Legal constraints on EU Member States as primary law makers : a case study of the proposed permanent safeguard clause on free movement of persons in the EU negotiating framework for Turkey's accession

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PART II

Legal Constraints Flowing from the Accession Process

INTRODUCTION

This thesis tries to identify legal constraints on Member States *qua* primary law makers in the specific context of accession negotiations flowing from EU association law, enlargement law, as well as constitutional law. The first part examined the first "pre-accession" or "association" level, in which the main legal framework of relations between Turkey and the EEC was the Association Agreement signed back in 1963. It was argued that in terms of rights enjoyed by Turkish nationals, the existing legal framework constitutes the legal stepping-stone (a minimum basis, and as such a constraint), which would need to be complemented with further rights at the time of accession in order to be fully aligned with EU law in the area of free movement of persons. This argument leads us to the second level of analysis, i.e. that of "accession", which lays down the procedural and substantive constraints flowing from the past and present Treaty provisions specifying the main contours of the enlargement process, as well as past practice that sheds light on its true nature.

The main purpose of this part is to reveal the complex nature of the accession (enlargement) process, which has become more supranational over the years, (despite its erroneous reduction to being intergovernmental by those who cast only a first glance). Chapter 4 begins by setting the ground for the whole part, by providing an analysis of the past and present forms of the Treaty provisions governing the accession procedure. These provisions are of utmost significance, as they enable us to identify the most salient procedural and substantive constraints on Member States when acting within the scope of the enlargement procedure, as well as enable us to track their evolution.

Chapter 4 deals with procedural constraints on Member States that flow firstly, from the stipulations of Article 49 TEU itself; secondly, established practice; and thirdly, from principles of negotiation that were consistently applied in every subsequent accession wave. Since the Court established long ago that Article 237 EEC (now Article 49 TEU) is "*a precise procedure* encompassed within *well-defined limits* for the admission of new Member States",[485] it is not difficult to foresee that a Council Decision entailing the admission of a new Member State, which has not complied with those precise

485 Emphasis added. *Case 93/78 Mattheus v Doego*, [1978] ECR 2203, para. 7.

procedural requirements, would be susceptible to annulment for "the infringement of an essential procedural requirement".[486] In other words the constraining effect of the procedural aspect of Article 49 TEU flows from the threat of an external sanction, i.e. from the annulment of the above-mentioned Council Decision by the Court of Justice.

A closer analysis of the enlargement procedure and past practice reveals that the procedure laid down in the Treaty is perhaps not as precise as the Court claims it to be. Article 49 TEU is undoubtedly very important, as it establishes the main framework to be followed by the institutions operating within its scope. However, as important as it is, it merely lays down the basic contours of the process, i.e. it provides a bare skeleton. Therefore to provide a fuller and clearer account of how the process works in practice, starting from the precedent set by the first enlargement, an overview of the evolution of past enlargement practice is provided. The role of the Union institutions in this process is highlighted. It should be noted beforehand, that the role of the institutions in this context is not limited to their roles specified under Article 49 TEU, but extends further to their additional roles under the pre-accession strategy designed for the successful realization of the Eastern enlargement. In short, this part will add flesh to the bones provided under Article 49 TEU.

Last but not least, by identifying the main principles that governed past processes of accession and negotiations taking place therein, the flesh and bones of the enlargement process will also acquire their spirit. Identifying these principles and verifying their consistent application over past enlargement waves, will demonstrate the existence of further constraints on Member State action flowing from past enlargement practice.

It should be noted that past practice and principles of negotiation are legal constraints of different kind compared to the procedural constraints flowing from Article 49 TEU. While the latter are formal constitutional constraints written in the Treaties, the former are informal and are to be found in non-binding documents, Commission reports and European Council conclusions. The constraining effect of past practice is a good illustration of "an informal constitutional convention"[487] creating "path dependence",[488] while the con-

486 *Case 138/79 Roquette Fréres*.

487 The 'new institutionalist' literature in political science, and more specifically its 'historical institutionalist branch', serves here as a useful tool, a magnifying glass that provides a clearer picture, and hence, a better understanding of the dynamics of the enlargement process. The 'new institutionalist' approach views institutions "as extending beyond the formal organs of government to include standard operating procedures, so-called soft law, norms and conventions of behaviour". See, S. J. Bulmer, "The Governance of the European Union: A New Institutionalist Approach," *Journal of Public Policy* 13, no. 4 (1993): 355-56. See also, J. G. March and J. P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *The American Political Science Review* 78, no. 3 (1984): 734-47; and J. G. March and J. P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989).

straining effect of principles is an illustration of their internalization by various institutional actors. Arguably, "path dependence" also takes place as a result of learning and internalization of values, norms, and principles that have led to the establishment of these patterns of action,[489] i.e. past practice and principles have reinforced each other in the process of their development.

An overview of past and present of enlargement policy demonstrates clearly, how Member States despite their frustration with certain of its aspects "all find themselves locked into a system which narrows down the areas for possible change and obliges them to think of incremental revision of existing arrangements".[490] The following overview of past practice and the principles governing past enlargement processes provides a clear illustration of how the "the basics" or "the fundamentals" of enlargement policy have remained unchanged over the years while there has been some fine-tuning to meet the specific challenges posed by every subsequent enlargement wave.

The 'historical institutionalist' approach sheds light on how institutions, in the widest sense of the term (here, read values, norms, principles and conventions/ consistent past practice) shape not only actors' strategies (as explained by 'rational choice institutionalists') but also their goals. "[B]y mediating [actors'] relations of cooperation and conflict, institutions structure political situations and leave their own imprint on political outcomes".[491] In other words, norms, values, principles and past practice in the context of enlargement, govern the relations between the actors involved in the enlargement process (that is Union institutions, Member States, and the candidate State). They shape the process and constrain its actors from taking action that violates them. That is how they affect the outcome of the enlargement process. The overriding significance of these values and principles has been constitu-

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488 Path dependence is a common feature of institutional evolution. In addition to social processes, it "may occur in policy development as well, because policies can constitute crucial systems of rules, incentives and constraints". As is illustrated by the precedent set by the first enlargement, examined below, the initial action of institutions lays down a path that is difficult to change or reverse. As argued by Pierson, "[o]ver time, as social actors make commitments based on existing institutions and policies, the cost of exit from existing arrangements rises". For both citations see, Pierson, "The Path to European Integration: A Historical Institutionalist Analysis," 145-46.

489 Kochenov calls this "customary enlargement law". See, D. Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?," *European Integration online Papers* 9, no. 6 (2005).

490 M. Shackleton, "The Delors II Budget Package," in *The European Community 1992: Annual Review of Activities*, ed. N. Nugent (Oxford: Blackwell Publishers, 1993), 20; cited in Pierson, "The Path to European Integration: A Historical Institutionalist Analysis," 147. See also, Giandomenico, "Path Dependency in EU Enlargement: Macedonia'a Candidate Status from a Historical Institutionalist Perspective."

491 K. Thelen and S. Steinmo, "Historical Institutionalism in Comparative Politics," in *Structurung Politics: Historical Institutionalism in Comparative Analysis*, ed. S. Steinmo, K. Thelen, and F. Longstreth (Cambridge University Press, 1992), 9; cited in Bulmer, "The Governance of the European Union: A New Institutionalist Approach," 356.

tionalized by the inclusion of a reference to the provision listing those values (ex Article 6(1) TEU, now Article 2 TEU) with the Amsterdam Treaty revision.

As to the substantive constraints imposed on Member States by Article 49 TEU, they are dealt with in Chapter 5. The most important substantive constraint laid down in Article 49(2) TEU is the stipulation that admission of a new Member States necessitates only "*adjustments* to the Treaties…which such admission entails".[492] Hence, the focus in Chapter 5 is firstly, on the definition of the concept of "adjustment", and then, on the various forms in which adjustments may appear in Accession Agreements, namely as transitional and/or 'quasi-transitional' measures, as well as in the form of safeguard clauses of different kind. Next, the Chapter examines past examples of changes brought by Accession Treaties, which arguably go beyond being mere "adjustments". The rationale, and if available the "justification" for inclusion of such measures is analysed with a view to establishing how compatible they are with the system established by the Treaties. Last but not least, follows a similar evaluation of the compatibility of the proposed PSC with the letter and spirit of the Treaties.

As it will appear from our examination of the evolution of the accession procedure that follows below, it is possible to identify further substantive constraints flowing from Article 49(1) TEU that have been added relatively recently. However, since those constraints, requiring respect for the values referred to in Article 2 TEU and commitment to promoting them, are imposed on the acceding State in this provision, they will not be dealt with in detail here. However, these substantive constraints will be dealt with in Part III, since these values form part of the constitutional foundations of the Union, which Member States are bound to respect, especially when acting within the scope of EU law and procedures, including Article 49 TEU.

Overall, identifying the complex nature of the accession process is extremely important for the purposes of our analysis. A superficial reading of article 49 TEU leaves one with the impression that the process is intergovernmental since it culminates in "ratification by all contracting States in accordance with their respective constitutional requirements". A follow up assumption based on that impression is that, if the process were to be considered intergovernmental, Member States have unfettered freedom in their conduct within the procedure, including the drafting of the Accession Agreement. However, as mentioned above, and as will be demonstrated below, these assumptions are misconceived. As important as the intergovernmental component in Article 49 TEU might be, it is to be found only at the end of the process, or put differently ratification is the culmination, finalization of the process. While the final component or the conclusion of the procedure is intergovernmental, it will be demonstrated that the previous stages of the procedure have a strong Union

492 Emphasis added.

component, which constrains Member States' action, since they are acting within the scope of EU law that is within the limits of Article 49 TEU.

4 Procedural Constraints

4.1 Introduction

This Chapter begins by analysing the evolution Article 49 TEU has undergone over more than half a century. It is of utmost importance, because it is the one and only provision governing the enlargement of the Union. As such it contains the most important procedural and substantive requirements of the enlargement process, even though it has never fully or accurately reflected how the process worked in practice, hence, the need to examine actual practice. Since the precedent set by the first enlargement determined the path to be trodden in subsequent waves of enlargement, this Chapter casts a closer look at the way the accession procedure worked during the first enlargement. Then, it proceeds to examine the evolution of that practice during the most challenging of all the waves of enlargement so far, which is the enlargement to the Central and East European States. The various roles assumed by the Union institutions in this process are also analysed, since that has clearly strengthened the Union nature of the process.

Lastly, follows an overview of the practice future enlargements are expected to follow based on the Negotiating Framework documents drafted for current candidate sates. That overview reveals that to counterbalance the increasingly important roles assumed by the Union institutions throughout the process, Member States have increased their control over the negotiation process with the introduction of the 'benchmarking' system, which has multiplied their veto opportunities. At the end, by adding flesh to the bones, we will get a fuller picture of the process. Unfortunately, the fuller picture will reveal the complex nature of the process and not necessarily make it easier to reach a sweeping conclusion as to whether the process is intergovernmental or supranational. It will be only after establishing the main principles of negotiation and analysing the limitations imposed by the notion of "adjustment" that the Community/Union nature of the process will become more evident.

4.2 Past and present Treaty provisions governing enlargement

The enlargement process has extended the borders of the Union geographically to an unimaginable extent as compared to the times of its inception. What is now a Union of twenty-eight Member States started as a Union of six. There

is a huge literature on the topic,[493] straddling many disciplines, trying to explain the rationale underlying the process and the reasons for its success. In addition to primary sources of EU law, that literature will be used to reveal the nature and dynamics of the process as well as its evolution over the decades, the focus being on establishing the extent to which Member States are constrained within the context of the enlargement procedure.

