THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

EU ENLARGEMENT

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Introduction

1. Originally conceived as an intergovernmental *procedure* to allow third states to become contracting parties to the EU treaties, the accession process has evolved into the Union's enlargement *policy*[1] through which the Union´s institutions transform third states into Member States (the transformation process being referred to as "Europeanization"[2]). This EU Member State-building policy largely allowed the Union to exercise its normative power, and to organise the continent in its own image. However, concerns raised in the 2004 and 2007 enlargements to the Central and Eastern European countries ("CEECs") as well as Malta and Cyprus, have led Member States to review the nature of their input and contribution to such process of which the present Review forms a part.

2. I have been requested to provide evidence on EU Enlargement as part of the UK Government's "Review of the Balance of Competences between the UK and the EU" for which the relevant *Call for Evidence* may be consulted at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298658/UNCL_140324_Call_for_Evidence_-_Enlargement.pdf>.

3. In proceeding with this Evidence and providing answers, I have followed the order of questions outlined as part of the *Call for Evidence* and have indicated at the appropriate place where I believe that I do not possess the relevant expertise. I have thus concentrated on those matters which fall within my own competence and experience.

[1] See generally A.F. Tatham, *Enlargement of the European Union*, Kluwer Law International, Alphen aan den Rijn (2009).
[2] See generally F. Schimmelfennig and U. Sedelmeier (eds), *The Europeanization of Central and Eastern Europe*, Cornell University Press, Ithaca (NY) and London (2005); and H. Grabbe, *The EU's Transformative Power. Europeanization through Conditionality in Central and Eastern Europe*, Palgrave Macmillan, Basingstoke (2006).

Part I: Impact on the national interest

Question 1. What has been the impact of EU enlargement on UK interests? How has the UK influenced the enlargement process?

Question 2. What effect has EU enlargement had on UK interests in specific policy areas? What advantages and disadvantages has the UK experienced as a result? Please give examples.

4. Due to my own lack of experience and competence, I am unable to provide any detailed expert analysis on these particular questions. Certain points discussed later in this evidence as well as under Questions 9 and 10 (paragraphs 104-130 below) may nevertheless have relevance to further consideration of these questions.

Question 3. How do you consider the balance between the roles of Member States and of the EU institutions in the process? Might UK interests be served by any changes to the balance of competences in this area?

5. The balance that currently exists has developed gradually over 40 years with the agreement, tacit or otherwise, of the Member States and of the EU institutions. In my opinion, the balance in roles that has evolved does not impinge negatively on UK interests at this time and therefore UK interests would not be served if it were to be changed.

6. This position is further reinforced by the fact that the Lisbon Treaty amendments to Article 49 TEU concerning the modalities of accession have evinced incremental change of the mildest nature (although see paragraphs 28-29 below on parliamentary participation) and are to be found in instruments and practices beyond the Treaty on European Union which have developed *ad hoc* in response to the peculiarities of each accession round. Most of these "customary" elements of enlargement[3] have been elaborated in a step-by-step fashion, leading to a complex body of EU rules and mechanisms that supplement the barebones provisions of Article 49 TEU.

7. These customary elements are likely to continue to remain excluded from incorporation into the Treaty and thus underline the Union's continuing reluctance to codify them. The laconic wording of that Treaty framework can be seen as a strength, allowing customary enlargement practice to be nurtured and to thrive within its interstices, thereby maintaining a necessary flexibility in respect of each enlargement round without having the process "set in stone." In this way, the Union institutions can respond more quickly to developments

[3] D. Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?" (2005) 9 *European Integration online Papers,* No. 6, 20: <www.eiop.or.at/eiop/texte/2005-006a.htm>.

on the ground and not feel hemmed in by Treaty provisions that require unanimity among Member States to change. (As a result, the Member States and EU institutions are able to learn from each enlargement round and incorporate innovations into the process without needing to revise the Treaty: see further below in paragraphs 14-57.)

8. These customary elements or rules of enlargement greatly evolved in the lead up to the 2004 and 2007 enlargements when the Union was faced with the challenge of the impending accession of a large number of countries (the so-called "big bang" enlargement) that were simultaneously dealing with comprehensive and profound structural changes.[4] Nevertheless, sight should not be lost of the fact that these rules represent actual political agreements between the Member States in the Council or the European Council and that they mutated as conditions on the ground evolved and more was learnt of best practice in the enlargement process. Consequently, while the Commission was given day-to-day management of the pre-accession area and responsibility for monitoring the candidates' preparations and compliance with the established conditionality (see below paragraphs 41-57), the Council (and thus the Member States) retained overall control of the general direction and development of this policy and its outcomes.[5]

9. One last point does deserve mention in relation to the wording of Article 49 TEU. Within the context of further amendment to the Treaties, there may in the future be some justification for reconsidering the wording of Article 49 TFEU in order to clarify the different stages of the negotiation and accession procedure: as observed above, the basic text of this Article has not been radically altered since the Communities were established in the 1950s. It may therefore become appropriate, at some later stage, to set out more clearly the barebones of the accession procedure. Nevertheless, such change should not affect the position of Member States which remain in the driving seat for enlargement.

10. The reason for this has already been commented upon[6] in respect of the conflict between the wording of Article 49 TEU and practice which has developed under it. The wording of the provision gives the impression that the Council takes its decision only after the other institutions have been consulted. In practice however, the Council "decides" at an early stage, and this decision determines the fate of the application. A practice has thus developed according to which the Commission only prepares and gives its Opinion on the application once it has actually been *requested* to do so by the Council.[7]

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[4] A. Mayhew, *Comments on report The Creeping Nationalisation of EU Enlargement Policy by Christophe Hillion (Sieps 2010:6)*, 1, available at: <http://www.sieps.se/sites/default/files/Commentary_mayhew_2010_6_2.pdf>.

[5] Tatham (above n. 1), 84-116.

[6] C. Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," *SIEPS Report* 2010:6, Swedish Institute for European Policy Studies, Stockholm (2010), available at <http://www.sieps.se/sites/default/files/2010_6_.pdf>.

[7] As recalled in the Commission's Opinion on Iceland's application for EU membership: COM(2010) 62, 2.

11. This gives individual Member States the opportunity to delay a country's accession even before the opening of negotiations if it decides (for whatever reason) to refuse to ask the Commission to prepare its Opinion. The German Government exercised this option in relation to Albania's application when, in the context of the then approaching general election, it indicated the need to consult the German Parliament before making its decision in order to comply with the requirements of the Federal Constitutional Court's ruling in the *Lisbon case* in which that Court had reinforced the domestic parliamentary dimension in deepening EU integration. As a result, the Albanian application was "put on ice" until November 2009 when Germany finally gave its approval.[8]

12. From this, it is possible to conclude that the Council (and thus, each Member State) has acquired the power to assess the admissibility of a membership application, before the Commission or the European Parliament has the opportunity to make its position known. Does this practice conflict with the procedural requirements of Article 49(1) TEU which provide that the Council's formal decision on the application is only to be taken *after* the Commission has formally presented its Opinion?[9] However it is viewed,[10] the introduction of such preliminary Council decision does have the effect of weakening the role of the other EU political institutions and of *de facto* changing the nature of the procedure of Article 49(1) TEU: *in principle* inter-institutional, but *in practice* intergovernmental.

13. The flexibility in the development of customary enlargement practice or rules, beyond the basic Treaty provision, accordingly remains an issue that requires attention and monitoring (short of a complete revision of the wording of Article 49 TEU) in order to guarantee that the proper balance is maintained between the Member States and the EU institutions.

[8] 16 November 2009; 15913/09 (Presse 328).

[9] Practice shows that a Commission's positive opinion may be ignored by the Council, as exemplified by the second British application: Tatham, (above n. 1), 16-18.

[10] Hillion (above n. 6), 23-25 with further examples.

Part II: Exercise of competence

Question 4. How effectively have the Member States and the EU institutions run the enlargement process? Have lessons drawn from previous enlargement rounds been applied?

14. The running of the enlargement process itself has, on the whole, been effective and has been marked by a great degree of co-operation between the Member States and the EU institutions. Such formal and informal co-operation as exists between the different players on the EU side appears to be based on mutual respect both for the work done (specialisation and professionalism) and for the exercise of respective competences, whether solely by the EU (e.g., in trade matters) or mixed (e.g., in political or in the majority of legal approximation matters). In addition and equally importantly, lessons learned from previous rounds have been applied in subsequent rounds and have also led to more innovation in the present stage of enlargement linked to the Western Balkans.

15. In order to explain these views, the responses to Question 4 will address several matters in turn that will also have a bearing on conditionality under Question 5. So that the two questions remain distinct, I will address the use of conditionality and further innovations in respect of the accession negotiations with the Western Balkans and Turkey under Question 5. In showing that lessons have been drawn from previous enlargement rounds, it would be useful to divide my answers in the following manner and address specific examples. I will do this by looking at certain aspects of the enlargement process: (A) Evolution of pre-accession conditionality tools; and (B) Evolution in accession treaty practice.

(A) Evolution in pre-accession conditionality tools

16. The pre-accession strategy of today clearly derives its model from that devised for the 2004 and 2007 enlargements and includes a further degree of evolution to address concerns raised in the context of those previous enlargements. The current strategy therefore is characterized by an inclusive and differentiating approach to the candidate and pre-candidate countries: it is inclusive because all countries are to be treated on an equal basis; it is differentiating because the progress of these countries towards EU membership is dependent on their progress in meeting the EU's pre-accession conditionality.

17. Such conditionality has been devised by the Union independently and any candidate has to act of their own accord in response to the conditions and requirements of this conditionality. Thus the Copenhagen criteria of 1993 are an outgrowth of accession criteria previously determined in respect of the first three enlargements and expanded to take into account the peculiar circumstances of the CEECs. For the present stage of enlargement, additional

criteria on good neighbourliness and neighbourly relations have developed into an important aspect of conditionality in respect of the Western Balkans under the Council's 2007 Conclusions. In addition, the EU has deployed the Stabilisation and Association Agreements (SAAs) as the carrot for reaching the minimum level of compliance with the 1993 and 2007 conditionality in order that a Western Balkan state may be in the position of commencing accession negotiations (a similar situation arose in like manner with Slovakia in the 1990s).

