

Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law

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European Integration online Papers (EIoP) Vol. 8 (2004) N° 10;
<http://eiop.or.at/eiop/texte/2004-010a.htm>

Date of publication in the  : 12.7.2004

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Keywords

European law, enlargement, democracy, democratisation, Copenhagen criteria, rule of law, European Commission, European Council, Central and Eastern Europe, political science, law

Abstract

The paper makes an attempt 'to map' the Copenhagen criterion of democracy and the rule of law, one of the main instruments governing the biggest enlargement in the Union history. The meaning of it, however, is still as vague today as it was more than ten years ago, at the time of introduction of the criterion. How should democracy and rule of law be interpreted in the context of enlargement? What exactly is required of the candidate countries in order to meet this criterion? Based on the analysis of the documents released by the European Commission, the Council of Ministers and the European Council in the course of the application of the criteria and taking the experience of the previous enlargements into account, the paper outlines the core structure of the criterion and assesses the degree of change brought to the enlargement regulation by the conditionality policy applied by the Union. The paper concludes that the assessment of democracy and the rule of law criterion was not really full, consistent and impartial and that the threshold to meet this criterion was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria are met.

Kurzfassung

Dieser Artikel versucht eines der Hauptinstrumente für die größte Erweiterungsrunde in der Geschichte der Union, nämlich die Kopenhagener Kriterien der Demokratie und des Rechtsstaats nachzuzeichnen. Die Bedeutung dieser Kriterien ist allerdings auch heute noch so vage wie vor zehn Jahren zur Zeit ihrer Einführung. Wie müssen Demokratie und Rechtsstaat im Zusammenhang mit der Erweiterung interpretiert werden? Was genau wird eigentlich von den Kandidatenländern verlangt, damit sie diese Kriterien erfüllen? Der Artikel zeichnet – auf Basis einer Analyse der einschlägigen Dokumente von Kommission, Ministerrat und Europäischem Rat im Laufe der Anwendung der Kriterien sowie unter Einbeziehung der Erfahrungen bei früheren Erweiterungsrounden – die Grundstruktur der Kriterien nach und bewertet die Veränderungen in der einschlägigen Regulierung, die durch die Unionspolitik herbeigeführt wurden, dass die Erfüllung der Kriterien eine Aufnahmebedingung seien. Der Artikel kommt zu dem Schluß, dass die Bewertung der Kriterien Demokratie und Rechtsstaatlichkeit nicht umfassend, nicht konsistent und nicht unparteiisch war und dass der "Schwellenwert" zur Erreichung der Kriterien sehr niedrig war. Im Ergebnis hat die Kommission es nicht geschafft, zwischen dem aktuellen Status der Reformbemühungen in den Kandidatenländern einerseits und der Anerkennung, dass die Kopenhagener Kriterien erfüllt sein, andererseits eine überzeugende argumentative Beziehung herzustellen.

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1

Introduction ↑

With regard to the primary law of the European Communities it might seem absolutely clear what kind of criteria an applicant state should meet in order to have reasonable expectations to join the European Union. According to Article 49 TEU every candidate should be a European state, sharing the values of Article 6(1) TEU, *i.e.* democracy, human rights protection and the rule of law.

In addition to the primary law of the Union, however, the accession of the new members is also governed by a set of, arguably, 'quasi-legal' means (Hillion, 2002, 402), including the Copenhagen criteria (Presidency Conclusions, Copenhagen 31-22 June 1993) and a vast body of documents adopted by the Commission, the Council and the European Council, regarding their implementation (see *infra*). The scope, meaning and legal effect of these documents is much less clear.

It is possible to predict that the Copenhagen criteria will continue playing an important role in the regulation of the future rounds of enlargement, including, of course, the one to accommodate Romania, Bulgaria and, probably, Croatia, which has recently been awarded a candidate country status. At the same time, the broad and all-inclusive character of the criteria creates uncertainties in the candidate countries willing to achieve compliance with the Union's demands in the shortest

possible time and has not been clarified enough by the Union.

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Trying to bridge this gap, the paper will identify a detailed meaning of the Copenhagen political criteria of Democracy and the Rule of Law based on the analysis of the primary sources and on the experience of the previous enlargement rounds. Not aiming at providing an analysis of the concepts of democracy and the rule of law from a theoretical viewpoint, the article will focus on the discussion of the meaning conferred to them by the European Union for the purposes of the regulation of the enlargement process. It is far from being clear what kind of democracy and what kind of rule of law the Union requires the candidate countries to adhere to. It is up to the researchers to find out what European Council actually included among the requirements of democracy and the rule of law.

Focusing on the Copenhagen ‘political’ criteria and especially on the requirement to have the institutions guaranteeing democracy and the rule of law in place, the paper will proceed on the basis of the assumption that the famous accession criteria and the political criteria in particular, as formulated at Copenhagen are not clear and precise enough in order to serve as a real measurement tool for the progress made by the candidate countries towards accession (Engelbrekt 2002, 46).