493 J.-P. Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom* (Leiden: A. W. Sijthoff 1975). 142; G. Avery and F. Cameron, *The Enlargement of the European Union* (Sheffield Academic Press, 1998). 188-91; *EU Enlargement: A legal approach*, ed. C. Hillion (Oxford; Portland, Or.: Hart, 2004); N. Nugent, *European Union Enlargement* (Palgrave Macmillan, 2004); *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (The Hague: T.M.C. Asser Press, 2007); J. O'Brennan, *The eastern enlargement of the European Union* (New York; London: Routledge, 2006); V. Curzon Price, A. Landau, and R. Whitman, *The enlargement of the European Union: Issues and strategies* (Routledge, 1999); F. Schimmelfennig and U. Sedelmeier, *The politics of European Union enlargement: theoretical approaches* (London; New York: Routledge, 2005); C. Hillion, "EU Enlargement," in *The Evolution of EU Law*, ed. P. Craig and G. De Burca (Oxford: OUP, 2011); Inglis, *Evolving Practice in EU Enlargement*; *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003); M. J. Baun, *A wider Europe: the process and politics of European Union enlargement*, Governance in Europe (Lanham: Rowman & Littlefield Publishers, 2000); H. Motamen-Scobie, *Enlargement of the EU and the Treaty of Nice*, Executive briefings (London; New York: Financial Times/Prentice Hall, 2002); D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008); W. Kaiser and J. Elvert, *European Union enlargement: A comparative history* (London; New York: Routledge, 2004); W. Nicoll and R. Schoenberg, *Europe beyond 2000: the enlargement of the European Union towards the East* (London: Whurr Publishers, 1998); C. Preston, *Enlargement and integration in the European Union* (London; New York: Routledge, 1997); A. Tatham, *Enlargement of the European Union* (The Hague: Kluwer Law International, 1999); J. Redmond, *The 1995 enlargement of the European Union* (Ashgate, 1997); C. Ross, *Perspectives on the enlargement of the European Union* (Leiden; Boston: Brill, 2002); H. Sjursen, *Questioning EU enlargement: Europe in search of identity* (London; New York: Routledge, 2006); C. A. Stephanou, *Adjusting to EU enlargement: recurring issues in a new setting* (Edward Elgar, 2006); M. Sajdik and M. Schwarzinger, *European Union enlargement: Background, developments, facts* (New Brunswick, N.J.: Transaction Publishers, 2008); C. J. Schneider, *Conflict, Negotiation and European Union Enlargement* (Cambridge: Cambridge University Press, 2008); A. Ott and K. Inglis, *Handbook on European Union Enlargement: A Commentary on the Enlargement Process*, ed. Andrea Ott & Kirstyn Inglis (The Hague: T.M.C. Asser Press, 2002); M. Maresceau and E. Lannon, *The EU's Enlargement and Mediterranean Strategies*, ed. M. Maresceau and E. Lannon (Basingstoke: Palgrave, 2001); M. Maresceau, *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*, ed. M. Maresceau (London/New York: Longman, 1997); A. Skuhra, *The Eastern enlargement of the European Union: efforts and obstacles on the way to membership* (Innsbruck: StudienVerlag, 2005); W. Armstrong and J. Anderson, *Geopolitics of European Union Enlargement: The fortress empire* (Florence, KY, USA: Routledge, 2007); P. Nicolaides and S. R. Boean, *A Guide to the Enlargement of the European Union: Determinants, Process, Timing, Negotiations* (Maastricht: European Institute of Public Administration, 1997); A. Moravcsik and M. A. Vachudová, "Preferences, power and equilibrium: the causes and consequences of EU enlargement," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. F. Schimmelfennig and U. Sedelmeier (Routledge, 2005); H. Wallace, "Enlarging the European Union: reflections on the challenge of analysis," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. F. Scimmelfenning and U. Sedelmeier (Routledge, 2005).

Despite the criticism that the Treaty article regulating enlargement is "vague and open"[494] or it is an "imperfect guide to enlargement",[495] it lays down the legal basis on which the whole process rests. Therefore, as imperfect or incomplete the picture provided by that article might be,[496] the analysis of the enlargement process in this part requires a brief overview of its origins and evolution. As mentioned above, the latter analysis will reveal the skeleton of the process. As vague and imperfect the skeleton might be, it should be kept in mind that it plays the important function of shaping as well as holding the whole construct together. The flesh and the spirit of the process can develop only to the extent allowed by the framework provided by the skeleton.

To begin with the first of the Communities, Article 98 of the ECSC was worded as follows:

> 'Any European State may apply to accede to this Treaty. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the high Authority; the Council shall also determine the terms of accession, likewise acting unanimously. Accession shall take effect on the day when the instrument of accession is received by the Government acting as depository of this Treaty.'

What is notable in this provision is that all the control of the accession process is given to the Council, and Member States are not mentioned even once. It also makes no provision for negotiations. According to Puissochet, this makes the 'supranational' character of Article 98 of the ECSC Treaty more highly developed than in the other Community Treaties.[497]

As soon as the other Communities were created, aspiring candidates had to accede to the three Communities at the same time. The issue of accession was complicated by the fact that enlargement in the EEC and the Euratom Treaties was designed quite differently. Member States were given more powers to regulate the process, which gave it an 'intergovernmental' flavour.[498] Articles 237 EEC and Article 205 EAEC read as follows:

> 'Any European State may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote.

494 C. Hillion, "Enlargement of the European Union: A Legal Analysis," in *Accountability and Legitimacy in the European Union*, ed. A. Arnull and D. Wincott (Oxford: OUP, 2002), 402.
495 Avery and Cameron, *The Enlargement of the European Union*: 23.
496 Kochenov, *EU Enlargement and the Failure of Conditionality*: 13-14; O'Brennan, *The eastern enlargement of the European Union*: 56.
497 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 13-14.
498 Hillion, "EU Enlargement," 188-91; Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?."

> The conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules.'

Even if the Treaties prescribed different procedures for acceding to the ECSC, the EEC and Euratom, one procedure was followed for acceding to all three Communities. The practice of the first enlargement set the precedent for the principles and procedure to be followed in future enlargements. The result was that neither of the procedures prescribed in the Treaties was followed strictly.[499] As stipulated by Article 237 EEC, the Member States play an important role in the procedure; however, they have chosen to play that role meeting *qua* Council, as stipulated by Article 98 ECSC. Moreover, the Commission, whose role according to Articles 237 EEC and 205 EAEC seems to be limited to delivering an opinion, has played an increasingly important role in each and every succeeding accession wave.[500] However, eventually the fact that each Member State needs to ratify the end-product, that is the Accession Treaty, in line with its own constitutional rules leaves one with the impression that the procedure is of an inter-state character.

The only novelty introduced by the Single European Act in the accession procedure was the role to be played by the European Parliament. Article 8 of the Single European Act provided that before acting unanimously on the matter, the Council needs to obtain "the assent of the European Parliament which shall act by an absolute majority of its component members". This can be characterized as a development strengthening the legitimacy and Union nature of the process. Ratification by Member States' Parliaments was not enough, the organ representing the European people at Community level also had to give its approval to the process.

Another important development that followed was the introduction of a single enlargement article, Article O of the Treaty on the European Union, which abrogated all the previous articles. Moreover, as far as the wording is concerned, the first important change was the replacement, in the first sentence of the second paragraph of Article O TEU, of the word "amendment" with the

499 Kochenov argues that the enlargement procedure lies somewhere in between the models adopted by the ECSC and the EEC/Euratom Treaties. See Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?."; Hillion is of the opinion that the eventual procedure adopted is "imbued with state centrism", whereby the Member States are the gate keepers. See Hillion, "EU Enlargement," 191.

500 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 8-12. O'Brennan, *The eastern enlargement of the European Union*: 74-76; P. S. Christoffersen, "Organization of the Process and Beginning of the Negotiations," in *The Accession Story: The EU from 15 to 25 Countries*, ed. G. Vassiliou (Oxford: OUP, 2007), 35-36.

word "adjustment".[501] The implications of this change will be discussed in more detail in Chapter 5 below. It suffices to say here that rather than providing a substantive change in that provision, the latter change in wording simply aims to clarify the already limited nature of the existing meaning and scope of the word "amendment" used in that provision, i.e. its limitation to amendments to the Treaty that are only required or necessitated by the candidate State's admission. The second change was the replacement of the word 'Community' with that of the 'Union'.

Article O was renumbered to Article 49 TEU by the Amsterdam Treaty revision, and a reference to Article 6(1) TEU (ex Article F1) was introduced. Only the first sentence of the first paragraph of the article, a substantive requirement for candidate States to respect the principles laid down in Article 6(1) TEU was added.[502] This implies a corresponding obligation/constraint on the Member States to ensure that new comers abide by these principles. The principles mentioned in Article 6(1) TEU were those of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." Even though this reference might look like a novelty, it was not. This was simply the codification of a long existing practice that only functioning democracies could join the club.[503]

It is difficult to judge whether the most recent changes brought by the Lisbon revision, again only in the first paragraph of Article 49 TEU, will translate into any practical changes in the enlargement procedure. Article 49 TEU provides that "Any European State which respects *the values referred to in Article 2 and is committed to promoting them* may apply to become a member of the Union".[504] The principles that needed to be respected in the previous Treaty have been renamed as "values", and it seems that in addition to respecting those values a second condition that has been added is that the applicant state needs to be committed to promoting those values. It is also worth noting that the list of values listed in Article 2 TEU is longer than the principles listed in the *ex* Article 6(1) TEU. It reads as follows:

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501 Cf: Article 237 EEC provided as follows: "The conditions of admission and the *amendments* to this Treaty necessitated thereby shall be the subject of agreement between the Member States and the applicant State." Article O TEU provided: "The conditions of admission and the *adjustments* to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State." Emphasis added.

502 The first sentence of Article 49 TEU provided that: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union."

503 European Council of Copenhagen, "Declaration on Democracy", Bull. EC 3/1978, p. 6. Hillion, "The Copenhagen Criteria and their Progeny," 1-22; B. De Witte, "The Impact of Enlargement on the Constitution of the European Union," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003), 229.

504 Emphasis added.

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.'

Other novelties in the current Article 49(1) TEU are that in addition to the European Parliament, the national Parliaments need to be notified of the application for membership, and finally, that "[t]he conditions of eligibility agreed upon by the European Council shall be taken into account." The former is indeed a novelty that requires simply informing i.e. notifying the national Parliaments of the new application and does not go further than that. While the latter addition of the European Council's power to add new conditions to the existing ones is also new as a written element, substantively, it is simply another codification of existing practice.[505]

Based on this overview of past and present Treaty articles governing the enlargement process, it is possible to make a few observations. Firstly, the only condition stipulated for membership in the EEC Treaty was that the applicant country needed to be 'European'.[506] With the Amsterdam and Lisbon Treaty revisions, in addition to being European, the candidate states were required to respect as well as promote the above-mentioned lists of principles and values. The next section shows the latter requirement is codification of existing practice of requiring candidate states' compliance with those principles and values as pre-accession criteria. Moreover, although not stipulated as constraints on Member States in Article 49 TEU (since its focus is on the compliance of the acceding State with these principles and values), the reference to Article 2 TEU is a reminder of the constraining force of these values on Member States as well. Thus, the final part of this thesis demonstrates not only the emergence of these values (as general principles of law), but also their

505 Hillion, "EU Enlargement," 212.

506 The term 'European' remains undefined. According to the Commission, "[i]t combines geographical, historical and cultural elements which all contribute to the European identity. The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review by each succeeding generation. The Commission believes that it is neither possible nor opportune to establish now the frontiers of the European Union whose contours will be shaped over many years to come". See Commission Communication, "Europe and the Challenge of Enlargement", Bull. EU Supp. 3/92, p. 11. K. Inglis, "EU Enlargement – Membership Conditions Applied to Future and Potential Member States," in *The Constitution for Europe and an Enlarging Union: Unity in Diversity?*, ed. K. Inglis and A. Ott (Groningen: Europa Law Publishing, 2005), 234-35. F. Hoffmeister, "Changing Requirements for Membership," in *Handbook on European Enlargement*, ed. Kirstyn Inglis and Andrea Ott (The Hague: T.M.C. Asser Press, 2002), 91-92. M. Fisne, *Political Conditions for "Being a European State" – The Copenhagen Political Criteria and Turkey* (Afyon: Afyon Kocatepe University, 2003).

development to constitute part of the "very foundations" of the Union that constrain Member States at all times.[507]

Secondly, we are able to identify the institutions involved in the process. While initially the only two institutions engaged in the process were the Council and the High Authority/ Commission, subsequently the European Parliament and the European Council have also been included in the provision on enlargement. As to the roles they play in the actual process of accession, the following part demonstrates how succinct the Treaty is regarding their respective roles. However, it needs to be kept in mind that as succinct as the procedure might be, any deviation from it, for instance failure to obtain the assent of the European Parliament, is capable of triggering the annulment of the Council Decision concluding the process.[508]

Last but not least, if we are to draw a general conclusion as to the nature of the process based on the evolution and current wording of Article 49 TEU, that conclusion would be that the enlargement procedure is of hybrid character, embodying both supranational and inter-governmental components. When we examine the first paragraph of Article 49 TEU, it is all about procedural aspects of the process that is the role played by the EU institutions therein.[509] In the first sentence of the second paragraph of Article 49 TEU, the applicant State and Member States need to agree on the conditions of admission and the adjustments to the Treaties, which such admission entails. It is only in the second and final sentence where all States become 'contracting States' that need to ratify the accession agreement in line with their respective constitutional requirements. This means that throughout the procedure Member States need to act as Member States of the Union, conscious of the fact that they are acting within the scope of EU law, thus respecting its values and general principles.