18. Coupled with these, the EU has introduced further soft law instruments in order to reinforce and measure pre-accession conditionality.

(i) Accession Partnership

19. In *Agenda 2000*,[11] the Commission proposed that all forms of EU pre-accession support be brought together within a single framework, namely the Accession Partnership (AP); this was endorsed by the 1997 Luxembourg European Council.[12]

20. The AP as a new instrument was the key feature of the enhanced pre-accession strategy, and was set to mobilize all forms of assistance to the CEECs within a single framework. Within such framework, the APs set out the priority areas for further work identified in the European Commission's Opinions on the measures needed for each candidate country in view of accession, the financial means available to help the countries implement these priorities – in particular Phare assistance – and the conditions that applied to that assistance. Moreover, financial assistance was linked to the applicants' progress and, more specifically, to compliance with their own National Programmes for Adoption of the Acquis (NPAA) (see further below paragraphs 22-25).

21. Each AP set out the priorities and intermediate objectives, divided into two groups – short and medium term. The terms of the APs formed part of the conditionality, according to which candidate countries were judged prepared for accession or were progressing towards such accession.[13]

(ii) National Programme for the Adoption for the Acquis

22. The NPAA comprised the areas of structural reform and economic policy measures required in the process towards EU membership. On this basis, an overview of the process of legislative alignment was prepared, including the

[11] European Commission, *Agenda 2000. The Challenge of Enlargement*: COM(97) 2000, vol. II.
[12] Presidency Conclusions, Luxembourg European Council, 12–13 December 1997.
[13] K. Inglis, "EU Enlargement – Membership Conditions Applied to Future and Potential Member States," in K. Inglis & A. Ott (eds), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?*, Europa Law Publishing, Groningen (2005), chapter 10, 225, 248-253.

schedule for assuming membership obligations by a specified future date: this target date was, in many instances, the putative accession date as proposed by the candidate country and accordingly represented no commitment to accession by the EU for that date. The costs and requirements in terms of human resources and administrative structures were also included according to each chapter of the *acquis*. Coherence in the NPAA was ensured by taking into account the interdependencies and influences between individual measures and policies.

(iii) Relationship between the AP and the NPAA

23. The AP was an EU instrument and as such was not binding on the candidate country. In order to tie the candidates to a more express commitment to the priorities of the AP, the Commission required the compilation and domestic legal adoption on the part of the candidate countries of their own NPAA. Taken together the AP and the NPAA formed a legal matrix – ultimately based on the relevant EAs – which bound both the CEEC and the EU.

24. The Union accordingly develops the APs in order to go hand in glove with the priorities set out the candidate country's NPAA. They thus provide a focus for the development and reform in a candidate country of problems identified by the Commission in its original Opinion or the annual update thereof the Regular or Progress Report. They link a field with the necessary funding to be provided by the EU, the state itself and/or third parties. These APs now have their own preparatory phase in the form of so-called "European Partnerships" (EPs): thus when Croatia moved from pre-candidate to candidate status, its EP evolved into an AP.

25. While the APs were ostensibly designed by the EU in co-operation with each CEEC candidate country (as well as Malta and Cyprus), in order to reflect the candidate's priorities, these priorities had already been determined through the Commission Opinion and its Regular Reports. In order to cope with the complexity of the 2004/2007 enlargements, each AP was based on a standard-form document produced by the Commission which was adapted to the relevant candidate. The NPAAs were also formatted in a similar way in order to facilitate ease of understanding and comparison between the different candidate countries.

(iv) Funding

26. Progress has also been seen in the way in which the EU approaches funding in the pre-accession and accession period. From its rudimentary and emergency beginnings with the original Phare, EU funding instruments mushroomed into a diverse number of programmes, designed to meet the particularities of different states and situations with the Phare expanded to cover the CEECs, and later complemented by ISPA (transport and environment infrastructure projects) and SAPARD (agriculture and regional policy projects); TACIS and OBNOVA; and the various instruments covering Malta, Cyprus and Turkey. These have all now been rationalised into one overall programme, the Instrument for Pre-Accession (IPA), which is soon to be superseded by IPA II.

(B) Evolution in accession treaty practice

27. Three further issues may usefully be addressed under this title, viz. (i) the development of parliamentary participation in the accession procedure which tends to underline the significance of the domestic impact of accession and national parliamentary responses to it; (ii) the use of referendums in the enlargement process; and (iii) the changes in transitional arrangements to cope with the plethora of CEECs admitted in 2004 and 2007.

(i) Parliamentary participation

28. Of possible significance is the express inclusion of the European Parliament as well as national parliaments in the accession process from the very beginning. In the context of recent and general trends, the role of the European Parliament in the Union decision-making process has been increased while the information provided to and interaction with national parliaments – as a way of reducing the Union's democratic deficit – have improved.[14] The indication would appear to be that the parliamentary dimension of enlargement needed to be enhanced, by explicitly including Member State parliaments.

29. On the one hand, this new wording could broaden the domestic debate on the enlargement process and so bring decision-making closer to the citizens thereby contributing to their understanding of the process, as previously advocated by the Commission in its 2005 Communication,[15] as well as to increase the legitimacy of enlargement.[16] On the other hand, however, the

[14] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocol No. 1 on the Role of National Parliaments in the European Union: [2010] OJ C83/201.

[15] European Commission, Communication, *Action Plan to Improve Communicating Europe by the Commission*: SEC(2005) 985 final.

[16] S. Piedrafita, "The Treaty of Lisbon: New Signals for Future Enlargements?" 2008/1 EIPASCOPE 33, 36: <www.eipa.eu>.

Union might be able to pass the responsibility for refusal of entry to a candidate country onto the shoulders of a national representative assembly which – for whatever reason – had voted against that candidate's membership: keeping the unanimity requirement for enlargement in Article 49(2) EU serves to reinforce the likelihood of this happening in an EU of 28 or more Member States. This confirms the existence of a number of veto players at the European and national levels. As a consequence, not only might the European Parliament veto the accession of an applicant, but the Member States each possess a double veto option: first in the context of the Council vote; and second in the need for national ratification.

(ii) Use of referendums and other national rules to control the enlargement process

30. Domestic constitutional arrangements of the parties to the accession treaty may include the need to put such membership to a national referendum, in particular for the acceding country. This has been followed, to some extent, in most accession rounds as a means to gain popular legitimacy for accession[17] although such referendums do not always prove to be harbingers for eventual membership: e.g., domestic referendums, post signature of the accession treaty, resulted in Norway's rejection of membership twice (1972 and 1994).[18]

31. More intriguing is the option, only exercised once so far, where a current EU Member State has held a referendum on the accession of another. This was the case in 1972 France used a referendum to approve primarily British (as well as Irish and Danish) accession with, domestic political concerns being in fact of paramount concern – for the then French President, Georges Pompidou, it was a way of dealing with political opposition.[19]

[17] Tatham (above n. 1), chapter 9, 240, 267-268.
[18] M. Sæter, "Norway and the European Union. Domestic Debate versus External Reality," in L. Miles (ed.), *The European Union and the Nordic Countries*, Routledge, London and New York (1996), chapter 9, 133, 141-145.
[19] Tatham (above n. 1), chapter 9, 240, 267.

32. In a more recent example, in 2005, France amended its Constitution[20] to require a referendum to be held on any post-2007 accessions, a provision clearly aimed at preventing eventual Turkish accession, unpopular in France. Although subsequently amended,[21] it does bear eloquent witness to the severe reservations in some Member States to a possible Turkish accession. There is no EU rule prohibiting a Member State from holding a national referendum to approve membership of the Union by another country. Use of this by some States could effectively derail a State's accession even after the relevant agreement is signed.

33. Austria[22] has been inspired by the French example, while the Netherlands considered introducing specific constitutional requirements for ratifying accession treaties in the form of a two-thirds qualified majority in parliament.[23]

34. The tightening of the national parliamentary grip on enlargement issues has also been witnessed in Germany.[24] As already mentioned (see above at paragraph 11), the Federal Constitutional Court in the *Lisbon case* foresaw increased involvement of the *Bundestag* in EU affairs. The amended ratification law for the Lisbon Treaty[25] now provides, in particular, a new rule requiring the German Government to seek the opinion of the *Bundestag*[26] on the opening of accession negotiations.[27]

35. Since then, however, the German Government has invoked this consultation requirement at various stages of the enlargement procedure, and not just for the specific decision to open accession talks; this is best exemplified by the Albanian case set out above (above paragraph 11) and has had a decelerating or "chilling" effect on such procedures.[28]

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[20] Constitutional Act No. 2005-204, section 2 introduced into the 1958 Constitution, Article 88-5 that stated: "Any government bill authorizing the ratification of a Treaty pertaining to the accession of a State to the European Union and to the European Communities shall be submitted to referendum by the President of the Republic."

[21] Article 88-5 is not applicable to accessions that result from an Intergovernmental Conference whose meeting was decided by the European Council before 1 July 2004 by virtue of section 47 of the Constitutional Act 2008-724 of 23 July 2008. This convoluted time limitation ensured that it did not apply to the Croatian Accession Treaty but would apply to Turkey and any subsequent applications.

[22] See *Government Programme 2007–2020*, 8, available at <www.austria.gv.at/DocView.axd?CobId=19542>.

[23] *Kamerstukken* TK 30874, nrs. 1-3.

[24] Hillion (above n. 6), 33.

[25] *Gesetz zur Änderung des Gesetzes über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* (EuZBBG), available at <http://www.bundesrat.de/nn_8396/SharedDocs/ Beratungsvorgaenge/2009/0701-800/715-09.html>.

