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WORK AND WELFARE REFORM PROMOTION IN THE PRE-ACCESSION Commission's Unlimited Powers Bringing Modest Results

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Abstract

This note argues that the Commission could do much more in order to effectively promote work and welfare reform in the candidate countries during the pre-accession exercise. It analyses the legal and political tools available to the Commission to ensure reform effectiveness in the candidate countries and enabling it to make efficient use of the pre-accession principle of conditionality. Also, the note explains why the Commission was not legally restrained in the choice of standards it could promote in the candidate countries. The way the reform promotion tools and the virtually unlimited pre-accession competences of the Commission were used for the promotion of work and welfare reforms in the candidate countries clearly leaves much to be desired. The issues related to work and welfare only enjoying marginal importance in the pre-accession (if at any), the Commission failed to effectively use the pre-accession to export change to the new Member States of the EU.

Introduction

Despite the fact that the text of Article 49 EU does not make any articulate links between the accession to the European Union and the work and welfare reform in the candidate countries, in the course of the pre-accession exercise,¹ the European Union had a wide range of tools at hand to influence the reforms in the work and welfare sectors going on in the candidate countries of Central and Eastern Europe.² Potentially, such influence could bring about a considerable change in virtually any sphere of regulation of welfare and employment.

Use could be made of the broad framework of the Copenhagen criteria³ and the Copenhagen-related documents⁴ employed by the Union in the regulation of the pre-accession and enlargement process. It was particularly important in this context that the Union's pre-accession demands addressed to the candidate countries were in no way limited by the competences the EC enjoyed *vis-à-vis* its Member States, making the principle of enumerated powers of Art. 5(1) EC *de facto* inapplicable to the pre-accession exercise:⁵ *i. e.* providing the EU with a unique opportunity of promoting welfare and employment reforms in the candidate countries virtually without any constraints.

Thus it is possible to talk about internal and external facets of work and welfare regulation in the EU, using an analogy with Alston and Weiler's classification of the EU's competences in the field of human rights.⁶ Just as in the case of human rights, the 'external' facet of the welfare regulation the Community institutions could employ is much wider than the 'internal' one. In other words, the European Commission – the main actor of the pre-accession reform promotion in the candidate countries – had both competence, indeed, virtually a *carte blanche* to promote any reforms it saw fit, and, which is probably more important, sufficient tools it could employ to influence the reform progress in the candidate countries, making sure it went in the direction envisaged, or at least approved by the Union.

Due to the divergence in the potential scope of the internal and external facets of work and welfare competences of the Community, there is a notable difference between the elements of work and welfare reform in the candidate countries falling within the scope of the *acquis communautaire* and those falling outside its scope, but still playing a notable role in the pre-accession exercise.⁷ The analysis of the latter elements of reform can clearly prove

¹ Pre-accession is a concept employed by the Community institutions when referring to the application of the conditionality principle to the candidate countries with a view of preparing them for the accession by promoting reforms in different spheres. Cf. Inglis, K., 'The Pre-accession Strategy and the Accession Partnerships', in Ott, A. and Inglis, K. (eds.), *Handbook on European Enlargement*, The Hague: T. M. C. Asser Press, 2002; Maresceau, M., 'On Association, Partnership, Pre-accession and Accession', in Maresceau, M. (ed.), *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*, London /New York: Longman, 1997. See also § II. 5., *infra*.

² Unless otherwise specified, the discussion in this note is limited to 10 East and Central European Countries: those that joined the Union in the 5th enlargement (Estonia, Latvia, Lithuania, Poland, The Czech Republic, Slovakia, Hungary and Slovenia: 2003 Treaty of Accession, *OJ L* 236, 2003) and Romania and Bulgaria, whose accession will mark the 6th enlargement of the European Union (2005 Treaty of Accession, *OJ L* 157, 2005). On a very concise history of enlargements and the evolution of their legal regulation see *e. g.* Kochenov, D., 'EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?', 9 *EIoP* 6, 2005, available at <<http://eiop.or.at/eiop/texte/2005-006a.htm>>.

³ Adopted by the Copenhagen European Council, *Bull. EC* 6-1993, point I.13. Cf. Hillion, Ch., 'The Copenhagen Criteria and Their Progeny', in Hillion, Ch. (ed.), *EU Enlargement: A Legal Approach*, Oxford /Portland, OR: Hart, 2004; Bulterman, M., 'European Union Membership and Political Conditionality', in Bulterman, M., Hendriks, A. and Smith, J. (eds.), 'To Baehr in Our Minds: Essays on Human Rights from the Heart of the Netherlands', 21 (special issue) *SIM*, 1998.

⁴ This notion embraces all the legal and political instruments used by the Community institutions in the course of the application of the principle of conditionality during the preparation of the 5th and the 6th enlargements. For details see § II. 1., *infra*.

⁵ III., *infra*.

⁶ Alston, Ph. and Weiler, Joseph H. H., 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in Alston, Ph. (ed.), *The EU and Human Rights*, Oxford, OUP, 1999 (with further references).

⁷ On the scope and the main elements of the *acquis* from a scholarly perspective see *e. g.* Delcourt, Ch., 'The *Acquis Communautaire*: Has the Concept Had Its Day?', 38 *CMLRev.*, 2001.

more fascinating compared to the routine elements of the *acquis communautaire*, since the pre-accession is the only framework where the exercise of Community influence on the outer-*acquis* elements of work and welfare regulation was possible. The requirement to conduct pre-accession reform also in the spheres falling outside the scope of the *acquis* follows directly from the text of the Copenhagen ‘political’ criterion, requiring the countries willing to join the EU to respect democracy, human rights and the rule of law.

The ideal picture of work and welfare reform promotion in the pre-accession appears to have been, however, a rather unbalanced one: possessing the competence and the tools of influence is not sufficient to guarantee the reform’s effectiveness. A number of other elements of importance, such as the standard to promote in the candidate countries and the mechanism of effective application of the reform tools available seemed to be missing from the Commission’s pre-accession arsenal.⁸ Consequently, the pre-accession exercise can be viewed as a missed opportunity to bring change to the legal regulation of work and welfare in the now new Member States of the European Union, turning the duality of Competences the Commission had in its possession from an opportunity into a burden. How did the EU use this unique opportunity of unlimited reform promotion? Was this duality of competences offered by the very nature of the pre-accession readily employed by the EU for the benefit of the candidate countries and the Union, or remained largely unexploited?

I. Structure of the argument

In order to convincingly demonstrate that there was virtually no restraint to what the Commission could do in terms of reform promotion in the candidate countries in the course of the pre-accession and that a number of workable tools were at the Commission’s disposal to promote pre-accession reforms, this paper will first discuss in some detail the Copenhagen-related documents and the pre-accession influence tools that were meant to be employed in the pre-accession in order to make sure that the pre-accession reform brings fruit (II.).

The note will proceed assessing the issue of competences of the Commission in the field of reform promotion in the pre-accession, demonstrating that the system of the Copenhagen-related documents and of the pre-accession influence tools could be effectively used to bring change into those fields, which fell both within and outside the scope of the *acquis communautaire*. The application of the system of the Copenhagen-related documents was thus not limited to the issues falling within the scope of ‘traditional’ or ‘internal’ competences of the Community (III.).

The note will proceed discussing the puzzling effect the duality of competences the EU had in the pre-accession work and welfare reform promotion: faced with no competence restraints in the area of ‘external’ welfare reform promotion competences the Commission seemed to have problems with making a reasonable use of them, unable to fill the standards-vacuum. Consequently, the framework of the Copenhagen-related documents and pre-accession influence tools⁹ at the Commission’s disposal remained largely unused – at least in the field of work and welfare reform promotion.¹⁰ The last section of the note will list those

⁸ Although the Commission never recognised this fact.

⁹ § II. 6 *infra*. Cf. Kochenov, D., ‘EU Enlargement: Flexible Compliance with the Commission’s Pre-Accession Demands and Schnittke’s Ideas on Music’, *CSEPS Working Paper* (Centre for Study of European Politics and Society, Ben-Gurion University of the Negev), 2005, 5 – 6, also available at <http://hsf.bgu.ac.il/europe/index.aspx?pgid=pg_127842651974615376>.

¹⁰ The application of the pre-accession influence tools differed depending on the area of reform. Unlike work and welfare reform, minority protection issues, or child protection issues proved more important in the eyes of the Commission. On the role of minority protection in the pre-accession see e. g. Hillion, Ch., ‘Enlargement of the European Union: The Discrepancy between Membership Obligations and Accession Conditions as Regards the Protection of Minorities’, 27 *Fordham Int’l L.J.*, 3, 2004; Wiener, A. and Schweltnus, G., ‘Contested Norms in the Process of EU Enlargement: Non-Discrimination and

rare instances when the issues relevant to work and welfare reform were raised in the Copenhagen-related documents and will also discuss the effects those elements of the pre-accession reform had on the candidate countries' actual progress towards accession to the European Union. While a complete analysis of all the Copenhagen-related documents released in the context of the pre-accession reform of all the Central and East-European countries is probably too challenging a task (especially given the quantity of the documents released) it is still possible to sketch the overall picture that will enable to come to some conclusions regarding the effectiveness of the Commission's involvement in the candidate countries' pre-accession work and welfare reform (IV.).

