

EU Enlargement Law: History and Recent Developments: Treaty – Custom Concubinage?

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enlargement, Copenhagen criteria, Central and Eastern Europe, Europe Agreements, regulation, supranationalism, *acquis communautaire*, rule of law, democracy, law

Abstract

This note provides a detailed account of the development of the EU enlargement law. Based on the material provided by the latest enlargement round, it outlines the main set of enlargement principles, criteria and procedural tools employed by the Union in the process, also making a sketch of the actual chronology of enlargement events. Based on the analysis of the legal regulation of five rounds of enlargement and making parallels with the notion of customary law as understood in public international law, it argues that the Union enlargements have always enjoyed a dual regulation: by written (mostly Treaty based) and also by customary enlargement law. The existence of customary law explains the consistency of enlargement regulation throughout all the rounds of this process, notwithstanding the stage of the Treaty reform in force at the time of every particular accession. The minimal amendments introduced into the enlargement article by the Treaty Establishing a Constitution for Europe (Art. I-58) suggest that the future enlargements are likely to be building on the body of customary law in force to date. The process of gradual incorporation of customary law into the written law of the EU is also likely to continue.

Kurzfassung

Dieses Papier zeichnet die Entwicklung des Erweiterungsrechts der EU detailliert nach. Basierend auf den Unterlagen der letzten Erweiterungsrunde behandelt es die wesentlichen Erweiterungsprinzipien, die Kriterien und Verfahren, welche von der Union in diesem Prozess angewendet wurden, und entwirft auch eine Chronologie des Erweiterungsgeschehens. Auf Basis einer Analyse der gesetzlichen Regulierung von fünf Erweiterungsrunden und indem Parallelen zum völkerrechtlichen Begriff des Gewohnheitsrechts gezogen werden, wird argumentiert, dass die Erweiterungen der Union immer durch eine zweifache Regulierung geprägt waren: Durch geschriebenes (vorwiegend auf den Verträgen basierendes) Recht und auch durch Gewohnheitsrecht. Die Existenz von Gewohnheitsrecht erklärt die Konsistenz von Erweiterungsbestimmungen durch alle Erweiterungsrunden, ungeachtet der Phase der Vertragsreform, die zum Zeitpunkt der jeweiligen Erweiterung in Kraft war. Die minimalen Änderungen des Erweiterungsartikels, wie sie durch den Verfassungsvertrag eingeführt werden (Art. I-58) legen nahe, dass zukünftige Erweiterungen wahrscheinlich wiederum auf der Gesamtheit des bis heute gültigen Gewohnheitsrechts aufbauen werden. Der Prozess der schrittweisen Aufnahme von Gewohnheitsrecht in das geschriebene Recht der EU wird sich also voraussichtlich ebenso fortsetzen.

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1

Nous ne pouvons nous arrêter quand autour de nous le monde entier est en mouvement. Ai-je assez fait comprendre que la Communauté que nous avons créée n'a pas sa fin en elle-même?

Jean Monnet(1)

Introduction [↑]

Already with the first enlargement round it became clear that there are considerable differences between the way the EU enlargement process is inscribed in the Treaty (three Treaties back then: ECSC, Euratom and EEC) and the way EU enlargements are conducted in practice. The EU Treaty still omits a number of crucial elements of enlargement law, including the main principles of the enlargement process, some of the criteria that applicant States have to satisfy in order to have reasonable aspirations to join the Union and even the real sequence of enlargement events. The

difference between how enlargements are regulated in practice and what can be found in the Treaty is striking.

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The last enlargement of the European Union followed the pattern, established by the four previous enlargements, and contributed to widening the gap between the enlargement routine and the way enlargements are regulated by the Treaty to a scale, unknown before. This was mostly due to its complexity and scale, and also due to the nature of the majority of the applicant States, faced with the need not only to adapt to the requirements of membership of the European Union, but also to build up their whole legal and economic structure anew on the ruins of the communist past.

The Treaty Establishing a Constitution for Europe failed (or demonstrated the reluctance of the Union) to bridge this gap between the legal text and reality. When this document comes into force, it is unlikely to bring any drastic changes to the way enlargements of the European Union are regulated. In other words, not only the next enlargement, to include Romania and Bulgaria, but also further enlargement rounds, will take place in the atmosphere of a 'split' legal regulation.

The complexity of contemporary enlargement law, which includes a number of relevant EU Treaty articles (most notably 6(1) and 49) and basic principles of EU law, as well as a body of "soft law", including the Copenhagen criteria and a body of the Copenhagen related documents (Kochenov (2004a): 5), some of them falling in between legal and political regulation, and also specific principles and criteria of enlargement law proper, which cannot always be traced to the text of the Treaties, can sometimes lead to terminological confusions. In order to make the terminology used as clear as possible, alongside with 'enlargement law', which suggests the use of primarily legal sources in the discussion, this paper operates the term 'enlargement regulation' (or 'the regulation of enlargement process'), which is a system of legal and political documents and practices applied by the European Union in the course of the preparation of enlargements. This term should not be confused with Regulations as sources of Community law (Art. 249 EC). To make this distinction clearer, in cases when a reference to a Regulation in the sense of Art. 249 EC is made, the first letter of the word is capitalised. This terminology allows one to discuss the evolution of enlargement law (*i. e.* the Treaty text and relevant secondary Community law) alongside the evolution of enlargement regulation, making a clear distinction between the two. See figure 1 for a graphic representation of this relationship.

Figure 1

There are quite a number of scholarly works dealing with the regulation of the enlargement process of the European Union and its implications for the future development of Europe (Cremona (2003); Beurdeley (2003); Ott and Inglis (2002)).⁽²⁾ While scholars generally agree that the provisions of the Treaty represent an 'imperfect guide to enlargement' (Avery and Cameron (1998): 23; Tucny (2000): 78), are 'vague and open' (Hillion (2002): 402), or, more mildly, 'only outline the most general principles of the process' (Isaac (1989): 26), and 'se caractérisent par concision' (Beurdeley (2003): 42), enlargement scholars do not, however, concur on how the existing enlargement regulation should be characterised.

The analysis usually focuses on the 'classical enlargement method' (Preston (1997): 9), rooted in the community method of integration (*Ibid.*: 8) or on the outlining of a set of 'enlargement principles' (Maniokas (2000); Booß and Forman (1995): 100). Only rarely do scholars talk about the customary (Fierro (2003): 137)⁽³⁾ regulation of the enlargement process.

At the same time, the classical enlargement method and the principles governing the enlargement process can be viewed as a fusion of the elements of customary enlargement regulation and constructive interpretation of the Treaties. It is thus possible to observe that all the rounds of enlargement were largely governed by a fusion of customary and Treaty law, as opposed to the black-letter text of the Treaties. Every upcoming enlargement regulation tended to build on this body of customary law.

The story of evolution of the customary enlargement law is not over: the next expansion to accommodate Bulgaria, Romania and, later, Croatia and probably Turkey will not be the last one. It is likely that a number of other European states will follow, putting enlargements on the agenda of the Union for a very long time. It is even possible that the Union is entering a permanent enlargement process (Manin (2001): 59).

Why is it instrumental to talk about customary enlargement law while discussing the enlargement regulation? How did it evolve and what is its future? What are the main elements of the customary enlargement law and the role played by custom in the enlargement regulation?

In search for some answers to these questions this note will start (in Section one) with a concise overview of the stages of development of enlargement regulation triggered by the revisions of the Treaties. It will also discuss the possible interpretations of the Treaty text governing enlargements at different stages of its development and will focus on assessing different possible interpretations of Article 49 TEU and its predecessors pointing out to the time and the causes of creation of the customary enlargement regulation. As a result of this overview of a step-by-step development of enlargement regulation, the roots of the customary enlargement law of the European Union will be outlined.

Further, (in Section two) the article will make a comparison between the actual enlargement regulation, as it stands after the Fifth enlargement and the text of the EU Treaty. Emphasis will be made on the differences between what can be found in the Treaties and the way enlargements are regulated in practice. The result of this exercise will be an identification of what is missing from the Treaty's 'enlargement article', thus delimitating the possible scope of the customary aspect of the EU enlargement law. The incorporation of certain elements of customary enlargement law into the text of the Treaties will also be discussed. The second section will provide a detailed overview of the enlargement law of the European Union as it stands after the Fifth enlargement.

The third section will discuss the influence of the Treaty Establishing a Constitution for Europe, in case it is adopted, on the EU enlargement law and its influence on the future enlargement of the Union.

The article will conclude by stating that the EU enlargement regulation, especially after the Fifth enlargement, largely represents a *concubinage* of customary and Treaty enlargement law. The roles, played by customary and Treaty law in the process are constantly changing, as new customary norms arise and those, previously existing are being constantly incorporated into the Treaties. Thus the constantly evolving customary law component of the EU enlargement law largely (with only minor exceptions) represents a difference in scope between enlargement regulation and the written EU enlargement law, including both the Treaty text and the Copenhagen related documents.

Talking about customary law of the EU is not popular among the academics. At present simply no literature exists, exploring the possible relation between, on the one hand, the customary law theory which evolved in relation to International law and the law of the traditional societies and, on the other hand, the law of the European Union.⁽⁴⁾ At the same time, it seems, customary law has already entered the legal system of the European Union and researchers cannot ignore it any longer, at least assessing European enlargement law. As a consequence of the years of academic silence on the issue, invoking a customary law argument within the European law context one has no other option but to turn to the sources lying outside the scope of EU law.

In relation with the traditional societies, the quest for customs was compared to the ‘Journey without maps’ depicted by Lewis Carroll in *The Hunting of the Snark* (Allott (2000): 81). And although it is not among the goals of this note to go deep into the discussion of the theories of customary law, it is necessary to clarify what kind of *Snark* it is pursuing. Obviously, the existence of a custom is a starting point of customary law (van Praag (1915): 23). Custom has historically been defined by lawyers as ‘un ensemble d’usages d’ordre juridique qui ont acquis force obligatoire [...] par la répétition d’actes publics et paisibles pendant un laps de temps relativement long’ (Glissen, (1989) : 434). In international law a custom is understood as a certain practice generally recognised by states of as obligatory (Brownlie (2003): 6; Shaw (2003): 68). The main elements of custom are the actual practice of regulation, its uniformity, generality and duration, and *opinio juris et necessitatis*, or a belief that an activity is legally obligatory (Shaw (2003): 80; Brownlie (2003): 8). Duration of application element is not necessary, according to Brownlie, once consistence and generality of practice are proved (Brownlie (2003): 7).

Using the understanding of customary law applied in international law, it is possible to state that EU enlargement is governed by custom only in case enlargement practice represents consistent application of legal principles and criteria, throughout several rounds of enlargement governing the accession of a number of new Member States and, at the same time, this practice is considered legally binding by all the actors involved and does not make part of the written enlargement law of the European Union.