[26] §10(2) EUZBBG provides that the German Government has the right to take a decision that contradicts the position of the *Bundestag* for "important reasons of foreign or integration policy." Both institutions can then turn to the Federal Constitutional Court if either one considers its rights have been infringed by the other institution.

[27] §3(1)2 EuZBBG.

[28] The slowing-down effect of the German law has been all the more tangible that the consultation of the *Bundestag* requires prior translation of relevant background documents, notably the Commission

(iii) Transitional arrangements

36. With the exponential growth of the *acquis* from the early 1990s and the nature of the states entering in 2004 and 2007, a new flexibility was introduced into the 2003 and 2005 Accession Treaties. A broader array of transitional periods needed to be incorporated into these treaties and these transitional arrangements greatly complicated the conclusion of these treaties. Moreover, the staggered participation of 10 CEECs and Malta and Cyprus from 2004 and 2007 in the Common Agricultural Policy, the Schengen *acquis* and the Eurozone added a great degree of complexity, compounding uncertainty in the application of a level-playing field throughout the Union and leaving it in a state of continuing transition well into the future, even as it proceeds with its present enlargement strategy in order to guide and prepare the Western Balkans and Turkey during the extended pre-accession process for eventual membership. While many of the transitional arrangements have now expired, various one are still running their course, e.g., in respect of the environmental *acquis*, for which Poland has until 2017 to bring installations classified as large combustion plants into alignment with the *acquis*.

37. However, this runs in the face of *Agenda 2000*'s "reinforced pre-accession strategy" of 1997, the aim of which was to keep temporary derogations to an absolute minimum: such requirement justified the large and lengthy approximation process due to the insistence of the transposition, implementation and enforcement of the whole *acquis* upon accession. This of course depended on the development of the necessary administrative and judicial capacity of national institutions to deal with these laws.

38. Nevertheless, these great expectations were not met by the CEECs. Their failures to comply with the whole *acquis* by accession marked the emergence of so-called "informal transitional arrangements."[29] This term describes the circumstances where candidate countries give undertakings to close a negotiating chapter in order to be in full compliance with the *acquis* in that chapter by accession, except for those matters for which a transitional period was put into the accession treaty: however, in these cases, the candidates fail to comply with such undertakings and are thus, on the date of accession, *de jure* in breach of their side of the accession bargain.

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reports, mostly written in English. It should however be noted that §9(1) EuZBBG provides that the involvement of the *Bundestag* should not hold up the EU decision-making process.

[29] On this and related aspects of the same issue discussed in this Evidence, K. Inglis, "The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the New Members of the Union," in C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Hart Publishing, Oxford and Portland (OR) (2004), chapter 5, 77-109.

39. While the Commission and other institutions and Member States may initiate proceedings before the CJEU to force such recalcitrant states to comply, such proceedings can take a number of years and there is still no certainty that, even after the conclusion of enforcement proceedings that the breaching state can comply. Such problems necessarily emphasise one of the weaknesses of the pre-accession strategy. The fact that they have arisen at all is confirmation of the importance which Member States attach to their political commitment to enlarge which seems to override all other considerations (see above paragraphs 87-92).

40. In reaction to these informal transitional arrangements, the Member States have ensured that they and the Commission have more powers over the opening and closing of negotiating chapters, by introducing benchmarking in the negotiations and by a stricter control of the pre-accession process (see paragraphs 46-48).

Question 5. How do you assess the EU's use of conditionality (e.g., the Copenhagen Criteria, the "New Approach" on rule-of-law issues)? Has conditionality been effective in ensuring candidate countries implement reforms necessary for EU membership? Please give examples.

41. The EU has been consistent in its use and development of the applicability of conditionality, now extending it throughout the entire process of enlargement. However, there have been doubts cast on the credibility, effectiveness and legitimacy of such conditionality.

42. It has developed the use of conditionality since enlargement entered the then EEC's agenda back in the 1960s. The issue of the conditionality is one that is addressed by the Union through a combination of political, economic, legal, administrative, and institutional criteria.[30] However, the field of conditionality is rather complex[31] since the Union attaches different sets of conditions to:[32] (a) the conclusion and operation of association agreements; (b) the opening and continuing of negotiations (and is itself now subject to benchmarking: see below paragraphs 46-48); and (c) to the actual accession itself.

43. While some of the relevant conditions are governed by Article 49 TEU, further ones are laid down in various other Union instruments and have evolved in response to developments since the period of the first enlargement.[33] Thus, despite its wording, Article 49 TEU remains an imperfect guide to enlargement[34] and forms merely the departure point for the principles and procedures that have been developed through practical experience into the framework covering the enlargement process.[35] The issue of conditionality was profoundly affected by the fifth and sixth enlargements and led to a more express delineation of those conditions as well as the introduction of others.

[30] On the principle of conditionality in general, and the concepts of democracy and the rule of law in particular, as effective tools for scrutinizing the preparations of prospective Member States for accession, see D. Kochenov, *EU Enlargement and the Failure of Conditionality,* Kluwer Law International, Dordrecht (2008); and in respect of the (potential) candidate countries in South East Europe, see S. Blockmans, *Tough Love: The European Union's Relations with the Western Balkans*, TMC Asser Press, The Hague (2008), chapter 5, 241-307.

[31] K.E. Smith, "The Evolution and Application of EU Membership Conditionality," in M. Cremona (ed.), *The Enlargement of the European Union*, OUP, Oxford (2003), chapter 5, 105, 109-121.

[32] Inglis (above n. 13), 225-256.

[33] For which see, in detail, Tatham (above n. 1), 239-269.

[34] G. Avery & F. Cameron, *The Enlargement of the European Union*, Sheffield Academic Press, Sheffield (1998), 23.

[35] D. Booss & J. Forman, "Enlargement: Legal and Procedural Aspects" (1995) 32 CML Rev. 95, 100.

(A) Inadequate administrative reform

44. The EU has further benefited from the learning process of previous enlargements in respect of conditionality. Not only have the APs, NPAAs and rationalised funding under the IPAs allowed for linkages between funding and compliance to evolve, the New Approach with increased attention being paid to corruption, the quality of governance and the practice of the rule of law result from the lessons from the accession of Bulgaria and Romania and the need to reform of the administration in future acceding countries, in order to address the shortcomings from the 2007 enlargement, resulted from the experience of the Member States suggesting that wholesale reform was being held up by inadequate administrative capacity in government and a New Approach to rule-of-law issues was needed.

(B) Benchmarking in accession negotiations

45. In addition the introduction of benchmarks for the opening and closing of chapters in the negotiations also resulted from a judgment by the Member States that the gulf between agreement to introduce EU *acquis* and its implementation has been too large in the past. Benchmarking represents an important methodological innovation which has thereby introduced conditionality into the accession negotiations.

46. On the basis of a Commission recommendation,[36] the Council may define "benchmarks" which a candidate country has to meet for the EU to open, and/or to close a particular negotiating chapter. According to the Commission's 2006 Enlargement Strategy:

> "Benchmarks are a new tool introduced as a result of lessons learnt from the fifth enlargement. Their purpose is to improve the quality of the negotiations, by providing incentives for the candidate countries to undertake necessary reforms at an early stage. Benchmarks are measurable and linked to key elements of the *acquis* chapter. In general, opening benchmarks concern key preparatory steps for future alignment (such as strategies or action plans), and the fulfilment of contractual obligations that mirror *acquis* requirements. Closing benchmarks primarily concern legislative measures, administrative or judicial bodies, and a track record of implementation of the *acquis*. For chapters in the economic field, they also include the criterion of being a functioning market economy."

[36] Benchmarks are drafted by line DGs of the Commission, following the so-called "screening process." For an explanation of the screening process, see Tatham (above n. 1), 254-257. Further see: <ec.europa.eu/enlargement/the-policy/process-ofenlargement/screening-and-monitoring_en.htm>.

47. As already observed,[37] non-fulfilment of such pre-defined benchmarks may lead to the suspension of negotiations, in the form of the non-opening of the related negotiation chapter, or possibly the reopening of a provisionally closed chapter.[38] In this process, both the definition of the benchmarks and the assessment of their fulfilment are subject to the Council's unanimous approval, and thus to Member States' endorsement. As long as the Member States do not agree on the benchmarks, the chapter concerned cannot be open or closed.[39]

(C) Effectiveness of conditionality

48. Academic literature and real-world evidence seems indicate that conditionality often fails to promote compliance, especially in transition states (like the CEECs and Western Balkans) where the EU demands political and economic as well as institutional changes.[40] In fact, the EU's hard-line conditionality regime is probably the most stringent and extensive of any international organisation and the use of its hegemonic power has been rigorously used to promote national compliance and implementation in candidate countries. However, such approach has proven to be problematic in several respects. Most importantly, in the 1990s-2000s there emerged a growing and disconcerting gap between word and deed among candidates, which became a source of constant frustration in Brussels.[41]

49. Thus the strict conditionality regime generated problems of ownership and lack-of-consensus in the applicant countries. While there was little doubt that most CEEC applicants would comply with the EU dictates, the cost might well be serious domestic political problems down the road, a fear that has proven only too true in hindsight.

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[37] Hillion (above n. 6), 18-19.

[38] It should be noted that the substance of such benchmarks, and a *fortiori* the evaluation of their fulfilment, is not public, contrary to earlier indications given by the Commission in the name of transparency (see from European Commission, Communication, *Enlargement Strategy and Main Challenges 2006–2007*: COM(2006) 649, 10).

[39] The opening and advancement of accession negotiations have also been subject to the candidate's positive track-record in fulfilling its existing contractual obligations with the EU, under e.g. the Stabilisation and Association Agreement for countries from
South-East Europe, the Ankara Agreement for Turkey, or the European Economic Area Agreement for Iceland: See *Negotiating Framework for Croatia*, October 2005, Luxembourg, point 13, available at: <www.ec.europa.eu/enlargement/pdf/croatia/st20004_05_hr_framedoc_en.pdf>; *Negotiating Framework for Turkey*, October 2005, Luxembourg, point 6, available at <www.ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf>; and *Negotiating Framework for Iceland*, July 2010, Brussels, point 18, available at: <http://ec.europa.eu/enlargement/pdf/iceland/st1222810_en.pdf>.