This note will conclude stating that the pre-accession work and welfare reform promotion was more of a missed opportunity than an effective implementation of a clearly formulated policy. Thus the conclusions are nowhere near to comforting: not only did the Commission fail to establish a clear strategy in the field of employment and welfare to be promoted in the candidate countries in the course of the pre-accession, it also seemed to be largely unwilling to benefit from the ability to step outside the scope of the *acquis communautaire* in this field in the course of the pre-accession. As a consequence, the effectiveness of the pre-accession was almost exclusively confined to the *acquis*-related matters (e. g. non-discrimination on the basis of sex) and left the issues falling outside the scope of the *acquis* almost intact, falling short of ensuring effective reform in such areas (e. g. non-discrimination on the basis of sexual orientation, that only made it to the *acquis communautaire* with the relatively recent equality directive 2000/78/EC¹¹ adopted on the basis of Art. 13 EC). It is clear that both future candidate countries and the Union at large are likely to benefit from the change in the Commission's policy in this field in the future.

II. Pre-accession reform promotion *de jure* I.: The legal and political tools at the Commission's disposal

With a view of effective implementation of the principle of conditionality an impressive system of legal and political instruments of pre-accession steering and progress analysis was created in the course of the preparation of the fifth enlargement. It aimed at checking the level of the candidate countries' preparation for accession and at providing necessary information on the basis of which the most important decisions finally leading to the enlargement were to be taken. Drafting of the Copenhagen-related documents in the course of the preparation of the candidate countries for accession was meant to result in harmonious enlargement of the Union and effective implementation of the conditionality principle.

§ II. 1. The notion of the Copenhagen-related documents

Since all political and legal instruments drafted by the Commission during the preparation of the fifth and the sixth enlargements are rooted in the Copenhagen criteria and are aimed at facilitating the application of the principle of conditionality applied to determine which applicant country was ready to join the European Union, the whole bulk of the documents

Minority Rights', *ConWEB*, No. 2/2004, 2004, available at <<http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/Filetoupload.5307.en.pdf>>; von Toggenburg, G. N., 'Minorities (...) The European Union: Is the Missing Link an "Of" or a "Within"?', 25 *Eur. Integration* 3, 2003; van der Meulen, J. W., *Bescherming van minderheden als criterium bij EU-uitbreiding: de Europese Commissie en Midden-Europa*, The Hague: Nederlands Instituut voor Internationale Betrekkingen 'Clingendael', 2003; Hughes, J. and Sasse, G., 'Monitoring the Monitors. EU Enlargement Conditionality and Minority Protection in the CEECs', *JEMIE* 1, 2003, also available at <http://www.ecmi.de/jemie/download/Focus1-2003_Hughes_Sasse.pdf>.

¹¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ L* 303/16, 2000.

relevant for the pre-accession assessment of the candidate countries' readiness for accession is hereafter called 'Copenhagen-related documents'.¹²

It is impossible to find one single document, upon reading of which the meaning of the Copenhagen political criteria would become clear. Multiple sources are available, all of them able to contribute to the better understanding of the Copenhagen political criteria. Since the promotion of democracy and the rule of law in the course of the preparation of enlargement was largely started with the adoption of the Copenhagen political criteria, the analysis of the whole bulk of the Copenhagen-related documents is absolutely necessary, once one aims at understanding the Commission's role as a (potential) promoter of work and welfare reform in the pre-accession. Of special relevance are the sections of the Copenhagen-related documents dealing with the promotion of economic and social rights in the candidate countries. The importance of the Copenhagen-related documents is crucial: all the main enlargement activities, although conducted under the umbrella of Article 49 EU and guided by the Copenhagen criteria, were in fact effectuated exclusively through the Copenhagen-related documents, bringing these instruments into the spot-light of the pre-accession reform-promotion analysis.

§ II.2. Overview and classification of the main Copenhagen-related documents

The notion of Copenhagen-related documents is introduced in order to simplify the analysis of the legal regulation of the fifth and the sixth enlargements and does not embrace the legal instruments to be found in the Treaty. Article 49 EU does not say anything about conditionality. Neither does it mention any mechanisms that either the Member States or the Commission could employ in order to check the candidate countries' compliance with the pre-accession conditions. In other words, *all* the documents assessing the application of the principle of conditionality in the course of the last EU expansions are rooted in the Treaties very loosely indeed, which allows one to talk about the birth of the customary element in the Enlargement law of the European Union.¹³

Throughout the years preceding the fifth and the sixth enlargements hundreds of documents have been drafted to guide the process, forming a complicated spider-web of instruments one has to address in detail in order to see both the tools available to the Commission to promote the Copenhagen ideals and to be able to analyse the extent to which the Commission managed to use the potential these tools had to offer for the benefit of the Union and the new Member States alike. Agreeing with Maresceau, it is not always easy 'to find one's way in the EU's terminological enlargement labyrinth', which might even create an impression that 'chaos dominates the enlargement cosmos'.¹⁴

§ II.3. First Group of the Copenhagen-related documents: documents dealing with individual candidate countries

The first group of the Copenhagen-related documents addressed the progress of the candidate countries towards accession on a country by country basis. It included five main types of Copenhagen-related documents: Opinions on the Application for Membership of the EU; Regular Reports on the candidate countries' progress towards accession; Comprehensive Country Monitoring Reports, Accession Partnerships, and Road Maps drafted by the Commission in the context of certain countries' progress towards accession.

¹² The term first formulated in Kochenov, D., 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', 8 *EloP* 10, 2004, 5 – 7, available at <<http://eiop.or.at/eiop/texte/2004-010a.htm>>.

¹³ Kochenov (2005), 'EU Enlargement Law ...'

¹⁴ Maresceau, M., 'The EU Pre-accession Strategies: A Political and Legal Analysis', in Maresceau, M. and Lanon, E. (eds.), *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis*, Basingstoke: Palgrave, 2001, 4.

Commission Opinions on the candidate countries' Application for Membership of the EU were released in the year 1997;¹⁵ followed by 1998,¹⁶ 1999,¹⁷ 2000,¹⁸ 2001,¹⁹ 2002²⁰ rounds of Regular Reports of the Commission concerning all the Central and East-European candidate countries,²¹ as well as 2003²² and 2004²³ Regular Reports dealing with Romania, Bulgaria and Turkey; and 2003²⁴ and 2005²⁵ Comprehensive Country Monitoring Reports, the former dealing with the eight East-European acceding countries and the latter limited to Bulgaria and Romania. The differentiation in types of the documents released by the European Commission in relation with the progress towards accession of eight CEECs in 2003 and of two Balkan States in 2005 is a consequence of the signing of the Treaties of Accession²⁶ with these countries.

Another type of sources to be included into the first group are the Accession Partnerships²⁷ adopted in the form of Council Decisions on the proposals by the Commission.²⁸ Three rounds of Accession Partnerships have been decided concerning every candidate country so far: in 1998,²⁹ 1999³⁰ (with the exception of Cyprus, Malta³¹ and

¹⁵ *Agenda 2000 – Commission Opinion on Estonia's Application for Membership of the European Union*, Brussels, 15 Jul. 1997, DOC/97/12. On the same date other Opinions were released: DOC/97/13 (Hungary); DOC/97/14 (Latvia); DOC/97/15 (Lithuania); DOC/97/16 (Poland); DOC/97/17 (Czech Republic); DOC/97/18 (Romania); DOC/97/19 (Slovenia); DOC/97/20 (Slovakia). The Opinion on Malta was released two years later, following the March 1998 communication from the Maltese government stating the desire to reactivate Maltese application for membership in the EU. On 5 Oct. 1998 the Council requested the Commission to update its 1993 Opinion on the application of Malta, which resulted in the Commission's *Report Updating the Commission Opinion on Malta's Application for Membership*, Brussels, 17.02.1999, COM(1999) 69 final. The Cyprus Opinion was released on 30 Jun., 1993; see DOC/93/5.

¹⁶ 1998 Regular Reports from the Commission on Progress towards Accession by each of the Candidate Countries were released on 4 Nov.1998. All in all 12 reports were drafted (as Maltese application was still suspended back then).

¹⁷ 1999 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 13 Oct.1999. All in all 13 reports were drafted.

¹⁸ 2000 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 8 Nov.2000. All in all 13 reports were drafted.

¹⁹ 2001 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 13 Nov.2001. All in all 13 reports were drafted. Bulgaria: SEC(2001) 1744; Cyprus: SEC(2001) 1745; Czech Republic: SEC(2001) 1746; Estonia: SEC(2001) 1747; Hungary: SEC(2001) 1748; Latvia: SEC(2001) 1749; Lithuania: SEC(2001) 1750; Poland: SEC(2001) 1751; Romania: SEC(2001) 1752; Slovakia: SEC(2001) 1753; Slovenia: SEC(2001) 1754; Malta: SEC(2001) 1755; Turkey: SEC(2001) 1756.

²⁰ 2002 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 9 Oct. 2002. See COM(2002) 700 final. All in all 13 reports were drafted. Bulgaria – SEC(2002) 1400; Cyprus – SEC(2002) 1401; Czech Republic: SEC(2002) 1402; Estonia: SEC(2002) 1403; Hungary: SEC(2002) 1404; Latvia: SEC(2002) 1405; Lithuania: SEC(2002) 1406; Poland: SEC(2002) 1407; Romania: SEC(2002) 1408; Slovakia: SEC(2002) 1409; Slovenia: SEC(2002) 1410; Malta: SEC(2002) 1411; Turkey: SEC(2002) 1412.

²¹ As has been pointed out earlier, this study deals only with 10 CEECs, generally omitting such East-European candidate countries as Turkey, Croatia and FYROM. However, dealing with these countries the Commission generally followed the same strategy as applied to other East-European States. Croatia's Opinion, COM (2004) 257 final was released on 20 Apr. 2004; FYROM Opinion, COM (2005) 562 was released on 9 Nov. 2005.

²² 2003 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 5 Nov. 2003. All in all 3 reports were drafted: for Bulgaria, Romania and Turkey.

