binding force in EC law. Nevertheless, the Court of the First Instance and, very recently, the ECJ, both made references to the provisions of the Charter: *e.g.* Case C-540/03 *Parliament v Council* [2006] judgement of 27 Jun. 2006, nyr, § 38; Case T-177/01 *Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365, § 42.

importance for the Commission, and has implications on the application of the pre-accession influence tools, although officially this is nowhere recognised.

To illustrate the application of different pre-accession influence tools in the course of the preparation of the Fifth enlargement and the enlargement to come, some examples should be given.

Tool 6 has been used extremely rarely. The use of this tool is fully dependant on the European Council and thus represents the highest instance of the political decision-making in the conditionality process. For the last time the tool has been used by the Brussels summit (2005), when the EU decided that the accession negotiations with Croatia,[70] that were supposed to begin on March 17, 2005 could not be opened before this country made decisive steps to find the alleged Yugoslav war criminal general Ante Gotovina and assure his surrender to the International Criminal Tribunal for the Former Yugoslavia (ICTY).[71] While surrendering the alleged war criminal is certainly a noble goal, the method chosen by the EU to assure that Croatia co-operates with ICTY seems to be quite an unbalanced one. Making the whole country's accession prospects dependant on the destiny of one man, however symbolic his capture might be, appears to be an exaggerated response from the part of the Union and has already provoked negative reactions.[72] The negotiations were only opened after the general traveling on a French passport was caught in Spain.

The previous use of the same tool allows a speculation that it has probably not been employed in a reasonable and balanced way. The decision taken by the Luxembourg European Council (1997) to divide the 12 candidate countries into 'two waves' of accession (which can also be considered as an application of tool 6 to the 'second wave' countries, theoretically sending a message to those left in the 'second wave' that their preparation for the membership of the Union should be stepped up), in practice only caused a wave of outrage in those candidate countries, which was more than understandable with a view that neither the Commission nor the European Council provided any more or less convincing arguments regarding the fundamental differences existing between the countries of the first and of the second wave, that would be able to justify such a division. Marc Maresceau, the leading expert in the field stated that 'the true and complete story of this unexpected choice […] will probably never be fully known'.[73] Moreover, scholarly research demonstrated that the decision taken in Luxembourg had little to do with the fulfillment by the candidate countries (belonging to either group) of the Copenhagen criteria.[74]

Ultimately, the formal division into 'waves' was abolished by the Helsinki European Council (December 1999), proving the arbitrary character of the previously introduced

[70] Croatia was granted a candidate country status by the Brussels European Council, 17–18 June 2004. *See* Presidency Conclusions, § 33.

[71] The necessity of Croatian co-operation with the ICTY was especially underlined by the Brussels European Council, 17–18 June 2004. *See* Presidency Conclusions, § 35.

[72] See, for example, the position of the Chairwoman of the south-east Europe delegation of the European Parliament, Doris Pack MEP, who pointed out that holding Croatia alone responsible for the capture of a French national can only be regarded as a pretext used to postpone the negotiations. See her note 'EU Accession Negotiations with Croatia are Being Delayed Unfairly', EPP-ED-Press Service, March 15, 2005, available at <http://www.epp-ed.org/Press/showpr.asp?PRContentID=6443&PRContentLG=en> (accessed on 25 October 2005).

[73] (Talking especially about the choice of Estonia as a country ready to join the 'first wave') Maresceau, Marc, 'The EU Pre-Accession Strategies: a Political and Legal Analysis', in Maresceau, M. and Lannon, E. (eds), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis* (Palgrave, Basingstoke, 2001), 18.

[74] Friis, Lykke, '"The End of the Beginning" of Eastern Enlargement – Luxembourg Summit and Agenda Setting', [1998] 7 *EIoP* 2, 1, available at SSRN: http://ssrn.com/abstract=302727, (accessed on 10 December 2006)

divide. Moreover, the fact that three countries of the former 'second wave' (Slovakia, Lithuania and Latvia) have already become EU Member States hints that tool 6 was misused by the Commission. Thus, this tool, enjoying absolute priority over all the other means of pre-accession steering, as far as its potential effectiveness is concerned, has not been applied by the European Council consistently and its employment has not brought any positive consequences so far.