The 1993 Copenhagen European Council, aiming at simplification, improvement and ‘depoliticisation’ of the enlargement regulation, (since, in principle, all the applicant countries were ‘destined to join the Union on the basis of the same criteria and [...] on an equal footing’ (Luxembourg European Council 12-13 December 1997, §10), in reality made a giant step towards vagueness and unpredictability (Hillion 2002, 402), requiring the countries willing to join to comply with criteria so vague and general, that the principles of assessment of compliance (non-compliance) with them were far from being clear. Thus, ‘despite this apparent ‘depoliticisation’, the accession process nevertheless remains a political one’ (Inglis 2000, 1209).

It took both the Union and the candidate countries four long years before the meaning of the criteria was to some extent clarified. The situation arose when all the countries with aspirations for membership had to do their best to align their legal and political systems with a general political statement without getting any guidance whatsoever from the Union – the inventor and the enforcer of the criteria. The meaning of the political criteria only started to become clear in 1997, upon the release of the Commission’s Opinions on the Application for Membership (allowed for by Art. 49 TEU) made by Central and East European countries and the Agenda 2000.

Thus the ‘predictable and just’ enlargement practice was in fact more like a game of guesses. By stating this we should not however, disregard the historical approach to the meaning of the concepts behind the criteria in the context of previous enlargements: the analysis of the role democracy and the rule of law played back then can undoubtedly shed some light on the meaning of the Copenhagen political criteria.

In the light of the pre-Copenhagen developments in the enlargement law, the paper will also address the question whether the level of scrutiny of the state of democracy in the candidate countries has changed since the introduction of the Copenhagen political criteria.

Composed of four parts, the paper will proceed as follows: firstly, based on the historical analysis of the legal regulation of enlargements, the roots and hierarchy of the Copenhagen criteria will be identified; secondly, the paper will outline the structure of the Copenhagen political criteria based on the documents released by the Union; thirdly a number of substantive components of the Copenhagen criterion of democracy and the rule of law will be discussed. The paper will conclude

with an overview of the resulting set of the elements of the criteria and outline their possible implications on the legal regulation of the future enlargement rounds.

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I. Democracy and the Rule of Law before Copenhagen, Hierarchy of the Copenhagen Criteria [↑]

Democracy and the rule of law have been part of enlargement criteria from the moment of creation of the ECSC.

References to these principles can be found (explicitly or implicitly) in the preamble to the draft Treaty Establishing a Constitution for Europe,⁽¹⁾ preamble to the EC Treaty, Opinions of the Commission,⁽²⁾ and in numerous declarations of the Council, Commission and the European Parliament.⁽³⁾ The same applies to the ECJ jurisprudence.⁽⁴⁾ All these documents put the principles in question and especially the principle of democracy among the milestones of European integration.

It is unjustified to state that these principles first appeared in the Copenhagen criteria and had later been included into the list of requirements that each candidate country has to comply with in order to become a member of the European Union by way of reference to Article 6(1) TEU. The introduction of the reference to Article 6(1) TEU can be viewed as a codification of the existing customary regulation (Fierro 2003, 137).

All the three articles regulating the enlargement of the initial Communities (Art. 98 ECSC, Art. 237 EEC and Art. 205 EURATOM) were allowing ‘European states’ to apply for membership. No direct reference to the principles of democracy and the rule of law has been made, which does not mean that democracy and the rule of law were less important than other principles regulating enlargements.

As early as in 1952, Robert Schuman proclaimed that ‘cette Europe est ouverte à tous les pays européens libre de leurs choix’ (Hoffmeister 2002a, 93), a principle, reflected in the Copenhagen political criteria 41 years later.

The criterion of Europeanness present in the Treaties was interpreted very broadly, sometimes to include the principles of democracy and the rule of law. Academic literature discusses possible implications of different definitions of Europeanness (Fišne 2003; Hoffmeister 2002a), mostly focusing on the geographical (Hoffmeister 2002a; Preston 1997, 213) and civilizational understandings, the latter to include democracy and the rule of law as part of the ‘European political tradition’.

The European Commission, too, clearly chose a combined approach, not limiting the definition of Europe to geographical factors, stating that the term ‘European’ ‘combines geographical, historical and cultural elements’ (European Commission 1992, point 7) – thus following a scholarly approach already formulated on the eve of the first enlargement of the Communities:

[L]e terme “européen” ne constitue pas seulement une limitation géographique; il a également un contenu historique, culturel, économique et politique, et désigne les pays qui font ou qui pourraient faire partie de l’Europe libre’. (Soldatos and Vandersanden 1968, 687)

The importance of the principles of democracy and the rule of law in the context of enlargements was reflected in the enlargement practices of the Communities: the Association Agreement with Greece was frozen after the *coup d'Etat* of the colonels (Contogeorgis 1978, 23); the application of the Franco's Spain to join the Communities had been left unanswered because of the dictatorial nature of the regime in place (Carrillo Salcedo 1978, 170). That is to say, the democratic system in the applicant countries has always been a precondition for the membership of the Communities.