²³ 2004 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate countries were released on 6 Oct. 2004 COM (2004) 657 final (Bulgaria, Romania) /COM (2004) 656 final (Turkey). All in all 3 Reports were drafted: Bulgaria: SEC(2004) 1199, Romania: SEC(2004) 1200, Turkey: SEC (2004) 1201.

²⁴ 2003 Comprehensive Monitoring Reports on Preparations for Membership by Each of the ten acceding States were released on 5 Nov. 2003.

²⁵ 2005 Comprehensive Monitoring Reports on Preparations for Membership by Each of the two acceding States were released on 25 Oct. 2005, COM (2005) 534 final. Bulgaria: SEC (2005) 1352; Romania: SEC (2005) 1354.

²⁶ 2003 Treaty of Accession *OJ* L236, 2003; 2005 Treaty of Accession *OJ* L157, 2005.

²⁷ Adopted by qualified majority in the Council on the basis of Council Regulation (EC) 622/98 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, *OJ* L 085/1, 1998.

²⁸ Strangely enough, the Commission only publishes its own proposals on the web page and sometimes dates the Partnerships not by the date of the Council Decision but by the date when the proposal was released.

²⁹ Council Decisions of 30 Mar. 1998: 98/266/EC (Bulgaria); 98/267/EC (Czech Republic); 98/264/EC (Estonia); 98/259/EC (Hungary); 98/263/EC (Latvia); 98/265/EC (Lithuania); 98/260/EC (Poland); 98/261/EC (Romania); 98/262/EC (Slovakia); 98/268/EC (Slovenia). See *OJ* L121/1 – 46, 1998.

Turkey³²) and in 2002.³³ The fourth Accession Partnership round of 2003³⁴ only covers the remaining candidate countries (excluding Croatia and Macedonia (FYROM) who did not enjoy the candidate country status back then).³⁵

The terminological aspect of the candidate countries' movement towards accession reflected in the titles of the Copenhagen-related documents and in the official status of the countries themselves is very important and requires some clarification. When a country sends an application for membership of the European Union it automatically becomes an *applicant country*. This status is exchanged to the *candidate country* status after the European Council agrees with the positive Opinion of the Commission to grant such a status to the country in question. Such status enables the candidate country to actively pursue the accession goal and eventually start and complete the negotiations with the EU (Member States) according to the procedure partly described in Article 49 EU.³⁶ This status changes again upon the signing of the Treaty of Accession: the candidate country becomes an *acceding State*. Although this status is still one step short of membership, it changes a lot in the Copenhagen-related documents released in the context of acceding State's application. Once the Treaty of Accession is ratified and enters into force, the acceding States become *Member States* of the European Union.

§ II.4. Second group of the Copenhagen-related documents: documents providing an overview of the pre-accession progress of several candidate countries

The second group of the Copenhagen-related documents includes the general documents of the Commission establishing the principles of the progress assessment and containing an overview of all the candidate countries, such as the Commission's Agenda 2000,³⁷ yearly Composite Papers³⁸ and Strategy Papers,³⁹ as well as the 2003 Comprehensive Monitoring Report of the Commission.⁴⁰

³⁰ Council Decisions of 6 Dec. 1999: 1999/857/EC (Bulgaria); 1999/858/EC (Czech Republic); 1999/855/EC (Estonia); 1999/850/EC (Hungary); 1999/854/EC (Latvia); 1999/856/EC (Lithuania); 1999/851/EC (Poland); 1999/852/EC (Romania); 1999/853/EC (Slovakia); 1999/859/EC (Slovenia). See *OJ* L335/1 – 61, 1999.

³¹ For Malta and Cyprus see Council Regulation (EC) 555/2000 on the implementation operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta, *OJ* L68/3, 2000. Accession Partnerships: Council Decisions of 20 Mar. 2000: 2000/248/EC and 2000/249/EC, *OJ* L078/10 and 17 respectively.

³² Council Regulation (EC) 390/2001 on the assistance to Turkey in the framework of the pre-accession strategy and in particular on the establishment of an Accession Partnership, *OJ* L058/1. The first Accession Partnership: Council Decision of March 8, 2001 2001/235/EC, *OJ* L085/13.

³³ Council Decisions of 28 Jan. 2002: 2002/83/EC (Bulgaria); 2002/84/EC (Cyprus); 2002/85/EC (Czech Republic); 2002/86/EC (Estonia); 2002/87/EC (Hungary); 2002/88/EC (Latvia); 2002/89/EC (Lithuania); 2002/90/EC (Malta); 2002/91/EC (Poland); 2002/92/EC (Romania); 2002/93/EC (Slovakia); 2002/94/EC (Slovenia). See *OJ* L044/1-101, 2002.

³⁴ Council Decisions of May 13, 2003: 2003/396/EC (Bulgaria); 2003/397/EC (Romania); 2003/398/EC (Turkey). See *OJ* L145/1-40, 2003.

³⁵ First AP with Croatia was released on 13 Sep. 2004. See Council Decision (EC) 2004/648 on the principles, priorities and conditions contained in the European Partnership with Croatia, *OJ* L 297/19, 2004.

³⁶ Cf. Kochenov (2005) 'EU Enlargement law...', *passim*.

³⁷ Agenda 2000: for a Stronger and Wider Union COM(1997) 2000 final, 15 Jun. 1997 (Vol. 2).

³⁸ The Commission issued two Composite Papers: 1998 *Composite Paper Reports on Progress towards Accession by Each of the Candidate Countries*, COM(1998) 712 final; and 1999 *Composite Paper Reports on Progress towards Accession by Each of the Candidate Countries*, COM(1999) 500 final.

³⁹ The Commission issued four Strategy Papers: 2000 *Enlargement Strategy Paper Report on Progress towards Accession by Each of the Candidate Countries*, COM(2000) 700 final; 2001 *Making a Success of Enlargement Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries*, COM(2001) 700 final, SEC(2001) 1744-1753; 2002 *Towards the Enlarged Union Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries*, COM(2002) 700 final, SEC(2002) 1400-1412; 2003 *Continuing Enlargement Strategy Paper and Report of the European Commission on the Progress towards accession by Bulgaria, Romania and Turkey*, COM(2003) 676 final.

⁴⁰ 2003 *Comprehensive Monitoring Report of the European Commission on the State of Preparedness for EU Membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia*, COM(2003) 675 final.

§ II.5. Evolution of the Copenhagen-related documents

Such a sophisticated system of different types of instruments used by the Commission to regulate the process of EU enlargement did not come to life at once and is an illustration of gradual evolution of the principle of Conditionality in the EU enlargement law, which went a long way from the *de facto* formulation of the principle for the first time by the European Council at Copenhagen in 1993 to establishing a rather rigid legal framework for its application that came to life through the pre-accession re-orientation of the Europe Agreements and the adoption of the Accession Partnerships, introduced by the European Council at Luxembourg in 1997.

The Copenhagen European Council (21-22 June 1993) established the criteria for membership, but did not allocate the task of controlling the progress made by the candidate countries with any of the Institutions. The Conclusions of the Presidency only stated that

the European Council will continue to follow closely the progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions.⁴¹

In doing so, the European Council paid attention to the issue of enlargement during a number of meetings, confirming the 1993 Copenhagen European Council policy⁴² and monitoring the progress in the EU's relations with the Associated Countries.⁴³

To meet the Copenhagen criteria was, however, not the only requirement which preceded the launch of the enlargement process. The Union itself had to get ready for the exercise. That is why the opening of any accession negotiations had been postponed (at least) until the completion of the 1996 Intergovernmental Conference.⁴⁴ However, already the Madrid European Council (15-16 December 1995) asked the Commission 'to expedite' the preparation of the Opinions on the Application for Membership,⁴⁵ to allow the Opinions to 'be forwarded to the Council as soon as possible after the conclusion of the Intergovernmental Conference',⁴⁶ and 'to embark upon preparation of a Composite Paper on enlargement'.⁴⁷

Article 49 EU (*ex. Art. O*), which provides for the preparation by the Commission of the 'Opinions on Application for Membership in the European Union' does not contain any clarification of what a Composite Paper might be and does not require any of the institutions

⁴¹ SN 180/93 at 12-13, also available at <http://www.europarl.eu.int/summits/copenhagen/co_en.pdf>.

⁴² See *e. g.* Presidency Conclusions of the Essen European Council (9-10 Dec. 1994); Cannes European Council (26-27. Jun. 1995); Madrid European Council (15-16 Dec. 1995).

⁴³ See *e.g.* Annex 6 to Presidency Conclusions of the Madrid European Council (15-16 Dec. 1995). On Europe Agreements see *e. g.* Beurdeley, L., *L'élargissement de l'Union européenne aux pays d'Europe centrale et orientale et aux îles du bassin méditerranéen*, Paris: L'Harmattan, 2003; Hoffmeister, F., 'Nature and Objectives of the Europe Agreements', in Ott, A. and Inglis, K. (eds.), *Handbook on European Enlargement, A Commentary on the Enlargement Process*, The Hague: T.M.C. Asser Institute, 2002; Inglis, K., 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation', in 37 *CMLRev.*, 2000; Maresceau, M., "'Europe Agreements": A New Form of Cooperation between the European Community and Central and Eastern Europe', in Müller-Graff, P.-Ch. (ed.), *East Central European States and the European Communities: Legal Adaptation to the Market Economy*, Baden-Baden: Nomos Verlagsgesellschaft, 1993; Maresceau, M., 'Les accords européennes: analyse générale', *RMCUE*, 1993.