[40] For a detailed approach to this entire field, see P. Nicolaides, "Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Application of EU Rules," in M. Cremona (ed.), *The Enlargement of the European* Union, OUP, Oxford (2003), 43-78.

[41] H. Grabbe, "A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants," *Robert Schuman Centre Working Paper* 99/12, European University Institute, Florence (1999), 36.

50. For example, although the APs were supposed to be "partnerships" decided in collaboration with each applicant, in practice the process of consultation seems to have involved only cursory attention to CEEC objections to either the content or sequencing of demands. Applicant state preferences were consistently marginalised, with predictable results.[42] Absent any policy dialogue with a larger set of national stakeholders, the partnerships come off as external imposition – from one set of technocratic elites in Brussels to another in the various national capitals. This replication of the EU's democratic deficit in applicant states hindered the building of political consensus favouring reform – as the appearance of increasingly vociferous anti-EU voices in Poland and elsewhere attested.[43]

51. Thus, while there is still a role for the pressure and material incentives of traditional, *ex ante* conditionality, analysts recognize that they alone are unlikely to produce compliance and indicate the need for dialogue or persuasion.[44]

52. In this respect, a two-track, conditionality-plus-dialogue approach is a real alternative and can help applicant states develop the necessary domestic institutional capacity and political consensus for making compliance in word turn into compliance in deed. It would appear that the EU has heeded these voices as noted in the present *Call for the Evidence* where an independent review of IPA assistance published in 2013 by ECORYS[45] determined that, while overall delivery was good, impact could have been improved. The best results were seen where assistance was driven by a clear need to comply with EU standards and requirements, and where there was strong political and national ownership within the beneficiary country.

53. Moreover, the picture of the effectiveness of conditionality should not lose sight of some of the successes. One of these surely is in respect of the closing of certain nuclear reactors – built during communist times – in the CEECs. It was clear that the CEECs affected would feel the direct impact of the loss of these reactors in their economy and fro providing relatively cheap electricity in society at large. Yet they regarded their decommissioning as worth the price of

[42] T. Killick with R. Gunatilaka & A. Marr, *Aid and the Political Economy of Policy Change*, Routledge, London (1998), 175; and Grabbe (ibid.), 22, 34-37.

[43] On the linkage between EU conditionality and growing anger within applicant states, see K. Fierke & A. Wiener, "Constructing Institutional Interests: EU and NATO Enlargement" 1999/6 *Journal of European Public Policy* 721; F. Schimmelfennig, "The Community Trap: Liberal Norms, Rhetorical Action and the Eastern Enlargement of the European Union" (2001) 55 *International Organization* 47; J. Lloyd, "A New Wall for Europeans to Climb Over," *Financial Times*, 11 January 2000.

[44] C. Gilbert, R. Hopkins, A. Powell & R. Amlan, "The World Bank and Conditionality" (1997) 9 Journal of International Development 507, 514; and C. Gilbert, A. Powell & D. Vines, "Positioning the World Bank," *The Economic Journal* 109 (November 1999), F598, F621-F622.

[45] A copy of this report is available at: <http://ec.europa.eu/enlargement/pdf/financial_assistance/phare/evaluation/2013/ipa_interim_meta_evaluation_report.pdf>.

EU accession, provided the EU saw to ensuring a cushioning of the loss and a contribution towards the costs of such decommissioning.

54. For several EU-15 Member States – in particular, Austria and Germany – and for the green parties in the European and national parliaments, the issue of continued operation of such reactors was a sensitive environmental, safety and political issue. Experience of the fall-out from the Chernobyl accident in Ukraine in 1986 had had continent-wide repercussions. The "importation" into the EU, through the 2004 and 2007 enlargements, of Soviet-built reactors of similar or the same design to that in Chernobyl was anathema to the political elite and the general public alike.[46]

55. Though clearly cognizant of the safety implications, the CEECs involved were fearful of being overwhelmed by the impact decommissioning would have on their (relatively cheap) energy supplies. In many instances, these reactors supplied large parts of a nation's energy needs.[47] Consequently, deprivation of such energy source would have a direct, tangible, and wholly negative impact on the relevant CEEC economies. Again the poorer CEEC candidates felt that they were required to pay a very high price, financially and politically, to meet exacting EU standards.

56. The Union, nevertheless, displayed some sensitivity to the CEECs' predicament. A combination of (increased) EU support to cover the spiralling costs of closure and decommissioning a reactor together with a transitional period, post accession, within which to achieve such closure was eventually accepted by each affected candidate. As a result, for example, Lithuania[48] committed itself to the closure of Unit 1 of the Ignalina nuclear power plant before 2005 and of Unit 2 of this plant by 31 December 2009 at the latest, and to the subsequent decommissioning of these units; and Slovakia[49] committed itself to the closure of Unit 1 of the Bohunice V1 nuclear power plant by 31 December 2006 and Unit 2 of this plant by 31 December 2008 at the latest and to subsequent decommissioning of these units.

[46] Tatham (above n. 1), 103-104.
[47] For example, the four nuclear power stations in Paks produce almost 40% of Hungary's electricity: <www.world-nuclear.org/info/inf92.html>.
[48] 2003 Treaty of Accession, Protocol 4: OJ 2003 L236/944.
[49] 2003 Treaty of Accession, Protocol 9: [2003] OJ L236/954.

Question 6. How effective has EU financial and technical assistance been in helping candidate countries prepare for EU membership? Please give examples.

57. On the whole, EU financial and technical assistance has helped candidates prepare for membership. In this context, perhaps the infrastructure programmes in transport, environment, agriculture and regional development have had the largest visible impact and have helped changed perceptions in these areas. However, my own expertise in assessing how such EU assistance has helped the candidates is not extensive. In such case, I should like to address two issues of technical assistance of which I have some knowledge and/or experience and which exemplify the way in which financial and technical assistance impacted effectively in helping candidate countries. These are: (A) Twinning; and (B) Training judges and prosecutors in EU law.

(A) Twinning

58. This innovative tool[50] was designed in response to the perceived need to assist directly in a candidate country's requirements to develop administrative and regulatory capacity to cope with the demands of EU membership. Twinning met this goal through long-term secondment of Member State civil servants to the relevant CEEC ministries or other national authorities, and was gradually extended to regional-level agencies. Such civil servants made available their expertise by working side-by-side with their CEEC counterparts in order to support the adoption, implementation and enforcement of key areas of the *acquis*.

59. The initial focus of twinning was agriculture, environment, public finance, JHA, and regional policy, but was subsequently extended to all areas of the *acquis*. For example, over 500 twinning projects were programmed for the period 1998-2001, often including two or more Member State officials.

60. Twinning arrangements were made annually through the European Commission. By means of various sources, including the Regular Reports, APs and information provided by its Delegations in the candidate countries, the Commission identified a certain shortcoming in a candidate country's administrative capacity. It then requested the candidate's authorities to devise a twinning project, aimed at rectifying this shortcoming. The projects were collected and the Member States invited to put together a team of experts, led by a project leader and a pre-accession adviser, the latter to be based at the relevant national authority.

[50] Tatham (above n. 1), 295.

(B) Training judges and prosecutors in EU law

61. The training of judges and other court staff proved to be another area for Phare funding and expertise. The trainings themselves were held in conjunction with public prosecutors and lawyers and, although initially presented by experts from the EU, increasing reliance came to be made on local experts for presentation.

62. From one aspect of all training throughout the public administration as well as the court system, certain limitations had to be made on the number of people entitled to receive it. These included age – for those over a certain age or close to retirement, training was seen as unnecessary; discipline – the EU would fund training for judges, public prosecutors, police and those employed in the public sector, but would not extend support to lawyers in private practice who were to provide their own type of formation through local bar associations; language knowledge – initial training sessions funded exclusively by Phare brought experts from EU Member States unable to converse in the local language; and time – training sessions were usually of short duration, needing to be fitted into judicial and experts' work schedules: judges and court staff from the provincial centres often found it difficult to attend seminars in the capital.

63. In light of the vital role judges are called upon to play in the furtherance of the objectives of the Union, the Commission sought to target more help to the CEEC judiciaries in the lead up to accession and beyond. In its *2002 Action Plans*,[51] the Commission noted that while work had progressed on the reform of the judicial system in most negotiating countries, in the ten CEECs the strengthening of the independence of the judiciary, the improvement of remuneration and working conditions as well as the training of judges still needed to be further pursued. In order to tackle these weaknesses, the Commission proposed that the *Action Plans* include measures such as:[52]

> "[t]he implementation of a judicial reform strategy, the adoption of outstanding basic legislation, measures to guarantee the adequate financing of the judicial system, the simplification of court procedures, the development of probation and mediation services, the development of training facilities and the training of judges in good judicial practices and EC law, the creation of judicial information networks, and the reinforcement of systems for legal aid and related public awareness campaigns."

64. The Commission foresaw supplementary assistance in this area for Bulgaria, Hungary, Poland, and Slovakia, focusing on the implementation of a judicial

[51] European Commission, Communication, *The Action Plans for Administrative and Judicial Capacity, and the Monitoring of Commitments Made by the Negotiating Countries in the Accession Negotiations*: COM(2002) 256 final, 7.
[52] Ibid.

reform strategy, strengthening the independence of the judiciary through support to the national judicial council, training of judges on good judicial practices and EC legislation, and twinning focusing on professional ethics.

65. Consequently, in the lead up to and in the immediate aftermath of accession, the Union engaged in the funding of teaching CEEC judges in EU law in order to prepare to be ready to apply EU law, where necessary, from the first day of membership.

66. For example, the then Hungarian Judicial Academy (HJA) (in addition to teaching such subjects in Hungarian), as part of its 100-110 seminars annually, organised EU law trainings in English and German and held by native speakers. In 2008, e.g. ten English- and ten German-language three-day seminars on EU law were offered to judges and future judges while in 2009 four English- and three German-language seminars on EU law were held. Such language seminars continued in 2010 and 2011. The teaching of EU law to domestic judges only in English and German (and not in Hungarian) was a unique feature of the HJA programmes.