1. The evolution of enlargement law in the Treaty text: the roots of the custom [↑]

All in all, there are five main stages of development of enlargement law of the European Communities (Union):⁽⁵⁾ 1. Article 98 ECSC; 2. Articles 98 ECSC, 237 EEC and 205 Euratom; 3. Articles 237 EEC and 205 Euratom as amended by the SEA and Art.98 ECSC; 4. Article O TEU (all the other articles were abrogated); 5. Article 49 TEU (O renumbered) with a reference to Article 6(1) TEU.

To these five stages one might add the 6th stage, which is a possible future development: Article I-58 of the Treaty Establishing a Constitution for Europe.

It is important not to confuse the stages of development of enlargement law with the rounds of enlargement. While the former reflects the evolution of the Treaties, the latter is related to the widening of the treaties’ geographical scope and is not necessarily related to substantive changes in the law. Thus these two processes, although evolving simultaneously, are not synchronised. As a result, not all of the stages of enlargement law development were applied in practice. The line of the evolution of the Treaty based enlargement law is of importance for the assessment of the

developments in enlargement regulation in general.

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Focusing on the roots of the customary component of the EU enlargement law, this section assesses the most important historical developments of written enlargement law and customary enlargement law of the European Union, providing background for the detailed analysis of the EU enlargement law as it stands at present in the second section.

1.1. Initial stage of the EU enlargement law development (Art. 98 ECSC): no need for customary law ↑

The initial Coal and Steel Community Treaty allowed any ‘European state’ to apply for membership and gave the Council almost exclusive powers to deal with such application. Puissochet saw a reflection of a supranational approach to enlargement procedure in the ECSC Treaty regulation,⁽⁶⁾ since all the stages of the process were meant to be fully controlled by the Council. Indeed, Article 98 ECSC allocated no role in the process to the Member States, stipulating that the application had to be submitted to the Council and allowing the Council to determine the terms and conditions of accession. Apart from the Council only the High Authority (European Commission) was entrusted with a role in the process – it had to submit an Opinion on the application. The accession was to take effect when ‘the instrument of accession is received by the Government acting as a depository of the [ECSC] Treaty’ (Art. 98 ECSC).

Article 98 ECSC was detailed enough in order to regulate the accessions to the ECSC Treaty. The only problem that might require some clarification was the voting procedure the Council had to use in order to accept the application for membership before obtaining the Opinion of the High Authority – an issue not clarified by the Treaty.⁽⁷⁾

It is true that Article 98 ECSC alone did not regulate any enlargement process. However, this article influenced the interpretation of all other enlargement instruments and, through this influence, continues to affect the way enlargements are conducted until now, notwithstanding the fact that the article itself was abolished long ago and even the ECSC Treaty ceased to exist. The customary law currently regulating enlargements of the Union seems to have emerged out of the differences between the regulation of enlargements in the ECSC Treaty and in the two other Treaties (EEC and Euratom).

1.2. Supranational vs. intergovernmental: enlargement law after the creation of EEC and Euratom, the custom is born ↑

After the creation of two new Communities in 1957,⁽⁸⁾ the aspiring members had to accede to all the three Communities at the same time (cf.: *infra*), which created a crucial link between the three accession articles. As if to complicate the matters the enlargement of the EEC and Euratom was built around an absolutely different set of principles as compared to the supranationality of Article 98 ECSC. Unlike the ECSC, EEC and Euratom enlargement articles were rooted in the principle of intergovernmentalism: the Member States were given much more powers to regulate the process, especially if compared to the ECSC enlargement article.

At the same time, the creation of the European Economic Community and Euratom did not change the open nature of European integration: just like in the case of ECSC, ‘European states’ were entitled to apply. The supranational organs, however, were allocated a much more limited role at all stages of the regulation of the process. The texts of the enlargement articles of the EEC Treaty (Art. 237) and Euratom Treaty (Art. 205) were identical, both stipulating that the application should be addressed to the Council, ‘which shall act unanimously after obtaining the Opinion of the Commission’ (Arts. 237(1) EEC and 205(1) Euratom). That is to say the procedure of submitting the application did not change compared to that of Article 98 ECSC. Further, however, the article made the conditions of admission and adjustments of the Treaties subject to the ‘agreement between the Member States and the Applicant State’, giving the Council (a leading player in Art.98 ECSC) absolutely no role to play at this stage of the process. The formal procedure in order for accession to take effect was also changed considerably. Compared to that outlined by the ECSC Treaty: according to the EEC and Euratom Treaties, the Accession Treaty had to be ratified by ‘all the Contracting States in accordance with their respective constitutional requirements’ (Arts. 237(2) EEC and 205(2) Euratom).

To summarise, judging by the text of the Articles, Community organs lost their influence in two out of three key stages of the enlargement process.⁽⁹⁾ Having said this, it becomes clear that we are dealing not with just a ‘slightly different procedure’ as some scholars put it, (*e.g.* Hoffmeister (2002a): 91) but with an essentially different one.

This difference gave rise to the procedural aspect of the customary enlargement regulation.⁽¹⁰⁾ Already during the first enlargement, it became clear that the accession to each of the three Communities would *not* be regulated separately, as the Treaties theoretically prescribed. Unlike what one could predict, such a situation did not result in either the ECSC or the EEC model governing the whole of enlargement to be adopted,⁽¹¹⁾ but triggered the crystallization of the procedural aspect of the customary enlargement regulation, making the practice of enlargement different from both the ECSC and EEC/Euratom regulation standards. The customary regulation was somewhere in between the models adopted by ECSC and EEC/Euratom Treaties. The Member States were certainly given a role to play, as EEC stipulated, however they chose to meet in Council, as ECSC Treaty demanded. The accessions were only possible after the negotiations (as EEC regulation stipulated), at the same time, the negotiations presupposed the adherence by the candidate State to the principles of enlargement, which amounted, one could argue, to an imposition of the conditions of accession on the candidates (as stipulated by ECSC Treaty).

The resulting procedural facet of the customary enlargement regulation is basically twofold and includes:

- The list of actors, *de facto* participating in the process (which is different from what can be found in the Treaty text (cf.: II.2.a));
- The chronology of enlargement events, specifying at what stage of the process either actor should intervene, which also has little to do with the Treaty text (cf.: II.2.b).

De jure, judging by the texts of the Treaties, every pre-Maastricht enlargement was regulated by *two* types of Treaty instruments based on totally different principles and resulted in the accession to *three* Communities simultaneously. In contrast, in practice, *one* enlargement was governed by *one* enlargement law, which included Treaty law and customary components, inspired by both the models of regulation present in the Treaties and borrowing from both of them.

This single regulation arising from the duality of the approaches to be found in the Treaties was the foundation of contemporary enlargement regulation. Further reforms of primary enlargement law were unable to alter enlargement practice: all the enlargements starting with the very first one have been carried out in accordance with one enlargement law, which has by now proved to be workable throughout all the 5 rounds and largely consists of the echo of ECSC regulation intertwined with later norms.

1.3. Further Treaty revisions: separation between the custom and the Treaty text [↑]

The third revision of the written enlargement law contributed to the clarification of the role of the institutions of the Communities in the enlargement process. It was brought about by the SEA, which gave the European Parliament a role to play in the process. This development, long awaited by scholars (Soldatos and Vandersanden (1968): 682), was the last revision of the Treaty regulation of enlargement to reflect the change in the institutions participating in the process.

Compared to the previous Treaty changes, the fourth stage of reform of enlargement instruments (among the 5 stages outlined in [section 1. supra](#)) was intended to be a far more significant one. The Maastricht European Union Treaty introduced significant changes into enlargement regulation, in L.W. Gormley's words, 'start[ing] to bridge the gaps between the various elements of the Union' (Kapteyn, VerLoren van Themaat and Gormley (1998): 52), including Arts. 98 ECSC, 237 EEC and 205 Euratom. A single enlargement Article was introduced, crossing out any theoretical possibility to join only one of the Communities.⁽¹²⁾ However, the heritage of the past divergence could not just disappear.

Article O TEU was a simple restatement of Art. 237 EEC (or 205 Euratom). The changes in the text of the article were limited to the newly introduced word "Union". Although all the previous enlargement articles were abrogated, the old customary regulation based on the symbiosis of supranational and intergovernmental approaches of the earlier instruments (see *infra* for details) remained in place: the interpretation of the restated Art. 237 EEC (Art. O) proved to be strongly influenced by the 'echo' of Art. 98 ECSC: the Union organs played a much more important role in the process regulated by Art. O alone, than the text of the article would suggest. It would have been really naïve to assume that the substitution of three instruments which gave birth to a workable practice tested in the course of three enlargements by one single instrument copying two of those previously in force would change the situation in the field of *de facto* regulation.

Three pre-Maastricht enlargements governed by a custom resulting from a compromise between two different approaches to enlargement regulation in the Treaty instruments previously in force had prepared a solid base for the future enlargement regulation. As a result, the changes introduced by the Maastricht Union Treaty had but a small influence on the previously existing practice. Arguably, the only substantive change concerned the entry into force of accession documents: with the abrogation of Article 98 ECSC the acceding states did not need to deposit the accession document with the French government on the day of accession to the ECSC any more, provision that had been doomed to be changed anyway because of the fusion of the Communities into one EC.

This is why it is not surprising that generally the actual regulation of the fourth enlargement, already governed by Article O TEU (now Art. 49 TEU) (*Bull. EC* 6-1992, para 10; Booß and Forman (1995): 107) was on the whole in no way different from that of the previous enlargements.

The fifth and the last Treaty reform to deal with enlargement regulation was brought about by the Amsterdam EU Treaty, which renumbered Article O to Article 49 TEU and introduced a reference to Article 6(1) TEU (*ex. Art. F(1)*). From that moment on, only the European states respecting the values of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law could apply. The introduction of such a reference into the old article might be misleadingly taken for a *nouveauté*, which it was not. In reality it was an incorporation of a long existing practice into the text of the Treaty – a reflection of the substantive facet of customary enlargement law of the European Union (cf.: II.1.a. (c)).

1.4. Section one: concluding remarks [↑]

The initial legal regulation of enlargement was extremely complicated: *de facto* the same enlargement was *de jure* represented as an accession to three different Communities. Moreover, the accession to the three communities, which had to be simultaneous, was (judging from the text of the Treaty articles alone, not their application) governed by two drastically different principles: supranationality (in the case of ECSC) and intergovernmentalism (in the case of EEC and Euratom).