⁴⁴ Presidency Conclusions of the Essen European Council (9-10 Dec. 1994) and Florence European Council (21-22 Jun. 1996).

⁴⁵ Although the obligation to consult the Commission is contained in Article 49(1) EU, the Opinions demanded by the Madrid European Council are not rooted in the text of the article. Thus they should not be confused with the document drafted by the Commission in accordance with Art. 49(1) EU, the release of which immediately precede accession. See Commission's Opinion on the applications for accession to the European Union by 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 Poland, the Republic of Slovenia and Slovak Republic of 19 Feb. 2003, *OJ L* 236, 2003; Commission's Opinion on the applications for accession to the European Union by the Republic of Bulgaria and Romania, of 22 Feb. 2005, *OJ L* 157/3, 2005.

⁴⁶ Presidency Conclusions of the Madrid European Council (15-16 Dec. 1995), confirmed by the Presidency Conclusions of the Florence European Council (21-22 Jun. 1996).

⁴⁷ Presidency Conclusions of the Madrid European Council (15-16 Dec. 1995).

to draft a Composite Paper. Historically, however, the practice of such co-operation between the European Council and the Commission when the latter releases a document which is not mentioned in the Treaty, following a request from the European Council is not new. Before 1995 Madrid European Council the Commission has already prepared a number of papers related to enlargement, following European Councils' requests.

The Presidency Conclusions of the European Council in Amsterdam (16-17 June 1997) did not talk about a 'Composite Paper' any more, but about a 'Comprehensive Communication'.⁴⁸ Although the name of the document to be presented by the Commission had been changed, the essence of it remained the same. The Amsterdam European Council also explained the contents of such a Communication, which was to contain

the main conclusions and recommendations from the Opinions and give its views on the launching of accession process including proposals on reinforcing pre-accession strategy and further developing pre-accession assistance building on ongoing reforms of PHARE,⁴⁹

in other words, it had to summarise the Opinions and assess the future steps to be taken in relation with the continuation of the enlargement process.

Such a Communication was presented on July 15, 1997 and was entitled 'Agenda 2000'.⁵⁰ The submission of Agenda 2000, however, did not mean that the idea of Composite Papers was abandoned. The request to submit Papers assessing the progress of the candidate countries towards accession reappeared in the Presidency Conclusions of the groundbreaking Luxembourg European Council (12 and 13 December 1997), which decided to open negotiations with six of the candidate countries. The European Council also introduced two significant changes into the regulation of the accession process.

Firstly, it adopted a comprehensive enlargement framework, based on the Copenhagen criteria. Giving a positive assessment to the Agenda 2000, (where the Commission also proposed to continue the practice of assessment of the candidate countries' progress), the European Council decided to continue the practice of assessment of the candidate countries' preparedness to accession and asked the Commission to make regular Reports to the Council, starting from the end of 1998. In making such Reports the Commission was asked to follow the Agenda 2000 methodology. The process of accession was generally established as evaluative and inclusive, as all the candidate countries were announced to be 'destined to join the Union on the basis of the same criteria and [...] on an equal footing'.⁵¹

In response to the aforementioned request from the European Council, the Commission embarked on issuing annual progress reports concerning every candidate country's progress towards accession in the light of the Copenhagen criteria and also Composite Papers, summarizing the Reports and giving recommendations to open negotiations with those, meeting the political criteria. Following the Luxembourg Presidency Conclusions eight rounds of regular Reports have been released by now,⁵² the 2003 round only included three Reports: on the progress of Bulgaria, Romania and Turkey and the round released in the year 2005 – two (all in all 73 documents, due to the absence of the Report on Malta in 1998, as Maltese application was still suspended).

Every round of Regular Reports was accompanied by an analytical Paper of the Commission. Two of such papers were entitled 'Composite Papers', respecting the text of the

⁴⁸ Presidency Conclusions of the Amsterdam European Council (16-17 Jun. 1997).

⁴⁹ *Id.*

⁵⁰ COM(1997) 2000 final.

⁵¹ Presidency Conclusions of the Luxembourg European Council (12-13 Dec. 1997), § 10.

⁵² The Vienna European Council (11-12 Dec. 1998) welcomed the first Progress Reports from the Commission and asked for the preparation of the second round of Reports, Presidency Conclusions, § 58; The third round of Progress Reports was asked by the Helsinki European Council (10-11 Dec. 1999), Presidency Conclusions, § 6.

Madrid European Council Presidency Conclusions, while four others (2000, 2001, 2002, 2003) were entitled 'Strategy Papers', thus underlining the importance of the recommendations given by the Commission.

The second equally important innovation introduced by the Luxembourg European Council was an enhanced pre-accession strategy, consisting of two elements: increased pre-accession aid and the introduction of the Accession Partnerships. Particularly the second element had far-reaching implications on the legal regulation of the enlargement process. Accession Partnerships were intended to be a 'new instrument and a key-feature of the enhanced pre-accession strategy'.⁵³ The idea behind the APs is to address the urgent needs of each applicant country by outlining the principles, priorities and intermediate objectives, which are instrumental in order to meet the Copenhagen criteria. In other words, each AP was drafted with a view to articulate the most important steps to be taken by the candidate country in question in order to improve the compliance with the Copenhagen criteria.

The legal framework for the adoption of the Accession Partnerships⁵⁴ was established by Council Regulation 622/98,⁵⁵ which was provided for by the Luxembourg European Council. The Regulation was adopted based on Article 308 EC, since the Treaty does not provide any other legal basis for the adoption of such instrument. Accession Partnerships are adopted by the Council with a qualified majority following the proposal by the Commission.⁵⁶ In other words, notwithstanding the attractive name these documents received the candidate countries were not invited to participate in the drafting of the Accession Partnerships.⁵⁷ Moreover, the key-role granted to the Commission in the drafting of these documents further reinforced its role in the pre-accession. The Commission *de facto* acquired a monopoly of regulatory output in the pre-accession field.

Stipulating (in Article 4) that those candidate countries failing to adhere to the priorities set by the APs and unable to meet the Copenhagen criteria should face negative consequences of their actions, Regulation 622/98 moved the whole pre-accession from the field of soft-steering into the spot-light of the law, making the Copenhagen criteria legally enforceable.⁵⁸ The Copenhagen-related documents and the Copenhagen criteria themselves thus instantly became legal instruments, providing the Commission with sufficient grounds to freeze accession progress of a country failing to respect the requirements contained in these documents (at least as far as the financing of the pre-accession projects was concerned).⁵⁹

After the closure of accession negotiations with ten applicant countries by the Copenhagen European Council (12 and 13 December 2002), the continuation of issuing of the Reports on their Progress towards Accession of the candidate countries seemed unreasonable. However, the European Council found that

⁵³ Presidency Conclusions of the Luxembourg European Council (12-13 Dec.1997).

⁵⁴ On Accession Partnerships see e. g. Inglis, K., 'The Pre-Accession Strategy and the Accession Partnerships', in Ott, A. and Inglis, K. (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process*, The Hague: T. M. C. Asser Press, 2002; and Maresceau, M., 'Pre-Accession' in Cremona, M. (ed.), *Enlargement of the European Union*, Oxford: OUP, 2003. Hillion, Ch., 'Enlargement of the European Union: A Legal Analysis', in Arnulf, A. and Wincott, D. (eds.), *Accountability and Legitimacy in the European Union*, Oxford: OUP, 2002, 416

⁵⁵ Council Regulation (EC) No. 622/98 of 16 Mar. 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, *OJ L 85/1*.

⁵⁶ Art. 2, Regulation (EC) No. 622/98.

⁵⁷ When the Commission first proposed to draft Accession Partnerships in Agenda 2000 (at IV. 1) these documents were supposed to take the form of Commission's Decisions taken after consulting the applicant countries.

⁵⁸ Inglis (2000), 1186.

⁵⁹ Art. 4 of Council Regulation (EC) No. 622/98 reads as follows: 'Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant State'.

Monitoring up to accession of the commitments undertaken will give further guidance to the acceding States in their efforts to assume responsibilities of membership and will give the necessary assurance to current Member States.⁶⁰

On the basis of this statement the process of issuance of regular Reports addressing the preparedness of the ten acceding countries was launched leading to the issuance of ten Comprehensive Country Monitoring Reports, accompanied by a Comprehensive Monitoring Report.⁶¹ The process continued in 2005 with the release of the Comprehensive Monitoring Reports addressing Bulgarian and Romanian preparedness to join the Union.

§ II.6. Pre-accession influence tools: Employing the Copenhagen-related documents to vary the level of pressure on the candidate countries

The elaboration by the European Union in the course of the pre-accession exercise of such a number of different types of Copenhagen-related documents allowed the Commission to vary the levels of pressure on the candidate countries by hand-picking different combinations of the legal /political instruments available while dealing with each particular issue of the pre-accession. This effect was reinforced by a clearly hierarchical order of effectiveness potentially formed by the entirety of the Copenhagen-related documents. For example, the inclusion of certain pre-accession demands among the priorities of the Accession Partnerships was likely to be more effective than mentioning the same demand in a Strategy Paper. In the case of the former the candidate country could face suspension of accession negotiations in case of non-compliance, while the latter was leaving it entirely to the candidate country to decide whether it chooses to follow the Commission's demand or not, threatening, in the worst case, to result in the shaming of the candidate country in question in the mass media in case no compliance is achieved.