67. Funding by the EU for training of judges had already been a part of the pre-accession strategy[53] and was also part of the aims of funding on the Transition Facility from which the Hungarian Judicial Academy received funding for judicial training in EU law.[54] Further joint funding of such training was made in 2008, when the Office of the National Council of Justice received HUF 194,601,900 (about EUR 730,000) in the framework of the "*Új Magyarország Fejlesztési Terv*" (New Hungary Development Plan), a project co-financed by the European Social Fund and the Hungarian Government.[55]

[53] Tatham (above n. 1), 380-383.
[54] Ibid, 302-303.
[55] A.F. Tatham, "The Impact of Training and Language Competence on Judicial Application of EU Law in Hungary" (2012) 18 *European Law Journal* 577-594.

Part III: Future options and challenges

Question 7. What challenges / opportunities might EU enlargement face in future?

69. The EU faces a number of challenges in future enlargement perspectives. The issues which I briefly set out here are general policy issues which enjoy increasing resonance in the coming years, namely: (A) The re-emergence of the argument over deepening and widening; (B) The questioning of the Union's continuing capacity to take on new Members; and (C) Possible future adjustment of the Treaties (TEU and TFEU).

(A) Argument over deepening and widening re-emerges

70. Since the founding of the EEC in the 1950s, the European project has been subject to constant change and treaty reforms – in the main caused by the need for deeper integration through the extension of EU policy-making competences and EU institutional adaptation and strengthening.[56] The nature of the relationship between the widening of the membership and its deepening has been debated in the face of every enlargement. The main focus has been on whether, to what extent, and in what ways the twin dimensions of widening and deepening potentially conflict with each other. Thus, it is argued,[57] that the larger, the more diverse, and the less cohesive the EU becomes, so then its decision-making becomes more difficult and, therefore, policy development more problematical. Because most existing Member States are concerned that widening might threaten deepening, they have tended to take a cautious approach towards new applicant States.

71. This cautious approach has been exemplified by the Union in attempting to pursue these twin dimensions in (almost chronological) parallel by first insisting on deepening the EU before following through on enlargement. Preservation and reinforcement of that stage of integration has been a necessary (pre-) condition for any accession. In this way, the various enlargements of the EEC/EU have been the catalyst for intense discussions on the nature and depth of the subsisting integration process. In fact, widening and deepening have reinforced each other and can be regarded as mutual preconditions for the other's successful achievement.[58] Put another way, each wave of enlargement has provided grounds for institutional reform and policy-making remit extensions within the EEC/EU.

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[56] F. Cameron, "Widening and deepening," in F. Cameron (ed.), *The Future of Europe: Integration and Enlargement*, Routledge, London (2004), chapter 1, 1, 2.

[57] N. Nugent, "Distinctive and Recurring Features of Enlargement Rounds," in N. Nugent (ed.), *European Union Enlargement*, Palgrave Macmillan, Basingstoke (2004), chapter 4, 56, 63-64.

[58] T. Chopin & L. Macek, "Après l'adhésion de la Bulgarie et la Roumanie: en finir avec l'opposition entre élargissement et approndissement," *European Issues*, No. 49, 8 January 2007, Fondation Robert Schuman, Paris/Brussels (2007), available at: <www.robert-schuman.eu/archives_questions_europe.php>.

72. For example, the 2004 and 2007 enlargements were preceded by EU institutional deepening under the Amsterdam and Nice Treaties, the introduction of the euro and the calling of the 2002 Constitutional Convention on the Future of Europe, followed by the 2003 Intergovernmental Conference (IGC) that finalized the then EU Constitutional Treaty. The phoenix-like rebirth of the Constitutional Treaty, from the ashes of the negative French and Dutch referendums, in the form of the Lisbon Treaty was (more than ever) a necessary prerequisite for further enlargements.

73. Widening has accordingly been an important factor in driving deepening.[59] The Union's attempts to keep these two dimensions in tandem had been reasonably successful until the 1990s.[60] However, more recent scholarship has challenged the EU's well-established twin-track formula in respect of deepening preceding widening with the focus of the debate shifting towards the institutional capacity of the EU to absorb new Member States.

74. Clearly, while any future enlargement to include the smaller States of the Western Balkans would probably be covered by the type of amendments proposed in the Lisbon Treaty; that of Turkey would undoubtedly be preceded by substantial institutional reform of any then-subsisting mechanisms. It is therefore this aspect – internal reform – that now looms larger on the enlargement horizon than the old widening/deepening discourse. The Commission itself has noted:[61] "The EU does not need new institutional arrangements simply for the sake of enlargement; it also needs them so that the current Union can function better."

75. Therein lies the dilemma: if widening trumps both the EU's capacity to absorb new Members (see below paragraphs 78-83) and deepening then the Union risks being weakened, with a looser integration and more flexibility mechanisms for some Member States to push ahead with the possibility of imperilling solidarity[62] between Member States.[63] What this intangible commitment to solidarity between Member States actually means in practice was brought home with the financial crisis of 2008, e.g., that it could encompass the difficulties of managing deep integration between States that are still at very different stages of development in terms of economic management and performance. These events and others like them have

[59] Nugent (above n. 57), 64.

[60] U. Guérot, "The European Paradox: Widening and Deepening in the European Union," *U.S.-Europe Analysis Series*, June 2004, The Brookings Institution, Washington, DC (2004), 1, available at: <www.brookings.edu/articles/2004/06europe_guerot.aspx>.

[61] European Commission, Communication, *Enlargement Strategy and Main Challenges 2006-2007*: COM(2006) 649, para. 18.

[62] M. Cremona, "EU Enlargement: Solidarity and Conditionality" (2005) 30 EL Rev. 3, 3-22.

[63] On the various options in this respect, see A. Ott, "The 'Principle' of Differentiation in an Enlarged Union: Unity in Diversity?," in Inglis & Ott (above n. 13), chapter 5, 103, 105-131.

brought home the fact that membership of the Union – and the admission of new Member States – carry serious implications.[64]

76. If, however, Union absorption capacity and deepening both trump widening, prospective Member States could very well become hostage to national prejudices slowing down the pace of negotiations or even postponing accession, e.g., by a strategic use of benchmarking or the use of the threat to suspend negotiations in order to resolve outstanding bilateral issues (see below at paragraph 126).[65]

77. Politically the implications of enlargements to the Western Balkans and Turkey are likely to provoke greater controversy than even the "big bang" enlargement of 2004. Absent major institutional reform, it will be difficult for an enlarging Union to continue to deliver the goods.[66]

(B) The EU's integration or absorption capacity

78. The Union's capacity to integrate new Member States looms large over any enlargement, entailing reform of the functioning and decision-making processes of the EU institutions. In all these reforms, Turkey remains the elephant in the enlargement room, not for cultural, religious or political reasons but rather from demographic and socio-economic ones.

79. The onus is on the EU to achieve the necessary technical adaptations to take account of the new Members. These adaptations, to be found in the Treaties and EU secondary legislation, include the size and composition of the central EU institutions as well as other institutions and organs based in Brussels and throughout the EU; the weighting of votes in the Council; the addition of new official languages; and the extension of the territory of the Union.

80. Underlining the express issue linkage between institutional innovation and enlargement in an ever larger EU, the June 2006 European Council[67] asked the Commission to report to it on the Union's capacity to integrate new Members. In reply, the Commission[68] noted that the Union's capacity in this respect was determined by two factors:[69] (a) maintenance of the momentum to reinforce and deepen European integration by ensuring the EU's capacity to function; and (b) assurance that candidate countries were ready to take on the

[64] M. Cremona, *Comments on report The Creeping Nationalisation of EU Enlargement Policy by Christophe Hillion (Sieps 2010:6)*, 2, available at: <http://www.sieps.se/sites/default/files/Commentary_cremona_2010_6_1.pdf>.
[65] Hillion (above n. 6), 21-23.
[66] A. Łazowski, "And Then They Were Twenty-Seven … A Legal Appraisal of the Sixth Accession Treaty" (2007) 44 CML Rev. 401, 404-405.
[67] Presidency Conclusions, European Council, Brussels, 15-16 June 2006, paragraph 53.
[68] European Commission, Communication, *Enlargement Strategy and Main Challenges 2006-2007, Including annexed special report on the EU's capacity to integrate new members*: COM(2006) 649 final.
[69] Ibid, 15.

obligations of membership when they joined by fulfilling the rigorous conditions set. It then stated:[70] "The capacity of the Union to maintain the momentum of European integration as it enlarges has three main components: institutions, common policies, and budget. The Union needs to ensure that its institutions continue to act effectively, that its policies meet their goals, and that its budget is commensurate with its objectives and with its financial resources."

81. Of importance in regard to budgetary issues is the fact that the Negotiating Framework for Turkey[71] takes an important step forward by specifying the content of the integration capacity condition, viz. that Turkey cannot accede before the Member States have decided on the EU budget for the period from 2014.

82. The EU's capacity to integrate new Member States is thus coming to play an increasingly greater role in accession conditionality and remains a condition over which candidate or accession countries can exercise no direct influence. Understandably, in the present economic climate, budgetary matters have assumed a much greater importance and, e.g., the problems of funding of regional and common agricultural policies, in an ever larger Union, are particularly stark.