An even more explicit inclusion of democracy into the list of necessary requirements to be met before accession to the Communities was made by the Commission in 1978, when it clarified the meaning of Art. 237(1) EEC, (the predecessor of Art. 49 TEU) in its submission in *Mattheus v. Doego*(5) case, also bringing democracy and geography together:

Article 237 should be interpreted as follows:

It permits the accession of the 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.(6)

Two important conclusions follow from the submission.

Firstly, since nothing is said about the achievement of a certain level of economic development, economy was not at issue (and did not in fact make part of Art. 237(1) EEC) that is to say, historically speaking, political criteria had absolute priority over the economic ones. That is certainly reflected in the enlargement practice before Copenhagen. The largely unfavorable economic assessment of Greece's application for membership made by the Commission (Preston 1997, 50 et seq.) was simply disregarded(7) by the Council.(8)

Secondly, it is clear from the submission that the level of scrutiny exercised by the Communities in the field of democracy and human rights was minimal: the requirement to have an established democracy was limited to the constitutional guarantees, not taking into account the real situation in the acceding countries.

Given both these observations, a legitimate question arises: did the situation remain the same after the adoption of the Copenhagen criteria or these criteria completely changed the enlargement practice?

As far as the hierarchy of the criteria is concerned, the Copenhagen criteria being clearly designed as a set of three elements of equal importance were very soon modified by the European Council and the Commission in order to accommodate a well established pre-Copenhagen tradition of giving priority to the state of democracy in the candidate countries in the course of accession.

The key documents to reflect such a modification are the Presidency Conclusions of the Luxembourg European Council (12-13 December 1997), which held that 'compliance with the Copenhagen political criteria is a prerequisite for opening of any accession negotiations' (para 25)(9) and the 1999 Commission's Composite Paper, which made an important step towards 'striking the right balance of keeping up speed [of enlargement] without sacrificing quality' (1999 Composite Paper, 4). In the Paper the Commission followed the European Council in altering the conditionality principle based on the Copenhagen criteria. From that time on it was recommended to open negotiations with all the countries satisfying only the Copenhagen political criteria, thus giving them priority over two other groups of criteria adopted by the 1993 Copenhagen European Council.

The Commission recommended ‘to stress the absolute priority of the Copenhagen political criteria before beginning and continuing the accession negotiations with any candidate country’ (1999 Composite Paper, 30). It became clear that the EU ‘is not ready to start the negotiations with a country if there are any doubts concerning the democratic conditions, the respect for human rights and the protection of minorities’ (Verheugen 2000, 441). This principle is in no way a *nouveauté* for the enlargement practice, especially taken into account the examples of Greece and, to a lesser extent, Spain and Portugal. Thus the Commission, together with the European Council reinvented the old and well established practice introducing, a certain deviation from the initial Copenhagen idea.

Of course, the fact that a candidate country satisfies the political criteria does not mean that it can enter the Union without meeting the economic conditions, as the examples of Bulgaria and Romania show.⁽¹⁰⁾ Thus there is a clear deviation from the previous enlargements where the country could join the Union notwithstanding the negative Commission’s Opinion on the state of this country’s economy.

Knowing that the hierarchical arrangement of the criteria with priority given to the political conditions of guaranteeing democracy, human rights protection and the rule of law has not changed since the Copenhagen European Council conclusions of 1993, it is important to know whether the level of scrutiny of democracy and the rule of law has changed compared to just constitutional guarantees required at the time of *Mattheus*.

The Commission answers this question in the affirmative. From the Composite Papers it is possible to conclude that the whole approach of the Commission to the assessment of democratic reforms in the candidate countries has changed since *Mattheus*. The requirement to have constitutional guarantees in place has been reinforced by the principle of ‘look[ing] at the way democracy functions in practice, instead of relying on formal descriptions of the political institutions’ (1998 Composite Paper, 3). It is thus possible to conclude that the constitutional guarantees alone without any practical implementation would not stand the scrutiny and would not allow the candidate to meet the Copenhagen political criteria. The assessment of compliance of the candidate countries with the Copenhagen criteria is well documented, which allows the researchers to trace the implementation of this ‘strict scrutiny’ principle by the Commission in practice.

It follows that in order to give an answer to the question whether the character of the assessment of democracy and the Rule of Law in the candidate countries has changed since the 1993 Copenhagen summit it is necessary to analyse a block of documents related to the implementation of the Copenhagen political criteria and their content, which will also bring us to the achievement of the goal of the paper, *i.e.* mapping the criterion of Democracy and the Rule of Law as understood by the Union Institutions.

II. The structure of the Copenhagen political criteria as follows from the Copenhagen-related documents

II.a. Copenhagen-Related Documents

The 1993 Copenhagen European Council, while having established the criteria, did not clarify the principles for the assessment of the progress towards meeting them or the actual means to measure the conformity with them, stating only that ‘the European Council will continue to follow closely the progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions’.