On the idea of varying effects of different Copenhagen-related documents the notion of the pre-accession influence tools is based. Combining different Copenhagen-related documents applied in the course of the pre-accession democracy and the rule of law promotion was likely to bring different levels of compliance. Following the hierarchy of the Copenhagen pre-accession tools applied by the Union, it is possible to make a relative assessment of importance of the elements of the Copenhagen political criteria that appear in the Copenhagen-related documents. Hypothetically, the fact that the tools of 'higher order' are applied to pressure the candidate countries to conduct reforms in a certain sphere can be taken as a proof of this issue's higher importance, compared to other elements of the Copenhagen political criteria assessed in the course of the pre-accession with regard to which the influence tools of 'lower order' were applied. Moreover, theoretically making it possible to apply varying levels of pressure on the candidate countries failing to comply with the pre-accession demands, the pre-accession influence tools represented an important instrument of dynamic steering of the pre-accession reforms in the candidate countries. By shifting the level of pressure up or down better pre-accession compliance could be achieved.

The European Union had several pre-accession influence tools to influence the candidate countries' reforms and to push the candidates to meet the Copenhagen political criteria in the course of the pre-accession. These included (if placed in the hierarchical order of diminishing potential effectiveness in the pre-accession):⁶²

⁶⁰ Presidency Conclusions of the Copenhagen European Council (12-13 Dec. 2002), § 5.

⁶¹ COM(2003) 675 final.

⁶² Kochenov (2005) 'EU Enlargement: Flexible Compliance...', 5 – 6.

1. an absolute imperative to perform, when the need to deliver was articulated at the highest political level and the progress of the country on the way to accession was made directly dependant on this country's performance;⁶³
2. the inclusion of the same issue into all the types of the Copenhagen-related documents and clear articulation in these documents that a failure to perform might have consequences on the prospects of accession for the country in question;
3. acknowledgement of the importance of a particular reform in the Regular Reports and listing the issue in question among the short term priorities of the Accession Partnership with the candidate country in question;
4. including the issue into the Reports and, simultaneously, among the mid-term priorities of the accession partnership;
5. including the issue into the Reports on a constant basis without, however, placing it among the priorities of the Accession Partnership with the country in question;
6. occasional mentioning of the issue in the Reports.

Of course, the choice of the tool of influence by the Commission cannot be explained solely by the principle importance of the issue in question in the course of the pre-accession exercise. There are certainly other factors, influencing the choice made by the Union Institutions, such as, for example, the need to resolve specific problems of the country in question.⁶⁴ This is not to say, however that these other factors prevail over the main pre-accession priority-setting.

Offering a variety of tools of influence, the Copenhagen-related documents provided the Commission with a sophisticated system of reform promotion in the candidate countries that allowed it to make practical use of the conditionality principle for the benefit of both the European Union and the candidate countries, offering a potentially

§ II.7. Pre-accession influence tools and the Copenhagen-related documents as a framework of effective implementation of the conditionality principle

The fifth enlargement was the first in the history of the European Union to see a systematic application of the principle of conditionality. Having no tools able to assure the application of this principle besides the Copenhagen criteria that were (in case taken alone) not detailed enough in order to be effective in the course of the pre-accession democracy and the rule of law promotion exercise, the European Union gradually elaborated a large palette of Copenhagen-related documents enabling it to assure consistent and effective conduct of the pre-accession. The application of the Copenhagen-related documents to both the clarification of the meaning and the scope of the Copenhagen criteria and to the assessment of progress achieved by the candidate countries on the way to compliance with the criteria meant a revolution in the EU enlargement regulation. Never before was the Union able to be so intrusive into the legal and political spheres of its candidate countries. Never before did the Union have a legal basis (the Conditionality principle) and the necessary tools (the

⁶³ For example, the opening of the accession negotiations with Croatia was firmly linked to the extradition of general Ante Gotovina to the International Criminal Tribunal for Former Yugoslavia (ICTY). Brussels European Council (Jun. 2004) required of Croatia to co-operate with the ICTY making future pre-accession progress on such co-operation (Presidency Conclusions, § 35). Consequently, the negotiations were only started on Oct. 6 2005, after Gotovina was caught. Cf. Council (EU), *EU opening statement for the accession conference with Croatia*, of 25 Oct. 2005.

⁶⁴ The deficiencies of the Ceaușescu's policy in the sphere of women's rights and family law explains for instance, the importance of the issue of Romanian child-care reform in the pre-accession. Included among the priorities of the APs with Romania, this issue did not play any important role in the preparation of other candidate countries towards accession.

Copenhagen-related documents) to make such an intrusion beneficial to both the candidate countries and the Union itself.

Employing a number of different types of Copenhagen-related documents of potentially different effectiveness available to the Commission made it possible to combine them in different ways in order to achieve better results in the field of reform promotion and formulate an adequate response to the diverging weak points of the candidate countries with a view of assuring that the performance of all of them is judged based on the same criteria and that a symmetrical response is given to their inability to perform in any field, having implications on their pre-accession progress.

Having all the necessary instruments at hand, the Commission's task was to apply them effectively. The pre-accession reform-promotion exercise was destined to be a success, it seemed.

III. Pre-accession reform-promotion *de jure* II: Unlimited competences?

Effective application of the pre-accession influence tools and the Copenhagen-related documents obviously depended on the scope of the competences the Union possessed while regulating enlargements. The analysis of the issue of how far the Union's pre-accession demands could reach becomes crucial: in case the Union could not step outside the scope of the *acquis*, the whole system of instruments devised to promote the pre-accession reform in the candidate countries with a view of effective implementation of the principle of conditionality could prove to be largely unworkable, since a number of the pre-accession 'problem-areas' lay outside the traditional reach of the European Union. In other words, in order to be an effective reform promoter, including in the sphere of work and welfare, it was not enough for the Community institutions to possess a developed system of pre-accession influence tools. Being able to apply them to the candidate countries' reforms in the areas lying outside the scope of the *acquis* was crucial.

At the first glance such stepping outside the scope of the *acquis* was, legally speaking, hardly possible. Indeed, 'limitation' is always a key word while talking about the competences of the European Community (Union) and the *acquis communautaire*.⁶⁵ Apart from being simply set in the Treaties,⁶⁶ the discussion of such limitation entered the legal doctrine⁶⁷ and the case-law of the ECJ⁶⁸ at a very early stage of the development of Community law. This limitation most definitely reminded of itself in the *Tobacco advertising*⁶⁹ – a European analogue of *Lopez*.⁷⁰

So what exactly does 'limitation' mean in the context of EU law? Simply put, it reflects the nature of the Union and helps one understand that the *acquis*, although composed of thousands of documents, does not provide the EC with a general legislative competence.

⁶⁵ Compare with the thoughts of A. Hamilton in 'Federalist No. 32. The Same Subject Continued (Concerning the General Power of Taxation)', *The Independent Journal*, Wednesday, January 2, 1788, also available at <<http://www.federalistpapers.com/federalist32.html>>, 1; and J. Madison in 'Federalist No. 45 'The Alleged Danger from the Powers of the Union to the State Government Considered'', *The Independent Journal*, Saturday, January 26, 1788, also available at <<http://www.federalistpapers.com/federalist45.html>>, 3.

⁶⁶ Art. 5 EC.

⁶⁷ See e. g. Gaudet, M., 'The Legal Framework of the Community', *Legal Problems of the European Economic Community and the European Free Trade Association*, 1961, 10.

⁶⁸ Case 111/63 *Lemmerz-Werke v. High Authority* [1965] ECR 893.

⁶⁹ Cases C-376/98 *Germany v. European Parliament and EU Council* [2000] ECR I-02247 and C-74/99 *R. v. Secretary of State for Health, ex. Parte. Imperial Tobacco Ltd. and Others* [2000] ECR I-08399.

⁷⁰ *US v. Lopez* (93 – 1260), 514 U.S. 549 (1995).

Of course there are exceptions from this principle. What is a policy *sui generis* without such exceptions?⁷¹

A very important exception and the one which is vital for the understanding of the nature of the enlargement process is concerned with the application of such limitation when acting within the framework of the pre-accession, *i. e.* promoting market economy, democracy, the rule of law, and the protection of human rights in the EU's Member States-to-be. These States not being the signatories of the Treaties, the candidate countries' status *vis-à-vis* the Union is not governed by unequivocal limitations of the Community authority *vis-à-vis* its Member States, which can be found in the Treaties.

In the case of the candidate countries the Community has an additional argument to make the case for virtually unlimited scope of competences: the goal oriented reading of the enlargement instruments to be found in the Treaty. Once a principle decision to enlarge has been taken by the *Herren der Verträge*, it is up to the Community institutions responsible for enlargement to make sure that the accession of the candidate countries will not mean any destructive potential for the Union and that these States pass the democracy, human rights protection and the rule of law test of Article 6(1) EU, as required by Article 49 EU. Given the loose wording of Article 6(1) EU, it would be logical to presuppose that the standard of democracy and the rule of law contained in the Article is *not per se* limited to the sphere of competences of the Community. Moreover, since Article 6(1) EU is employed (as required by a reference made to it from Article 49 EU) as a 'gate-keeper' of the Community to make sure that only democratic States join, limiting its reach to the issues covered by the *acquis* would be contrary to its very purpose and will fail to ensure the effective functioning of the Union's enlargement law as envisaged by the framers. That is to say, Article 49 EU read in conjunction with Article 6(1) EU and the Copenhagen political criteria carry no signs of competence limitations the Community could possibly face regarding the reach of its pre-accession demands addressed to the candidate countries preparing for accession.