83. However, it is the link between population and institutional participation, based on the principle of digressive proportionality,[72] that appears as Banquo's ghost at the EU feast. Even the modification of the digressive proportionality principle fails to take properly into account the possibility of fluctuating populations: predicted demographics for Europe show most countries will experience a contraction in population during the next 20-50 years while the demographic of Turkey will continue to flourish.[73] The impact of these changes could have important consequences. In relation to the European Parliament, for example, and despite the new 751-MEP limit in the Lisbon Treaty, the proportionate allocation of seats will remain unstable in the coming years with small countries particularly fearful of losing comparative representation. In fact with a projected membership to include the Western Balkan States, the remaining EFTA countries and Turkey, the EU could in time have a population of over 585 million: on present figures, a ceiling of 751 MEPs would still result in an approximate average of one MEP representing approximately 779,000

[70] Ibid, 20.
[71] *Negotiating Framework for Turkey* (above n. 39), paragraph 13.
[72] In the absence of an actual "mathematical formula," the EEC and subsequently the EU used the principle of digressive proportionality, according to which so many seats in the European Parliament are awarded between Member States on the basis of population bands.
[73] S. Kurpas *et al.* (eds.), "The Treaty of Lisbon: Implementing the Institutional Innovations," *CEPS Special Report*, Joint Study CEPS, EGMONT and EPC, Brussels, November 2007, 65, available at: <http://aei.pitt.edu/11751/>.

people.[74] Based on that, Turkey would become the largest nation in the EU, even surpassing Germany.[75]

(C) Adjustments to the Treaties

84. The adjustments contained in the accession treaty cover adaptations to EU secondary legislation,[76] transition periods and temporary derogations, safeguard clauses, postponement clauses[77] and institutional changes. Since EU law, in principle, applies completely from the date of accession,[78] any transition periods for adopting outstanding *acquis* must be fixed and limited, and any derogations from applying it have to be partial and restricted in order not to impede the evolution of the Union. Yet the 2005 *Negotiating Framework on Turkey* states:[79] "Long transitional periods, derogations, specific arrangements or permanent safeguard measures …may be considered." The implication seems to be that the Union expects that Turkey's integration into the Union will be a long and exceptional process, probably taking more time than any previous enlargement.

[74] A little better than the former limit of 700 MEPs that would have resulted in one MEP on average per 835,714 inhabitants.

[75] European Commission, *Opinion on Turkey's Request for Accession to the Community*, 20 December 1989: SEC(89) 2290 final/2, paragraphs 5-6.

[76] Joined Cases 31-35/86 *LAISA v. Council* [1988] ECR 2285, paragraphs 9-12. Such agreements, while allowing for the necessary adjustments to the European treaties, may not amount to a disguised fundamental amendment of such treaties for which another provision – Article 48 TEU – is to be used. Article 48 TEU, like Article 49 TEU, has a mandatory character: Case 43/75 *Defrenne v. SABENA* [1976] ECR 480, paragraph 58.

[77] Postponing accession was provided for in relation to Bulgaria and Romania for up to one year if there were a serious risk that either State was "manifestly unprepared to meet the requirements of membership by the date of accession" in a number of important areas. It will be interesting to note whether or not the Union will be tempted to increase that period of postponement in relation to future accession countries: Article 39 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded: [2005] OJ L157/203.

[78] Case 258/81 *Metallurgiki Halyps A.E. v Commission* [1982] ECR 4261, paragraph 8.

[79] *Negotiating Framework for Turkey* (above n. 39), paragraph 12.

85. In a new and important development, the 2005 *Negotiating Framework for Turkey* also mentions *permanent* safeguard clauses in such fields as free movement of persons, structural policies and agriculture.[80] This has the effect of allowing the Union or any Member State, whenever it feels justified after Turkish accession, e.g., to suspend permanently the right of Turkish nationals to move freely within the EU. In so limiting their right to move, such nationals would be discriminated against on the grounds of their nationality, thereby infringing a basic value enshrined in the Treaties since the very inception of the integration process in the 1950s. By allowing the Union and its Member States legally to flout their own common European values would be an affront to the State concerned and difficult to justify legally.[81]

[80] *Negotiating Framework for Turkey* (above n. 39), paragraph 12.

[81] U. Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," *Jean Monnet Working Paper* 15/01: <www.jeanmonnetprogram.org/papers/01/01380.rtf>.

Question 8. How might the EU's approach to enlargement be improved in future?

86. While the EU and the Member States have ensured that lessons learnt in previous enlargement rounds have been applied and developed in subsequent rounds, there are a number of issues concerning the EU approach to enlargement which could be considered further. I have decided to highlight the following: (A) The significance of the political commitment to enlarge and the trumping of Commission reservations; and (B) The need to enforce the postponement and safeguards clauses for more sectoral fields and for a longer period of time, post accession.

(A) The significance of the political commitment to enlarge

87. The political commitment to enlarge has been used on a number of occasions to trump the legal, administrative and economic accession conditionality set by the Union in the pre-accession stage.

88. An early indication of this was when the Council of Ministers overrode the Commission's qualified Opinion on Greek membership and proceeded to open up negotiations. The Opinion,[82] while agreeing to the Greek request and advising that negotiations be opened, was nevertheless half-hearted in its approach and clearly envisaged a pre-accession period before as well as transitional periods for Greece after accession. In view of its various reservations, the Commission proposed a pre-accession period allowing Greece to prepare for membership: this would involve considerable EEC financial support to ensure the necessary structural adjustments, while Greece familiarized itself with the operation of the EEC institutions and processes for decision-making.[83] In the face of strong opposition from the Greek Government and a good deal of effective lobbying from the Greek (Conservative) Prime Minister Konstantinos Karamanlis (who had spent years of exile in France), the Council of Ministers rejected the Commission Opinion and instead decided that negotiations be opened.[84]

89. More recently, Member States and the EP went ahead with signing the 2005 Accession Treaty in spite of the lack of preparedness for membership that the Commission had noticed in its progress reports in respect of both Bulgaria and Romania. In its Comprehensive Monitoring Reports on the two states in autumn 2005, the Commission was able to note that, e.g., Romania was still markedly deficient in the JHA *acquis*, as well as in competition and state aids.

[82] European Commission, *Opinion on Greek application for membership*: Bull. EC, Supp. 2-1976, 7.
[83] Although ultimately unused, this proposal was effectively dusted down for use in respect of the CEECs and Western Balkans.
[84] Bull. EC 1-1976, points 1101-1111, 6-9.

90. The so-called "trust mechanisms"[85] in the form of postponement clauses and safeguard clauses (for the Internal Market and the JHA *acquis*), the use of which high-level Commission officials had threatened in the lead up to the 2004 and 2007 enlargements, were hardly used: and the Union therefore came to be regarded as a dog whose bark was worse than its bite (the implications of that lack of bite have come to haunt the EU in its dealings with the CEECs over the last few years).

91. For example, in respect of Romania, postponement was not considered for most of its breaches for various chapters of the *acquis*: thus a vital breathing space for both sides failed to be utilised in order that the EU could use its carrot of accession to ensure Romanian compliance pre-accession, a matter possible under Article 39 of the 2005 Act of Accession. Instead the EP decided to proceed with enlargement and thus, even after accession, it had failed to establish the necessary controls for agricultural spending. A threatened cut off of subsidies failed to materialise. Moreover, Bulgaria and Romania remained under a Co-operation and Verification Mechanism for several years after accession and accordingly subject to the loss of EU funding due to problems, e.g., with corruption in local government and judicial independence.

92. One may conclude that not only was the 2005 Accession Treaty premature but also that more differentiation should have been included in the pre-accession strategy in order to deal with the specific problems of each state and full use of the powers given to the Commission in the process utilised. In overriding the EU conditionality while being fully aware of the States' continuing shortcomings and their eventual potential loss of Union funding, both the EP and the Member States need to question their positions on this approach. If the political criteria and the political commitment always trump the economic and legal preconditions, candidates will be increasingly less likely to comply with the conditionality knowing full well that, when push comes to shove, it will be ignored.

(B) Need for proper enforcement of postponement clauses and safeguard clauses

93. In that respect, there may be a greater need to ensure that the trust mechanisms are actually used. Safeguard clauses come into play after accession and can be requested by any Member State for its protection from the Commission which issues the measures in an emergency procedure. From the first enlargements, such measures have been available for several years after accession in respect of protecting a particular economic sector or particular area against serious deterioration.[86] The 2003 and 2005 accession treaties[87]

[85] Inglis (above n. 29).

[86] For example, Article 37 of the 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

extended these measures against new Member States' failures to meet their commitments in the Internal Market and the Area of Freedom, Justice and Security (formerly Justice and Home Affairs).

94. With the mention of permanent safeguards in the 2005 *Negotiating Framework for Turkey* (see above, paragraph 85) is the possible consideration of the enforcement of postponement and safeguard clauses with an extended sectoral remit and an extended shelf life into the post-accession period.

95. In other words, safeguard clauses have been used for failures in respect of the Internal Market and JHA but these could usefully be extended to include other sensitive and large sectors like environment and agriculture as well as regional policy.

96. Safeguard measures also could exclude nationals of acceding states from practising certain professions where the acceding state has not adopted the rules of mutual recognition for other Member States' professionals – although this in itself would also give rise to a whole group of questions concerning core principles of EU law on non-discrimination that could normally be relied on by individuals. In fact, the threat to use such safeguard clauses seem to have more currency as a pre-accession threat than as a post-accession conditionality tool.

97. The timescale for the use of such measures in the post-accession period could also be radically extended in order to allow for further, longer-term monitoring by the Commission and Council. Recent constitutional issues in certain CEECs have given rise to proposals that would "beef up" the EU's powers to suspend the voting rights of Member States failing to comply with European values as set out in Article 2 TEU. Might it not be better to complement this suspension procedure (which is not a speedy one) with the actual withdrawal of benefits in respect of the Member State concerned, which sanction could have a more direct and speedy impact economically and politically than a drawn-out procedure in the corridors of power in Brussels.

98. Lastly, the Conclusions of the European Council of 17 December 2004 stated that "long transitional periods, derogations, specific arrangements or permanent safeguard clauses would be considered specifically in respect of Turkey" and that "transitional arrangements or safeguards should be reviewed regarding their impact on competition or the Internal Market." The Commission and the European Council have accordingly already indicated that any future accession treaty with Turkey might well include a new *permanent* safeguard clause or clauses in the fields of freedom of movement of persons, structural policies or agriculture.