Tool 5 has been used on several occasions in the course of the Fifth and the preparation of the Sixth enlargement. Most notably, it has been applied to Slovakia during the rule of Mr. Mečiar, and to Romania. While the former was said to have failed to meet the Copenhagen political criteria,[75] in the latter, the protection of the rights of children in the institutionalized care has been made a precondition for the continuation of the pre-accession process. The narrow application of the tool, including applying it to a specific number of issues within Copenhagen political criteria and restricting its application to a single given country seems to suggest that the application of it is mostly triggered by the necessity to deal with the most urgent problems arising in a particular candidate country, and is rooted in the specificity and extent of the local problems more than it is rooted in the general EU's pre-accession priorities. Thus the narrow application of the tool makes it less instrumental in the context of the assessment of the *acquis*' influence on the Commission's position regarding certain elements of the Copenhagen political criteria in the course of pre-accession.

Tools 3 and 4 have been used by the Commission very frequently. The issues of concern outlined by the Commission usually shifted between the short and medium term priorities of the APs. Different aspects of the same issue were often included into both the short term and the medium term priorities of the APs, making the two tools closely interconnected. This connection can be illustrated by the Commission's promotion of non-discrimination on the basis of ethnic origin, especially concerning the Roma (in the countries where this minority is present). The requirement to take concrete steps to address the situation, such as drafting of the governmental programme of Roma inclusion, for example, or demands to adopt a clear schedule for its implementation, were usually included among the short term priorities of the APs,[76] while more general issues, such as the 'continuation of the application of the programme', were included among medium-term priorities of the APs.[77] These tools applied to a huge array of issues, including (but not limited to) fostering equality, employment opportunities, desegregation of schooling, regulation of the status of civil servants, and adoption of the public service reform packages, improving consultation procedures between the ministries, increasing the involvement of the interested parties in the discussion of the proposed legislation, implementation of the measures to support the local government and increase their effectiveness, the issues related to the independence of the judiciary, people's access to legal aid. Unlike the application of tool 5, which mostly concerned individual candidate countries, the application of tools 3 and 4 demonstrated high levels of uniformity of application to different candidates and was used by the Commission in the context of numerous candidate countries' pre-accession reforms.

[75] This did not come as a surprise, since Mečiar's Slovakia had a much worse democracy and human rights record than other applicant countries. *Cf.* Fish, Steven M., 'A Vladimír Mečiar Retrospective', [1999] 8 EECRev 1-2, available at <http://www.law.nyu.edu/eecr/vol8num1-2/special/endofmec.html>, (accessed on 10 December 2006).

[76] *See e. g.* 1st AP with Bulgaria, § 4.1; 1st AP with Romania, § 4.1.

[77] *See e. g.* 1st AP with Bulgaria, § 4.2; 1st AP with Romania, § 4.2; 1st AP with Hungary, § 4.2.

The application of tool 2 usually involved issues falling outside of the scope of the *acquis*. Mentioning the problem in the Regular Reports did not create the incentives for the candidate countries to seriously address the problem, since the Reports, taken alone without the APs, represent a very soft tool of steering the candidates' reform process in the course of the pre-accession. Promotion of reform with the help of tool 2 leaves it entirely up to the candidate country to do anything to meet the Union's requests or not: the country's progress towards accession does not depend on whether it tackles the issues outlined by the Union with the help of tool 2 or not. Supposedly, the issues promoted with the help of such a soft instrument should have been of marginal importance for the establishment of democracy and the Rule of Law in the candidate countries. The experience of the preparation of the Fifth enlargement demonstrates, however, that it was not the case. Tool 2 was applied to the issues such as the promotion of the creation of the post of Ombudsman, freedom of speech, establishing a legal regime allowing for effective work of the NGOs in the candidate countries, and so forth. While it is difficult to agree on their marginality, it is clear that what is common to all of them is the fact that they lie outside the scope of the *acquis*.

Tool 1 has been reserved for the issues of minor importance, also lying outside the scope of the *acquis*. Consider for example, the importance within the general framework of pre-accession involving 12 States of the protection of the rights of the Romanian Csango minority to be provided with the possibility to learn Hungarian.