EU enlargement law and the regulation of the pre-accession exercise is not the only example of an area where the internal and external competences of the Community differ in scope. In the sphere of human rights protection, too, the external competences of the Union are potentially (as well as practically) much broader than the internal ones.⁷² Certainly being two sides of one coin, to agree with Alston and Weiler, the gap between external and internal competences (especially in the field of democracy and human rights protection) has far-reaching consequences and is felt both in the Union and in the 3rd countries alike.⁷³

This gap is especially obvious if one keeps in mind the wording of the ECJ's decision in *Grant* case, where the Court asserted (concerning internal competences of the Community) that 'human rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community'.⁷⁴ In contrast, as far as the external dimension of human rights protection is concerned, the ECJ approved the legality of the human rights clauses in the external agreements concluded with the 3rd

⁷¹ On the *sui generis* nature of the Community see *e. g.* Caporaso, J. A., Marks, G., Moravcsik, A. and Pollack, M. A., 'Does the European Union Represent an n of 1?', 10 *ECSA Rev.* 3, 1997.

⁷² See *e. g.* Duparc, Ch., *De Europese Gemeenschap en de rechten van de mens*, Luxembourg: Official Publications of the European Communities, 1993; Clapham, A., 'A Human Rights Policy of the European Community', 10 *YbEL*, 1990; *cf.* McGoldrick, D., 'The EU after Amsterdam: An Organisation with General Human Rights Competence?' in O'Keeffe, D. and Twomey, P. (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford /Portland, OR: Hart, 1999, on the difference between internal and external EU competences in the field of human rights.

⁷³ Alston, Ph. and Weiler, J. H. H., 'An 'Ever Closer Union'', in Alston, Ph. (ed.), *The EU and Human Rights*, Oxford: OUP, 8.

⁷⁴ Case C-249/96 *Lisa Jacqueline Grant v. South-West Trains Ltd.* [1998] ECR I-621, §45. This wording is generally in line with the Opinion 2/94 [1996] ECR I-1759.

countries.⁷⁵ In other words, while the limitation of the scope of the internal Community powers seems to be really strict, the situation with the external powers provides a contrasting picture.

To summarise, in the course of the pre-accession the Community was in possession of both almost unlimited competences in the sphere of reform-promotion in the candidate countries and a wide range of legal and political tools to effectively use these competences. It was up to the Commission to fill this competence-instruments framework with substance. Did the Commission manage to use this framework effectively, while promoting work and welfare reform?

IV. Pre-accession work and welfare reform-promotion *de facto*: the competences and compliance instruments largely unused

The Copenhagen-related documents discuss some issues related to the work and welfare reform in the candidate countries only sporadically. From both the structure and substance of the Regular Reports and other relevant documents it follows quite clearly that the Commission did not regard the work and welfare reform as one of the main areas of the pre-accession transformation required of the candidate countries. The Copenhagen-related documents did not even contain any special section to assess the issues related to work and welfare in the candidate countries.

§ IV.1. Work and welfare reform as part of Economic, Social and Cultural rights

This does not mean, however, that the Commission totally neglected the issues of work and welfare in the course of the pre-accession exercise. Some relevant information can be found in the sections of the Regular Reports dealing with Economic, Social and Cultural Rights. Generally, the sub-structure of the sections of the Regular Reports dealing with the human rights component of the Copenhagen political criteria employed by the Commission, although remained generally stable, including a tripartite division to civil and political rights; economic, social and cultural rights; and minority protection, demonstrated little consistency as far as the issues included in every of the sub-categories concerned. The freedom of religion, for instance, was fluctuating between the Economic, Social and Cultural rights sub-sections and the sub-sections dealing with Civil and Political rights. The same can be noted regarding the issues relevant for the candidate countries work and welfare reform. To provide an example, the issue of child protection was assessed in different sub-sections of the Reports, being part of Civil and Political Rights sub-sections in the context of Romanian preparation for accession and part of Economic, Social and Cultural rights once the Commission dealt with all the other candidate countries.⁷⁶ Notwithstanding such inconsistencies, the majority of work and welfare reform issues deemed by the Commission relevant for the progress of the candidate countries towards accession to the European Union was mostly concentrated in the same sub-sections of the Regular Reports.

⁷⁵ Case C-286/94 *Portugal v. Council* [1996] I-06177. Cf. Hillion, Ch., *The Evolving System of European Union External Relations as Evidenced in the EU Partnerships with Russia and Ukraine*, doctoral thesis defended at the University of Leiden, February 22, 2005 (unpublished, copy available at the library of the Leiden University).

⁷⁶ Given that the Commission viewed child protection mostly as an issue relevant for the pre-accession promotion of civil and political rights, which is demonstrated by the inclusion of the issue among the assessment of such rights in the context of the Romanian application for the membership of the European Union, where the problem has been most acute, this note will not deal with child protection.

Such issues were mentioned in the Commission's Composite and Strategy Papers only occasionally and have not played a crucial role in the preparation of the candidate countries towards accession. Unlike in other spheres of pre-accession, where the Commission stated that a lack of progress in a given field can result in negative prospects for a given candidate country to accede the Union, the lack of progress in the issues related to work and welfare has never resulted in such assessments of the Commission. It is also telling that all the candidate countries were declared by the Commission to have met the Copenhagen political criteria already when the Commission's Opinions on their applications for the membership of the European Union were released or shortly thereafter.⁷⁷

§ IV.2. Economic, Social and Cultural Rights in the Commission's Regular Reports

Since a number of issues related to work and social welfare reforms in the candidate countries were included by the Commission in the sections of the Regular Reports dealing with economic, social and cultural rights, it is necessary to look into the list of issues the Commission analysed in these sub-sections.

Compared to the sections of civil and political rights and the minority protection, economic, social and cultural rights got the least attention from the Commission. The Opinions and Regular Reports are often limited to stating that 'basic economic, social and cultural rights continue to be respected'.⁷⁸ Interestingly, the majority of such statements were made during the first round of reporting, thus producing an impression that the Commission just did not have a set of issues in mind, to tackle in this sections of the Regular Reports. Later, the Commission embarked on a more profound assessment of the issues related to the pre-accession work and welfare reform and dedicated more space to the assessment of such issues in the Regular Reports. Unlike the Regular Reports, some of the Strategy and Composite Papers of the Commission did not mention these rights at all, pointing, again, at the marginal importance of the issues related to work and welfare reform for the pre-accession.

Alongside with their general marginality, probably the biggest problem related to the pre-accession assessment of work and welfare reform and of the bloc of economic, social and cultural rights as a whole was an extremely blurred understanding given to all the components of the list of such rights by the Commission: nowhere did it provide a definition of any of the rights it included in the sub-sections of the Regular Reports dealing with economic, social and cultural rights.

In the assessments the Commission mentions a number of issues:

1. Non-discrimination;
2. Trade Unions;
3. Right to strike;
4. Integration of the disabled and socially vulnerable people's rights
5. Social Security Rights.

Strangely, besides these issues, in the same sections of the Regular Reports, the Commission also discussed the acquisition of land by foreigners in the border areas⁷⁹ and freedom of religion. This list gives an idea of a rather inconsistent approach to structuring the pre-accession assessment.

⁷⁷ With an exception of Mečiar's Slovakia that fell short of meeting the criteria in 1997 (to do it in 1998), all the other candidate countries met the Copenhagen political criteria in 1997.

⁷⁸ 1998 Czech Report, 10; 1998 Estonian Report, 10; 1998 Polish Report, 12.

⁷⁹ 1999 Estonian Report, 12.

According to Betten and Grief the fact that the Community ‘is (or was) mainly an economic organisation, makes the protection of economic and social rights at least as relevant as the protection of civil and political rights’,⁸⁰ it is impossible to disagree with this statement with a view, especially, of the development of the ECJ’s human rights jurisprudence⁸¹ and the role played by the social rights in the Community.⁸²

Out of the six issues discussed by the Commission, only one enjoyed really serious pre-accession assessment: that of non-discrimination. It is quite obvious that the differences in the treatment of the issues outlined by the Reports is related to the scope of the *acquis*. The non-discrimination fell within its scope clearer than other elements of the pre-accession analysis of Economic, Cultural and Social rights.

§ IV. 3. The pre-accession analysis of equality and non-discrimination

For the Commission, non-discrimination was clearly the main issue from the whole economic, social and cultural rights list. This principle is at the core of the Community goals, as follows from Articles 2 and 3(2) EC, moreover, Article 141 EC allows adoption of specific measures⁸³ to ensure the application of the principle of non-discrimination and equal pay for equal work or work of equal value. Thus, this issue lies at the core of *acquis communautaire*.⁸⁴ It also stands separately from other issues due to the obligation on the candidate countries to incorporate and to assure an effective implementation of the anti-discrimination *acquis*.

§ IV. 3.1. Non-discrimination in Community law

Unlike other elements of the Commission’s pre-accession economic, social and cultural rights list, non-discrimination is one of the core principles of Community law, introduced from the very beginning, mostly in the form of gender equality⁸⁵ and the abolition of discrimination on the grounds of nationality.⁸⁶ Later, Amsterdam EC Treaty expanded the non-discrimination framework, to cover ethnic and racial discrimination. According to Article 13 EC the Community can ‘take appropriate action to combat discrimination based on

⁸⁰ Betten, L. and MacDevitt, D. (eds.), *The Protection of Fundamental Social Rights in the European Union*, The Hague /London /Boston: Kluwer Law International, 1996, 70.

⁸¹ E.g. Rodríguez Iglesias, G. C., ‘The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities’, 1 *Colum. J. Eur. L.*, 1995. For a somewhat more critical account of the same process see de Witte, B., ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’, in Alston, Ph. (ed.), *The EU and Human Rights*, Oxford: OUP, 1999; Mancini G. F. and di Bucci, V., ‘Le développement des droits fondamentaux en tant que partie du droit communautaire’, in *Collected Courses of the Academy of European Law*, Vol. I, book 1, 1991.