Slovak Republic and the adjustments to the Treaties on which the European Union is founded: [2003] OJ L236/33; and Article 36 of the Act of Accession 2005 (Romania and Bulgaria): [2005] OJ L157/203.

[87] Articles 38 and 39 of the Act of Accession 2003 (CEECs, Cyprus and Malta) (ibid); and Articless 37 and 38 of the Act of Accession 2005 (ibid).

99. If this were to be the case for Turkey, whose European vocation is still subject to doubt in some Member States and whose accession perspective seems to be continually slipping back, then arguments in this vein vis-à-vis Western Balkan candidates and pre-candidates may eventually arise: in other words, why should Turkey be singled out when other candidates (e.g., CEECS and Croatia, and now other Western Balkans) who were much further behind in the process (after all, the Ankara Agreement was signed in 1963 and Turkish accession negotiations commenced in 2006) have now overtaken it?

(C) The need for more qualitative assessment by the Commission, in conjunction with the candidate countries, other EU Institutions, and the Member States

100. The need for the Commission to deepen both its pre-accession and post-accession monitoring has clear budgetary implications at the EU level and it may be that further concentration between it and the Member States could allow their joint funding of projects in this matter. While the changes to pre-accession monitoring are to be welcomed (e.g., the New Approach to rule-of-law issues), there may be a need to revise the approach to measuring compliance with conditionality.

101. For example, in the enforcement of EU-derived law and use of CJEU rulings (difficult in the constitutional context of a candidate before accession when these rules can be regarded as the nature of international law or the law of a third party[88]) before candidate country courts, no comprehensive studies have been conducted into how successful EU law training has helped judges (or even lawyers in this work) and so no overall information has been available in respect of the 2004, 2007 or 2013 enlargements that provided a clear, overall in-depth analysis.

102. It has been argued that Commission concentrates too much on institutional matters and personnel levels and on the powers of the institutions and the budget made available for them but little on how EU polices and laws are put into practice: thus the benchmarks created by bureaucrats need to evolve to reflect the changes in emphasis in the pre-accession period.

103. In addition, the discrepancy between the accession conditions and membership obligations ("don't do as I do, do as I say") has been considered as promoting double standards with the candidates being asked to do more and recalcitrant Member States being subject to less stringent demands to comply with the same rules. Such discrepancy has resulted in a post-accession drop in

[88] See, e.g., the situation in Hungary pre accession, A.F. Tatham, "Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court" (1999) 48 ICLQ 913.

the EU monitoring of new Member States,[89] and a setback in the protection of certain rights advocated in the pre-accession context, because the Union lacks adequate tools internally. The protection of minority rights is a clear example. Despite the Lisbon Treaty reforms, complete harmony between accession requirements and membership obligations remains unfulfilled.[90] Post-accession monitoring should also be required for a much greater extended period, not just for three years, and to cover broader fields. In order to achieve this, the Commission could further deepen its co-operation with the Member States.

[89] Hillion (above n. 6), 16. Except perhaps for Bulgaria and Romania which remained for several years under specific post-accession monitoring in the form of the so-called "Co-operation and Verification Mechanism" though it was itself riddled by shortcomings: Łazowski (above n. 66).

[90] See e.g., U. Sedelmeier, "After conditionality: post-accession compliance with EU law in East Central Europe" (2008) 15 *Journal of European Public Policy* 806; D. Kochenov, "A Summary of Contradictions: An Outline of the EU's Main Internal and External Approaches to Ethnic Minority Protection" (2008) 31 *Boston College International and Comparative* Law Review 1; C. Hillion, "Enlargement of the European Union: The discrepancy between Accession conditionality and membership obligations" (2004) 27 *Fordham International Law Journal* 715.

<u>Question 9.</u> What future impact might EU enlargement have on UK interests? How might any positive impacts be enhanced or disadvantageous impacts be addressed?

104. It is difficult to use a crystal ball in order to predict future impacts on UK interests but the main areas which might be identified relate to budgetary and migratory matters as well as to the way in which the UK seeks to project its own national interests into the enlargement debate/accession process through the development of a tailored enlargement strategy that *could* garner cross-party support.

(A) EU budgetary issues

105. Every enlargement – whether through accession of one, two or several states – affects the economies and politics of EU Member States. As a result, in respect of each accession, they will make both an economic and a political judgment.

106. The most obvious (but by no means only) economic impact that easily comes to mind is the impact of an enlargement on the EU budget (e.g, in respect of CAP spending) and the amount that the UK would have to contribute.[91] Like other large contributors (as well as the net recipients whose funding might fall), the UK has to calculate the economic costs and benefits of an accession, particularly when there is enormous pressure to reduce national budget deficits and debt and the expediency of seeing the reduction in the level of farm transfers under CAP across the Union. Admittedly, EU Member States seem to be better able at estimating costs than benefits, but such approach is entirely justifiable and it would be reckless to ignore it.[92]

(B) Migration issues

107. Migration is another element which has both an economic and a strongly political impact in the UK, among other Member States, and domestic politicians need to consider the impact on political stability and the economy of any future likely migratory flows.

108. Both issues have an effect on society in general and their perceptions combined with their own experiences of previous enlargements play a role in forming general public opinion which then feeds back into the positions taken by the political parties. For example, the estimates presented by the Labour Government on migratory flows following the 2004 and 2007 enlargements

[91] Mayhew (above n. 4), 2.

[92] See generally A. Mayhew, "The Financial and Budgetary Impact of Enlargement and Accession," in Hillion (above n. 29), chapter 7, 143-167.

underestimated their size and this has had a continuing negative impact on UK public opinion on further enlargement towards the East and South East of Europe.[93]

109. However, fear of social dumping, internal migration pressure and mistrust in candidates' level of preparedness have all contributed[94] to a recurrent suspicion on the justification for enlargement within the populations in the old Member States, including the UK. It has indeed been argued that enlargement is taking place with weak democratic support and without proper explanation to the population of the Member States.[95] As a result, enlargement allegedly lacks domestic preparation, engendering scepticism about its benefits, which in turn has increased disaffection towards the EU more generally: indeed, this may be one of the lessons to be learnt from the last EP elections.

110. A number of ideas have already been floated to try and respond to these worries about social dumping and migratory flows: the restriction of access to the benefits system; extension of transitional periods for free movement of workers (e.g., Spanish and Portuguese workers were subject to a 10-year period after accession before they could benefit fully from the right of free movement); safeguard clauses to be given extended scope both temporally (deeper into the post-accession period) and materially (to cover more sectors) thereby allowing the Commission and the Member States greater leeway over acceding countries; and the threat of permanent derogations from the four freedoms and other areas of EU policy could be extended beyond Turkey.

111. Moreover, further suggestions have been made more recently in order to establish some type of "neutral mechanism," compliance with which would then give a newly-acceded Member State's nationals the right to benefit from the free movement of persons, services, and establishment. Such right might be triggered when this new State's GDP reaches 75%-80% of the EU average; or when that State joins the Euro thereby providing a second check by the Commission and/or the European Central Bank within the terms of EMU and the related conditionality.

[93] See generally, M. Dougan, "A Spectre is Haunting Europe … Free Movement of Persons and the Eastern Enlargement," in Hillion (above n. 29), chapter 6, 111-141.
[94] Hillion (above n. 6), 17.
[95] See, in this sense, J-D Giuliani, "Elargissement: La Commission européenne fait-elle bien son travail?," available at <http://www.jd-giuliani.eu/fr/article/cat-2/225_Elargissement-La-Commission-europeenne-fait-elle-bien-son-travail.html>.

(C) Developing a UK long-term enlargement strategy

112. It may that, if this has not already been considered or provided, the UK would do well to develop an enlargement strategy with cross-party consensus that will be maintained in long term, identifying the UK's continuing national interest in enlargement. Such strategy would have the benefit of maintaining long-term consistency and influence and allow for linked-up forward-planning and with it, the construction of mechanisms, targeted funding opportunities, consideration of added value and complementarity to the work of the EU and establishment of a network of reliable partners in each candidate country.

113. For example, the UK could concentrate on twinning both within the EU-funded context and outside, in order to build relations in administration and the judiciary with future Member States. The UK possesses the necessary expertise and flexibility in coping with such matters that may be more useful in some countries than a bureaucratic ethos different in nature to that of the UK (at the very least, it could be proffered as an alternative).

114. UK will need to think in more geo-strategic terms within the enlargement context since the point will come when defence and security implications (linked to extending the borders of the EU) will assume an increasingly important role in accession. Although this is probably a long-term prospect, nevertheless the extension of these borders might include further former Soviet republics as well as the expansion of the EU frontiers to Iraq, Iran, and Syria so that defence and security risks assessment will in any case have to be conducted as an integral part of the accession process. The EU's capacity in such matters is set to develop in the coming years but the UK needs to be in a position to mould this debate.

115. The UK will have to be engaged in this matter, even if not involved in other parts of the enlargement debate, as there will be a growing need to provide necessary forces and support (material, logistical and manpower) to ensure that the borders of the EU are protected. Full engagement in this debate will be of paramount importance in view of the fact – as a nuclear and military power – the UK may be required to assume military and security obligations that we did not agree with – need to establish task force on this matter to help prepare policy on this issue

(D) Deeper Member State involvement in pre-candidate period

116. Perhaps it would also be advisable for the UK to examine the putative impacts on the pre-candidate, in terms of politics, economics, reform of judiciary and administration, etc. While this is already done to some extent by the Commission in its *Opinion*, it is abundantly clear that the very complexity of the accession process makes increasingly strong demands on the pre-candidate in adjusting its economic regulation: this is based on the assumption that its future membership brings more benefits than the costs of preparing for accession. Changes are made in domestic regulation and structures which would not be made without a perspective of membership. The changes involved can lead to expensive changes to domestic economic structure and regulation, e.g., the necessary investments to ensure compliance with the environmental *acquis* in terms of installations, agencies and procedures.