The fact that the procedure ends with ratification of the accession agreement in line with respective constitutional requirements could be deceptive and leave a misleading impression as to the nature of the whole process. The Community/Union/supranational component of this process is at least as heavy as the inter-governmental one. As is demonstrated in the following Chapter, the fact that the Union institutions are involved in the process in a similar manner to their respective roles in other areas of EU law, clearly confirms the 'supranational'/ Union nature of the process.

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507 A risk of serious breach of values triggers Article 7 TEU, which does not restrict its application to Member States acting within the scope of Union law. In other words, Member States need to respect these values and principles at all times. For details see, note 84 above.

508 See, *Case 138/79 Roquette Fréres*; and *Case C-370/12 Pringle*, judgement of 27 November 2012, n.y.r.

509 The only exception is the reference to the national Parliaments that need to be notified of the membership application. On a closer look, that is not even an exception, because it grants the national Parliaments the passive right to be informed, while it is the Union institutions that need to fulfil that duty.

4.3 Accession procedure in practice

4.3.1 Precedent set by the first enlargement

Article 237 of the EEC Treaty was not very clear as to when the Commission or the Council were to deliver their opinions, nor was it clear as to whether the Commission was to play any role in the negotiations. In the case of the UK's first application in 1961, when the Council requested the Commission's opinion on the matter, the President of the Commission Walter Hallstein replied that the negotiations would deal with many problems of interest to the Community, "the Commission will express itself on these insofar and to the extent of the progress of the negotiations. It is on the basis of their results that the Commission will express its opinion as provided by Article 237 of the Treaty".[510] It has been argued that giving an immediate opinion "might have made the Commission *functus officio* with no further right to take part in the procedure provided by Article 237".[511]

The way practice developed with the UK's second application was as follows: the Commission delivered a first opinion pursuant to Article 237(1), but stated that this opinion was only preliminary. It delivered its second and final opinion after the conclusion of the negotiations.[512] That practice has not changed until today. The Commission first delivers an opinion on an application by a candidate state at the very beginning, and then it gives its final opinion after the end of the negotiations.[513]

In its communiqué of the meeting of Heads of State and Government of the Member States in The Hague on 1-2 December 1969, Member States reaffirmed their agreement on the principle of the enlargement of the Community.[514] At its session on 8-9 June 1970, the Council of the European Communities established the procedure for negotiations with the applicant States[515] that is Denmark, Ireland, Norway and the UK. The first paragraph of their decision stated that the negotiations were to be conducted in accordance with a standard procedure by *the European Communities* [emphasis added]. It followed that in respect of any problems arising from the negotiations for membership the Council was the institution to decide on the common standpoint of the Communities. However, in the adoption of that standpoint the Commis-

510 H. Smit and P. Herzog, "Article 237," in *The Law of the European Community: A Commentary on the EC Treaty* ed. D. Campbell (Vol. 6: Matthew Bender & Co., Inc., 2005), 6-373.
511 Ibid., 373-74.
512 Ibid., 375.
513 For the sequence of institutions' roles and contributions to the sixth enlargement round see, Kochenov, *EU Enlargement and the Failure of Conditionality*: 61.
514 Communiqué of the meeting of Heads of State and Government of the Member States at the Hague, 1-2 December 1969, (1969 Communiqué), para. 13.
515 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 8.

sion was invited to make proposals for the resolution of the problems that arise. The relevant discussions in the Council were to be prepared by the Committee of Permanent Representatives, and the country presiding over the Council was to preside over the meetings for negotiations at all levels. During the negotiations, the common standpoint of the Communities was to be set and defended by the Commission when already agreed upon Community policies were concerned, and by the President-in-office of the Council or by decision of the Council in general. Moreover, the Council stated:

> '… its readiness to call on the Commission to seek, in liaison with the candidate countries, possible solutions to specific problems arising in the course of the negotiations and to report thereon to the Council, which will give the Commission any directives required to pursue the matter further with a view to working out the basis for an agreement to be submitted to the Council. This provision will apply in particular where common policies already agreed are concerned.'

It is remarkable that Member States are not mentioned even once throughout the decision, whereas Article 237 EEC and Article 205 EAEC envisaged that "[t]he conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of agreement between *the Member States* and the applicant State" [emphasis added]. The Community character of the procedure is demonstrated by the fact that it is the Community institutions carrying out the negotiations; that is the Commission in the area of pre-agreed policies and the Council in general. According to Puissochet, the Community character of the negotiations was already decided by the summit in The Hague where Heads of State and Government agreed to "the opening of the negotiations between *the Community* on the one hand and applicant States on the other."[516] He argued that the desire behind this decision was to demonstrate the singleness of purpose of the Member States. Moreover, by choosing a joint spokesman, the voicing of any divergent opinions among the six was also avoided.[517]

In practice negotiations were conducted at two levels. During the first and informal phase Member States were supposed to agree among themselves on any given issue. This was followed by the official phase in which the President of the Council met with the candidate country conducting the negotiations. Negotiations had quite a rigid character since the President was not able to depart from the pre-established position. Formal monthly meetings took place at ministerial level and weekly meetings at deputy level, that is at the level

516 1969 Communiqué, note 514 above, para. 13 cited in ibid., 9. See also, Smit and Herzog, "Article 237," 6-374.

517 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 9. Smit and Herzog, "Article 237," 6-374.

of permanent representatives of the six Member States.[518] As it will be discussed below, the structure of the meetings and negotiations remained the same in following enlargements, depending on the level of preparedness of the candidate State, it was the frequency of these meetings that changed. The more time a candidate needed for preparation, the less frequent the meetings were.

The first session of the "Conference between the European Communities and the States Applying for Membership" took place on 30 June 1970 in Luxembourg. The title of the conference was meant to indicate the Community nature of the process. The main issues with the UK were tackled between the fall of 1970 and the summer of 1971. What remained were the negotiations with Norway concerning fisheries and its agricultural supports. The Act of Accession was signed on 22 January 1972,[519] and entered into force on 1 January 1973 for the UK, Ireland and Denmark.

An interesting point to be noted is that the Communities were actually prepared for an instance whereby one of the applicants would not eventually accede. Article 2(3) of the 1972 Treaty of Accession provided for the entry into force of the Treaty in such a case for those States that had deposited their instruments of ratification. In the case of such a scenario, it was the Council acting unanimously which needed to "decide immediately upon such resulting adjustments as have become indispensable" to the Act of Accession. According to Puissochet, the reason why that power was given to the Council rather than a conference of representatives of States which had ratified it was a practical one, that is to obviate the need for recourse to another round of parliamentary ratifications or referendums. However, that choice had serious theoretical implications. A Community institution was given the power to amend the Treaties that is primary law, even if that power was circumscribed by the term indispensable "adjustments". Puissochet claims that "[t]he procedure followed underlines the real individuality of the Community and its autonomy *vis-á-vis* the States which had set it up".[520]

In conclusion, an overview of the procedure for negotiations set by the Council on 8-9 June 1970, and later followed in practice, illustrates clearly the Community nature of the process. It was established that it was the European Communities conducting the negotiations, more specifically the Council. The Council was the main player in the process empowered to decide on the common standpoint of the Communities. The Commission had a very active supporting role. Where areas in which Community policies already agreed were concerned, it would set and defend the common standpoint during the negotiations. The Commission was also supposed to seek solutions to the

518 Smit and Herzog, "Article 237," 376.

519 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 10-13.

520 Ibid., 125.

problems that arose during the negotiations together with the candidate states, and make proposals concerning the adoption of a standpoint. In short, the Commission was actively engaged in the process under the guidance of the Council. Its actual role in the process was a far cry from the role assigned to it under Articles 98 ECSC, 237 EEC and 205 EAEC, which was that of delivering an opinion on a membership application. As to the Member States, it is worth repeating that they had no individual roles to play in the process, the only role they played was *qua* Council of the European Communities.[521]

The experience of the first enlargement laid down the ground rules to be adhered to in future enlargements.[522] As illustrated by the review of the changes in the Treaty articles, other institutions, such as the European Parliament, were also given a role to play in the procedure at a later stage. However, the main dynamic of the process, which is the central roles played by the Council and Commission, remained unchanged.

It is worth noting that there is another Union institution, which is not mentioned in Article 49 TEU and therefore not covered in detail in this Chapter, however, whose authority is felt by other Union institutions as the sword of Damocles swaying upon them through every step of the procedure. It is the possible source of "external sanction" if the game were not played in line with the rules stipulated in Article 49 TEU. That is the Court of Justice of the European Union. The jurisdiction of the Court over the enlargement procedure was already acknowledged in the founding treaties of the Communities "without any particular explicit restriction."[523] That remained unchanged and now under the Lisbon Treaty, Article 49 TEU is subject to the Court's jurisdiction as enshrined in Article 19 TEU and Article 275-276 TFEU. Treaties of Accession also explicitly stipulate that "[t]he provisions concerning the rights and obligations of the Member States and the powers and jurisdiction of the institutions of the Union as set out in the Treaties … shall apply in respect of this Treaty [of Accession]."[524]

Last but not least, it is not the intention of this Chapter to trivialize the important role played by the Member States. They are the gatekeepers that trigger the opening and closing the door of the accession procedure, i.e. they

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521 Smit and Herzog, "Article 237," 375-76. That is also clearly illustrated by Article 4 of Protocol 10 of the 2003 Act of Accession, which provides as follows: "In the event of a settlement, the Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community".

522 Kochenov, *EU Enlargement and the Failure of Conditionality*: 62. C. Preston, "Obstacles to EU Enlargement: The Classical Community Method and the Propsects for a Wider Europe," *Journal of Common Market Studies* 33, no. 3 (September 1995): 452. Smit and Herzog, "Article 237," 377-78.

523 Hillion, "EU Enlargement," 213.

524 For an example, see Article 1(3) of the Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, OJ C 241, 29.8.1994.

are at the peak of their influence at the very beginning (by taking the decision that a State qualifies as a "candidate" for EU membership) and the very end (during the ratification of the Act of Accession).[525] However in between, once the procedure of Article 49 TEU is triggered, as illustrated by the first enlargement, the Union institutions come into play and Member States have to exert their influence through the institutional structures of the Union. How that works is analysed in more detail below.[526]

4.3.2 Evolution of the enlargement practice

There were no major changes in the way in which the accession of a new Member State took place until the eastern enlargement. It was the responsibility of each candidate State to prepare itself in the light of the *acquis* applicable at the time of its accession.[527] However, the sheer challenge presented by the prospect of the CEECs joining the Union,[528] prompted the EU institutions to revise the existing practice so as to be more actively involved in preparing the candidate States for their future accession. The enormity of the challenge invited a proportionate amount of attention from academics, who wrote about every possible aspect of what was called "the big bang enlargement".[529]

525 The fact that France vetoed twice the UK membership application is a good illustration to Member States' influence at the very beginning of the process.