⁸² Social rights are not irrelevant in the Community legal order: e.g. Póiares Maduro, M., ‘Striking the Elusive Balance between Economic Freedom and Social Rights in the EU’, in Alston, Ph. (ed.), *The EU and Human Rights*, Oxford: OUP, 1999; Szyszak, E. ‘Social Rights as General Principles of Community Law’, in Neuwahl, N. and Rosas, A. (eds.), *European Union and Human Rights*, The Hague: Martinus Nijhoff, 1995; de Witte, Bruno E. F. M., ‘Economische, sociale en culturele rechten: De rol van de Europese Gemeenschap’, in Coomans, A. P. M. and Heringa, A. W. (eds.), *De toenemende betekenis van economische, sociale en culturele mensenrechten*, Leiden: Stichting NJCM-Boekerij, 1994.

⁸³ Using co-decision procedure of Art. 251 EC.

⁸⁴ On equality in the EU see e.g. Defeis, E. F., ‘Equality and the European Union’, 32 *Ga. J. Int’l & Comp. L.*, 2004; Caruso, D. ‘Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives’, 44 *Harv. Int’l L.J.*, 2003; Barnard, C., ‘Gender Equality in the EU: A Balance Sheet’, in Alston, Ph. (ed.), *The EU and Human Rights*, Oxford: OUP, 1999; Bell, M., ‘European Union Anti-Discrimination Policy: From Equal Opportunities between Women and Men to Combatting Racism’, *EP DG for Research and Development Public Lectures Series LIEBE* No. 102 EN, 1997; Dashwood, A. and O’Leary, S. (eds.), *The Principle of Equal Treatment in EC Law*, Cambridge: CUP, 1997; Lenaerts, K., ‘L’égalité de traitement en droit communautaire: un principe unique aux apparences multiples’, *CDE*, 1991.

⁸⁵ Art.141 EC, regarding equal pay. See also Council Directive 76/207/EEC of 9 February 1976, *OJL* 039/40, 1976.

⁸⁶ The non-discrimination on the basis of nationality (Arts. 12, 39(2), 34(2) EC and Regulation 1612/68 (*OJL* 257/2, 1968)), is one of the key principles of Community law. It did not play such an important role in the pre-accession, only to gain importance after the candidate countries became full Member States of the European Union. On a comprehensive account of nationality discrimination prohibition in EC law see Davies, G., *Nationality Discrimination in the European Internal Market*, The Hague /London /Boston: Kluwer Law International, 2003.

sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. It is notable, that this article does not by itself prohibit discrimination,⁸⁷ only giving a legislator a possibility to act, as has been confirmed by the ECJ in *Grant* case.⁸⁸ This is why the actual steps taken by the Community are of ultimate importance: a Framework Directive on equal treatment in employment and occupation⁸⁹ and a Directive on the prohibition of discrimination on the basis of racial or ethnic origin.⁹⁰

Community Law does not only prohibit discrimination on the basis of sex, but also allows affirmative action in the fight with gender discrimination. According to Article 141(4) EC 'maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'⁹¹ is expressly allowed to the Member States. The Court of Justice was also supportive of such measures,⁹² finding, however, that they are not unlimited.⁹³

§ IV. 3.2. Non-discrimination in the Copenhagen-related documents

All the legislative initiatives aimed at strengthening the ban of all forms of discrimination and promotion of equal treatment are welcomed by the Commission and mentioned in the Reports.⁹⁴

Apart from monitoring the legislative developments and the *acquis* incorporation, the Commission paid attention at the discrimination in the work place in terms of hiring⁹⁵ and wage differences between women and men⁹⁶ and also at the number of parliamentary seats won by women-candidates.⁹⁷ An increase in such a number is praised as a positive development.⁹⁸ Also the Commission welcomed the developments resulting in shifting the burden of proof in discrimination cases to the employer.⁹⁹

The candidate countries were also encouraged to create special bodies dealing with the promotion of equal opportunities, like the Czech Council for Equal Opportunities.¹⁰⁰ The task of such bodies is usually advising the government on equal opportunities legislation. Some countries chose to create a position of an Ombudsman for equal opportunities. As Lithuanian example demonstrates, such a post can be very useful: already resulting from the

⁸⁷ von Toggenburg, G. N., 'The Race Directive: A New Dimension in the Fight against Ethnic Discrimination in Europe', 1 *EYbMI*, 2001, 20. For a different point of view see Lenaerts, K., 'Fundamental Rights in the European Union', 25 *Eur. L. Rev.*, 6, 2000, 579. Cf. Bell, M., 'The New Art.13 EC Treaty: A Sound Basis for European Anti-Discrimination Law?', 6 *Maastricht J.* 1, 1999; Waddington, L., 'Testing the Limits of the EC Treaty Article on Non-Discrimination', 28 *Industrial L.J.* 2, 1999; Flynn, L., 'The Implications of Article 13 EC – After Amsterdam, Will Some Forms of Discrimination Be More Equal Than Others?', 36 *CMLRev.*, 1999.

⁸⁸ Case C-249/96 *Lisa Jacqueline Grant v. South West Trains Ltd.* [1998] ECR I-621, § 48, Cf. Weyembergh, 'Les droits des homosexuels devant le juge communautaire', in 6 *Journal des Tribunaux – Droit européen*, 1998.

⁸⁹ Council Directive 2000/78/EC of 27 Nov. 2000, *OJ L* 303/16-22, 2000.

⁹⁰ 'Race Equality Directive', Council Directive 2000/43/EC of 29 Jun. 2000, *OJ L* 180/22-26, 2000. Cf. von Toggenburg (2001); Elspert, G., 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations', 29 *Industrial L.J.* 4, 2000.

⁹¹ Art.141(4) EC, see also Art.2 (1) and (4) of Directive 76/207.

⁹² Case C-450/93 *Eckhard Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3051; Case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363. Cf. Charpentier, L., 'The European Court of Justice and the Rhetoric of Affirmative Action', 4 *Eur. L.J.* 2, 1998.

⁹³ Case C-407/98 *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist* [2000] ECR I-5539.

⁹⁴ 1999 Lithuanian Report, 14; 2001 Czech Report, 24.

⁹⁵ 2000 Latvian Report, 20.

⁹⁶ 1999 Czech Report, 15; 2000 Latvian Report, 20.

⁹⁷ 2001 Estonian Report, 21. For the discussion of the role played by women in the legislatures of Belgium and the EU-15 see Mateo-Diaz, M., 'Searching for the Panacea of Long-Term Equality: On the Art of Combining Quick-Fix Solutions and Structural Measures to Increase the Presence of Women in Parliament', *EUI WP*, RSCAS No. 2004/07, 2004.

⁹⁸ 2001 Bulgarian Report, 22.

⁹⁹ 2000 Hungarian Report, 18.

¹⁰⁰ 2002 Czech Report, 29.

first year in office, the Lithuanian Ombudsman for Equal Opportunities acted on a number of occasions, which resulted in the improvement of the situation in the sphere of education (The Lithuanian Military Academy), social protection (parental benefits) and access to work (job advertisements).¹⁰¹ It is important to note that welcoming the creation of such bodies, the Commission did not insist on their creation in the Copenhagen-related documents.

Tackling these issues in the Reports, the Commission usually just named them, sometimes raising a question of insufficiency of resources at the disposal of the government concerned.¹⁰² While welcoming certain developments, the Commission has never used a full spectre of the pre-accession influence tools, demonstrating unwillingness to criticise those countries failing to perform in this field and, also, adopting a very flexible general approach to the promotion of equality, avoiding any setting of really strict standards.¹⁰³

§ IV. 4. Pre-accession and the assessment of the functioning of trade unions

The majority of the Regular Reports of the Commission simply stated that ‘trade unions continued to play an active role in the society’¹⁰⁴ in the candidate countries. Some also mentioned the right to strike, also stating that it is ‘generally respected’.¹⁰⁵ A source of concern was a declining membership in the trade unions¹⁰⁶ or alleged infringements of the workers’ right to unionise.¹⁰⁷ The Commission also monitored the percentage of workers-members of the Unions.¹⁰⁸ In some cases, to the puzzlement of the Commission, while the entire legislative framework was put in place, trade unions still did not function. The explanation coming from the Reports attributes such a situation to a ‘struggle with distrust from the legacy of the past’,¹⁰⁹ which seems to be a reasonable explanation, given the role that the trade unions played in the socialist totalitarian regimes, being directly linked to the Party and thus *de facto* built in the machinery of oppression.

As becomes clear from the Regular Reports, the functioning of trade unions was a totally auxiliary issue in the pre-accession assessment of the candidate countries. Although not entirely alien to EC law¹¹⁰ and certainly possessing an obvious potential to bring change to the countries in transition, the functioning of trade unions did not have any effect whatsoever on the progress of the pre-accession.

§ IV. 5. Pre-accession and the integration of the disabled

Generally, what was true concerning all the candidate countries was that ‘people with either physical or mental disabilities continue to face difficult living conditions’.¹¹¹ Just as in the case of the trade union rights’ assessment, the Commission did not provide any particularities

¹⁰¹ See *e. g.* 1999 Lithuanian Report, 31. See 2000 Lithuanian Report 20 and 2002 Report 29 for some insight of the activities of this Ombudsman. See also Croatian Opinion, 86.

¹⁰² 1999 Bulgarian Report, 15 (insufficient resources for the integration of the disabled).

¹⁰³ It can be argued that the Commission opted for a soft indirect reform-promotion, avoiding making direct use of the pre-accession influence tools and still achieving some results. See Kochenov (2005) ‘EU Enlargement: Flexible Compliance...’