This triple regulation proved to be unsustainable in practice: too drastic were the differences between the instruments to be applied. This led to the creation of a customary European Enlargement law (the substance of which will be discussed further), incorporating some elements from both supranational and intergovernmental models of regulation and governing the accession to all the three Communities equally.⁽¹³⁾ The introduction by Article O (now Art. 49 TEU) of a single enlargement regulation did not change much in practice. The European Union continued to apply the customary regulation born out of disparities between ECSC and EEC/Euratom enlargement articles.

2. In search for customs: contemporary enlargement practice and its reflection in the Treaty [↑]

The regulation of the Union's enlargements as it stands after the fifth enlargement round can be structured as follows:

1. Substantive facet:

- application criteria;
- enlargement principles.

2. Procedural facet:

- actors participating in the process, their powers and competences;
- chronology of enlargement events.

The Treaty does not regulate all these elements of enlargement law. Thus, following the proposed structure, based on the actual enlargement regulation applied during the last enlargement round, it is easy to provide examples of how different the Treaty based enlargement law is from that we find in practice (*i. e.* the customary enlargement law).

2.1. Substantive facet of enlargement regulation [↑]

Substantive facet of enlargement regulation consists of enlargement principles and enlargement criteria. The criteria represent a list of requirements that an applicant country is unable to change (like the Geographical location), while the principles consist of a list of positions to which an applicant country has to agree in order to have reasonable aspirations for membership.

It is also possible to illustrate the difference between the principles of enlargement and the criteria on the basis of a different rationale. The criteria of enlargement should be met at the time of the submission of the application for membership to the Council. If it is not the case, the question of adhering to the principles cannot even be raised: the application made by a state that does not meet the criteria would be immediately rejected or left unanswered. A situation might arise when an applicant country meets the formal criteria but is not ready to adhere to the principles⁽¹⁴⁾ or might be ready to adhere to the principles, but does not meet the criteria.⁽¹⁵⁾ In both the cases enlargement is impossible. Thus, taken this distinction into account it is possible to agree with Christophe Hillion that a country ‘can be eligible but not admissible’ (Hillion (2002): 411).

2.1.1. Enlargement criteria [↑]

The enlargement criteria are probably the only field of European enlargement law today where the wording of the Treaty has incorporated almost all the existing customary regulation.

The Treaty text lists three basic criteria that an applicant state should satisfy in order to apply for the membership of the Union. According to Article 49 TEU ‘any European State which respects the principles set out in Article 6(1) TEU may apply to become a member of the Union’. Thus the criteria are the following:

- a. Statehood;
- b. Europeanness;
- c. ‘freedom, democracy, respect for human rights and fundamental freedoms and the rule of law’ (Art. 6(1) TEU).
- d. The fourth and the last criterion and the only one outside the wording of the Treaty is membership in the Council of Europe.⁽¹⁶⁾

At which stage of the development of enlargement process were the criteria formulated? The analysis of the past enlargements demonstrates that all of them were in place since the first enlargement round.

The requirement of being a ‘European State’ in order to apply was part of all the enlargement articles from the moment of creation of the Communities. The third ‘democracy’ criterion and the criterion related to the membership in the Council of Europe were part of unwritten law from the very beginning (Kochenov (2004a)). Interestingly, there were attempts to incorporate them into the Treaty text even before the creation of EEC and Euratom. Article 49 TEU bears striking similarities to Article 116 of the unfortunate Draft Treaty embodying the Statute of the European Community (EPC),⁽¹⁷⁾ which, upon entry into force was supposed to abrogate Article 89 ECSC.⁽¹⁸⁾ Concerning the criteria of enlargement Article 116(1)EPC stipulated that

Accession to the Community shall be open to the Member States of the Council of Europe and to any other European State which guarantees the protection of human rights and fundamental freedoms mentioned in Article 3.⁽¹⁹⁾

This Article is interesting due to three important points: firstly the EPC was to be built on the same principles as those to be found in the contemporary Article 6(1) TEU;(20) secondly, a logical structure introduced by Amsterdam EU Treaty into the ‘accession article’, namely the reference to the principles of Article 6(1) TEU is a repetition of the wording of the unfortunate EPC Treaty; and thirdly, the EPC Treat clearly shows the importance of the Membership in the Council of Europe, which at present is the only criterion of enlargement left outside the wording of the Treaty.

The substance of the criteria was clarified in the course of five enlargement rounds.

a. The criterion of Statehood does not represent much of a problem for the majority of European states(21) (the exception might be the Vatican City, as the goals of the agreement of Lateran establishing it are not entirely in line with those of the EU (Le Roy (1953): 125)).(22) Some of the micro states ‘thoroughly consider all implications [...] of possible membership in the European Union’.(23)

b. The meaning of ‘Europeanness’ in the context of enlargements is much more difficult to determine. It is important to understand that the term ‘European’ is not only defined geographically, but also, according to the European Commission, contains socio-cultural understandings.(24) The legal scholars generally oppose a purely geographical understanding of ‘European’.(25) On the whole, the question ‘what is Europe?’ for the purposes of the EU enlargement law has already been answered,(26) based both on the responses by the EU to the applications for membership received (27) and on the analogy with other bodies, requiring its members to be European States, like the Council of Europe, for example (see *e. g.* Hoffmeister (2002a): 92). This is to say, presumably, every member of the Council of Europe could become an EU Member State – or at least apply for membership.

c. The matters are more complicated in the case of the criterion related to democracy and the rule of law, which are very difficult to measure (Beurdeley (2003)). It is absolutely clear, however, that democracy and the rule of law have been important criteria for membership from the very beginning of the European integration. As early as 1952 Robert Schuman stated that ‘cet Europe est ouverte à tous les pays européens libre de leurs choix’ (Hoffmeister (2002a): fn. 44), thus referring to a dependent position of the countries behind the iron curtain belonging to the Soviet bloc. The fact that an applicant country should be a democratic state follows from the history of the European enlargements and the relations of the Communities with the associated countries.(28) The Association Agreement with Greece, for example, was frozen by the Community after the *coup d’État* of the colonels (Contogeorgis (1978): 23). The dictatorial regime in Spain was the reason for which the initial application of Spain to join the community was left unanswered.(29) The Commission’s Opinions on the application of accession usually emphasized the importance of democratic consolidation in the future Member States. The importance of democracy was underlined on numerous occasions, being reflected in the preamble to the EC Treaty,(30) in the opinions of the institutions, and in numerous declarations by the Council, Commission and the European Parliament (31) as well as in the ECJ jurisprudence.(32)

On one occasion the Commission expressly stated that Article 237 EEC ‘permits the accession of a state only if that state is a European State; and its constitution guarantees, on the one hand, the existence and continuance of a pluralistic democracy and, on the other hand, effective protection of human rights’.(33)

Thus, democracy, the rule of law and protection of human rights have always been among the necessary conditions for accession to the Union (Community) (Rose and Haerpfer (1995): 428), even before the changes introduced to enlargement law at Amsterdam. In other words, Amsterdam amendments of Article 49 TEU clearly represent an incorporation of one of the aspects of customary enlargement regulation into the text of the Treaty.

d. Some scholars argue that the Membership in the Council of Europe is a necessary criterion for joining the EU, which is reasonable in the light of the values, the Council of Europe shares with the EU.⁽³⁴⁾ It is notable, that the applicant countries often saw the membership of the Council of Europe as a necessary step towards the EU membership (Tucny (2000): 28).

The European Commission explicitly demonstrated that the membership of the Council of Europe is a necessary step towards accession to the Union. References to this organisation can be found in almost all the Copenhagen related documents released in the course of the preparation of the Fifth enlargement. 2002 Commission's Strategy Paper 'Towards the Enlarged Union', for example, points at the importance of adherence to international human rights instruments, those adopted by the Council of Europe included. Outlining the method of the Commission it states that 'the Commission analyses the way in which the candidate countries respect and implement the provisions of the major human rights conventions'.⁽³⁵⁾ A special accent was made on the documents adopted by the Council of Europe, and especially on the European Convention on Human Rights (ECHR).⁽³⁶⁾ Such an attitude to the Council of Europe documents is not surprising. Although not a part of Community law,⁽³⁷⁾ the ECHR, in case applied in the context of the Treaty provisions, represents a source of the principles of EC (EU) law, ⁽³⁸⁾ and also possesses 'special significance' in the European law context, as clarified by the ECJ.⁽³⁹⁾ Complying with the principles of Article 6(1) (and 6(2)) TEU, the candidate countries were expected to ratify the Convention. Thus, in the context of pre-accession the 'adherence to the Convention and its supervisory machinery' (Shelton (2003): 97), played a very important role, making the participation in the Convention 'the principal – if not the only – objective criterion for determining their commitment to respect fundamental rights' (Lenaerts (2000): 599).

To summarise, in order to expect its application not to be rejected the applicant country should satisfy the following criteria: it should be a Member of the Council of Europe, respecting freedom, democracy, the rule of law and protecting human rights and fundamental freedoms. After the amendments introduced by the Amsterdam EU Treaty, all the aforementioned criteria with the sole exception of the membership in the Council of Europe can be found in the text of Article 49 TEU.

2.1.2. Principles of enlargement

The situation with the reflection of the principles of enlargement in the texts of the Treaties is quite different from the regulation of the criteria, as not a single principle can be found in the text of the TEU enlargement article. Moreover, the set of principles of enlargement is not static, as are the criteria, but undergoes considerable changes with every round of enlargement.

Notwithstanding their dynamic character, the core of the enlargement principles came to life during the preparation of the first enlargement: the accession of Denmark, Ireland and the UK⁽⁴⁰⁾ and has not changed ever since. They were all formulated in the speech of the Council President in office Mr. Harmel opening the way to the first enlargement.⁽⁴¹⁾ Mr. Harmel stated that in order to proceed with enlargement the future members have to subscribe to a number of principles, restating point 13 of The Hague European Council communiqué of 1 and 2 December 1969.⁽⁴²⁾ The document stated that

[t]he negotiations can only begin in so far as the applicant States accept the Treaties and their political aims, the decisions taken since the entry into force of the Treaties and the options adopted in the sphere of development (*Bull. EEC*, 1-1970: 16).

The applicants accepted these conditions immediately and the first successful enlargement was launched. The wording of point 13 of The Hague Council communiqué can be interpreted to contain a number of milestone principles of enlargement:

1. Enlargement consists of joining an existing entity, not the creation of a new community;
2. The *acquis communautaire* should be accepted in full;
3. The transitional periods should be strictly limited and cannot contain serious derogations from the Treaty text and the principles on which the Community is built.
4. During the regulation of the last enlargement, these three principles were joined by another one: conditionality.

None of these principles follows directly from the text of Article 49 TEU, although it can be argued that their existence stems from the spirit of the Treaties and is a ‘core component of the Community method’ (Preston (1997): 18).