117. These are difficult matters to address and usually it is the pre-candidate which makes the risk assessment as part of its proposed application. However, it might be considered unfair to put the responsibility squarely onto the shoulders of the pre-candidate to provide the necessary and correct information to the Commission. In this situation, it might seem proper to suggest that the EU and its Member States ought to take a far deeper look at the putative problems associated with enlargement in the pre-candidate before agreeing to open negotiations.[96]

[96] Mayhew (above note 4), 3.

Part IV: General

Question 10. Are there any further points you wish to make which are not captured above?

118. There are a number of broader issues that are likely to arise in the coming future which I consider worth mentioning here and have not been fully captured by the previous questions. I do so in order to pose questions for others so that they may be able to reflect more fully on them rather than provide an answer myself. These matters concern: (A) Where the limits to the Union are to be; (B) The continuing Member State political influence in the accession process; and (C) The individualisation of negotiations.

(A) The limits of Europe and the European Union are not co-extensive

119. In each enlargement so far, the question of the European identity[97] of the candidates and the need to determine a *finalité* to the Union was rarely debated, if ever. Thus while each enlargement has brought with it greater political, economic, social, and cultural diversity, unification has nevertheless occurred in the sense of a broadened agenda and an ever stronger institutional capacity for joint policy-making. The widening and deepening of the Union have thus come together[98] although the evident strains on these old "Tweedledum and Tweedledee" concepts are starting to show in relation to the vexed question of the EU's absorption capacity and its need for profound institutional reform to allow for future successful enlargements.[99]

120. The European way of coping with both the unity and diversity of the Union has so far been accomplished in the absence of a *finalité politique* – "an agreed upon political philosophy, a coherent blueprint for a desired future and a strategy for achieving it."[100] Consequently,[101] the Union has shown an ability to live with an open-ended process and enduring inconsistencies, tensions, and conflicts not merely in terms of politics but also institutional arrangements. The Union has thereby evolved from its original, founding mission into a highly

[97] See generally, W. van Gerven, *The European Union. A Polity of States and People*, Hart Publishing, Oxford and Portland (OR) (2005), chapter 1, 7, 41-61.

[98] M. Jachtenfuchs, "Deepening and Widening Integration Theory" (2002) 9 *Journal of European Public Policy* 650.

[99] K. Inglis, "EU Enlargement: Membership Conditions Applied to Future and Potential Member States," in S. Blockmans & A. Łazowski (eds.), *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, TMC Asser Press, The Hague (2006), chapter 3, 61, 64-67; and Łazowski (above n. 66), 404-405.

[100] J. Olsen, "Unity and Diversity – European Style" (2005) *ARENA Working Paper* No. 24, ARENA, Centre for European Studies, University of Oslo, Oslo, September 2005, 22, available at: <www.arena.uio.no>.

[101] See, e.g., S. Bartolini, *Re-structuring Europe. Centre Formation, System Building and Political Structuring between the Nation State and the European Union*, OUP, Oxford (2005); and W. Wessels, A. Maurer & J. Mittag (eds.), *Fifteen into One? The European Union and Its Member States*, Manchester University Press, Manchester (2003).

complex entity the reach of which extends both domestically and internationally.

121. However, with the prospect of Western Balkan and Turkish membership firmly on the enlargement agenda – and expressions of ultimate membership goals for Ukraine, Moldova, and Georgia – the issue of a *finalité politique*, the definition of borders, the determination of "us" and "them,"[102] and the need to guarantee the continued effectiveness and vitality of the Union have come together to pose the question of "European identity." The argument on identity was accentuated by the developing role of the Union outside its borders,[103] resurfaced at the time of the negotiations for the accession of the CEECs[104] and crystallized in the debates on the EU Constitutional Treaty[105] and Turkey's "European credentials."[106]

122. Although Article 49(1) TEU provides that an applicant country to the Union must be a European State, no geographical definition of Europe is to be found in the Treaties or in any official document. As Judt has said:[107] "Europe, then, is not so much about *absolute* geography – where a country or a people actually are – as *relative* geography: where they sit in relation to others." Instead, the focus has tended to "European identity" as a more flexible and inclusive concept. This approach is necessarily occasioned by the existing political, economic, social, linguistic, ethno-cultural, and religious diversity of the continent. Moreover, in the European Union, there are differences in the size of the population and territory of the Member States, in their respective economic and military strength, and in their individual political and legal traditions.[108]

123. Yet while this notion or concept of "European identity" has served the Union well so far, its continuing utility as a viable determinant for EU membership will probably come under closer observation as the Union seeks to open up to Turkey and possibly to other states to the East. In this sense, ever more consideration will need to be had to the geopolitical and security implications of proceeding with enlargement beyond the Western Balkans. The role of the CDSP and of NATO in these considerations will probably enjoy much

[102] See generally, M. Berezin, "Territory, Emotion and Identity: Spatial Re-calibration in a New Europe," in M. Berezin & M. Schain (eds.), *Europe without Borders: Territory, Membership and Identity in a Supranational Age*, Johns Hopkins University Press, Baltimore (2003), 1, 15; and M. Spiering, "National Identity and European Unity," in M. Wintle (ed.), *Culture and Identity in Europe*, Ashgate Publishing, Aldershot (1996), 98.

[103] L.-E. Cederman (ed.), *Constructing Europe's Identity: The External* Dimension, Lynne Rienner Publishers, Boulder (CO) (2001).

[104] See, e.g., D. Laitin, "Culture and National Identity: 'The East' and European Integration" (2002) 25 *West European Politics* 55.

[105] G. Toggenburg, "The Debate on European Values and the Case of Cultural Diversity," *European Diversity and Autonomy Papers* No. 1/2004, 5, available at: <www.eurac.edu/edap>.

[106] C. Balkir, "Turkey and the Question of European Identity" (2001) 8 *European Urban and Regional Studies* 44.

[107] T. Judt, *Postwar: A History of Europe Since 1945*, Penguin, London (2005), 753.

[108] Olsen, (above n. 100), 7.

greater currency than in respect of the CEECs and the Western Balkans: even then, the tacit agreement of third countries was needed to allow for the expansion of the Union eastwards and south eastwards.[109]

124. For some, the accession of Ukraine, Georgia, or Turkey is neither a cultural/religious nor a socio-economic issue but a security issue coupled with issues of free movement, migration and Schengen when the external borders of the Union may one day extend deep into the Middle East and the Russian steppes.

(B) Continuing Member State political influence on accession process

125. In the early 1990s, Member States which favoured the integration of the CEECs leading to their eventual accession to the Union used every opportunity to advance their policies. The German Presidency of the Council in 1994 accordingly led a strong campaign to speed up their preparation for accession which resulted in the "pre-accession strategy." The German Government also insisted on the urgency of the CEEC enlargement process at the Madrid summit in 1995 which eventually led to *Agenda 2000*.[110]

126. Examples of EU Member States using the prospect of accession and the integration process as a tool for resolving bilateral disputes[111] has a long pedigree. France wielded this threat in respect of Greek accession in order to gain further EU regional funding and protection for its Mediterranean food products that would have had to compete with the cheaper Greek ones. Greece returned this compliment when it did the same in respect of Spanish accession during the mid-1980s. More recently, the EC-Slovenia Europe Agreement was held up by the Italian Government, which wanted to resolve a bilateral real estate dispute dating from the initial seizure of power by the communists in Yugoslavia at the end of the Second World War. Again, the Slovenes had also learned their lesson and they were active in blocking Croatian accession until their border dispute had been resolved

127. Such behaviour could be politically and economically disastrous if an acceding country had already fulfilled all the criteria for accession, had successfully closed all the chapters of negotiation, and was then faced with a refusal of the Member States to ratify the accession. Such situation would frankly create political problems not only within the EU but also between the EU and the applicant state, entailing severe economic costs for the applicant state.

[109] On these issues generally, see the contributions in E. Brimmer & S. Fröhlich (eds.), *The Strategic Implications of European Union Enlargement*, Center for Transatlantic Relations, Johns Hopkins University (2005).
[110] Mayhew (above n. 4), 2.
[111] Ibid.

(C) Individualisation of negotiations: divide and rule out?

128. This possible propensity of a Member State to "pick on" a pre-candidate or candidate may be exacerbated by the change in the negotiating strategy of the Union. For example, in respect of future enlargements and as a way of assuaging various Member States' concerns regarding the then future opening of negotiations with Croatia and Turkey (and foreseeing further problems with FYROM and other Western Balkan States in the future),[112] the European Council agreed in 2004[113] on a revised framework for every future round of negotiations. According to the new formulation, a negotiating framework is to be created "according to own merits and specific situations and characteristics of each candidate State."

129. From one perspective, this is clearly a reassertion of the EU's previous practice in relation to candidate countries but which became rather lost in the negotiating processes to the CEEC "big bang" enlargement. From another perspective, it could be seen to represent the EU's abandonment of its quasi-classical model of negotiating in groups of countries. This would underline a wariness on the part of the Union and its Member States vis-à-vis the remaining (potential) candidates – particularly (though not exclusively) in such matters as human and minority rights protection, fighting corruption, judicial independence and judicial and public administration reform – and the need to ensure a greater level of delivery on these issues before their being considered fit for membership.

130. As if to underline this necessity of differentiation, the 2010 *Negotiating Framework for Iceland*,[114] already a member of the EEA and linked to the EU through various other legal agreements (e.g., participation in the Schengen area, like Norway), had a markedly different content compared to that of Turkey.[115]

[112] S. Blockmans, "Consolidating the enlargement agenda for South Eastern Europe," in S. Blockmans & S. Prechal (eds.), *Reconciling the Deepening and Widening of the European Union*, TMC Asser Press, The Hague (2007), chapter 4, 59, 82.
[113] Presidency Conclusions, European Council, Brussels, 16-17 December 2004, paragraph 23.
[114] *Negotiating Framework for Iceland* (above n. 39).
[115] *Negotiating Framework for Turkey* (above n. 39).

131. Should you require any further assistance and additional explanation of the matters discussed in this evidence, I shall be pleased to help.

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27 June 2014

[redacted]