526 See the sub-sections under section 4.3.2.

527 Hoffmeister, "Changing Requirements for Membership," 103.

528 O'Brennan, *The eastern enlargement of the European Union*: 172.

529 A. Albi, *EU enlargement and the constitutions of Central and Eastern Europe* (Cambridge: Cambridge University Press, 2005); Armstrong and Anderson, *Geopolitics of European Union Enlargement: The fortress empire*; A. L. Dimitrova, *Driven to change: the European Union's enlargement viewed from the East* (Manchester University Press, 2004); M. A. Landesmann and D. K. Rosati, *Shaping the new Europe: economic policy challenges of European Union enlargement* (Basingstoke, New York Palgrave Macmillan, 2004); P. Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 1 vols., vol. 2, European Council Commentary (Brussels: EuroComment, 2004); Maresceau, *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*; Nicoll and Schoenberg, *Europe beyond 2000: the enlargement of the European Union towards the East*; Sajdik and Schwarzinger, *European Union enlargement: Background, developments, facts*; M. Schmidt and L. Knopp, *Reform in CEE-countries with regard to European enlargement: institution building and public administration reform in the environmental sector*, Environmental protection in the European Union (Berlin: Springer, 2004); S. Senior Nello and K. E. Smith, *The European Union and Central and Eastern Europe: the implications of enlargement in stages* (Ashgate, 1998); Skuhra, *The Eastern enlargement of the European Union: efforts and obstacles on the way to membership*; M. A. Vachudová, *Europe undivided: democracy, leverage, and integration after communism* (Oxford OUP, 2005); A. Verdun and O. Croci, *The European Union in the wake of Eastern enlargement: institutional and policy-making challenges* (Manchester University Press, 2005); A. E. Kellerman, J. W. de Zwaan, and J. Czuczai, *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001); A. Inotai, "The 'Eastern Enlargements' of the European Union," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP,

The event that constituted a milestone not only for the eastern enlargement but for all subsequent enlargements was the June 1993 Copenhagen European Council, where the CEECs were given the prospect of joining the Union. The Presidency conclusions explicitly declared that "[a]ccession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions."[530] The conditions that had to be satisfied for accession, which became known as the Copenhagen criteria, were as follows:

> 'Membership requires that the candidate country has achieved 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 within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.
>
> The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.'[531]

The Copenhagen criteria became the cornerstone of EU conditionality for both the eastern and future enlargements. Accession negotiations could only be opened after the political Copenhagen criteria were fulfilled by a candidate State.[532] In addition to the political and economic reforms that CEECs needed to undergo as preparation for membership that is for the adoption of the community *acquis*, the Copenhagen criteria stipulate that the Union itself also needs to undergo reforms to be able to "absorb" the new Member States and

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2003); K. Engelbrekt, "Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement," *International Politics* 39(March 2002); U. Sedelmeier, "Eastern enlargement: Risk, rationality and role-compliance," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. U. Sedelmeier and F. Schimmelfennig (Florence, KY, USA: Routledge, 2005); F. Schimmelfennig, "The community trap: liberal norms, rhetorical action and the eastern enlargement of the Euroepan Union," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. F. Schimmelfennig and U. Sedelmeier (Florence, KY, USA: Routledge, 2005); G. Vassiliou, *The Accession Story: The EU from 15 to 25 Countries*, ed. George Vassiliou (Oxford: OUP, 2007); E. Landaburu, "The Need for Enlargement and Differences from Previous Accessions," in *The Accession Story: The EU from 15 to 25 Countries*, ed. G. Vassiliou (Oxford: OUP, 2007). R. Goebel, "Joining the European Union: The Accession Procedure for the Central European and Mediterranean States," *International Law Review* 1, no. 1 (2003-2004). C. Chiva and D. Phinnemore (eds.), *The European Union's 2007 Enlargement* (London and New York: Routledge, 2012).

530 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, SN 180/1/93 REV 1, p. 13.

531 Ibid.

532 Inglis, "EU Enlargement – Membership Conditions Applied to Future and Potential Member States," 238.

ensure that it still functions effectively. The so-called "absorption capacity" of the Union,[533] a novelty introduced in Copenhagen, became an additional criterion to which enlargement-sceptic Member States could pay lip service to in the future.

It should be noted that the political conditions formulated at Copenhagen are not entirely new.[534] In the mid-1970s when Greece, Portugal and Spain were making a transition from authoritarian rule to democracy, it was important to send a clear signal to these countries that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership in the European Communities".[535] Some trace back the roots of political conditionality to the 1960s when the Political Committee of the Parliament issued a report on the necessary political and institutional conditions to become a Member State of the Communities.[536]

Unlike the political conditions, the economic conditions can be considered relatively new. Since the states aspiring to join the Communities during the Cold War years were capitalist states, the emphasis was placed on the political conditions those states needed to fulfil. The collapse of communism and the need for a total overhaul in the systems of the CEECs made both political and economic conditionality a central feature of enlargement policy.[537]

The heavy emphasis on the Copenhagen criteria, resulted in their partial codification in Article 6(1) TEU as the principles (later becoming "values" under Article 2 TEU after Lisbon) on which the Union is founded and principles that require respect from candidate States. In other words, those principles were upgraded from being unwritten constitutional principles to being formal constitutional principles and hence, formal constraints on Member States. Their increased visibility in the Treaties was bound to increase their constraining

533 M. Emerson, S. Aydin, J. De Clerck-Sachsse, G. Noutcheva, "Just what is this 'absorption capacity' of the European Union?," *CEPS Policy brief* 113 (September 2006). F. Vibert, ""Absorption capacity": the wrong European debate," http://www.opendemocracy.net/content/articles/PDF/3666.pdf. G. Durand and A. Missiroli, "Absorption capacity: old wine in new bottles?," in *European Policy Center Policy Brief* (September 2006). S. Gidisoglu, "Defining and Understanding the Absorption Capacity of the European Union: from absorption to integration capacity," *Insight Turkey* 9, no. 4 (2007); F. Amtenbrink, "On the European Union's institutional capacity to cope with further enlargement," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (T.M.C.Asser Press, 2007), 111-16.

534 Hillion, "The Copenhagen Criteria and their Progeny."; K. E. Smith, "The Evolution and Application of EU Membership Conditionality," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003), 109-10.

535 European Council of Copenhagen, "Declaration on Democracy", Bull. EC 3/1978, p. 6.

536 B. Kliewer and Y. Stivachtis, "Democratizing and Socializing Candidate States: The Case of EU Conditionality," in *The State of European Integration*, ed. Yannis A. Stivachtis (Abingdon, Oxon: Ashgate Publsihing Group, 2008), 146; G. Pridham, *Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe* (New York: Palgrave, 2005). 30.

537 Kliewer and Stivachtis, "Democratizing and Socializing Candidate States: The Case of EU Conditionality," 146.

power. The recurrent appeal to these principles requires corresponding commitment and compliance with them, if the Union's credibility were to be kept in place. This consistency requirement as to the compatibility between what one practices and what one preaches has been called "the civilizing force of hypocrisy",[538] and can be identified as an important political as well as legal constraint in the context of enlargement.

The significance of the Copenhagen European Council for the EU's enlargement cannot be overstated. If there is a distinction to be made in terms of the evolution of the enlargement practice, i.e. distinction between different periods, Copenhagen will definitely be the borderline event. Thus, one can speak about enlargement pre and post Copenhagen. Hillion is also of the opinion that since Copenhagen, enlargement has become a *policy* governed by a set of elaborated substantive rules as opposed to being merely a procedure.[539] That policy was given shape by the following European Councils as well as by the myriad of pre-accession instruments developed by the Commission along the way. The more involved Union institutions were in the process, the less chance Member States got to hijack or abuse the process in line with their national agendas. For a better understanding of how enlargement practice changed with the eastern enlargement, a closer look at the role of the institutions in this particular enlargement wave is warranted.

4.3.2.1 Role of the Commission

There were many factors that made the eastern enlargement a huge challenge. To name a few, the number of candidate States, their political, economic, administrative, judicial structures that had to be reformed in line with Western standards, and the level of integration already achieved by the EU, that is the enormous *acquis communautaire* which they had to adopt. Perhaps it is the scale of the challenge that required a greater role for the institution that was to orchestrate the process that is the Commission. Therefore, it is worth noting that what follows is not an exhaustive description of the Commission's role in the process, but just an overview of its most important functions that will enable us to understand and appreciate that role.

With the incoming membership applications after the Copenhagen Summit, the pressure on the Union to develop a coherent strategy to prepare the CEECs for membership increased. The Commission was given a very important role in the process, as it was the institution that needed to prepare proposals for the so-called pre-accession strategy,[540] which was the route plan for the CEECs

538 J. Elster, "Introduction," in *Deliberative Democracy*, ed. J. Elster (Cambridge University Press, 1998), 12.

539 C. Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," (Swedish Institute for European Policy Studies, 2010), 14.

540 Presidency Conclusions, Corfu European Council, 24-25 June 1994.

in their preparation for accession. The pre-accession strategy[541] was approved by the December 1994 Essen European Council.[542] The political and economic conditionality laid down in Copenhagen was used as the basis of the pre-accession strategy and the instruments it was composed of further refined and clarified that conditionality.[543] According to Inglis, the fact that the Commission was so heavily involved in the formulation and implementation of the instruments of the pre-accession strategy as well as its duty to monitor and evaluate candidates' performance in meeting their respective targets under those instruments is an evidence of its unprecedented role in the eastern enlargement.[544]

One of the most important ideas of the Commission came up from its *Agenda 2000* Report, in which it presented its opinions on the ten CEECs.[545] Unlike previous opinions, *Agenda 2000* provided a mid-term perspective on the candidate's preparedness rather than evaluating their current situation. This concept, which set targets for fulfilling different objectives in different time frames for different candidate states, established the basis of the most important legal instrument guiding the candidate states through their process of preparation for accession: the *Accession Partnership*.[546]

As soon as the Commission would draw an Accession Partnership for a particular candidate State, that State had to adopt a National Plan for the Adoption of the *Acquis* (NPAA) that reflected the principles, objectives and priorities outlined in its Accession Partnership document. It also included the policies and financial instruments to be adopted by the Union to support the candidates' reforms towards accession. However, setting goals was not enough.

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541 European Commission, "The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession", COM(94) 320 final; and European Commission, "Follow up to Commission Communication 'The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession'", COM(94) 361 final.

542 Presidency Conclusions, Essen European Council, 9-10 December 1994.

543 K. Inglis, "The Pre-Accession Strategy and the Accession Partnerships," in *Handbook on European Union Enlargement: A Commentary on the Enlargement Process*, ed. A. Ott and K. Inglis (The Hague: T.M.C. Asser Press, 2002), 104. For more information on the pre-accession strategies and different forms of conditionality applied by the EU, see; Smith, "The Evolution and Application of EU Membership Conditionality." M. Maresceau, "The EU Pre-Accession Strategies: A Political and Legal Analysis," in *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis* ed. M. Maresceau and E. Lannon (Palgrave, 2001). Kliewer and Stivachtis, "Democratizing and Socializing Candidate States: The Case of EU Conditionality."; L. Tunkrová, "Democratization and EU conditionality: A barking dog that does (not) bite?," in *The Politics of EU Accession: Turkish challenges and Central European experiences*, ed. L. Tunkrová and P. Šaradín (Routledge, 2010); M. Maresceau, "Pre-accession," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003).

544 Inglis, "The Pre-Accession Strategy and the Accession Partnerships," 104.

545 European Commission, "Agenda 2000: For a Stronger and Wider Union", Bull. EU Supp. 5-1997.

546 Inglis, "The Pre-Accession Strategy and the Accession Partnerships," 103-11.

Therefore, starting from the end of 1998, the Commission was also asked to prepare yearly reports, which made an overview of the progress made by each applicant State towards accession.[547]

It was obvious that the tasks entrusted to the Commission could no longer be dealt with by the task force (TFNA – Task-force Négociations d'Adhésion) established in 1998. Thus, to represent the political importance as well as the scale of the challenge of enlargement to the east, a Commissioner for Enlargement was appointed and a Directorate General for Enlargement was created to assist him. According to Chrystoffersen, the creation of DG Enlargement reflected "a shift in the focus of the accession process from diplomatic negotiations to a much broader-based preparation process".[548]

To make the negotiations easier and more systematic, the *acquis* was divided into thirty-one chapters, each covering a specific policy area, upon which the negotiations were carried out. The negotiations always started with the analytical examination of the *acquis* by the Commission for each chapter, the so-called "screening" process, which was presented to all candidate States in joint meetings. Subsequently, the Commission held bilateral meetings with each candidate State so as to identify the changes required to conform to the Union's *acquis* in all thirty-one chapters. At the end of the screening process, the Commission presented its findings to the Council in a report, which described the state of affairs and identified problematic areas.[549]

After the screening process was over, both the EU and the candidate states prepared their negotiating positions on each individual chapter. Candidate States explained how they intended to adopt the *acquis*, what changes were needed, and how they planned to implement those changes. On the EU side, it was the Commission that proposed the draft negotiating position for each chapter and country. The only exceptions were the CFSP and JHA. For the latter chapters, it was the Council Presidency that was officially responsible for submitting proposals in "in liaison with the Member States and the Commission."[550] However, in practice according to Chrystoffersen, in the JHA area it was the Commission that did the work, which the individual EU Home and Justice Ministers followed closely.[551]

The Commission played an important role in the process, even though the negotiations formally took place in an IGC: in the case of the fifth enlargement called "Conference for accession to the European Union" between the fifteen Member States and the specific candidate country.[552] It was not only

547 Presidency Conclusions, Luxembourg European Council, 12-13 December 1997, para. 29.
548 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 37.
549 Ibid., 44-45.
550 Ibid., 45.
551 Ibid.
552 L. Maurer, "Negotiations in Progress," in *Handbook on European Union Enlargement: A Commentary on the Enlargement Process*, ed. Andrea Ott and Kirstyn Inglis (The Hague: T.M.C. Asser Press, 2002), 117-18.

the institution monitoring the progress of the candidates, but also the one developing and fine-tuning the myriad of strategies and instruments that sought to manage the process. It acted as the main interlocutor with the candidate States.[553] Hence, Chrystoffersen concludes that the Commission's de facto role in the enlargement process "is more typical of the 'Community method': the Commission proposes, the Council decides, and the Commission implements, controls and evaluates".[554] That is again a far cry from the role envisaged for the Commission under Article 49 TEU.