1. The adherence of the candidates to the principles in question during the preparation of the first successful enlargement marked a huge step forward compared to the previous unfortunate experiences. The first enlargement attempt made by the UK was vetoed by General de Gaulle precisely because the UK was not ready to accept the Community legal order, trying to renegotiate the Common Agricultural Policy and some other issues (Le Tallec (1972): 232). Thus, in 1970, while starting the negotiations anew, this crucial principle of Community enlargement law had to be made clear: the new Member States can only be accepted as new members of an already existing Union (Community), created by the founding Treaties and thus are unable to modify it, as classical international law would presuppose (Brinkhorst and Kuiper (1972): 365; cf.: Maresceau (2001)). The acceding states had to accept the terms of the founding Treaties, becoming a part of a developing legal order at a certain stage of its evolution (Olm (1978): 79). It still remains the most crucial principle of enlargement, from which at least two other principles follow, namely the acceptance of the *acquis* in full and the temporary and limited character of the transitional periods.

2. For the purposes of enlargement, the *acquis communautaire* can be defined as all the body of Community regulation existing at the moment of accession. It is also possible to understand the *acquis* as a ‘*noyau dur* that must be progressively built upon while respecting the rules enshrined in the *acquis* itself’ (Verhoeven (2003): 147). Articles 2(1)5 and 3(1) TEU clearly construe the *acquis* as the most important constitutional core of the Community/Union legal system. This understanding, however, is not applicable to the definition of the *acquis communautaire* as part of the set of principles of the enlargement process, which is reasonable, since the acceptance of the core principles by the new Member States is not enough to fully integrate into the Community system – which brings about a somewhat broader understanding of the *acquis* for the purposes of enlargement.

The *acquis* currently comprises the following elements (cf.: Hoffmeister (2002a): 97; Delcourt (2001); Goebel (1995): 1143; Curti (1995)): (43) the Community Treaty, acts adopted, (44) external agreements based on them, (45) EU Treaty and acts related to the 2nd and 3rd pillars of the Union, (46) as well as decisions and agreements of the Council, Article 239 EC conventions, “declarations or resolutions or other positions taken by the European Council or the Council” and “positions adopted by the common agreement of the Member States”. (47) The case-law of the ECJ also forms part of the *acquis communautaire*. (48)

It also comprises the acceptance of the *finalités politiques* of the Union. Starting from the accession of the UK, Denmark and Ireland, the acceptance by the acceding states of the ‘options adopted in the sphere of development’⁽⁴⁹⁾ was regarded as a very important principle of the enlargement process. ⁽⁵⁰⁾ Legally, however, the procedure of this acceptance is far from being clear. Pierre Pescatore formulated this principle the following way:

‘Aux nouveaux venus, [...] il faut demander non seulement de définir leur position à l’égard des objectifs d’ores et déjà définis et consacrés par des engagements fermes. Il faut les interroger aussi sur leurs intentions en ce qui concerne les chances d’une évolution ultérieure vers l’union politique’ (Pescatore (1972): at 29; cf.: Soldatos and Vandersanden (1968): 689).

The ECJ, following the spirit of the Acts of Accession also gave the *acquis communautaire* a very broad reading, stating that even the decision of the board of the European school in Luxembourg forms part of the *acquis*.⁽⁵¹⁾

The Treaty is also silent on another important point: the candidate countries are not allowed to rely on the derogations granted to the existing Member States (Booß and Forman (1995): 118). That is to say, in some respects, the *acquis*, as applied to the newcomers can be wider than that applied to the existing members. The most telling examples are the EMU⁽⁵²⁾ and the Schengen *acquis*.⁽⁵³⁾

3. As far as the transitional periods are concerned, once again, the Treaty is not really helpful, only stipulating that ‘the conditions of admission and adjustments to the Treaties [...] shall be subject to an agreement between the Member States and the applicant State’(Art. 49(2) TEU). That is to say the enlargement article does not contain any detailed rules concerning the limits of adjustments to the Treaties. However, taking the previous two principles into account, it is clear that the adjustments can only concern purely technical issues (like the readjustments of seats in the institutions) or specific matters. In the latter field the adjustments can sometimes give rise to permanent changes resulting in some derogations from the *acquis*.⁽⁵⁴⁾

The main rule remains that accession cannot give rise to permanent derogations from the *acquis* or initiate policy innovations (Becker (2001): 15; Preston (1997): 19). The candidate country is only free to discuss the time-frame of the incorporation of the *acquis* (cf.: Becker (2001); Granell (1986)), which should not postpone the full embrace of any chapter of the *acquis* indefinitely.⁽⁵⁵⁾

Strictly speaking, any measure without a time-limit is a ‘measure which amends or repeals the acts of institutions otherwise than as a transitional measure’.⁽⁵⁶⁾ The fact that some measure is stated in the Act without a time limitation only means that it ‘has the same status in law as the provisions which [it] repeals or amends and shall be subject to the same rules as those provisions’.⁽⁵⁷⁾ The ECJ interpreted this provision of the Act (based on the Act of Accession of Spain and Portugal) as allowing for the change of the dairy quotas stated in the Act of Accession by qualified majority in Council almost right after the entry into force of the Act.⁽⁵⁸⁾ Commentators explain the position taken by the Court by the absence of a strict time limit for validity of the dairy quota for Spain stated in the Act (Goebel (1995): 1151, 1152).

In some cases even simple transitional periods with strictly limited timing can bring harmful consequences for the Community legal system at large.⁽⁵⁹⁾

It should be noted that even the technical adjustment of the Treaties can bring a lot of changes, affecting the role played by every Member State, shifting the established coalitions in the Council and influencing the benefits acquired by each of the Member States from its participation in the Union. That is to say any enlargement, however small the adjustments to the Treaties, has far-reaching system-transformative consequences.⁽⁶⁰⁾

To summarise, all the enlargements, including the fifth were governed by three main principles. None of these principles is reflected in the Treaty instruments regulating the enlargement process. Their elaboration had been completed at the time of the first enlargement that resulted in the joining of the UK, Ireland and Denmark.

4. Just as the other three principles, Conditionality is not mentioned in the Treaty text. Its origins lie in the specific character of the fifth enlargement, which was not exactly like the previous ones both due to the number of applicants (Maresceau (2001): 3) and because of the nature of the majority of the new-comers, most of them being ex-communist states.⁽⁶¹⁾ While the Community was prepared to deal with poor situation in economies using transitional periods, it had no experience in dealing with poor situation in the field of democracy and human rights (Tucny (2000): 23). The Union had also become far more complex since the first enlargement round. Being afraid of ‘going to bed with bad guys’ (Klabbers (1999): 279) as Jan Klabbers put it and realising the potential threat of ‘dilution, or even dislocation, of the integration process’ (Hillion (2002): 401), coming from enlargement, the Community tried to get some guaranties that democratisation and economic reform of the Central and East European Countries (CEEC) will be a success before these countries can become Member States. The best way to ensure the success of political and economic reforms is to control their progress, which was done through the newly-introduced pre-accession strategy (Beurdeley (2003): 43; Hillion (2002): 414; Inglis (2002); Maresceau (2001)) concept.

In the light of this control idea, the Union established a link between the achievement of certain standards in the development of economy, public administration, human rights protection and in other spheres and the benefits the applicants could get from the Union. Among those were various types of aid and assistance⁽⁶²⁾ and the ultimate dream of the CEECs – accession to the Union. In this respect, the core of the principle of conditionality might remind the conditions for enlargement, discussed earlier. However, a difference between the two is clear.

Firstly, conditionality presupposes that the applicants agree with the Union’s scrutiny of all spheres of their legal, political and economic reform and agree to fulfil the demands of the Union, while in the case of conditions the Union exercised more or less a one-time judgement of whether an applicant fulfils the minimal requirements for membership. Secondly, the demands of the Union concerning all aspects of reform are not counterbalanced with the right of the applicants to accede. The absence of it has been restated on numerous occasions by the scholars and also follows directly from the Treaty text.⁽⁶³⁾ Thirdly, the principle of conditionality applies throughout the whole of the accession process, different groups of conditions are developed by the Union to distinguish if the applicants are ready for moving forward with the accession. And finally, the conditionality principle allows the Union to exercise an ‘impartial assessment’ of the applicants’ progress towards accession. As a result, theoretically, only the most prepared candidates get a chance to join the Union. In practice, however, conditionality did not make accession more predictable and clear (Kochenov (2004a); Hillion (2002): 402).

The Europe Agreements,⁽⁶⁴⁾ initially concluded by the Communities with no view of making an accession tool out of them, became one of the main instruments in the application of conditionality (Inglis (2000)) after the EU formulated clear policy priorities *vis-à-vis* the countries of Central and Eastern Europe, beginning to regard them as possible future members. But as the main legal basis for this principle, the Union applied the ‘Copenhagen criteria’ adopted by the 1993 Copenhagen European Council. The criteria were initially designed as a list of three⁽⁶⁵⁾ equally important elements, ‘complementing the Treaties’ (Tucny (2000): 78):

1. The stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;⁽⁶⁶⁾
2. The existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union;
3. The ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union (*Bull. EC* 6-1993).

Later on, however, a strict hierarchy of the criteria was introduced. Presidency Conclusions of the Luxembourg European Council (12-13 December 1997), held that ‘compliance with the Copenhagen political criteria is a prerequisite for opening of any accession negotiations’.⁽⁶⁷⁾ The European Commission, trying to ‘stri[k]e the right balance of keeping up speed [of enlargement] without sacrificing quality’,⁽⁶⁸⁾ proposed to open negotiations with any applicant satisfying only Copenhagen political criteria.⁽⁶⁹⁾ Following this recommendation, negotiations were open with all the candidate countries,⁽⁷⁰⁾ triggering disappointment in some scholarly circles concerned with the fact that conditionality is not applied strictly enough (Inotai (2000): 6).

At the same time, these developments made the conditionality principle instrumental not only for the achievement by the applicants of the ultimate goal of accession but also for the movement forward along the lines of the accession process: from acceptance of application to the opening of negotiations and then, ultimately, to accession. In short, different sets of criteria and principles are applied to different stages of the process: in order to apply it is necessary to fulfil minimal conditions, later, in order for the negotiations to be opened, Copenhagen political criteria should be met and, finally, in order to accede the Union all the remaining criteria related to economic development and adoption of the *acquis* should be satisfied.

The broad character of the Copenhagen criteria, coupled with ‘underdeveloped notion of democracy and purely technical nature of institutions building’ (Anastasakis (2001): 8) leaving many scholars sceptical about their workability (e.g. Beurdeley (2003): 35), was supposed to be compensated by a number of documents adopted in their implementation. Following requests made by a number of European Councils, the Commission not only released the Opinions on the Application for membership – which it was supposed to do according to Article 49(1) TEU⁽⁷¹⁾ – but also embarked on preparing annual reports on the candidate countries’ progress towards accession (on a country by country basis),⁽⁷²⁾ accompanied by summarising documents,⁽⁷³⁾ also containing recommendations concerning the opening of negotiations and the general assessment of the situation with fulfilment of the Copenhagen Criteria. Generally, the tradition of issuing such summary reports started in 1997, when a document entitled ‘Agenda 2000’⁽⁷⁴⁾ was issued by the Commission to accompany the Opinions on the candidates’ application for accession.