Sometimes, however, the Commission actively promoted some reform in several candidate countries, ignoring the fact that similar problems existed in other candidate countries as well. To provide an example, by including the requirement to amend criminal law in order to abolish discrimination on the grounds of sexual orientation (in the form of different minimal ages of consent for homosexual and heterosexual relations) into numerous Regular Reports regarding Bulgaria's and Romania's progress towards accession the Commission ignored that the same drawback existed in Estonian legislation as well. When Estonia amended its Criminal Code without any demand from the Commission, the fact that the amendment abolished discrimination was included by the Commission into the relevant Regular Report.[78] Thus the readers of the Copenhagen-related documents regarding Estonia's accession had the impression that the Commission was applying tool 1 (simply mentioning national reform in the area of minor importance). Such unequal promotion of the same reform by the European Commission certainly sends a wrong message and is contrary to the Luxembourg European Council (1997) statement that all the candidate countries' applications will be judged on their merits based on the same criteria. Hence, once an issue is only occasionally mentioned in one of the Reports, it is necessary to consult the Copenhagen-related documents related to other countries' pre-accession in order to be sure that tool 1 and not a different pre-accession influence tool was used.

The assessment of the use of different tools of influence available to the Commission in the course of the pre-accession process allows drawing some important conclusions concerning the link existing between the mode of influence the Commission is likely to choose in the course of the pre-accession and the relation of the issue in question to the *acquis*. With the exceptions of specific issues, bearing on a limited number of candidate countries and of the issues of marginal importance, all the elements of the Copenhagen political criteria were mostly promoted by the Commission unequally. Whether a certain issue was part of the

[78] European Commission, 2001 Regular Report on Estonia's progress towards accession to the Union, 21.

acquis or not made a difference in the choice of the tool of influence. Moreover, as the example with the abolition of discrimination based on sexual orientation demonstrates, when the issue moves into the scope of the *acquis*, the Union is likely to apply a stricter pre-accession tool.

All this allows talking about the hierarchy among the elements of the particular blocks of the Copenhagen political criteria. While the use of tools 5 and 6 is too country-specific and narrow to lead to a conclusion that the fact that these tools are used reflects the larger priorities of the EU which can be applied to all the candidate countries (just as, to use some examples, the capture of general Gotovina or the protection of a disproportionably high numbers of orphaned children in Romania have no parallels in the context of the majority of other candidate countries' applications); the choice of issues 3 and 4, or 2 can be really telling as far as the importance of the issue is concerned. And this is where the relationship between the elements of the Copenhagen political criteria and the *acquis communautaire* comes into play.

In other words, based on the texts of the Copenhagen-related documents, it is clear that a certain hierarchy exists between the promotion by the EU of different elements of the Copenhagen political criteria and the scope of the *acquis*. Thus not only the Copenhagen criteria themselves, but also their elements are in hierarchical relation to each other.

It is not quite clear whether such a hierarchy is contrary to the idea behind the Copenhagen political criteria. On the one hand, since their main function is to enable impartial assessment whether a country qualifies to join the EU, the Union should be free to choose which elements of the criteria are more important in the course of the pre-accession process. On the other hand, it seems that by introducing such a hierarchy and, consequently, disregarding certain important elements of the criteria (by applying less demanding pre-accession influence tools to those elements), the Union narrows down the meaning of the criteria to a degree which is not at all acceptable – democracy, the Rule of Law and human rights protection acquire a connection with the *acquis communautaire*, misusing both the *acquis* (which was not created to check the level of democracy, the Rule of Law and human rights protection in the third countries and can hardly be useful in such a role) and the idea of impartial assessment of democracy, the Rule of Law and human rights protection in the candidate countries. The very introduction of the criteria can thus be viewed as somewhat halfhearted, aimed at the substitution of the criteria proper, equally important and justly applied, by the *acquis*-oriented bias.

Once it is established that a certain pattern exists in the application of different pre-accession influence tools to different elements of the Copenhagen political criteria, the next step would be to assess whether the actual results of the application of different pre-accession influence tools by the Commission were different. One might suggest that the application of different pre-accession influence tools influences the overall success in the promotion of a particular element of the Copenhagen political criteria. It is thus necessary to compare the influence of the application of different pre-accession influence tools by the Commission on the overall success of the Rule of Law, democracy and human rights promotion in the candidate countries in the course of the pre-accession.