4.3.2.2 Role of the Council

Defining the role of the Council in the enlargement process is a bigger challenge than defining the Commission's role, since we talk about the role of multiple entities under the rubric "the Council". We talk about the European Council,[555] the Presidency of the EU, the Council of Ministers, Coreper (Committee of Permanent Representatives), the expert working groups reporting to Coreper. In the case of the eastern enlargement, these different parts of the machinery combined to form the complex and multifaceted Council, which had responsibility over a wide range of policy domains. According to O'Brennan, this differentiated sharing of responsibility within the Council machinery contributed to the fragmentation of enlargement policy, undermining the coherence of the EU position and alienating the candidate states.[556]

To mention a few of the reasons for fragmentation within the Council; firstly, officials working in the Council were Member State representatives with relatively clearly defined and fixed national objectives which made it difficult for the Council to develop its distinct 'enlargement perspective'.[557] Secondly, the Council would meet in one of its many configurations, composed of ministers in a given sectorial area such as finance, the environment or agriculture, which at the end would result in not only national but also sectorial cleavages.[558] Finally, cooperation and coordination was needed among the sectorial Councils, the General Affairs Council, and Coreper as well as between all these and the Presidency. All that fragmentation, according

553 O'Brennan, *The eastern enlargement of the European Union*: 56.

554 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 36.

555 At the time of the eastern enlargement the European Council was not officially a fully-fledged institution under the Treaties, but an inter-governmental forum. Therefore, it will be dealt with as part of the Council machinery when describing its role in the eastern enlargement.

556 O'Brennan, *The eastern enlargement of the European Union*: 58-59.

557 M. Conrad, "Persuasion, Communicative Action and Socialization after EU Enlargement," in *Second ECPR Pan-European Conference* (Bologna24-26 June 2004), 20; cited in O'Brennan, *The eastern enlargement of the European Union*: 59.

558 U. Sedelmeier, "Sectoral Dynamics of EU Enlargement: Advocacy, Access and Alliances in a Composite Polity," *Journal of European Public Policy* 9, no. 4 (2002): 631.

to O'Brennan, frequently undermined the Council's ability to carve out a consistent enlargement policy.[559] Arguably, all these drawbacks experienced by the Council might have contributed to the strengthened role of the Commission in the enlargement process.

As to the role of the Council machinery in the negotiation process itself, every piece of work would start at the lowest level, and if not resolved, would be transferred to a higher level until it reached the highest level of decision-making. A draft common position would initially be examined by the Council's Enlargement Working Group, which would be composed of diplomats experienced in EU affairs. If there were difficulties in reaching an agreement on the definition of the common position, the issue would be referred to Coreper, a senior committee composed of EU ambassadors of Member States and the Director General for Enlargement representing the Commission in this particular case. If it were still not possible to resolve the issue, it would be referred to the General Affairs Council, composed of Foreign Ministers of Member States and a member of the Commission. In exceptional cases, such as a number of financial issues that needed to be agreed on at the end of the negotiations of the fifth enlargement, the matter had to be raised to the level of the European Council.[560]

Negotiations, which took place under the title "Conference for the Accession to the European Union", usually, began at (deputy) ambassador level. The President of Coreper, who was assisted by the Director General Enlargement, led the Union delegation. Negotiations also took place at ministerial level with the EU being represented by the General Affairs Council and the Enlargement Commissioner. A candidate State was represented by its chief negotiator, who was a minister appointed to conduct the negotiations. Any results reached in the negotiations at deputy level had to be approved at the ministerial level. Usually each presidency held one meeting at deputy and one at ministerial level. The negotiations, i.e. the conference could also be held at the level of heads of state and government.[561]

According to Chrystoffersen, little real negotiation took place in the enlargement conferences. They were purely formal. Their main function was to register the progress of the negotiations. Most of the real negotiations took place behind the scenes, in meetings between the chief negotiator of the country and the Commission and/or the Presidency.[562] This suggests a limited role for Member States representatives during the conference.

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559 O'Brennan, *The eastern enlargement of the European Union*: 60.

560 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 41-42.

561 Ibid.; Maurer, "Negotiations in Progress," 117-18. Schneider, *Conflict, Negotiation and European Union Enlargement*: 18-19.

562 See also, Christoffersen, "Organization of the Process and Beginning of the Negotiations," 42-43; G. Avery, "The Enlargement Negotiations," in *The future of Europe: integration and enlargement*, ed. F. Cameron (London: Routledge, 2004), 40.

The roles of the European Council and especially that of the Presidency of the Council of Ministers also deserve special attention. To begin with the role of the latter, it is one of the key institutional actors in the negotiating process. It was expected to take a leadership role, and act as a mediator when there were institutional or policy disputes. Activist Presidencies, such as the Swedish and Danish presidencies, made a big difference in the acceleration and conclusion of the accession process. Presidencies' role in the process is crucial since it is the Presidency that decides not only on the format of the negotiation sessions, but also on their number and frequency. They are able to structure and shape the negotiating agenda. Especially when the Commission and a Presidency enjoyed a good working relationship, they were able to resolve problems since it would become more difficult for the Member States to oppose proposed solutions backed by both institutions.[563] According to Ludlow, as far as the EU is concerned, the Commission and the Presidency were the main actors in the enlargement story to the East.[564]

As to the role of the European Council, it provided the general political direction to the enlargement process.[565] Important decisions, such as the opening of accession negotiations with a group of countries, or additional criteria that had to be fulfilled by the candidates, would be specified in these summits.[566] Though there were few summits that provided momentum to the enlargement process, O'Brennan argues that the structural dynamics of intergovernmental bargaining was often inclined to produce non-decisions. Where European Council meetings did produce EU agreement, "that was more often than not because of the informal day-to-day supranational process which increasingly characterized EU enlargement practice and provided the problem-solving capacity in advance of intergovernmental gatherings".[567]

To recap, the Council's role in the process is complex and multifaceted. Due to various forms of fragmentation mentioned above, it was not able to act consistently throughout the process. Its role was still very important, since it was the Council machinery through which Member States tried to maintain their control over the process. This was important because the Commission succeeded in establishing authority in key parts of the EU enlargement framework from early on. Thus, the Council machinery enabled Member States to

563 O'Brennan, *The eastern enlargement of the European Union*: 62-65.

564 Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 2: 64.

565 See Article 15(1) TEU.

566 The December 1999 Helsinki European Council for instance, invited Bulgaria, Romania, Latvia, Lithuania and Slovakia to begin accession negotiations in February 2000. It was emphasised that negotiating states had to comply not only with the Copenhagen criteria but also with the principle of peaceful settlement of disputes in accordance with the UN Charter. See Presidency Conclusions, Helsinki European Council, 10-11 December 1999, paras. 10 and 4 for the respective examples.

567 O'Brennan, *The eastern enlargement of the European Union*: 72.

scrutinize the Commission's activities and ensure their interests were protected throughout the process.[568]

The purpose of describing the role of each institution in the accession process was to demonstrate its complex nature and the structures within which Member States and Union institutions had to operate. All of these limit Member States' room for manoeuvre. Overall, the accession process of the CEECs was far from being purely intergovernmental, and Member States were far from having full control over it. They had to use existing structures, i.e. various parts of the Council machinery, to be able to control the process. As in other policy areas, there were and there still are inter-institutional turf battles whereby each institution tries to maximize its power and influence over the process. As a response to the increase in the Commission's power over the process, as argued in section 4.3.3 below, Member States have devised new ways to increase their control over the process.

4.3.2.3 Role of the European Parliament

Upon a plain reading of Article 49 TEU, the role of the European Parliament seems to be limited to saying "yes" or "no" at the end of the accession process. However, scholars argue that with the eastern enlargement the EP became a player in its own right in all the stages of the process within the Union and within the candidate countries themselves. It managed to translate its formal power of assent into various forms of informal influence over the process.[569]

The Parliament was pro-enlargement from the early stages of the process. It was in favour of an inclusive strategy and insisted on the equality of treatment of all the candidate states. Its Foreign Affairs Committee was largely responsible for supervising and coordinating studies and debates on enlargement. Embedding democratic norms, human rights and fundamental freedoms in the candidate states were the main themes of these studies and debates. The EP also contributed to the early socialization of the members of the national parliaments of the candidate states through their meetings in Joint Parliamentary Committees.[570] As negotiations progressed towards tackling more challenging issues specialist committees were formed within the Parliament to tackle sector-specific enlargement issues. These specialist committees

568 Ibid.

569 Ibid., 95; Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 2: 64. See also, The European Parliament, "The European Parliament in the Enlargment Process: An Overview", June 2002.

570 O'Brennan, *The eastern enlargement of the European Union*: 99-104; Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 2: 64-65.

were involved in monitoring the negotiations in their areas of expertise, and when needed conducted fact-finding missions in the candidate countries.[571]

Overall, the European Parliament played an important monitoring role in the pre-accession process. In addition to holding annual debates on enlargement on the basis of reports prepared by its Foreign Affairs Committee and its specialist committees in the process of negotiations of the Eastern enlargement, it also adopted resolutions on the Commission's regular progress reports for each candidate country.[572] These resolutions were quite influential and stirred fruitful debates within the Union as well as within the candidate countries.

Though a minor player compared to the Commission and the Council, Parliament's pro-enlargement stance undoubtedly gave an extra momentum to the process and contributed to its legitimacy. Parliament's role is another illustration of the Union nature of the enlargement process, as Parliament usually has no say in purely intergovernmental settings. In other words, the role of the EP in the enlargement process brings it closer to other areas of Union law, which are shaped and implemented by the Community/Union method, that is the interaction between the Commission, Council and the European Parliament.

An overview of the roles of various institutions in the process was important to illustrate how active and involved they were in the process, way beyond what had been envisaged in Article 49 TEU. That role now extends to cover the pre-accession process. The main reason behind this extension was the fact that the Union institutions had to be involved in "Member State building"[573] or "Member State creation". Economic, administrative and judicial structures compatible with the EU's DNA, that is liberal democracy based on the rule of law and on market economy principles, had to be created before admitting the new comers. The transformation of the CEECs needed the support and guidance of Union institutions, without which it might have lasted way longer, and could have lost its momentum along the way. It needs to be emphasised that this was indeed an evolution of the process and not only an exception, as the majority of the candidate countries and potential candidates are countries in need of a similar transformation process. Except for

571 See, "The European Parliament in the Enlargement Process – An Overview", March 2003. Available online at: http://www.europarl.europa.eu/enlargement_new/positionep/pdf/ep_role_en.pdf

572 Ibid.

573 The term was first used by G. Knaus and M. Cox, "The "Helsinki Moment" in Southeastern Europe," *Journal of Democracy* 14(2005): 39-53. See also, S. Blockmans, "EU enlargement as a peacebuilding tool," in *The European Union and Peace Building: Policy and Legal Aspects*, ed. S. Blockmans, J. Wouters, and T. Ruys (The Hague: TMC Asser Press, 2010), 77-78.