The role of the Copenhagen-based conditionality was increased even further with the introduction of Accession Partnerships.⁽⁷⁵⁾ These documents, adopted by the Council on the proposals of the Commission in the form of Decisions on the basis of Regulation 622/98⁽⁷⁶⁾ changed the nature of the Copenhagen criteria. Article 4 of the Regulation made the reception of accession aid conditional on their fulfilment, thus introducing the criteria, previously mostly political in nature, into the field of legal regulation of enlargements.

Right after their adoption, it was argued that the criteria only regulate the accession of the CEECs, while now it became clear that the conditionality principle is there to stay and all the future enlargements will be regulated with a due regard to the Copenhagen criteria (Avery and Cameron (1998): 23).

Undoubtedly being part of the enlargement regulation, conditionality is not regulated by the Treaty. Interestingly, its application starts before the moment identified by Article 49 TEU as a starting point for enlargement regulation, namely before the submission of a formal application for membership. The majority of CEECs submitted their applications in 1994–1996,⁽⁷⁷⁾ while the Copenhagen criteria were formulated two years earlier (Avery and Cameron (1998): 24).

Discussing this principle it is possible to see in it a continuation and further articulation of the three initial principles of enlargement process: conditionality gives the Union guarantees that the obligations assumed by the Member States and stemming from the three ‘traditional criteria’ will be met. At the same time, this principle undoubtedly weakened the position of the candidate countries *vis-à-vis* the Union, leaving them no room for manoeuvre (Engelbrekt (2002): 43, 44) and made the regulation of enlargements more rigid.⁽⁷⁸⁾ Additionally, conditionality also allows the Union to choose the most successful applicants and only embrace those who ‘are ready’. Some scholars call it a separate enlargement principle of ‘differentiation’ (de la Serre (1994): 20; Maniokas (2000)). Since ‘differentiation’ is linked to conditionality as such, it might be unreasonable to make it a single standing additional principle of enlargement.

2.2. Procedural facet of enlargement regulation

The text of Article 49 TEU gives the impression of providing a full regulation of the enlargement procedure, naming the actors to participate in the process, their competences and the chronology of enlargement events.

There are two possible misleading interpretations of the Article 49 TEU, both of them seemingly naturally following from the text, but having nothing to do with the actual application of the Article.

Firstly, applying simple textual interpretation of the Article it might be concluded that the text implies a chronological division of the enlargement process into two phases:⁽⁷⁹⁾ a ‘supranational’ phase, where all the Union institutions act, regulated by Article 49(1) TEU and an ‘intergovernmental’ phase, regulated by Article 49(2) TEU.

The second possible misleading interpretation does not involve a chronological succession of the first and the second parts of the Article. In case the ‘supranational’ and ‘intergovernmental’ involvement in the process were to be understood chronologically, the Council would only be able to decide on the start of negotiations between the Applicant State and the Member States – and not on the actual enlargement.

The non-chronological view of the meaning of the Article is supported by the Rules of Procedure of the European Parliament, which stipulate that the EP gives its assent ‘when the negotiations are completed but before any agreement is signed’,⁽⁸⁰⁾ which means that the Council can only act unanimously (which is done upon getting an EP consent and an Opinion of the Commission) after the negotiations are completed.

In practice, however, it is impossible to understand the real enlargement procedure from the text of the article alone, without a due regard of the established practice of enlargement regulation, as the article does not mention all the actors participating in the process (most notably no mention is made of the European Council), and it only provides a superficial account of their powers. Further, these aspects of imperfection, inherent in Article 49 TEU will be assessed in greater detail.

2.2.1. Actors participating in the enlargement process and their powers ↑

According to Article 49 TEU, alongside the applicant country and the Member States there are three participants in the process: the Council (ruling on the application and taking a unanimous decision concerning enlargement), the Commission (which should be consulted) and the European Parliament (to give assent with an absolute majority of its members).

In reality, this list also includes the European Council, which has an ultimate power to take key decisions in the sphere of enlargement and has a huge influence in the sphere of the regulation of the enlargement process. The European Council takes the principle decision to enlarge (Presidency Conclusions, 1993 Copenhagen European Council). The European Council also formulated the Conditionality principle and drafted the Copenhagen criteria. The entire framework of documents and activities related to pre-accession strategy has also been created following requests made by the European Council. All the stages of the process are controlled by this organ: the decision to accompany the Commission’s Opinion on the CEECs applications for membership with a summarizing report, which resulted in the release of the Agenda 2000; the decision to make the Commission issue annual Reports on the Candidates’ Progress towards accession, accompanied by Composite and Strategy papers; the endorsement of the importance of the Copenhagen political criteria for the opening of the negotiations; the very decision to open negotiations (Kochenov (2004a): 6). Thus, Article 49 TEU omits to mention one of the key players in the enlargement process.

The role of the Council is also underestimated in the Article: in reality it does not only accept an application and decides to enlarge, but also empowers the Commission to play one of the key roles in the process (Inglis and Ott (2004): 146). The powers the Council enjoys in the course of accession are very broad. It does not only steer the progress of pre-accession – it is also empowered to change the rules of the game. The introduction of Accession Partnerships by way of Regulation 622/98 is a perfect example of this. Furthermore, all the rounds of the Accession Partnerships adopted by the Council *de facto* represent a clear road-map to accession for the candidate countries. The fact that these documents were drafted by the Commission does not change the essential role played by the Council in the process by adopting them. Steering the candidate countries’ policies by way of adoption of legal documents making accession prospects dependant on the fulfillment of the Copenhagen criteria and the priorities set in the Accession Partnerships themselves does not fit within the role given to the Council by Article 49 TEU. In other words, the actual role played by this organ is much more important than that envisaged by the accession article.

The Commission does a lot more than just issuing an Opinion.⁽⁸¹⁾ Some scholars state that it sometimes acts outside of the legal framework of enlargement regulation (Beurdeley (2003): 42), which is not entirely true, once the customary vision of enlargement regulation is adopted. Acting on the mandate of the Council and the European Council, it prepares a whole range of documents related to the assessment of the progress made by the candidates. Very importantly, it also prepares Accession Partnerships, later adopted by the Council in the form of Decisions. The Commission also participates in the negotiations by preparing common positions for the Member States. It is clear that the Member States and the community organs are free to disagree with the observations of the Commission, but usually they choose not to do so, which makes the Commission the most powerful player in the process, playing the ‘leading role’ (Inglis and Ott (2004): 146; Maniokas (2000)).

The Member States do not in fact play the exact role one might think they should play according to Article 49(2) TEU (Beurdeley (2003): 42). Since the first successful enlargement round, the procedure to conduct negotiations was defined by a Council decision (Avery and Cameron (1998): 28) and the negotiations have been conducted by the Member States meeting in the Council⁽⁸²⁾ (The meetings are prepared by COREPER and are conducted at the Ministerial level). The official name for the accession negotiation meeting is the ‘Conference for accession to the European Union’, which is *de jure* comprised of all the Member States and a candidate country. In other words, in practice all the negotiations are conducted within the Union framework.⁽⁸³⁾ It reflects the compromise between the approaches adopted by Article 98ECSC, where Member States were not supposed to have any role to play, and the original EEC/Euratom enlargement regulations.

It seems that only the role played by the European Parliament in the enlargement process is reflected fully in the text of the enlargement article.⁽⁸⁴⁾

To summarise, the Article does not reflect the real situation in enlargement regulation, introduced with the first round of enlargement several decades ago.

2.2.2. Chronology of enlargement events

A similar situation exists in the regulation of chronology of enlargement process. Numerous chronologies have been proposed by enlargement scholars, starting with Soldatos, Vandersanden and Puissochet, who discussed the possible interpretations of the ‘phase structure’ of the Treaty enlargement instruments. Later, chronologies were drafted in order to trace a real sequence of enlargement events as opposed to the chronology to be found in the Treaties. Probably the most detailed of them is made by Booß and Forman concerning the fourth enlargement – accession of Finland, Austria and Sweden (Booß and Forman (1995): 104). Frank Hoffmeister reproduces it as a table (Hoffmeister (2002a): 101). Other authors to pay attention at the chronology problem are Avery and Cameron (Avery and Cameron (1998): 24).

The fifth enlargement brought in an additional enlargement principle of conditionality, which could not pass unnoticed, thus affecting an established Booß and Forman-type chronology and adding complexity to the process.⁽⁸⁵⁾ Being based on the regulation of the four previous enlargements, all the chronologies cited do not include the pre-accession strategy elements. That is to say a new enlargement chronology description is needed.

Based on the regulation of the fifth enlargement it is possible to sketch the following chronology of enlargement events:

1. The aspirant members demonstrate their willingness to join the EU.
2. The Union recognizes their desire and launches assistance programmes.
3. The European Council rules on enlargement and formulates the criteria.
4. The aspirant members submit applications to the Council and conduct national reforms in accordance with the criteria formulated by the Council.
5. The Council accepts or rejects the application (unanimously) and asks the Commission to issue an Opinion on the application.
6. The Commission issues an Opinion on the application, accompanied by a summary report and recommends starting negotiations.
7. The European Council reacts to the Commission's assessment and asks for yearly reports and summary papers.
8. The start of negotiations. The Commission proposes and the Council unanimously adopts the common positions to be taken by the Union in the negotiations.
9. The Council regularly issues Accession Partnerships drafted by the Commission, the candidate countries has to alter national reforms accordingly.
10. Conclusion of negotiations between the Member States meeting in Council and the applicant country. (Theoretically suspension of negotiations is possible in case the country seizes to satisfy the Copenhagen political criteria).
11. Assent of the European Parliament.
12. Unanimous Act by the Council.
13. Signing of the Accession Treaty by governments of the Member States and of the candidate Country.
14. Ratification of the Treaty in the candidate countries and in the Member States.
15. Entry into force of the Accession Treaty.
16. The accession is completed when all the transitional periods are over.

Only a small number of its elements are mentioned in Article 49 TEU.