VI. Comparing successes of application of different pre-accession influence tools in the course of enlargement preparation

While, theoretically speaking, it can be suggested that the hierarchy of the elements of the Copenhagen political criteria which is apparent from the use by the EU of specific pre-accession influence tools would influence the results of the promotion of democracy, the Rule of Law and human rights, empirical research, surprisingly, does *not* support this view. Moreover, the general lack of precedents of strict application of conditionality[79] sent the wrong signal to the candidate countries, resulting in a situation when different pre-accession influence tools applied by the Commission did not usually generate different responses from the candidate countries to which they were addressed. The first division of the candidates into two groups at Luxembourg was *de facto* unjustified (being not rooted in the actual findings of the Commission at all) and so biased that the candidate countries of the Fifth enlargement as well as Romania and Bulgaria can be said to have lost their belief in the pre-accession monitoring. And so did the Commission, to a certain degree, since the choice of the 'first wave' candidates by the European Council has clearly demonstrated that the Regular Reporting – however superficially conducted, was done by the Commission largely for nothing and basically represented a nice cover-up for the political decisions on inclusion-exclusion taken by the Member States.

The most crucial problem arising from the whole Regular Reporting exercise and the application of the Copenhagen criteria during the pre-accession is, however, not the political character of all the crucial choices taken in the course of the pre-accession (which should, following the logic of the pre-accession process, be based on the principle of measuring the progress achieved by the candidate countries solely on the basis of the same equally applied criteria). It is the approach taken by the Union to the implementation of conditionality, which is very difficult to call constructive. Instead of using the promise of accession as an effective tool to promote democratic reform, the EU announced from the outset that the Copenhagen criteria had been met by the majority of the candidates by the time of the release of the 1997 Opinions. The sole exception was the then Mečiar's Slovakia, which very soon joined the club. Once the Copenhagen political criteria were deemed by the Commission to be met, the candidate countries received a convincing message that they will become Member States of the EU even without some crucial reforms. Indeed, the assessment that a country has met the Copenhagen political criteria has never been reversed.[80] In other words, by recognising already in the Opinions of the CEECs' applications for membership (1997) that the Copenhagen criteria are met, the Commission publicly refused to use the most important conditionality tool in the course of the pre-accession. The introduction of the enhanced pre-accession strategy with its APs and increased financial assistance to the candidates did not change the situation at all: The main tool that the Commission could use for the promotion of democracy, the Rule of Law and human rights protection in the candidate countries had already been given up.

[79] The first albeit purely political and not related to the Copenhagen criteria example is the decision not to open accession negotiations with Croatia taken by the Brussels European Council (2005). However, the application of conditionality to Turkey might provide another example of how effective it can be.

[80] Although the European Parliament tried to make the Commission seriously consider the possibility of such reversals. This was especially acute in the context of Romania's application and stemmed form the active position of the EP's Rapporteur on Romania Baroness Nicholson.

Ironically, the Regular Reports were becoming more and more detailed with every reporting year, bringing more and more irregularities to light and, at the same time, constantly stating that the Copenhagen political criteria were met by the candidate countries. As a result, a dubious picture of the pre-accession was created – while the Commission itself was recognising in the Regular Reports that the candidate countries lacked some basic elements absolutely necessary for the effective exercise of democracy, the Rule of Law and protection of human rights, in the same documents the Commission also stated that the Copenhagen political criteria were met. In the Reports the Commission recognised *inter alia* that some candidate countries meeting the Copenhagen criteria lacked a system of civil service,[81] were criminalising homosexuality,[82] suppressing minority cultures and the use of minority languages,[83] lacking ombudsmen posts;[84] allowing segregated schooling[85] *etc*.

In other words, the initial threshold of meeting the criteria was placed so low that the idea of effective implementation of the conditionality principle itself was downgraded and, consequently, resulted in almost non-operational conditionality.

This is probably why the application of different pre-accession influence tools to the candidate countries usually did not result in any differences as far as the results of their application are concerned. The whole pre-accession conditionality boiled down to one thing: in case a candidate country was unwilling to implement reforms falling outside of the *acquis* recommended by the European Commission, it was joining the Union anyway, whatever pre-accession influence tool was applied to it. Thus, compared to the consequences which really effective application of the conditionality principle in the pre-

[81] In its 2002 Report on the Czech Republic's progress towards accession the Union the Commission noted that 'an acceleration of the timetable for implementation [of the civil service act] would be desirable' (at 21). The deadline set by the Czech authorities – the year 2006, *i. e.* two years after accession. In practice the law entered into force 4 month before the Czech Republic acceded to the EU. For an excellent account of the civil service reform promotion in the Czech Republic and Slovakia *see* Scherpereel, John A., *Between State Socialism and European Union: Remaking the State in the Czech Republic and Slovakia*, Ph.D. dissertation submitted at the University of Wisconsin, Madison, 2003 (unpublished, available from the library of the University of Wisconsin-Madison).