The European Council was doing so for a number of years mostly limiting itself to regular confirmations of the policy (Essen European Council 1994; Cannes European Council 1995; Madrid European Council 1995) chosen at Copenhagen and to the monitoring of the progress (Madrid European Council 1995, Annex 6) in relations with the Associated Countries (on Europe Agreements see Beurdeley 2003; Hoffmeister 2002b; Maresceau 1993a, 1993b). Only the Madrid European Council (15 – 16 December 1995) made the first move⁽¹¹⁾ towards making the new enlargement a reality, asking the Commission to prepare the Opinions on Applications for Membership of the Union made by Central and East European countries,⁽¹²⁾ as required by Article 49(1) TEU (Art.O⁽¹⁾ TEU at that time) in order to enable the Opinions to be ‘forwarded to the Council as soon as possible after the conclusion of the IGC’ (Madrid European Council 1995; Florence European Council 1996) and ‘to embark upon preparation of a composite paper on enlargement’ (Madrid European Council 1995). The Composite Paper, mentioned by the Amsterdam European Council (16 – 17 June 1997) as a ‘Comprehensive Communication’ was not included in the list of documents that the Commission had to draft in relation to the accession process according to the TEU. At Amsterdam it was established that the Communication had to contain ‘the main conclusions and recommendations from the Opinions and give its views on the launching of accession process including proposals on reinforcing pre-accession strategy and further developing pre-accession assistance building on ongoing reforms of PHARE’ (Amsterdam European Council 1997), thus summarising the Opinions and providing an assessment of the achievements of the candidate countries with regard to meeting the Copenhagen criteria.

Upon the presentation of such a Communication entitled ‘Agenda 2000’ on July 15, 1997 (released together with the Opinions on the Applications of ten CEE Countries for Membership of the European Union,⁽¹³⁾ which followed the Decisions of the Council of Ministers to implement the procedure of Art.O TEU (now Art.49 TEU)⁽¹⁴⁾), a new phase in enlargement regulation started. The release of yearly progress reports, stating whether each of the candidate countries met the criteria, assessing the preparedness of the candidates for accession, accompanied with a summarizing document⁽¹⁵⁾ containing ‘a synthesis of the analysis in each of the regular reports as well as a series of recommendations [and] also set out the state of play on the negotiations and the reinforcement of the pre-accession strategy’ (1998 Composite Paper, 1), aimed at the assessment of the progress made by the candidates towards meeting the Copenhagen criteria. This enabled the Union to make the criteria not just a ‘wish-list’ or a statement of expectations, but a workable tool in governing the accession. Making the annual assessment of compliance with the Copenhagen criteria a reality, the principles of the evaluative and inclusive character of enlargement were proclaimed: the Luxembourg European Council (12 – 13 December 1997) stated that all the candidate countries are ‘destined to join the European Union on the basis of the same criteria and [...] on an equal footing’ (Luxembourg European Council 1997, para 10). Once the criteria are recognised to be met, the Commission and other Institutions do not lose the right to return to the issue later. An example for this is an attempt made by the European Parliament to return to the issue of the Copenhagen political criteria in the context of the Romanian application, in the beginning of 2004.⁽¹⁶⁾

Six rounds of Progress Reports have been released by now,⁽¹⁷⁾ every round being accompanied by an analytical Paper.⁽¹⁸⁾ Following the requirement of the Madrid European Council, two of such Papers (1998, 1999) being entitled ‘Composite Papers’,⁽¹⁹⁾ while four others – ‘Strategy Papers’.⁽²⁰⁾ After the closure of accession negotiations with the candidate countries and signing the 2003 Treaty of Accession,⁽²¹⁾ the release of Commission documents assessing the progress continued,⁽²²⁾ which lead to the issuance of ten Comprehensive Country Monitoring Reports⁽²³⁾ and a Comprehensive Monitoring Report⁽²⁴⁾ summarizing their findings.

In order to enable this incredible amount of documents to make a difference in the enlargement regulation, an ‘enhanced pre-accession strategy’ consisting of increased pre-accession aid and the introduction of the Accession Partnerships (Maresceau 2003; Inglis 2002; Hillion 2002, 416) was introduced by the Luxembourg European Council. The second part of the strategy is of special interest to us. Intended to be a ‘new instrument and a key-feature of the enhanced pre-accession strategy’ (Luxembourg European Council 1997), the Accession Partnerships made the Copenhagen criteria legally enforceable (Inglis 2000, 1186), since the reception by the candidates of financial aid from the Union was made dependent on their performance related to meeting the Copenhagen criteria.⁽²⁵⁾ Part 3 of the Partnerships states that ‘the main priority for each candidate State relates to their ability to take on the obligations related to the Copenhagen criteria’.

Accession Partnerships are adopted by the Council on the proposal of the Commission and aims at articulating the most important steps to be made by the candidate countries in order to achieve compliance with the Copenhagen criteria. The legal ground for their adoption was Council Regulation 622/98 (adopted on the basis of Art.308 EC (ex. Art.235 EC)), which was provided for by the 1997 Luxembourg European Council.

Four rounds of Accession Partnerships have been decided concerning the majority of the candidate countries by now: in 1998,⁽²⁶⁾ 1999⁽²⁷⁾ (with the exception of Cyprus, Malta⁽²⁸⁾ and Turkey⁽²⁹⁾) and in 2002.⁽³⁰⁾ The fourth Accession Partnership round, that of 2003⁽³¹⁾ covers the three remaining candidate countries.