Iceland, there are no states like Austria, Finland or Sweden left outside the EU anymore.[574]

Poul Skytte Chrystoffersen, who was the Danish ambassador to the EU from 1995 to 2003, and in this capacity was the President of Coreper and the EU Chief negotiator, explained how formal enlargement conferences were and how little real negotiation they entailed. He notes their main function was to register the progress of the negotiations, which took place elsewhere, in meetings between the chief negotiator of the country and the Commission and/or the Presidency.[575] This demonstrates how constrained Member States' representatives were during the Conferences. They had limited room of manoeuvre, especially when the Commission and Presidency worked well together and came with common proposals.[576]

To sum up, the eastern enlargement showed how the active involvement of Union institutions added an extra momentum to the enlargement process. The institutions worked hard to make things move. The fact that so much energy and effort was invested in the preparation of the candidates for full membership, made it difficult for individual Member States to halt the process or sabotage it. Both Member States and Union institutions jointly prepared the ground for the unification of Europe. Once the process got underway, blocking such a historical event was no longer plausible. Member States were constrained (or 'entrapped' as Schimmelfennig calls it) both by their own rhetoric,[577] as well as by the momentum created by the scale of institutional involvement in the process.

4.3.3 Practice governing future enlargements

Even though there has been some fine-tuning, the accession process of the existing candidate states has been by and large working along the same lines with that of the CEECs. The Commission prepared Accession Partnership documents in which it outlined the short and medium-term priorities upon which the candidates prepared their National Programmes for the Adoption

574 The author assumes that in the current political climate, and after negative referenda on the issue of EU membership in both Switzerland and Norway, it is not very likely for either of these countries to revive its membership aspirations in the near future. Moreover, it should be noted that the Swiss also refused to join the EEA Agreement in December 1992, following which the current association regime of bilateral agreements was established. For more details, see the literature cited in footnote 199 above.

575 See also, Christoffersen, "Organization of the Process and Beginning of the Negotiations," 42-43; Avery, "The Enlargement Negotiations," 40.

576 O'Brennan, *The eastern enlargement of the European Union*: 62-65.

577 Schimmelfennig, "The community trap: liberal norms, rhetorical action and the eastern enlargement of the Euroepan Union."

of the *Acquis*.[578] These documents are updated by the Commission on a regular basis.[579]

The Negotiating Frameworks for Turkey, Montenegro and Serbia also contain a section on the "negotiating procedures" which briefly explain how the negotiations are to proceed. The first step is breaking down the *acquis* into chapters covering specific policy areas, to be followed by "screening". After the screening phase, building on the Commission's regular reports and in particular on the information obtained by the Commission during screening, the Council, acting by unanimity on a proposal by the Commission, lays down "benchmarks" for the provisional closure and opening of every chapter. This system of benchmarks is what differentiates the current accession process from all the previous ones. It is an evaluation and assessment system that makes use of pre-determined performance indicators. These indicators, i.e. the benchmarks, can be updated as needed. The fact that unanimity in the Council is required for identifying relevant benchmarks, (as proposed by the Commission), as well as for the opening and closing of individual chapters makes the process much more political and difficult than before, as it gives Member States plenty of opportunity to block decision-making at any stage they wish to do so. This has arguably weakened the "Union nature" of the enlargement process. Unlike initial practice, Member States' increased control over the process has given them the opportunity to hold up the negotiations also for reasons that are not necessarily related to compliance with accession criteria, thereby politicizing the process and making it unpredictable.[580]

Provisionally closed chapters might be opened at any stage and the definitive ending of the negotiations takes place only at the very end, after everything has been agreed upon. According to the Commission, there is such interdependence between different chapters of the *acquis* that the principle that governs the negotiations is that "nothing is agreed until everything is agreed".[581] This is one of the relatively novel principles, which tells us that no chapter is closed until all chapters are closed.

To be able to fully grasp the nature of the enlargement process we also need to know about the well-established principles governing the negotiations. These principles had to be respected by all actors involved in the process so far. As such they can be considered as constraints on all actors including the Member States. Having established some of the constraints flowing from the

578 For examples, see Turkish National Programme for the Adoption of the Acquis, available online at: http://ec.europa.eu/enlargement/pdf/turkey/npaa_full_en.pdf ; National Programme for the Adoption of the Acquis of the Republic of Macedonia, available online at: http://www.mfa.gov.mk/Upload%5CContentManagement%5CFiles%5CMFA-National%20programme%20for%20adoption%20of%20the%20acquis.pdf

579 For examples, see note 224 above.

580 Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," 21.

581 "Closure of Negotiations and Accession Treaty", available online at: http://ec.europa.eu/enlargement/the-policy/process-of-enlargement/closure-and-accession_en.htm

procedure laid down in Article 49 TEU and actual enlargement practice, that is the bones and the flesh of our construct, it is time to identify the main principles that have shaped the negotiation process thereby shedding light on its spirit.

4.4 Definition and consolidation of negotiation principles

As with the actual practice of enlargement, the main principles of negotiation established during the first enlargement have formed the very basis on top of which some new principles have been added, however by and large, the latter have been derived from the former. The focus in this part is on identifying the main principles, which are by now entrenched in enlargement practice. Principles that could be considered part of "customary EU law",[582] because there has been a consistent actual practice over time as a result of a belief that they are legally obligatory.[583] Thus, the list provided here is shorter than the lists of enlargement principles identified by scholars writing in this field,[584] since what is of interest for our purposes is identifying only the principles that have been entrenched and internalized as a result of consistent and repeated past practice. As part of "customary EU law", these principles constrain all the actors involved in the enlargement procedure, including the Member States.

To show that these principles have been repeatedly and consistently applied in each and every accession process out of a belief that such legal obligation existed, i.e. to prove they have been internalized, it is appropriate to examine the process in a chronological order. The fact that those principles were respected is evidence of state practice, while statements of the Commission, the Council, leaders of candidate states or Member States emphasizing the importance of those principles or the requirement they be respected are evidence of *opinio juris*, i.e. the belief that that following those principles is legally obligatory.[585] The emphasis in this part will be on the latter, while a more in-depth analysis of the evidence of actual state practice, as manifested by the Acts of Accessions follows in Chapter 4.

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582 Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?."

583 M. N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003). 68-80.

584 D. Booss and J. Forman, "Enlargement: Legal and Procedural Issues," *Common Market Law Review* 32, no. 1 (1995): 100-03. K. Maniokas, "Methodology of Enlargement: A Critical Appraisal," *Lithuanian Foreign Policy Review* 1, no. 5 (2000); Preston, "Obstacles to EU Enlargement: The Classical Community Method and the Propsects for a Wider Europe," 452-56. Kochenov, *EU Enlargement and the Failure of Conditionality*: 38-45.

585 For more information on what constitutes 'opinio juris' see, Shaw, *International Law*: 80-84. H. Thirlway, "The Sources of International Law," in *International Law*, ed. M. D. Evans (Oxford: OUP, 2010), 102-04.

4.4.1 The first enlargement as the source of all principles

Once the main principles of negotiation were established, the main issues to be discussed became also apparent. The founding Member States agreed that there were two main principles that would govern the accession process. The first principle had already been laid down in the Hague summit. It required that "the applicant States accept the Treaties and their political finality, the decisions taken since the entry into force of the Treaties and the options made in the sphere of development…".[586] In today's jargon, the applicant States needed to adopt the entire body of *acquis communautaire*.

The second principle, which is a corollary to the first one, was established by the Council at its session on 6th of March 1970 and provided as follows: "The rule … is that the solution of any problems of adjustment which arise must be sought in the establishment of transitional measures and *not in changes of existing rules*."[587] In the first session of the "Conference between the European Communities and the States applying for membership of these Communities" on 30 June 1970, the President-in-office of the Council at the time, Mr. Harmel, Foreign Minister of Belgium, emphasized these two principles. Regarding the second principle, he reaffirmed that any transitional measures that prove to be necessary need to be of limited duration, and that as a general rule they must incorporate precise timetables.[588]

According to Puissochet, these two principles demonstrated the intention of the founding Member States to apply the principle of continuity of the Community. The legal and political personality of the Community as well as existing economic arrangements were not to be distorted by accession in a way that would constitute novation in the legal sense of the term. Also legally, the Treaty articles on enlargement provided for "adjustments" and not amendment to the Treaties.[589]

These principles were in no way new. The Commission had outlined them long before the negotiations started. Back in the early 1960s, it made it clear that membership required the full acceptance of the principles and content of the Treaty of Rome. The entry of the new members was not to jeopardize

586 1969 Communiqué, note 514 above, para. 13.

587 Emphasis added. Cited in Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 6.

588 Ibid., 10.

589 Puissochet must have reached that conclusion based on the original language versions of the Treaty. Similarly, AG Lenz argued that "[s]ince accession treaties are, after all, agreements admitting additional States to a group of members of an existing community, it may be argued that such treaties should only contain the necessary technical adjustments of existing Community law without substantially changing the character of the Community." Emphasis added. See, Opinion of AG Lenz delivered on 1 December 1987 in *Joined Cases 31 and 35/86 LAISA and CPC España v Council of the European Communities*, [1988] ECR 2285, part B -I- (a) of the Opinion.

the aims of the Community, and consequently the Treaty was not to be subjected to any changes other than those required by the actual enlargement of the Community to new Member States.[590] Setting the limits within which future negotiations were to proceed was important in order to ensure that the interests of the Community were respected. Thus, already back in 1962 it was underlined that "the Community could never agree to schemes that might, by means of protocols or otherwise, introduce exceptions to the Treaty's rules which would be permanent or on so large a scale as to make the application of these rules an exception in itself."[591]

4.4.2 Enlargement to the South: Main principles maintained

To begin with the southern enlargement, the Commission acknowledged from the very outset that the integration of Greece, Portugal and Spain would be more problematic due to their lower level of development.[592] It was obvious to the Commission that the transitional period for these states should be longer than the transitional period adopted in the previous enlargement. However, there had to be a fixed deadline so as not to lose the incentive for reform. So the Commission concluded that the transitional period should be between five and ten years.[593]

The Commission also saw derogations or safeguard clauses of limited duration as a possible response to problems that arise in the transitional period. However it also emphasized that "[s]ubject to any strictly limited exceptions or derogations specified in the accession treaty, the end of the transitional period would represent the ultimate deadline for entry into force of all Community rules and application of all measures associated with enlargement."[594] In other words, at the end of the transitional period, the acceding States needed to have adopted the *acquis commnautaire* in full. This general principle guiding the negotiations was stated explicitly by the Commission, in addition to the principle that the terms of negotiation should be clear and that Portugal and

590 EEC-Commission, The first stage of the Common Market: Report on the Execution of the Treaty (January 1958 – January 1962), July 1962, pp. 95-96.

591 Ibid., p. 98.

592 For multi-disciplinary studies on the challanges of the 'enlargement to the South' see, J. B. Donges et al., *The Second Enlargement of the European Community: Adjustment Requirements and Challenges for Policy Reform*, Kieler Studien: Institut für Weltwirtschaft an der Universität Kiel (Tübingen: J. C. B. Mohr (Paul Siebeck) Tübingen, 1982). D. Seers and C. Vaitsos, *The Second Enlargement of the EEC: The Integration of Unequal Partners*, Studies in the Integration of Western Europe (New York: St. Martin's Press, 1982). L. Tsoukalis, *The European Community and its Mediterranean Enlargement* (London: George Allen & Unwin, 1981).

593 European Commission, Communication, "Enlargement of the Community – Transitional period and institutional implications", Supp. 2/78, pp. 6-7.

594 Ibid., p. 8.

Spain should accede simultaneously.[595] Put differently, the main principles underlying the negotiations of the first enlargement did not change during the second wave of enlargement.