[82] While Romania was recognised to have met the Copenhagen political criteria in 1997, the criminalisation of homosexual acts was only abolished there in 2001 (European Commission, 2001 Report on Romania's progress towards accession, 23), and the reform of penal legislation is still to continue. On the discussion of the Romanian position regarding criminalisation of homosexual acts see Torra, Michael J., 'Gay Rights after the Iron Curtain', [1998] 22 Fletcher F. World Aff., 79–81.

[83] This is mostly acute in the cases of Latvia and Estonia. All the Copenhagen-related documents dealing with the applications for membership submitted by this two countries discuss this issue. *Cf.* Van Elsuwege, Peter, 'Russian-Speaking Minorities in Estonia and Latvia: Problems of Integration at the Threshold of the European Union', [2004] ECMI Working Paper No.20, available at <http://www.ecmi.de/download/working_paper_20.pdf> (accessed on 10 December 2006); Stepan, Alfred, 'Kogda logika demokratii protivorechit logike natzional'nogo gosudarstva', [1995] *Rossijskij biulleten' po pravam cheloveka*, No. 3, 1995, available at <http://www.hrights.ru/text/b4/bul4.htm> (accessed on 10 December 2006).

[84] The Commission (in some cases joined by the OSCE) insisted on the establishment of such post in the candidate countries. Not having an Ombudsman in place, however, did not prevent some CEECs from meeting the Copenhagen political criteria.

[85] The European Union addressed this issue in the Copenhagen-related documents regarding Bulgarian, Czech and Hungarian applications for membership of the Union. This is not a comprehensive approach to the issue, since, as ERRC (European Roma Rights Centre) research demonstrates, school segregation based 'solely on the basis of ethnicity' also exists in Romania, Poland, Slovenia and Slovakia. For the comprehensive account of school segregation in Eastern Europe *see* ERRC, *Barriers to the Education of Roma in Europe: A Position Paper by the European Roma Rights Center*, (Roma Rights Centre, Budapest, 2002), available at <http://www.errc.org/cikk.php?cikk=385> (accessed on 10 December 2006).

accession process, could bring, the results achieved in the course of the pre-accession were nearly marginal.

Some examples can be given, to illustrate the successfulness of the pre-accession influence tools' application. Assessing the success of the application of tool 1 makes no sense – even the Commission itself does not return to the assessment of the progress in the problem fields of minor importance unsystematically mentioned in the Reports. The tools theoretically employed to bring clear results in the form of new legislation, administrative and legal reforms, training of civil servants and judges *etc*. were mostly tools 2, 3 and 4. As was discussed above, tool 5 was mostly applied to remedy peculiarities of some candidate countries and thus, although deemed to be effective (at least by the Commission), it lacked in generality due to its limited scope, just as did tool 6, only applied on extremely rare occasions.

Thus the assessment of the effectiveness of the application of the pre-accession influence tools should mainly be built around the success in the application of tools 2, 3 and 4, which were applied by the EU to the main bulk of problems arising in the candidate countries in the course of the pre-accession process.

Generally speaking, all the three chosen tools, although they were of help to reforms in some candidate countries, can hardly be characterised as truly effective. Several countries were somehow not only to ignore the Union demands which came in the form of the application of these tools, but even managed to join the Union without accomplishing some crucial reforms.