A vast number of documents were drafted in relation with the implementation of the Copenhagen criteria. It is, however, important to point out the fact that there is no single document to clarify the meaning of the criteria. Only a complex analysis of all the documents can help with the discovery of the actual set of concrete developments necessary in order to meet the criteria. Taken into account the considerable number of documents, it would be practical to classify them into two main groups: general documents, dealing with a number of candidate countries and documents assessing the progress made and compliance with the criteria by single candidate countries. Only the textual analysis of these documents will allow us to answer the question whether the level of scrutiny exercised by the Commission has really been changed since *Mattheus*.

The first group includes yearly Composite and Strategy papers, Agenda 2000 and 2003 Comprehensive Monitoring Report. The second group consists of a much wider range of documents: 1997 Opinions, six rounds of Regular Reports by the Commission, ten 2003 Comprehensive Country Monitoring Reports and the Accession Partnerships. (the overall body of documents belonging to both these groups will further on be referred to as “Copenhagen-related documents”).

II.b. Structure and Relevance of the Copenhagen-Related Documents

Documents belonging to both groups in our classification are organised to follow the structure of the Copenhagen criteria, which enables us to clearly identify the sections which are of special interest for the purposes of the present paper. The structural similarities between all these documents can be explained by the fact that the 1997 Luxembourg European Council, upon giving a positive assessment to Agenda 2000, deeply rooted in the criteria, recommended the Commission to follow the Agenda’s methodology in the future.

All the Opinions on the Candidate Countries' Applications for Membership released on July 15, 1997 contain the text of the Copenhagen criteria in full (All the Opinions, 5) as well as chapters, specifically dedicated to them: 'B. Criteria for Membership' (which is the core of the opinions, chapter A being the introduction and chapter C being the conclusion), divided into subchapters following the structure of the Criteria themselves, the first subchapter being 'B.1. Political Criteria'.

Regular Reports of the Commission on the progress of the candidate countries follow the structure of the 1997 Opinions, aiming *inter alia* at 'analys[ing] the situation in respect of the political conditions set by the European Council (democracy, rule of law, human rights, protection of minorities)' (All Regular Reports, A.a.), and containing, just as the Opinions, subchapter 'B.1. Political Criteria', on which the present paper will focus.

The structure of the Comprehensive Monitoring Reports on Accession Countries' Preparation for Membership is different from that of the Opinions on the Application for Membership and of the Regular Reports on Progress towards Accession, as the Monitoring Reports are built around the chapters of the *acquis*. At the same time, they certainly deal with the assessment of the state of democracy and the rule of law in the acceding countries further promoting the compliance with the Copenhagen political criteria. In the 2002 'Towards the Enlarged Union' Strategy Paper, the Commission itself recognised that there are a 'number of areas where further improvements need to be made in the context of *political* and economic criteria' (italics are mine). That is to say, the fulfilment of the political criteria is still on the agenda, even after signing the Treaty of Accession. The same logic applied to the opening of negotiations. The Commission's statement that the criteria are met does not mean that in the candidate countries 'everything is perfect' (Maresceau 2003, 25).

The relevant part of the Monitoring Reports is Section 1 of chapter 'C. Commitments and Requirements Arising from the Accession Negotiations', addressing a set of five issues: 1. Administrative and Judicial Capacity, 2. Public Administration, 3. Judicial Capacity, 4. Anti-corruption Measures and 5. Translation of the *acquis* into the language of the candidate country.

The general structure of most of the Composite Papers and Strategy Papers is more or less the same. One chapter (usually called 'Progress by the candidate countries in meeting the membership criteria') of every Paper usually reproduces the structure of the Copenhagen criteria,⁽³²⁾ including three sub chapters: 1. Political Criteria; 2. Economic Criteria and 3. Other Obligations of Membership. The 2002 Strategy Paper contains four sub-chapters in the Chapter scrutinizing the Copenhagen criteria, the last sub-chapter being 4. Overall Conclusions and Recommendations. Only the organisation of the 2003 Strategy Paper is different from all the others. The document is structured following a country by country logic of assessment. Elements of two chapters of this document are of interest for the purposes of the present research: Chapter 'B. Bringing Bulgaria and Romania into the Union' (and especially sub-chapters 'B.1. Progress made by Bulgaria in meeting the membership criteria' and 'B.2. Progress made by Romania in meeting membership criteria') and Chapter 'C. Turkey in the enlargement process' (and especially sub-chapter 'C.1. Progress made by Turkey in meeting the membership criteria').

The 2003 Comprehensive Monitoring Report is structurally based on the chapters of the *acquis* and thus differs greatly from all the Strategy Papers and Composite Papers.

The Accession Partnerships are also rooted in the Copenhagen criteria.