4.4.3 Enlargement to the North: Main principles confirmed

An interesting point concerning the negotiations preceding the northern enlargement was the fact that the Commission was preparing and carrying out the negotiations based on the future *acquis* of what was to become the European Union after the entry into force of the Maastricht Treaty.[596] The speech delivered by the Finnish President Koivisto in Bruges on 28 October 1992 reveals the spirit of the process, and is another illustration of the confirmation, or entrenchment if you will, of the principle established in the Hague Communiqué: that "the applicant States accept the Treaties and their political finality".[597] He provided as follows:

> 'The European Community is playing a growing role in determining the course of developments on our continent. We would like to play a part in this process. We have studied the obligations of EC membership with care. In applying for membership, we accept the *acquis communautaire,* the Maastricht Treaty and the *finalité politique* of the European Union. We are ready to accept the obligations conferred by membership and to help to meet them as agreed.'[598]

This does not mean that there were no difficulties at all. The northern states also had their concerns, which they raised during the negotiations such as their neutrality, their high environmental standards, taxation, their alcohol monopolies etc. Norway was particularly concerned with the rules in the area of energy and fisheries, which were considered as areas of vital national importance.[599] However, the President-in-Office of the Council of Ministers made it clear at the ministerial meeting opening the Conferences on the accession of Austria, Sweden and Finland to the European Union that:

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595 European Commission, Communication, "Problems of Enlargement – Taking stock and proposals", Supp. 8/82.

596 European Commission, "The Challenge of Enlargement. Commission opinion on Finland's application for membership", Supp. 6/92, p. 6; and European Commission, "The Challenge of Enlargement. Commission opinion on Sweden's application for membership", Supp. 5/92, p. 5.

597 1969 Communiqué, note 514 above.

598 European Commission, "The Challenge of Enlargement. Commission opinion on Finland's application for membership", Supp. 6/92, p. 8.

599 For more detailed analysis see, T. Pedersen, *European Union and the EFTA countries: enlargement and integration* (London; New York: Pinter Publishers, 1994). F. Granell, "The European Union's Enlargement Negotiations with Austria, Finland, Norway and Sweden," *Journal of Common Market Studies* 33, no. 1 (March 1995).

> 'The acceptance of the rights and obligations by a new member may give rise to *technical adjustments*, and *exceptionally* to temporary *(not permanent)* derogations and transitional arrangements to be defined during the accession negotiations, *but can in no way involve amendments to Community rules*.'[600]

This was another way of formulating the main principles established during the first enlargement. It is possible to recognize this formulation in a bit more elaborated form in the following two sub-titles.

4.4.4 Enlargement to the East: Negotiation principles entrenched

Without doubt, the most challenging enlargement was the enlargement to the east. As was discussed above, the Union and its institutions were much more involved in shaping and preparing the applicant States for future membership. However, as far as the main principles of negotiation are concerned, from the very outset the Commission identified the same principles discussed above as the basis on which the negotiations were to be conducted. The Commission in its *Agenda 2000* document[601] confirmed that as in the past, the basis of negotiations would be the *acquis* as it existed at the time of accession. It also added that transitional periods of definite and reasonable duration might be considered in duly justified cases, however, the objective should be the application of the *acquis* on accession by the new Member States. In particular, the measures concerning the extension of the single market should be applied immediately. Moreover, "[t]he Union should not envisage any kind of second-class membership or opt-outs."[602]

The general position of the Union presented to the CEECs at the outset of the negotiations was almost identical with its position in previous enlargements. It states that the acceptance of the CEECs of the *acquis*:

> 'may give rise to technical adjustments, and exceptionally to transitional measures. Such transitional measures should be limited in time and scope, and accompanied by a plan with clearly defined stages for the application of the *acquis*. They must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant distortions of competition. In this connection,

600 Emphasis added. European Commission, "The Challenge of Enlargement. Commission opinion on Norway's application for membership", Supp. 2/93, pp. 5-6.

601 European Commission, "Agenda 2000: For a Stronger and Wider Union", Bull. EU Supp. 5-1997.

602 Ibid., p. 51-52.

account must be taken of the interests of the Union, the applicant country and the other applicant states.'[603]

The last sentence is novel and interesting. If it is taken to refer to the whole paragraph, its meaning is easier to interpret in the light of well-established principles. What is probably meant is that a balancing act of the interests of the Union, the interests of an applicant state and interests of all other states is required when deciding whether any exceptional transitional measure is granted to a particular applicant state. Given the number of the applicants, this statement is meaningful, since any 'concession' given to one is very likely to be claimed by the others.[604] However, if the last sentence is understood to be qualifying the sentence it precedes, that it allows for such measures that "involve amendments to the rules or policies of the Union" or "lead to significant distortions of competition", if those decisions are a result of a balancing act of the interests of all, we reach a conclusion that is entirely incompatible with already established rules. With hindsight, there is no evidence to support the latter interpretation. This is just bad drafting that was corrected in subsequent documents.[605]

In the *Enlargement Strategy Paper*,[606] the Commission also provided guidelines as to what types of transitional measures were "acceptable", "negotiable" or "unacceptable". The transitional measures that were identified as "acceptable" were those, which pose no significant problems and are of a technical nature. Those measures were limited in time and scope and were considered not to have a significant impact on competition or the functioning of the internal market. The measures in the "negotiable" category were those with a more significant impact on competition or the internal market, or in terms of time and scope. The Commission might recommend the acceptance of transitional measures in this category under certain conditions and within a certain time horizon. In addition to the effects on competition and the single market, requests for transitional measures in this category were also to be evaluated in terms of their effects on the economy, health, safety and the environment, consumers, citizens, other common policies and the Union budget. The Commission further explains that classifying certain requests as "negotiable" does not mean that they will be accepted, in whole or in part, but that it means that a solution to those requests might be found under certain

603 European Commission, "Enlargement Strategy Paper – Report on progress towards accession by each of the candidate countries, 2000" (Enlargement Strategy Paper 2000). Available online at: http://www.esiweb.org/enlargement/wp-content/uploads/2009/02/ec-2000-strategy-paper.pdf , p. 26.

604 Avery, "The Enlargement Negotiations," 39.

605 See section 4.4.5. or Negotiating Framework for Turkey, point 12; Negotiating Framework for Montenegro, point 13; and Negotiating Framework for Serbia, point 33.

606 Enlargement Strategy Paper 2000, cited in note 603 above.

conditions. Finally, according to the Commission, requests for transitional measures that pose fundamental problems will not be accepted.[607]

Even though the principles established by the Commission in the conduct of the negotiations with the CEECs were the same as in previous enlargements, the result was a bit different. The use of temporary derogations, safeguard clauses and transitional arrangements was far from being exceptional. According to Ott, the extent of these derogations in the 2003 and 2005 Accession Treaties is without a precedent. She claims that half of the *acquis* chapters include derogations for the new Member States in areas such as: free movement of goods, free movement of persons, freedom to provide services, free movement of capital, company law, competition policy, agriculture, fisheries, transport policy, energy, telecommunications, environment etc.[608]

The whole pre-accession strategy was built around reducing the differences between the candidates and the existing Member States and building the administrative and legal capacity of candidates so that they are able to take on the obligations of membership when the time of accession comes. Yet, this was an ambitious objective despite all the legal and financial instruments employed to make the candidates ready for membership. What's more, the structure of the Union was getting more and more complex, and there were areas in which candidates could only join at a later stage, after becoming Member States and after fulfilling the specific conditions necessary to join these policy areas. That was the case for the EMU and the Schengen area. The new Member States had to accept the EMU and the Schengen *acquis* from the date of accession, yet they were not considered to be qualified to become full members of these areas yet.[609] They would be able to join in the future once they fulfilled the relevant criteria applicable to these areas.

In addition to the wider use of transitional arrangements, another novelty in the latest accession treaties was the inclusion of extra safeguard clauses. In addition to the general economic safeguard clause that was also employed in previous accession treaties,[610] two specific safeguard clauses on the internal

607 Ibid., p. 27.

608 A. Ott, "EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration," in *Fifty Years of European Integration – Foundation and Perspectives*, ed. A. Ott and E. Vos (The Hague: T.M.C. Asser Institute, 2009), 117.

609 From their accession date until their eventual entry into the eurozone, the new Member States are considered as "Member States with a derogation" in the sense of Article 122 EC (now Article 140 TFEU). They will need to fulfil the Maastricht convergence criteria to be able to adopt the euro and join the eurozone. Similarly, they will be able to join the Schengen area only after it has been verified that all the requirements of the Schengen acquis have been met in full. See C. Hillion, "The European Union is dead. Long live the European Union… A commentary on the Treaty of Accession 2003," *European Law Review* 29(2004): 593-96.

610 Article 37 of the 2003 Act of Accession. There were similar clauses in the Act of Accession for Denmark, Ireland and the United Kingdom (Article 135), and in the Act of Accession for Austria, Finland, and Sweden (Article 152).

market and on Justice and Home Affairs were included.[611] This is a clear indication of the mistrust of the old Member States concerning the new Member States' ability to take on the obligations flowing from the *acquis*. This mistrust went as far as the inclusion of a mechanism to monitor Bulgaria and Romania's performance in their post-accession phase, the so-called "Co-operation and Verification Mechanism".[612]

In short, even if the principles identified by the Commission before the negotiations started with the CEECs were the same as the principles that applied to the states that joined in previous enlargement waves, it turned out that these principles were applied more liberally than before. It will not be an exaggeration to say that transitional measures were the norm rather than the exception in many policy areas. However, transitional measures are just instruments that enable the extension of the *acquis* to the newcomers in a more flexible way. What needs to be underlined is the fact that the idea behind all the new creative mechanisms applied in the enlargement to the east was to enable the effective participation of the new Member States in the policies of the EU in the future where that was not possible at the time of accession. What is important is that the EU *acquis* was to apply to all the new Member States when the relevant transitional periods expire and that this was done without any opt-outs or amendments to the existing EU rules. In other words, despite all the difficulties, the gist of the main principles of negotiation was respected also during the most challenging enlargements of all, which is a clear illustration of how deeply entrenched those principles are.

4.4.5 Future Enlargements: Respect or deviation from entrenched principles?

The countries that are currently in the process of negotiating for accession are Turkey, Montenegro and Serbia. The principles governing these negotiations as well as their substance and procedure have been laid down in the "Negotiating Framework" laid down for each individual applicant.[613] The Negotiating Framework for Turkey was adopted on the 3 October 2005, that of Monte-

611 Article 38 of the 2003 Act of Accession is the internal market safeguard clause and Article 39 of the 2003 Act of Accession is the Justice and Home Affairs safeguard clause.

612 K. Inglis, "Accession Treaties: Differentiation versus Conditionality," in *Fifty Years of European Integration – Foundation and Perspectives*, ed. A. Ott and E. Vos (2009), 154.

613 Negotiating Framework for Turkey, available online at: http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf.
Negotiating Framework for Iceland, available online at: http://ec.europa.eu/enlargement/pdf/iceland/st1222810_en.pdf.
Negotiating Framework for Montenegro, available online at: http://glb.bos.rs/progovori-o-pregovorima/uploaded/Montenegro-negotiating-framework.pdf.
Negotiating Framework for Serbia, available online at: http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT.

negro on 29 March 2012, and that of Serbia on 21 January 2014. Apart from one major difference, which is mentioned below, these documents are quite similar both in terms of structure and content.[614]

The obligation to adopt and implement the *acquis* is the very first point mentioned in both documents under the title "Substance of the negotiations". The following paragraphs constitute a good summary of the main principles, which have constituted the basis of negotiations during previous as well as on-going enlargement processes. They have been cited in almost identical terms in the Negotiating Frameworks of Turkey, Montenegro and Serbia. They read as follows:

> 'Accession implies the acceptance of the rights and obligations attached to the Union system and its institutional framework, known as the "*acquis*" of the Union. Turkey will have to apply this as it stands at the time of accession. Furthermore, in addition to legislative alignment, accession implies timely and effective implementation of the *acquis*. The *acquis* is constantly evolving and includes …[615]
> …
>
> Turkey's acceptance of the rights and obligations arising from the *acquis* may necessitate specific adaptations to the *acquis* and may, exceptionally, give rise to transitional measures which must be defined during the accession negotiations.
>
> Where necessary, specific adaptations to the *acquis* will be agreed on the basis of the principles, criteria and parameters inherent in that *acquis* as applied by the Member States when adopting that *acquis*, and taking into consideration the specificities of Turkey.
>
> The Union may agree to requests from Turkey for *transitional measures* provided they are *limited in time and scope*, and accompanied by a plan with clearly defined stages for application of the *acquis*. For areas linked to the extension of the internal market, regulatory measures should be implemented quickly and *transition periods should be short and few*; where considerable adaptations are necessary requiring substantial effort including large financial outlays, appropriate transitional arrangements can be envisaged as part of an ongoing, detailed and budgeted plan for alignment. In any case, *transitional arrangements must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant*

614 The Negotiating Frameworks for Montenegro and Serbia have an additional Annex on "Procedure for and Organisation of the Negotiations". What is more important and worth noting however, is the emphasis laid down on the importance of reforms under chapters "Judiciary and fundamental rights" and "Justice, freedom and security". It is advised to tackle these chapters early in the negotiations so as to provide the candidates with enough time for the proper implementation of reforms. See, Negotiating Framework for Montenegro, points 21-23; and Negotiating Framework for Serbia, points 42-44.