¹⁰⁴ *E. g.* 1999 Bulgarian Report, 15, 2000 Bulgarian Report, 21,

¹⁰⁵ 2002 Bulgarian Report, 31.

¹⁰⁶ 2000 Czech Report, 25.

¹⁰⁷ 2001 Czech Report, 24.

¹⁰⁸ 1998 Lithuanian Report, 11; 2001 Hungarian Report, 21.

¹⁰⁹ 2002 Latvian Report, 29.

¹¹⁰ Bercusson, B., ‘Fundamental Trade Union Rights in the European Union’, in Betten, L. and MacDevitt, D., *The Protection of Fundamental Social Rights in the European Union*, The Hague /London /Boston: Kluwer Law International, 1996. Ety, T., ‘Old and New Elements in the Role of the Trade Unions’, in van Genugten, Willem J. M. and Lubbers, Ruud F. M. (eds.), *Division of Roles in the International Economic and Legal Order: Enterprises, Governments, Trade Unions, NGO’s and Human Rights*, Nijmegen: Wolf Legal publishers, 2002

¹¹¹ 1998 Romanian Report, 11.

on this issue.¹¹² Mostly it limited itself to restating that there clearly was a problem¹¹³ and welcomed the legislative developments in the candidate countries aimed at guaranteeing certain social benefits for the disabled¹¹⁴ as well as the stimulation of the companies to employ such people.¹¹⁵ The Commission welcomes specific legislation to protect mentally ill¹¹⁶ and is often dissatisfied with the conditions in the institutions for their treatment.¹¹⁷

Requiring of the candidate countries an unequivocal prohibition of discrimination against the disabled by law¹¹⁸ the Commission did not, however, provide any research of the implementation of such legislation. The Copenhagen-related documents did not contain any clear recommendations for the candidate countries to follow in this field, simply restating on a constant basis that ‘improvements are needed’.¹¹⁹

In other words, although mentioned in a number of the Regular Reports, the issue of the pre-accession integration of the disabled did not play any important role in the course of the pre-accession exercise. Making a parallel with the way this issue is treated within the *acquis communautaire*, it is notable that the Community approach to the rights of people with disabilities also leaves much to be desired. De Búrca regretted, for instance, that

‘the claims and interests of people with disabilities do not seem to have attained the same status of “fundamental rights” protected within Community law, although the Community has asserted competence in the field of disability’.¹²⁰

§ IV. 6. Pre-accession and social security systems of the candidate countries

The Commission did not raise the question of social security rights in all the Regular Reports, while some of them were rather detailed on this issue. The reforms promoted in this sphere in the course of the pre-accession were truly minimal. However, some of the findings of the Commission are of importance. The Commission made it clear, for example that there should be a centralised system of institutions dealing with socially vulnerable sections of the society: the institutional fragmentation is seen by the Commission as one of the main obstacles on the way of reform.¹²¹ Unfortunately, since the issue of pre-accession social security reforms was not included in the Regular Reports dealing with all the candidate countries, the reform-promotion appears rather sporadic. No clear standard of reform to be promoted can be deduced from the Reports. Moreover, the standards of assessment of the candidate countries’ progress in this sphere are also far from being clear: the assessment is very asymmetrical, concentrating on some countries, while forgetting the others.

The Commission’s activity in this field in the context of the Latvian application for accession can be cited as an example of a ‘detailed’ approach adopted by the Commission. According to the Latvian legislation in force in during the initial rounds of regular reporting, only those for whom the employer paid social security tax for at least nine months over the calendar year preceding their application to benefit from social security funds, were entitled to get unemployment benefits. Thus 200.000 people were excluded from the system.¹²² The

¹¹² Generally on the rights of the disabled in the EU see Quinn, G., ‘The Human Rights of People with Disabilities under EU Law’, in Alston, Ph. (ed.), *The EU and Human Rights*, Oxford: OUP, 1999.

¹¹³ 1999 Hungarian Report, 14. Making occasional references to the statistical data of the national Ombudsmen in the candidate countries to illustrate its findings: e. g. 2000 Hungarian Report, 19.

¹¹⁴ 1999 Estonian Report, 12.

¹¹⁵ 2001 Czech Report, 24.

¹¹⁶ 2000 Latvian Report, 20; 2001 Latvian Report, 22.

¹¹⁷ 1999 Latvian Report, 15 ‘substandard conditions’.

¹¹⁸ 1998 Hungarian Report, 11.

¹¹⁹ 2002 Estonian Report, 29.

¹²⁰ de Búrca, G., ‘The Language of Rights and European Integration’, in Shaw, J. and More, G. (eds.), *New Legal Dynamics of the European Union*, Oxford: Clarendon Press, 1995, 37.

¹²¹ 2001 Romanian Report, 28.

¹²² 1999 Latvian Report, 15.

Commission made it clear that the change of this provision was required. Already the 2000 Latvian Report stated that the ‘amendments to the law [were] under preparation’.¹²³ In the year 2001 the problem was resolved.¹²⁴ This simple example is one of the rare occasions when concrete demands of the Commission resulted in changing of the candidate country’s legislation and improved the situation in work and welfare sphere.

Unfortunately, the Latvian case was clearly an exceptional one. Willing to deal with such issues on an *ad hoc* basis the Commission failed to come up with a clear standard of reforming the social security systems of the candidate countries. It does not follow at all from the Copenhagen-related documents that the Commission had any clear idea regarding the direction of social security reforms in the countries of Central and Eastern Europe. This situation, where *ad hoc* demands were addressed at some candidate countries, while the Regular Reports dealing with others did not mention the issue of social security reform at all, resulted in minor differentiated treatment of the candidates. Although not really crucial for their pre-accession progress (given that the Commission announced that they met the Copenhagen political criteria even before the issue of social security reform appeared in the Regular Reports), such an approach to pre-accession reform-promotion is difficult to call productive. Moreover, it is also contrary to the main idea of the conditionality principle, since it does not guarantee the assessment of all the candidate countries’ progress according to the same criteria.

V. Pre-accession work and welfare reform promotion: A rare opportunity missed (concluding remarks)

The European Union possessed a virtually unlimited reform-promotion potential in the candidate countries of Eastern and Central Europe in the course of the preparation of the fifth and the sixth enlargements. This was due to two important factors. Firstly, the competences of the European Union in the course of the pre-accession were not limited to the *acquis communautaire*, meaning that the Union had a virtually total freedom of choice regarding the standards to promote in the candidate countries. Secondly, these virtually unlimited competences were substantiated by a workable system of legal and political tools to guarantee the effectiveness of the pre-accession reform-promotion. Consequently, the Commission could do virtually anything and do it effectively.

While the pre-accession reform-promotion in different spheres demonstrates the potential of the Copenhagen-related documents and the lack of competence restrictions quite clearly (if one looks, for example, at the promotion of minority protection reform in the course of the pre-accession), the promotion of the reform in the field of work and welfare did not play any crucial role in the preparation. Thus, once one regards the pre-accession work and welfare reform-promotion, it is clear that the whole framework of the pre-accession reform-promotion instruments remained largely unused.

1. The issues related to work and welfare were not assessed in the Copenhagen-related documents separately from other issues, being mostly concentrated in the sections of the Regular Reports dedicated to the analysis of the development of the protection of Economic, Social and Cultural rights in the candidate countries.

2. The Commission announced that the candidate countries met the Copenhagen political criteria even before the actual assessment of their progress in the field of Economic, Social and Cultural rights has started, demonstrating the initial unimportance of the issue in

¹²³ 2000 Latvian Report, 20.

¹²⁴ 2001 Latvian Report, 22.

the context of pre-accession. Moreover, other types of the Copenhagen related documents, such as Composite and Strategy Papers of the Commission at times ignored the issues related to work and welfare reform-promotion altogether.

3. The list of issues related to work and welfare reform included in the Economic, Social and Cultural rights sections of the Regular Reports was not based on any clear standard the Commission could employ to outline the relevant issues. It is also clear from the Regular Reports that the issues deemed important by the Commission varied from country to country in the course of the pre-accession exercise, making even the modest list outlined in this paper not applicable to all the candidate countries.

4. Not having a clear standard of issues to assess, the Commission was also lacking a uniform procedural standard of assessment of the issues it outlined. The lack of such standard manifested itself in two ways.

First of all, some issues assessed by the Commission played a relatively more important (although never a crucial) role in the pre-accession, compared to other issues. While the importance of the right to unionise in the context of the pre-accession was manifestly marginal, the importance of the pre-accession reform in the sphere of non-discrimination was much more articulated. In other words, the issues to be found on the Commission's list did not play an equally important role in the pre-accession. The varying importance of these issues can be explained by their different relation to the *acquis communautaire*. Those clearly falling within the scope of the *acquis* were likely to be assessed in a more comprehensive manner.

Secondly, the same issue assessed in the context of different candidate countries applications tended to demonstrate different levels of importance. So while relatively important in the context of Latvian accession to the European Union, the importance of the reform of the social security systems was not so articulated in the context of other candidate countries. Of course, such a difference can be linked to the fact that different countries experienced different problems that required different solutions. However, having no clear standard of an 'ideal' social security system to be promoted the Commission seemed to be exercising arbitrary judgements instead of conducting comprehensive pre-accession reporting and reform-promotion exercise, never explaining which issues it looked at and why it picked those particular ones it chose to include in the Regular Reports.

* * *

All in all it can be stated that the activity of the Commission in the sphere of work and welfare reform-promotion in the candidate countries is more a missed opportunity than a successful policy implementation. No effective use of the virtually unlimited competences has been made and the pre-accession influence tools were only employed very ineffectively, if at all.