Thus, the narrowed down block of documents adopted in relation to the Copenhagen political criterion dealing with democracy and the rule of law contains the following elements:

- a. Sub-chapters 'B.1. Political Criteria' of the Commission's 1997 Opinions.
- b. Sub-chapters 'B.1. Political Criteria' of the Commission's Regular Reports.
- c. Sub-chapters 1. of Chapters 'C. Commitments and Requirements Arising from the Accession Negotiations' of the Commission's Monitoring Reports.
- d. Sub-chapters '1. Political Criteria' of the Composite /Strategy Papers' Chapters 'Progress by the candidate countries in meeting the membership criteria' (until 2002) and sub-chapters B.1., B.2. and C.1. of the 2003 Strategy Paper.
- e. Some elements of the Comprehensive Monitoring Report on the preparedness of the ten acceding countries for EU membership.
- f. Sub-chapters 'Political Criteria' of the Accession Partnerships.

Having outlined the scope of the sources to be used for the analysis, the paper will proceed by framing the structure of the elements of the sources relevant for the present discussion. The comparative overview of the structures of these documents will enable us to make first conclusions concerning the content of the Copenhagen political criteria.

II.c. The Structure of the Copenhagen Political Criteria

The text of the criteria includes several separate elements. Based on the textual interpretation of the whole list it is possible to outline four main components:

1. Democracy;
2. The Rule of Law;
3. Human Rights;
4. Respect for and protection of minorities.

The text of the Community documents dealing with the criteria, however, offers a slightly different, somewhat simpler classification. Sub-chapters B.1. 'Political criteria' of the Commission Opinions and Progress Reports follow a binary structure: B.1.1. 'Democracy and the Rule of Law' and B.1.2. 'Human Rights and Protection of Minorities.' The same division can be found in the Accession Partnerships. That is to say, a binary division of the Copenhagen political criteria is introduced.

The text of the sub-chapters of the Composite/ Strategy Papers is more monolithic. It is possible, however to make a distinction between the elements of the set of criteria, especially bearing in mind that these Papers represent a concise summary of the most important findings and conclusions made by the Commission in the individual country Progress Reports.

Before outlining the classifications of the Copenhagen political criteria introduced by the Commission Papers it is necessary to make one general observation: contrary to the Commission's rhetoric concerning the 'absolute priority' (1999 Composite Paper, 29) and importance of the political criteria, a record-low space in the Papers is reserved for the political criteria analysis: the sub-chapter dealing with the political criteria is usually around 2 pages long,⁽³³⁾ which is not much, especially compared to a dozen of pages dealing with economic conditions. Of course, the number of pages devoted to a certain problem might be viewed as not important, but the Commission makes it too short, causing disappointment in scholarly literature (see *e.g.* Maresceau 2001, 19) and contradicting its own principle of full and impartial assessment. It is difficult to explain the reasons

for the reluctance of the Commission to provide more details concerning the Copenhagen political criteria.

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It is obvious at the same time that any analysis of the state of democracy, rule of law, protection of human rights and minorities in thirteen countries squeezed into two pages is deemed either to be purely superficial or to describe a situation in 13 ideal democracies. Unfortunately, as we know from the Federalist papers, humans are not angels and the situation in the candidate countries is very far from any democratic ideal, as the Regular Reports themselves tend to demonstrate.

Notwithstanding the limited space dedicated to the assessment of the political criteria in the Papers, accents made by the Commission at these two or three pages of every Paper might provide important food for thought. First of all, the binary division of the political criteria, which is a common practice for the Opinions, Regular Reports and Accession Partnerships, is abandoned in the Papers for the sake of new classifications.

1998 Composite Paper structures the 'Political criteria' subchapter the following way:

1. Democracy and the Rule of Law;
2. Human Rights;
3. Minorities

The 1999 Composite Paper demonstrates an even further deviation from the classification given in the Reports and Opinions, partially adopting a country-by country approach. In relation with the Copenhagen political criteria it discusses the following topics (in order of appearance in the Paper):

1. Slovakia;
2. Turkey;
3. Strengthening of the judiciary;
4. Corruption;
5. Children's rights in Romania;
6. Minorities;
7. Roma;
8. Hungarian minority

It is clear that the Paper focuses on the situation in the most problematic countries and areas, without adopting any balanced assessment of the state of play in the area of the political criteria.

The approach taken by 2000 Paper is different again. The overall structure of the sub-chapter 'Political criteria' is better articulated than that contained in the previous paper. The sub-chapter contains two parts: a) 'Overall development' and b) 'Conclusions'. The first identifies the main problem-areas related to the political criteria (highlighted in bold script):

1. Public administration;
2. Judiciary;
3. Corruption;
4. Childcare institutions in Romania;
5. Trafficking in women and children;
6. Gender equality;
7. Minorities;
8. Roma;

9. Situation in Turkey.

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This list demonstrates how wide the scope of the political criteria is according to the Commission.

2001 Paper keeps the sub-division of the ‘Political criteria’ sub-chapter into ‘Overall development’ and ‘Conclusions’ and contains the same list of problem-areas, adding a passage on the problems related to pre-trial detention. The same structure is kept in 2002 Paper with the only difference that the number of problematic areas is slightly decreasing.

All in all, it is clear that the general structure to address the question of assessment of compliance with the political criteria was formulated in the Commission Papers only in the year 2000 and focuses on the most problematic areas, rather than on the general description of the situation related to the candidate countries’ progress. It is thus less instrumental for the present research than the structure adopted by the Opinions and Regular Reports, which remained unchanged starting with the 1997 Opinions until the year 2002 (*i.e.* until the conclusion of accession negotiations with 10 candidate countries) and clearly follows the wording of the Copenhagen political criteria.