3. Dual Regulation of Enlargements and the European Constitution [↑]

The Treaty Establishing a Constitution for Europe follows the path of the Treaty instruments formally regulating the enlargement process at present. The Constitutional Treaty contains an Article which will substitute Article 49 TEU once the Treaty enters into force: Article I-58. The Article mostly repeats the wording of Article 49 TEU and reads as follows:

1. "The Union shall be open to all European States which respect the values referred to in Article I-2, and are committed to promoting them together.
2. Any European State which wishes to become a member of the Union shall address its application to the Council of Ministers. The European Parliament and the Member States' national Parliaments shall be notified on such application. The Council of Ministers shall act unanimously after consulting the Commission and after obtaining the consent of the European Parliament. The conditions and arrangements for admission shall be the subject of an agreement between the Member States and the candidate State. That agreement shall be subject to ratification by each contracting State, in accordance with its respective constitutional requirements."

Interestingly, the Constitutional Treaty does not contain any special procedure to be used by those states that left the Union in accordance with Article I-60 and are willing to rejoin. According to Article I-60(5) of the Constitution a standard I-58 procedure should apply in such cases.

The changes in the wording, compared to Article 49 TEU are really minimal. However, there are several important observations to make. The most important change concerns the structure of the Article. The implicit reference to the two phases of the enlargement process inherent to the structure of Article 49 TEU, was excluded from the text, by including all the procedural aspects of enlargement regulation to be found in the Treaty into Article I-58(2). It is a very positive development, which reflects the customary regulation of the chronology of enlargement events by eliminating the possibility of 'misleading' interpretations of the enlargement article, addressed above. Certainly, it makes the article more understandable. The second change is giving the national Parliaments a role to play. The nature of their participation is, however, very formal. They are only notified on the application, meaning that they do not enjoy any power in the regulation of enlargements. The reasons for inclusion of such a clause are thus unclear.

More generally, what follows from the draft Constitution is a clear reluctance to use yet another ideal opportunity to codify enlargement practices. Although, after restructuring, the text of the Article is clearer than that of Article 49 TEU, the proposed amendment does not include the majority of the elements of customary enlargement regulation. In a way, Article I-58 bears only slight differences from the initial EEC Article 237.

The Constitution Treaty drafters had an opportunity to rewrite the article in its entirety, but chose not to do so. That is to say the drafters preferred to leave the co-existence of double customary / Treaty law regulation of enlargements intact. Viewed from this perspective it can be argued that the Treaty Establishing a Constitution for Europe follows the path of previous Treaty revisions, marked by reluctance to codify all the existing customary practices, picking only the most important elements of customary regulation for inclusion into the Treaty text.

On concubinage: customary enlargement law and written enlargement law of the European Union (as a conclusion). [↑]

It is true that the scope of enlargement regulation was constantly growing, introducing new rules, principles and conditions governing the process. It is also true, however that this growth was going alongside the lines of the main principles and criteria, formulated from the very beginning. In other words, the roots of enlargement law remained unchanged from the very beginning and the evolution of some particular details of enlargement regulation only led to gradual clarification the main principles and criteria, present among the legal tools of enlargement regulation since the very first round of enlargement.

Thus enlargement regulation, although growing in scope and detail, represents a consistent picture of development along the main lines, set during the first enlargement round and is not marked by any unexpected turns and revolutionary changes.

Importantly, this consistency of application of enlargement law and constant evolution of the enlargement principles and criteria were achieved by the European Union in the atmosphere of vagueness of the Treaty text related to the regulation of this matter. Thus the Treaty only marks a starting point of enlargement law and does not hold monopoly on enlargement regulation.

The development of enlargement regulation throughout five rounds of enlargement and numerous Treaty changes demonstrate that some core principles crucial for enlargement law today were formulated in the course of the first enlargement and were *not* rooted in the enlargement articles of the Treaties then in force.

The most crucial aspects of enlargement law such as, for example, the requirement to accept the *acquis communautaire* in full or the roles *de facto* played by the Union organs in the process can be traced back to the agreement between the UK and the then EEC on the crucial points of enlargement law reflected in the Hague Communiqué of 1969, which was not a legal document *per se*. The substance of the procedural aspects of enlargement law now in force can also be traced back to the first enlargement and is mostly rooted in the crucial differences between the regulation of enlargements contained in the ECSC and EEC (together with Euratom) Treaties. As the paper has demonstrated, none of the procedural solutions contained in the Treaties was fully applied in the course of any enlargement process. The Communities and, later, the Union *de facto* applied the norms formulated in an almost *ad hoc* manner during the first enlargement. The fact that such procedural norms distant from both the *de jure* intergovernmental standard to be found in the EEC and Euratom Treaties and the *de jure* supranational standard of Article 98 ECSC were applied, also finds proof in the contemporary enlargement regulation. Although rooted in Article 237 EEC, as applied, Article 49 TEU does not substantially differ from the application of the three enlargement articles that regulated three pre-Maastricht enlargements.

In other words, in contrast with the Treaty text regulating enlargements (which changed five times in the course of five enlargements), the essence of the European enlargement law as applied remained largely unchanged and was only getting more detailed due to some legal instruments not mentioned in the enlargement article (such as the Regulation 622/98) and quasi-legal mechanisms applied by the enlargement actors in a manner not prescribed in the Treaty articles. In short, EU enlargement law, although rooted in the Treaty, is very much different from what is prescribed by the Treaty article now in force. And so it has been in the course of all the five enlargement rounds.

If not the Treaty alone, what regulated the enlargements? It can be suggested that alongside the Treaty regulation, which is responsible for establishing the very option for the EU to enlarge, European enlargements have been regulated by unwritten law. One might consider calling this unwritten law customary enlargement law of the European Union.

Since no literature on European customary law exists to date, an analogy with international customary law should be made, in order to establish or dismiss the possibility of customary enlargement regulation. As stated *supra* the main elements of customary law in public international law are the actual practice of regulation, its uniformity, generality and duration, and *opinio juris et necessitatis*, or a belief that an activity is legally binding (Shaw (2003): 80; Brownlie (2003): 8). This definition fits very well to the practice of the European enlargement regulation. Indeed, with the Treaty text available, enlargements were *de facto* regulated differently from what is stated in the Treaty and the candidate countries were not trying to invoke literal interpretations of the enlargement articles (which were discussed *supra* as ‘misleading’), understanding quite well that it is The Hague communiqué and the practice of previous enlargements that really matters in the legal regulation of the enlargement process.

Since the main principles of enlargements and criteria the candidate countries have to satisfy remained largely unchanged in the course of all the five enlargement rounds (with a sole exception of conditionality, which, however, appears to be a continuation of other principles applied), it can be stated that based on the experience of all the five enlargement rounds the customary enlargement law has been applied consistently and certainly amounted to a regulation crucially different from what one finds in the Treaties. The fact that the application of enlargement customary law was getting more detailed is not an argument against its consistent application, since none of the principles governing the first enlargement has been abolished or lost its legal force. Moreover, the willingness of the candidate countries to play along with the Union in the application of the customary enlargement law is a sign that it has been considered binding by all the actors participating in the process. In other words, all the elements inherent to customary law, are present in the legal regulation of EU enlargements.

What makes the European customary enlargement law unique is its application alongside the Treaty text and a constant interaction between the customary law and written enlargement law of the European Union, which occurs mostly through incorporation of customary legal norms into written enlargement law. One can cite examples of incorporation of the elements of the customary law both into the primary law and ‘soft law’ of the European Union. As an example of the former, one can name the introduction into Art. 49 TEU of a reference to Art. 6(1) TEU at Amsterdam, which is the first codification of a long standing enlargement principle that only democratic states respecting human rights and the principle of the rule of law can join the Union (Kochenov (2004a)), which has been consistently applied within the auspices of customary enlargement law throughout four rounds of enlargement. In search of an example of the latter it is possible to turn to the third Copenhagen criterion, stating that the candidate countries should be ready to accept the obligations of membership, *i. e.* the implementation of the *acquis communautaire*, a principle, consistently applied throughout all enlargement rounds and not making part of the Treaty article regulating enlargements.

Although certainly making part of EU law, customary enlargement law has a number of specific features, mostly related to the legal specificity of the enlargement process. Following the text of the Article 49 TEU it is clear that EU enlargement law has an articulated international law component and that the negotiations play an important part in the process of accession. The fact that any Accession Treaty is largely a result of negotiations between the candidate country and the Member States reduces the impact of ‘classical’ EU law principles on the process of accession. Clearly, the negotiating parties are constrained by the principles and criteria of enlargement law, both customary and stemming from the Treaty text. On the other hand, in case of breach, of either customary or Treaty-based components of enlargement law it is unclear how the enforcement of enlargement law would work. Although Article 49 TEU is formally subject to the ECJ’s jurisdiction according to Article 46(f), the Court demonstrated its reluctance to rule on the issues related to the regulation of enlargements. In *Mattheus v. Doego*, referring to the negotiations element contained in Article 237 EEC (now Art. 49 TEU), it found that ‘the legal conditions for accession remain to be defined in the context of that [Art. 237 EEC] procedure without its being possible to determine the content judicially in advance’.⁽⁸⁶⁾ In other words, the Court respects the position of the Member States and is unwilling to substitute the basic procedure included into the enlargement article by its own decisions. Unwilling to restrict the Member States in their negotiating powers, the ECJ basically allows for a very flexible interpretation of the enlargement article and is unlikely to put any constraints on the application of the customary enlargement law (which may otherwise be viewed as a misapplication of Article 49 TEU).

On the other hand, whether the ECJ will be willing to stand for the customary enlargement law in case the outcome of accession negotiations led to a serious breach of the enlargement customary law and resulted, for example, in important permanent derogations from the *acquis* for the new Member State, remains unclear.

To summarise, enlargement enjoys a dual regulation: both by the Treaty and by customary law. The existence of the core customary law explains the consistency of enlargement regulation throughout all the rounds of this process, notwithstanding the stage of the Treaty reform in force at the time of every particular accession. The future enlargements are likely to be building on the body of customary law in force to date. The process of gradual incorporation of customary law into the written law of the EU is also likely to continue.

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Endnotes

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(1) Monnet (1976): 616.

(2) Cf.: Chavance (2004); Drevet (2004); Maresceau and Lannon (2001); Tucny (2000); Dehousse (1998); Grabbe and Hughes (1998); Avery and Cameron (1998); Preston (1997); Telò (1994); Michalski and Wallace (1992); Seers and Vaitos (1982); Tsoukalis (1981); Wallace and Herreman (1978); Puissechet (1975); Bathurst *et al.* (1972); Uri (1967).

(3) Assessing the human rights conditionality, Elena Fierro talks about the 'Community custom' as a driving force behind the amendments introduced into Article 49 TEU by Amsterdam EU Treaty.

(4) Since the most important legal instrument regulating enlargements (Art. 49 TEU) is included into the Union Treaty, talking about the legal regulation of EU enlargements it is reasonable to use the term 'European Union law', while 'Community law' is mainly applicable to the pre-Maastricht enlargements.