615 See Negotiating Framework for Turkey, point 10; and Negotiating Framework for Montenegro, point 11; Negotiating Framework for Serbia, point 31.

> *distortions of competition*. In this connection, account must be taken of the interests of the Union and of Turkey.'[616]

In addition to few other differences,[617] the main difference between Turkey's Negotiating Framework and those of Montenegro and Serbia is that the second bullet point of paragraph 23 of the European Council conclusions of 16/17 December 2004 has been copy-pasted into the former document, while there is only a reference to that point in the latter. The following paragraph of the Negotiating Framework for Turkey reads as follows:

> '*Long transitional periods, derogations, specific arrangements or permanent safeguard clauses*, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as *freedom of movement of persons, structural policies or agriculture*. Furthermore, the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a *maximum role of individual Member States*. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.'[618]

In the Negotiating Framework of Montenegro and Serbia, what we find replacing this paragraph is the following sentence: "Transitional measures and specific arrangements, in particular safeguard clauses, may also be agreed in the interest of the Union, in line with the second bullet point of paragraph 23 of the European Council conclusions of 16/17 December 2004."[619] This leaves some room for speculation as to the meaning and significance of that paragraph. On the one hand, one could argue that it has been explicitly included in Turkey's Negotiating Framework because of the expectation that the accession of that country will involve greater difficulties and challenges. On the other hand, that paragraph was taken from the European Council conclusions and in principle it is supposed to refer to the accession of all countries which were mentioned there, that is Bulgaria, Romania, Croatia and Turkey, and even if not mentioned in the conclusions, by virtue of the reference included in its Negotiating Framework it applies to Montenegro and Serbia as well. Thus, as far as substance is concerned, the four Negotiating Frameworks are actually not much different from one another.

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616 Emphasis added. Negotiating Framework for Turkey, point 12; and Negotiating Framework for Montenegro, point 13; Negotiating Framework for Serbia, point 33.

617 These requirements are geared to the special expectations regarding each candidate state. For instance under point 6 of Turkey's Negotiating Framework, its continued support for efforts to achieve a comprehensive settlement of the Cyprus problem is required; whereas in the case of Serbia, improvement of relations with Kosovo is mentioned again and again.

618 Emphasis added. Negotiating Framework for Turkey, point 12, paragraph 4.

619 Negotiating Framework for Montenegro, point 13 (last sentence); Negotiating Framework for Serbia, point 33 (last sentence).

Yet, it is difficult to understand the reasoning behind the inclusion of that paragraph and the reference to it in the Negotiating Frameworks, since a brief glance at it and the paragraph preceding it is enough to reveal the stark incompatibility between them. The Negotiating Frameworks lay down firstly, the long established traditional position that transitional measures might be included if "they are limited in time and scope". Moreover, it is noted that if they are linked to the extension of the internal market "transition periods should be short and few". It is emphasized that "transitional arrangements must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant distortions of competition." Then, the Negotiating Framework contradicts itself and in the next paragraph declares that "[l]ong transitional periods, derogations, specific arrangements or permanent safeguard clauses … may be considered." The areas in which these measures are to be included, areas such as freedom of movement of persons, structural policies or agriculture, are areas which will have impact on the functioning of the internal market, the importance of which was emphasized a few lines before. Moreover, allowing a maximum role for individual Member States in the eventual establishment of free movement of persons, means that the new Member State will not be equal to other Member States even after their eventual accession. This will mean shift in power to the old Member States, the continuation of inter-governmental bargaining after accession and possibly the falling prey of the new Member State to the vagaries of the existing Member States. In short, it is very difficult, if not impossible, to reconcile the messages of the newly introduced paragraph with the established practice and principles of the past accessions. Inglis is also of the opinion that "[p]ermanent flexibility or safeguard mechanisms, such as suggested for Turkey, would go against the grain of any previous rationale underlying transitional flexibility mechanisms in accession treaty practice."[620]

Another important point is that the candidate States need to terminate all existing bilateral agreements between them and the Communities, and all international agreements which are not compatible with their obligations of membership, which is not something new. In addition, the Negotiating Frameworks provide that "[a]ny provisions of the [Association Agreement/ Stabilisation and Association Agreement] which depart from the *acquis* cannot be considered as precedents in the accession negotiations."[621] What this means in practice is that the *acquis* as it exists at the time of accession forms the basis of accession negotiations, i.e. if there was an area where one of the candidate States enjoyed a special regime, it will not be allowed to maintain it. The candidate needs to adopt the *acquis* as it stands at the time of accession in its entirety. While this requirement is not likely to pose any problems for

620 Inglis, "Accession Treaties: Differentiation versus Conditionality," 148.

621 Negotiating Framework for Turkey, point 11; Negotiating Framework for Montenegro, point 13; and Negotiating Framework for Serbia, point 33.

the period when a new Member States is fully integrated, it might pose problems for the transitional period. It is not very likely that a candidate state enjoys a more favourable regime with the EC/EU than the one between the Member States themselves in a given area. However, it is likely that it would enjoy a more favourable regime under previous agreements than the one that will regulate a given area in the transitional period. Thus, to ensure that the new transitional regime is not less favourable than the previous regime that applied under an association agreement, standstill clauses have been included in various fields of Accession Treaties. In other words, past practice demonstrates that previous agreements served as precedent where those agreements would be the basis on which more rights would be added and not subtracted.[622]

4.5 Conclusion

To sum up, after providing an account of the evolution of the procedure governing enlargement, now laid down in the Treaties as Article 49 TEU, this Chapter demonstrated how the wording of that provision never provided an accurate description of the process in practice. The procedural requirements of the Treaty provision, such as the opinion provided by the Commission and consent of the EP, are of paramount importance and were described as the skeleton of the process. However, arguably it is past practice that provides a clearer picture by adding flesh to the skeleton of enlargement procedure.

The analysis of past enlargements revealed that the precedent of the first enlargement set the basics of the procedure, both in terms of institutional interaction as well as establishing the main principles governing the negotiation process. Subsequent enlargements followed those basics with some fine-tuning, which did not challenge the basics. The most pronounced change to enlargement practice was experienced with the enlargement to the CEECs. The Chapter demonstrated the increased involvement of Union institutions in the process. The examination of the role of institutions as well as their interaction through-

622 Such a standstill clause was at issue in case C-546/07 *Commission v. Germany* [2010] ECR I-439. It read as follows "The effect of the application of this paragraph shall not result in conditions for the temporary movement of workers in the context of the transnational provision of services between Germany or Austria and Poland which are more restrictive than those prevailing on the date of signature of the Treaty of Accession." See, Annex XII to Act of Accession entitled 'List referred to in Article 24 of the Act of Accession: Poland'. Chapter 2 of that annex, entitled 'Freedom of movement for persons', paragraph 13. See, Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236/33, 23.9.2003.

out the process showed how Member States were left with less room for manoeuvre and influence, highlighting the supranational/Union aspect of the process.

Lastly, to complete the enlargement procedure with its spirit, the main principles of negotiation established during the first enlargement and consistently applied ever since, were put under the spotlight. The first principle requires the full adoption of the *acquis communautaire* as it stands at the time of accession, while the second principle requires the solution of any problems via the establishment of transitional measures and not via change of existing rules. The clear rationale underlying these principles is the preservation and continuation of the existing legal order. The newcomers are expected to make the necessary changes that will enable their integration into the existing system without changing its defining characteristics.[623] When that was too big a challenge for the candidates to achieve by themselves, as in the eastern enlargement, the Union institutions were actively involved in the process to assist them in achieving that important objective. As was demonstrated above, the rules of the game, i.e. the main principles of negotiation, were clearly voiced by the Community/ Union institutions and were accepted and respected by candidates and Member States alike in every enlargement wave. As such these principles constitute part of 'customary EU law' or 'customary enlargement law' as illustrated by past practice coupled with a belief in the existence of a legal obligation to respect and abide by those principles. In other words, these principles set constraints on Member States for future accession processes.

The only sign that puts a question mark on that conclusion, and the reason to conduct this research, is the statements in paragraph 4 of point 12 of the Negotiating Framework of Turkey. The latter is very confusing and difficult to interpret, as it stands in stark contrast to the reiteration and elaboration of the main negotiating principles in the immediately preceding paragraphs. It is quite possible that this paragraph was a result of a compromise and was included in the Negotiating Framework simply to appease certain Member States in return for opening the accession negotiations with Turkey. Whatever the political rationale for including that paragraph, its repercussions for both Turkey's accession and Union law are significant enough to justify the conduct of this study. At a time when Member States become more assertive and willing to control (or even hijack) the enlargement process, identifying the main procedures, rules and principles that constrain them is more important than ever.

With the overview of the principles of negotiation used in past enlargements the analysis, which tried to shed light on the functioning of the accession process, as enshrined in Article 49 TEU, has been completed. It was argued

623 The mirror image of that expectation (as well as an obligation) would be the legal constraint or preclusion of Member States from imposing on new comers anything that could disrupt the functioning of the system or its underlying principles.

that Article 49 TEU drew the main contours of the enlargement process, but did non manage to accurately reflect what happened in practice. We established that in practice the Union institutions' roles, especially that of the Commission, was more important and varied than past and present articles on enlargement suggest, especially during and after the eastern enlargement. Moreover, even though past and present articles stipulated that "[t]he conditions of admission…shall be subject of an agreement between the Member States and the applicant State", Member States have habitually acted via the Community/ Union institutions such as the Council and/or its Presidency. Even though with the introduction of the "benchmarking system" they seem to have gained more control over the process,[624] they still exercise that power acting via the Council machinery and not *qua* Member States, which means they need operate under different institutional constraints. This adds a Community/Union flavour to the process.

Having reviewed past and present Treaty provisions on enlargement, actual practice and its evolution, as well as the main principles of negotiation that shaped the process we have obtained a relatively clear picture of the nature and functioning of the process. However, as clear as that picture might be, it will not be complete without examining the final products of the processes that were described so far, namely past Accession Treaties. There are still important terms employed in Article 49 TEU and Accession Treaties that require further elaboration and clarification. For instance, what does the term "adjustments to the Treaties" mean? Can Member States go beyond "adjustments" in Accession Treaties? What are adaptations? What is the function of other instruments employed in Accession Treaties such as temporary derogations, permanent derogations and safeguard clauses?

The formulation of paragraph 4 of point 12 of the Negotiation Framework for Turkey is quite broad and vague. It is difficult to envisage what exactly those "specific arrangements or permanent safeguard clauses" will be like since they are unprecedented. Why would one need to "allow for a maximum role of individual Member States" in "the decision-taking process regarding the eventual establishment of freedom of movement of persons" in the existence of a permanent safeguard clause? Could it be that the "specific arrangements" in the area of freedom of movement of persons might *de facto* turn into a permanent derogation as in the case of the fisheries regime established by the first Act of Accession? The vague and ambiguous formulation of paragraph 4 of point 12 of the Negotiating framework opens it wide to speculation. Thus,

624 "Benchmarks" are conditions that need to be fulfilled by applicant countries in a given field (chapter) so as to ensure their eventual alignment with Union acquis. While they were designed with a view to assisting the applicants in their preparation process for accession, the fact that they are established unanimously by the Council on a recommendation by the Commission, gives any Member State plenty of opportunity to block the process, and push through demands related to its own national agenda. See, Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," 21.

not knowing the precise nature of the regime envisaged in the area of free movement of persons, the special mechanisms and terms used in past Accession Agreements are analysed with the expectation that past practice will provide clues as to the future boundaries which Member States will need to respect while exercising their Accession Treaty making powers.