It is also possible to state that the way the structure of the Papers was changing as well as the extremely small amount of space dedicated to the political criteria in the Papers talks for the superficial character of analysis contained therein. Upon reading the Papers not only is it unclear what the Copenhagen political criteria mean in detail (notwithstanding the fact that the complete wording of the criteria is present in every Paper), but also on which grounds this or that issue had been picked for discussion, let alone the causes for structural differences between the Papers.

Following the classifications proposed by the Institutions, the first proposed structure of the political criteria, composed of the four elements has to be dismissed. It is reasonable to follow the structure of the Opinions /Regular Reports, which contains a ‘Democracy and the Rule of Law’ criterion without dividing it into two. The Commission does not make a distinction between ‘democracy’ and the ‘rule of law’, preferring to place them together. Meanwhile, this distinction is an obvious and very important one. The literature suggests that the principle of democracy and the rule of law have been understood by the Commission in the context of enlargement in the form of an ‘organic combination’ (Hoffmeister 2002a, 94) of the two.

II.d. An ‘Organic Combination’ of Democracy and the Rule of Law

Frank Hoffmeister rightfully pointed to the fact that the ‘principles of *democracy* and the *rule of law* are two distinct concepts’ (Hoffmeister 2002a, 93). How justifiable is it to merge them to create one ‘organic combination’?

The rule of law has been one of the milestone principles of the law of the European Communities right from the moment of their creation. Although not being part of the Treaties until Maastricht,⁽³⁴⁾ it certainly had played a very important role in the field of Community law before (Arnold 2002; Fernandez Esteban 1998; Mackenzie Stuart 1977; Bebr 1965). The ECJ also stated that “the EEC Treaty, albeit concluded in the forms of an international agreement, none the less constitutes the constitutional charter of a Community based on the Rule of Law”.⁽³⁵⁾

At this point it might be necessary to recall that the ‘Rule of Law’ is not only a Community law term, as it is lying ‘at the crossroads of different constitutional traditions’ (Fernandez Esteban 1998, 65). Practically, the Treaty refers to different national concepts, depending on the language, as the English term does not have exact translation in other European languages (Fernandez Esteban 1998, 66). The Rule of Law in EU law thus coexists with *Etat de droit*, *Rechtsstaat* and other national doctrines of the Member States, which, while being close in meaning, are however not identical (Hoffmeister 2002a, 94). This is to say that in order to achieve consistency in the interpretation of the Treaties in all the Member States, the Rule of Law at the Community level cannot be understood the same way as a corresponding concept (*Etat de droit*, *Rechtsstaat*) is understood in the national legal order. An ‘autonomous Union concept of the rule of law needs to be identified’ (Arnull 2002, 240). Since the Treaties are silent on this subject ‘not indicat[ing] which meaning should prevail in the Community law context’ (Hoffmeister 2002a, 94; also Arnull 2002, 240), it is necessary to turn to scholarly authority. Lord Mackenzie Stuart characterised the Rule of Law in Community Law as follows: ‘those who administer the Communities are themselves subject to limitations imposed by law and that those who are administered have rights in law which must be protected’ (Mackenzie Stuart 1977, 3).

But how well would such a definition fit within the framework of the Copenhagen political criteria? The Criteria addressed to the reforming candidate countries should definitely be understood in the light of the national concepts existing in the candidate countries and corresponding to the Rule of Law. Being a document definitely belonging to the Community legal order, the Copenhagen criteria, however, are aimed at outlining the necessary level of achievements in the field of the national reform required of the candidate countries in order to become members of the European Union. Thus the Community definition, once formulated, will hardly be helpful in depicting of the Rule of Law requirement as part of the Copenhagen political criteria. The rule of law included into the Copenhagen criteria definitely belongs to the national legal systems of the candidate countries, which corresponds to the principle that the ‘Communities rest on the concept that Member States are free and democratic societies which share the belief that relations between citizen and the state should rest upon the rule of law’ (Mackenzie Stuart 1977, 5 and 104).

The concept includes several necessary elements, which remain in every democratic legal system and to a large extent stem from the British doctrine. Dicey characterised the rule of law the following way: ‘This peculiarity of our polity is well expressed in the old saw of the Courts: “La ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera.”’ (Dicey 1893, 174) According to Arnull, a modern vision of the concept usually includes the following elements:

‘Laws must be an effective guide to action, they must be publicised, reasonably clear and prospective, rather than retrospective in effect. [...] There must in addition be an independent and impartial judiciary with responsibility for resolving disputes over precisely what the law requires and providing effective remedies where the law is breached. The judiciary must respect the rules of natural justice and be accessible to those who claim that their rights have been infringed. Controversies must be decided timeously and according to rational and reasonably predictable principles. Judgements and the reasoning on which they are based must be made public so that they can guide future conduct and be the subject of critical scrutiny’. (Arnull 2002, 240-1)

The principle of **democracy** is usually understood as providing necessary guarantees for people to participate in governance. Just as in the case of the rule of law, the principle of democracy included into the Copenhagen political criteria is clearly different from that applying to the Union at large. Multiple studies suggest that in case democracy is in principle possible outside a nation state, its understanding at the national and at the Community level might be different (Cf.: Mancini 2000; Weiler 1997; 1995; Grimm 1995 and Höreth 1998 (for the summary of the debate)).