(5) Briefly on the regulation of accessions, see *e.g.* Timmermans (2003): 68, 69; Kapteyn, VerLoren van Themaat and Gormley (1998): 52, 93, 94. For a more detailed account see Hoffmeister (2002).

(6) (Puissechet (1975): 14) For a discussion of supranationalism see *e.g.* Kochenov (2003a): 248 *et seq.*

(7) It has been argued that based on Article 205 EC (*ex. Art. 146 EEC*) majority voting should apply. Soldatos and Vandersanden (1968): 679. Contemporary doctrine holds that unanimity should apply: Hoffmeister (2002a): 99.

(8) The Treaties entered into force on January 1, 1958.

(9) I am talking only about the texts of the articles here, not about their practical implementation.

(10) For a similar division line between procedural and substantive facets of enlargement regulation. See *e.g.* Hoffmeister (2002a): 91.

(11) As it was later done at Maastricht, by adopting the Art.237 EEC procedure as a basis for the Union enlargement regulation.

(12) Practically it was not possible since the entry into force of the Merger Treaty of 8 April 1965 (entered into force on 29 July 1967). Cf.: Delcourt (2001): 854; Cloos, *et al.* (1994): 131. Making it impossible to join one of the Communities separately from the others, Article O shifted enlargement law from the sphere of EC law to the sphere of EU law. As a consequence, changes in the structure or status of the Communities (the formation of single EC or the expiration of the ECSC Treaty could not have any bearing on the enlargement regulation.

(13) With some minor exceptions. One of them is, for example, the entry into force of accession documents.

(14) See George Le Tallec for a reference to the willingness of the UK to renegotiate the CAP: Le Tallec, (1972): 232.

(15) The application of Morocco of 8 July 1987 was refused by the Council on 1 October 1987: the kingdom is not situated in Europe.

(16) Some scholars also add an economic criterion which, they say, existed even before Maastricht (Tucny (2000): 11). However, the existence of market economy can be implied from the criterion of 'freedom, democracy and the rule of law' and a more profound economic criterion was only introduced by the Copenhagen criteria, which can be illustrated by the fact that a unfavourable opinion on the state of Greek economy released by the Commission did not prevent Greece from joining the Union.

(17) See: *Ad Hoc* Assembly Introduced to Work out a Draft Treaty Setting up a European Political Community, *Draft Treaty embodying the Statute of the European Community: Information and Official Documents of the Constitutional Committee, October 1952 – April 1953*, Paris: Secretariat of the Constitutional Committee, 1953.

(18) As well as Art. 129 of the European Defence Community Treaty, thus performing an operation of uniting the mechanism of accession to different Treaties, which has later been done by Maastricht TEU. See Art. 116(5) EPC.

(19) Article 3 EPC Treaty read as follows: The provisions of Part 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950, together with those of the protocol signed in Paris on 20th March 1952, are an integral part of the present Statute.

(20) Which bears striking similarities with Art. 3 EPC.

(21) Art. 299(4) EC (*ex. Art. 237(4) EEC*), stipulating that Community law already applies 'to the

European territories for whose external relations a Member State is responsible' used to apply to several European States (San Marino, Monaco) in the past, see: Soldatos and Vandersanden (1968): 684. Recently, the legal status of these states has changed. Art. 299(4) EC does not apply to any other sovereign states in Europe: thus Andorra and Vatican lie outside of the scope of Community law. These states are however parts of the Euro zone, see Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Vatican City State and, on its behalf, the Holy See, *OJ C* 299/1, 2001; the monetary agreement between France on behalf of the European Community and the government of His Serene Highness the Prince of Monaco of 24 December 2001, *OJ L* 142/59, 2002; the Monetary agreement between The Italian Republic on behalf of the European Community and the Republic of San Marino of 29 November 2000.

(22) There should be no confusion between the State of Vatican City and the Holy See. The latter, also enjoying a legal personality under international law, is a non-territorial institution which cannot meet the 'statehood' criterion of Article 49(1) TEU. On this distinction see *e. g.* Harris (1998): 144.

(23) Republic of San Marino, Secretariat of Foreign Affaires, *Aide Memoire*, available at the webpage of the European Commission:
http://www.europa.eu.int/comm/external_relations/sanmarino/doc/aidememoire.pdf, 2.

(24) European Commission, 'Europe and the Challenge of Enlargement', *Bull. EC* suppl. 3-1992, point 7.

(25) On the definition of 'European' in the context of enlargement see Fi^one (2003); Beurdeley (2003): 34; Hillion (2002): 403; Hoffmeister (2002a): 92; Tucny (2000): 37.

(26) Since Turkey has been recognised as a European state and the Moroccan application was rejected.

(27) The best source for the geographical understanding of Europe is the application of Morocco of 8 July 1987, which was refused by the Council on 1 October 1987 and the recognition of the fact that Turkey is a 'European State' under EU law: see the Preamble and Art. 28 of the Ankara Agreement of 1963, *OJ* 1964 at 3687 and the decision of the Helsinki European Council (10-11.12.1999), Presidency Conclusions, para 12. Cf.: Hoffmeister (2002a): 91,92; Preston (1997): 213.

(28) Which is generally in line with the principles the Community uses in its external relations: Youngs (2001).

(29) For the absence of democracy as an obstacle for Spain to join the union see Carrillo Salcedo (1978): 170.

(30) On the importance of the Preamble to the EEC Treaty in assertion of democracy as a criterion of enlargement see Olmi (1978): 77.

(31) See *e. g.* Council Declaration of European identity, enforcing human rights and democratic rule (13-14 December 1973), Joint Declaration of the European Parliament, The Council and The Commission on the respect of fundamental rights (5 April 1977), European Council Document, adopting the Joint Declaration (7-8 April 1978), *Bull. EC* 3-1978; European Parliament Declaration on Fundamental Rights and Freedoms (12 April 1989), The Council, Commission and European Parliament Joint Declaration on democracy, transparency and subsidiarity (25 October 1993), *etc.*

(32) See *e. g.* Case 138/79 *Rocquette Frères v. Council* [1980] *ECR* 3333; Case 139/79 *Maizena GmbH v. Council of the European Communities* [1980] *ECR* 3339; Case C-388/92 *European Parliament v. Council* [1994] *ECR* I-2067; Case C-65/93 *European Parliament v. Council* [1995] *ECR* I-643.

- (33) Commission's submissions in the Case 93/78 *Mattheus v. Doego* [1978] ECR 2203, at 2208.
- (34) The EU and CoE accession criteria are also said to be similar: Tucny (2000): 28 with further references.
- (35) European Commission, 2002 Strategy Paper, at 9.
- (36) See e. g. European Commission 2004 Opinion on Croatian application, at 21; European Commission 1997 Opinion on Slovenian application, at 18.
- (37) Case T-347/94 *Mayr-Melnhof Kartongerellschaft mbH v. Commission* [1998] ECR II-1751, para 311
- (38) See e.g. Case C-185/97 *Coote v. Granada Hospitality Ltd.* [1998] ECR 5199, paras 21-23; Case C-13/94 *P v. S* [1996] ECR I-2143, para 18; Case 22/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18. Cf.: Opinion of Advocate General Trabucchi in Case 118/75 *Watson & Belmann* [1976] ECR 1185, at 1207. On the ECHR's recognition by other Institutions see *OJ C 103/1977*, at 1.
- (39) Case C-299/95 *Kremzow v. Austria* [1997] ECR I-2629, para 14; Opinion 2/94 *on Accession by the Community to the ECHR* [1996] ECR I-1759, para 33; Case C-260/89 *ERT v. DEP* [1991] ECR I-2925, para 41.
- (40) As well as the first Norwegian accession attempt.
- (41) Speech of the Council President in office Mr. Harmel, opening the negotiations between the Communities and the UK, Ireland, Denmark and Norway in June 1970, *Bull. EC 8-1970*, 24.
- (42) The wording of the communiqué is substantially based on the Commission's opinion of 1 October 1969, concerning the applications of the UK, Ireland, Denmark and Norway, *Bull. EC supp. 9, 10-1969*.
- (43) See also Hillion (2002): 405 on the adoption of the *acquis* as a necessary element of the enlargement process.
- (44) Art. 2 of various Acts of Accession: *OJ L073*, 1972; *OJ L346*, 1981; *OJ L302*, 1985; *OJ C241*, 1994; *OJ L236*, 2003.
- (45) Art. 4 of pre-Maastricht Acts of Accession: *OJ L073*, 1972; *OJ L346*, 1981; *OJ L302*, 1985; Art. 5 of post-Maastricht Acts of Accession: *OJ C241*, 1994; *OJ L236*, 2003.
- (46) Arts. 2 and 3 of post-Maastricht Acts of Accession: *OJ C241*, 1994; *OJ L236*, 2003.
- (47) Art. 3 of pre-Maastricht Acts of Accession: *OJ L073*, 1972; *OJ L346*, 1981; *OJ L302*, 1985; Art. 4 of post-Maastricht Acts of Accession: *OJ C241*, 1994; Art 5 of the latest Act of Accession: *OJ L236*, 2003.
- (48) European Commission "Europe and the Challenge of Enlargement", *Bull. EC supp. 3-1992*, para 12; Opinion of 19 January 1972, *JO L 73/3*, 1972. The important position of the ECJ jurisprudence is also reflected in Art. 3 of the UK European Communities Act of 1972.
- (49) (The Hague communiqué, point 13)

(50) Foreign Minister of Luxembourg Gaston Thorn, who presided at the last stage of the first enlargement negotiations called the question ‘what the Europe of tomorrow will be like and what those concerned were prepared to’ a ‘vital one’, see Puissechet (1975): x.

(51) Case 44/84 *Derrick Guy Edmund Hurd v. Kenneth Jones (Her Majesty's Inspector of Taxes)*, [1986] ECR 29.

(52) EMU forms part of the *acquis* for the countries of Central and Eastern Europe Article 4 of the 2003 Act of Accession, OJ L236, 2003.

(53) *Ibid.*, art. 3.

(54) There are several examples to illustrate this point. The changes of fisheries regime after the first enlargement to reflect the sea-faring nature of the acceding states: Arts. 100, 102, 203 of 1972 Act of Accession. OJ 1972 L 73.; inclusion of cotton, which only grows in Greece into the CAP: 1979 Act of Accession, Protocol No. 4. OJ 1979 L 291; special regulation of Nordic agriculture at the 4th enlargement: Art. 142 of 1994 Act of Accession. OJ 1994 C 241; provisions related to the Sami people: 1994 Act of Accession, Protocol No. 3; the limitations on the acquisition of secondary residences in Malta: Protocol 6, 2003 Act of Accession, OJ 2003 L 236 *etc.* In the context of the preparation of the last enlargement much has been said about the specificity of spring bird-hunting in Malta. The resolution of this issue in the course of the negotiations did not, however, amount to the introduction of a derogation, since the question was resolved within the auspices of the *acquis*, namely Art. 9 of the Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds OJ 1979 L 103, as clarified by Commissioner Verheugen in his answer to Written Question E-2554/02 by Catherine Stihler (PSE) to the Commission, OJ 280 E 2003/5.