Bulgaria, for example, has been ignoring the application of tool 2 which was used for the promotion of the creation of a post of ombudsman for eight years in a row. Notwithstanding some minor improvements, such as the creation of local ombudsmen,[86] the Bulgarian ombudsman had not been appointed by the time 2005 Accession Treaty was signed. An example of the not so successful application of tool 3 is the promotion of the introduction of a unified system of professional civil service in the Czech Republic. Although the Commission made it quite clear that it is a necessary step to building democracy and the Rule of Law, the Czech Republic entered the Union in 2004 *de facto* without meeting the Commission's requirements, since its Civil Service Law was only 4 months old. The Application of a combination of tools 3 and 4 can be illustrated by the promotion by the Commission of the abolition of segregation in the schools of several candidate countries, including Bulgaria and the Czech Republic, where the majority of Roma children were automatically sent to schools for mentally retarded based solely on their ethnicity. As the Commission recognised in the 2002 Report on the Czech Republic's progress towards accession to the Union, all the efforts taken by that state to combat school segregation 'appear[ed] *ad hoc* and of low impact'.[87] Notwithstanding the fact that the issue was included among both the short- and medium-term priorities of the APs, the Czech Republic joined the Union without conducting a badly needed reform.

These examples demonstrate that the EU made clear that enlargement is possible even if reforms conducted in the candidate countries bring absolutely no results. They also show that the choice of a specific tool by the Commission does not guarantee the candidate countries' compliance with the Copenhagen political criteria.

[86] Ananieva, Nora and Yordanova, Maria, *Istitutzijata Ombudsman v Europa i Bălgarija: pravna săštnost i praktika* (Tzentr za izsledvane na demokratzijata, Sofija, 2004).

[87] European Commission, 2002 Regular Report on the Czech Republic's progress towards accession to the Union, 32.

The fact that a certain issue falls within the scope of the *acquis* increases the willingness of the candidate countries to act in order to conduct necessary reforms, since once the *acquis* comes into force after accession (and expiry of the transitional periods in some cases), the new Member State is expected to act in accordance with the *acquis* and can be liable for the failure to comply.

VII. Democracy, *acquis* and pre-accession – concluding remarks

This article has examined the role played by the *acquis communautaire* in the pre-accession process during the preparation of the Fifth enlargement and the imminent Sixth enlargement. Working with the whole body of the Copenhagen-related documents allowed it to demonstrate, using concrete examples from the pre-accession that the *acquis* was always playing an important role in the pre-accession. The scope of the *acquis* being narrower than that of the Copenhagen political criteria, the *acquis* still managed to influence the choice of the tools used by the EU to promote reform in some concrete fields. Based on the example of the promotion of non-discrimination on the basis of sexual orientation the paper demonstrated that the inclusion of a certain issue into the scope of the *acquis* is likely to cause a shift in the Commission's perception of the issue in question, resulting in the application of a more 'strict' pre-accession influence tool in the course of enlargement preparation.

Surprisingly, the choice of a particular pre-accession influence tool by the Commission does not at all guarantee that the reforms promoted by the EU will be accepted by the candidate countries and, ultimately, bring any results. The example of the Fifth enlargement, when a number of countries joined the Union without conducting crucial reforms in the spheres outlined by the Commission as important in the course of pre-accession, demonstrates that the regulation of enlargements still remains highly flexible and allows for a number of serious deviations from the Copenhagen criteria ideal. Possible dangers of the application of such approach to the future acceding States such as Turkey, Albania or Bosnia i Herzegovina, for instance, are evident.

The situation in which, *de jure*, equal elements of the Copenhagen political criteria are given a hierarchical order of priority in practice is not acceptable at all. The idea behind the Copenhagen political criteria was not to check the way the elements of democracy, the Rule of Law and human rights protection to be found in the *acquis* are implemented in the candidate countries, but to give the pre-accession a more general outlook of the problems and concerns of the candidate countries. Moreover, this outlook, theoretically, could legitimately be expected to have some practical implementation via the application by the EU of the conditionality principle. In practice, the reform of the issues falling outside the scope of the *acquis*, although constantly mentioned by the Union in the Copenhagen-related documents as a necessity, appears to be more of a mutual game played both by the Commission (imitating a strict reformer) and the candidate countries (imitating that they are conducting reforms). In order to change this, the whole approach of the EU to the meaning and implementation of the principle of conditionality should be revised. In a way, some glimpses of such revision are already apparent for those following the Turkish progress towards accession.

Thus, returning to Walter Benjamin's *Theses*, it seems that, in the end, the well-made stuffed dummy of conditionality could not play enlargement independently of an expert hunchback of *acquis communautaire* pulling the strings from under the chess-table, where

it is hidden by a system of mirrors. This discovery did not come as a surprise – only the most naïve believed that the puppet could live by itself.