(55) The length of transitional periods usually varies from 2 to 7 and in rare cases 10 years. See Hoffmeister (2002b): 87 *et seq.*

(56) Art. 9 of 2003 Act of Accession. OJ L 236/13, 2003.

(57) Art. 8 of the 1985 Act of Accession, OJ 302/23, 1985. The same wording can be found in Art. 9 of 2003 Act of Accession. OJ L 236/13, 2003.

(58) Case 203/86 *Spain v. Council* [1988], ECR 4598.

(59) Like disregarding the EU citizenship concept in the course of enlargement, for example. Cf.: Kochenov (2003b and 2005).

(60) See Fiis (1998a): 3; Fiis, (1998b) on specific nature of enlargement negotiations.

(61) For the concise history of CEECs – EEC relations see: de la Serre (1994); Smith (2004).

(62) On pre-accession assistance see Mresceau (2003): 12; Beurdeley (2003): 55; Guggenbühl and Theelen (2001); de Chavagnac (1996); Mayhew (1996); Deloche-Gaudez and Lequesne (1996); Lequesne (1994).

(63) Article 49(1) TEU contains a formula ‘may apply’, which cannot be interpreted as giving the applicant a right to join. The Claims made by the politicians in the early days of integration concerning the ‘legal and moral obligation on the EEC to accept new members’ are thus legally unfounded. See Nicholson and East (1987): 50, referring to the speech of the Belgian Foreign Minister Pierre Harmel at the Council meeting in Brussels on June 26 – 27, 1967.

(64) On Europe Agreements see: Beurdeley (2003): 45; Hoffmeister (2002c): 349 *et seq.*; Tucny (2000): 89; de la Serre (1994): 33; Lequesne (1994): 64; Maresceau (1993a); Maresceau (1993b).

(65) Not counting the fourth criterion addressed to the Union.

(66) For the analysis of the substance of this criterion see Kochenov (2004a).

(67) Presidency Conclusions of the Luxembourg European Council (12-13.12.1997), para 25. Interestingly, further on this statement was misquoted by the European Council itself. Referring to the conclusions of the Luxembourg European Council, the Cologne European Council (3-4.06.1999) stated that 'decisions on the opening of further negotiations can only be taken on the basis of the criteria established by the Copenhagen European Council', without referring solely to the Copenhagen political criteria. See Conclusions of the Presidency, para 59.

(68) 1999 Composite Paper of the European Commission, at 4.

(69) *Ibid.*

(70) With a sole exception of Turkey which did not satisfy the Copenhagen political criteria.

(71) European Commission *Agenda 2000 – Commission Opinion on Estonia's Application for Membership of the European Union*, Brussels, 15.07.1997. On the same day Opinions on other candidate countries (excluding Malta, whose application was suspended) were released. COM(1997) 2000 final.

(72) 1998 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 4.11.1998. All in all 12 reports were drafted. 1999 Regular Reports, released on 13.10.1999. All in all 13 reports were drafted. 2000 Regular Reports released on 8.11.2000. All in all 13 reports were drafted. 2001 Regular Reports released on 13.11.2001. All in all 13 reports were drafted. 2002 Regular Reports released on 9.10.2002. All in all 13 reports were drafted. And 2003 Regular Reports released on 5.11.2003. All in all 3 reports were drafted: for Bulgaria, Romania and Turkey.

(73) See: *1998 Composite Paper Reports on Progress towards Accession by Each of the Candidate Countries*, COM(1998) 712 final; and *1999 Composite Paper Reports on Progress towards Accession by Each of the Candidate Countries*, COM(1999) 500 final; *2000 Enlargement Strategy Paper Report on Progress towards Accession by Each of the Candidate Countries*, COM(2000) 700 final; *2001 Making a Success of Enlargement Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries*, COM(2001) 700 final, SEC(2001) 1744-1753; *2002 Towards the Enlarged Union Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries*, COM(2002) 700 final, SEC(2002) 1400-1412; *2003 Continuing Enlargement Strategy Paper and Report of the European Commission on the Progress towards accession by Bulgaria, Romania and Turkey*, COM(2003) 676 final.

(74) *Agenda 2000: for a Stronger and Wider Union* COM(1997) 2000 final, 15.06.1997.

(75) On Accession Partnerships see *e. g.* Maresceau (2003); Hillion (2002): 416; Inglis (2002).

(76) Council Regulation 622/98 *OJL* 85/1, 1998, adopted on the basis of Article 308EC.

(77) Hungary (31 March 1994); Poland (5 April 1994); Romania (22 June 1995); Slovakia (27 June 1995); Latvia (13 October 1995); Estonia (24 November 1995); Lithuania (8 December 1995); Bulgaria (14 December 1994); Czech Republic (17 January 1996) and Slovenia (10 June 1996).

(78) This led some scholars to outline a principle of ‘asymmetry’. See Maniokas (2000).

(79) Cf.: Puissechet (1975): 14. (Applying such a division to the texts of Arts.237EEC and 205Euratom).

(80) Rule 96(5) of the EP Rules of Procedure. See also Rule 86(2) on the assent procedure and Annex 2(6, 7, 8) to the Annex XIII ‘Framework Agreement on Relations between the European Parliament and the Commission’ to the EP Rules of Procedure. (Approved by the Conference of Presidents on 29 June 2000).

(81) Compare with the scholarly opinion issued before the first enlargement: ‘la Commission ne peut intervenir (tout comme le Conseil d’ailleurs) qu’*une seule fois* au cours de la procedure d’admission aux termes de l’article 237’. Soldatos and Vandersanden (1968): 681, fn. 36.

(82) During the negotiations concerning the accession of Austria, Finland and Sweden the General Affairs Council was used for the first time, instead of specialised Councils. See December 1992 Edinburgh European Council conclusions, *Bull. EC* 12-1992, point 1.5.; Falkner and Nentwich (2000): 15.

(83) The situation was different during the first (unsuccessful) application of the United Kingdom: the negotiations were conducted by the Member States which retained a considerable measure of autonomy, sometimes even having no common positions. Cf. Puissechet (1975): 9.

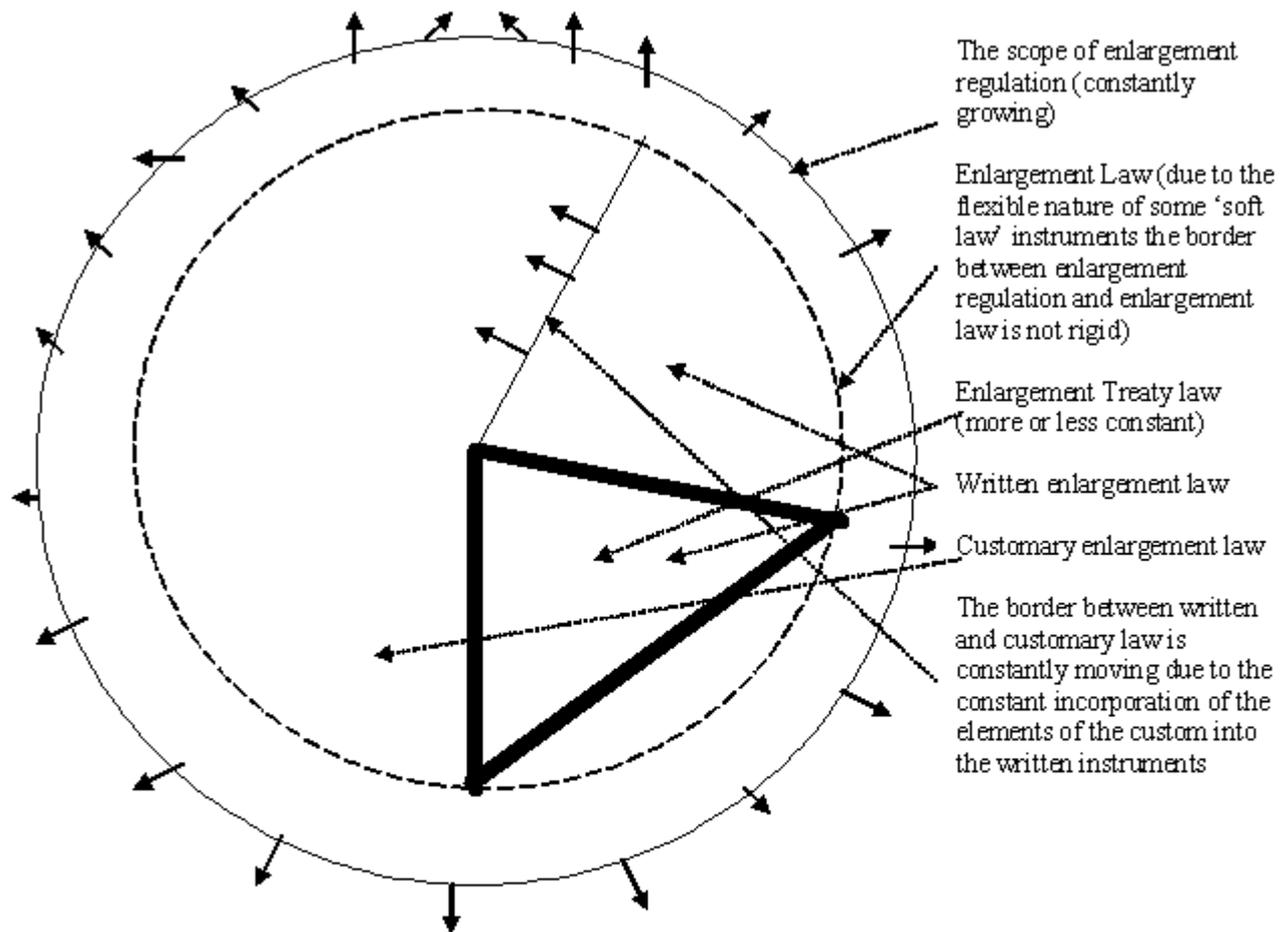
(84) In 1988 the EP passed a resolution stating that no accessions of new Member States would be approved until the democratic deficit is reduced. This threat has never been used by the EP. See Resolution of 15 September 1988, *OJ* C262, 1988; Weatherill and Beaumont, (1999): 144.

(85) Maniokas outlines ‘complexity’ as a separate principle of enlargement, although it is difficult to understand how it can be instrumental for the understanding of enlargement regulation. Maniokas (2000).

(86) Case 93/78 *Mattheus v. Doego* [1978] *ECR* 2203.

Figure 1

The structure and dynamics of contemporary enlargement regulation



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