Dahl suggested a list of criteria for a democratic process (Dahl 1989, 106-14), which is instrumental in clarifying what democracy is about. Those criteria include effective citizens' participation (citizens should have adequate and equal opportunity to express their preferences in the course of taking binding decisions, placing questions on the agenda and expressing reasons underlying their choice); voting equality at the decisive stage (the choice expressed by one citizen is equal to that expressed by any other); enlightened understanding (adequate and equal opportunity given to each citizen to discover and validate the choice which would better suite his/her interests) and control over the agenda (the opportunity to decide how matters should be placed on the agenda exclusively belongs to citizens).

In the context of the Copenhagen criteria democracy is usually described in a much narrower way. Hoffmeister characterises the principle of Parliamentary Democracy as follows:

‘Parliamentary democracy means, in essence, that fair and free multiparty elections must be held on a regular basis for the creation of a free Parliament so that the people take part in the exercise of public power’ (Hoffmeister 2002a, 94).

Upon making a brief outline of the meaning of democracy and the rule of law, theoretically following from the Copenhagen criteria, the difference between the two concepts is apparent.

Merging them might thus appear to be problematic but not impossible. The paper will proceed with the analysis of the body of the Copenhagen-related documents, specified *supra* in order to snapshot the Union's understanding of the Copenhagen political criterion of democracy and the rule of law.

III. The Main Elements of the Criterion of Democracy and the Rule of Law

The structural analysis of the documents related to the implementation of the Copenhagen criteria suggests that the Commission and the Council mostly concentrated on four main issues while addressing the criterion of Democracy and the Rule of Law. These issues are: the functioning of the legislature, the functioning of the judiciary, the functioning of the executive and anti-corruption measures.

This classification mirrors the structure of the Regular Reports. Sub-chapters B.1.1. of the 1997 Opinions were arranged slightly differently: they did not contain sections dedicated to anti-corruption activities and focused not only on the analysis of the consistency of the situation of one or another branch of power in a given candidate country with the requirements of democracy and rule of law. Clearly, the Commission was not interested in restating these structures every year in the Reports, which is why these sections have been omitted already during the first round of Reporting – in 1998, anti-corruption sections been introduced instead.

None of the Reports contains a special section dealing with elections and the democratic process in the candidate countries. At the same time, the Composite /Strategy Papers usually mention elections (from municipal to the presidential level) held in these countries. The same is valid for the Reports and Opinions. This is why it seems reasonable to include the elections among the elements of the Commission's Rule of Law and Democracy assessment.

To summarise, according to the documents released by the Union regarding the application of the Copenhagen criteria, it is possible to outline five main areas of scrutiny related to the assessment of the Democracy and the Rule of Law criterion:

- elections
- the functioning of the legislature
- the functioning of the executive
- the functioning of the judiciary
- anti-corruption measures

Needless to say, the present list might seem far from what one could expect from the democracy and the rule of law check, especially taken into account the fact that the first element, dealing with the electoral process, although included on the list, does not necessarily follow directly from the organisation of the Copenhagen-related documents.

The separation of powers in the candidate countries is absolutely necessary in order for them to satisfy the criterion. It follows from the methodology of assessment adopted by the Commission, consisting in scrutinising each branch of power separately from the others.

III.a. Free and Fair Elections

Every Composite /Strategy Paper informs the readers of 'free and fair elections' held in one or several candidate countries:

Free and fair elections have taken place, at Parliamentary or Presidential level, in Poland, Hungary, the Czech Republic, Lithuania and Latvia [...]. In these cases, the candidate countries have proved to have stability of institutions enabling the public authorities to function properly and democracy to be consolidated (1998 Paper, 3; similar wording: 1999 paper, 15; 2000 Paper, 15; 2001 Paper, 10).

Almost the same wording is repeated in the majority of the Annual Reports and Commission's Opinions, which provide little information, apart from *cliché* statements like 'the elections were free and fair and in line with international standards and commitments on democratic elections' (2002 Latvian Report, 19). Some Opinions also underline the smooth and peaceful character of the handover of power (Polish and Hungarian Opinions). All in all no more than two or three lines are usually dedicated to elections in every Composite /Strategy Paper, which can be considered insufficient, as elections are at the core of the democratic process.

The usual conclusion made by the Commission is that 'the candidate countries have continued to strengthen their democratic systems of governance' (1999 Paper, 15; 2000 Paper, 15; 2001 Paper, 10).

Silence about the insides of the electoral process is broken only rarely. It is done by the Commission's acknowledgement of a change in the electoral law, as it was done in the case of Estonia in the 1999 Report, when the Commission stated that 'election alliances [were] prohibited. Mergers between the parties [were] only allowed before elections' (1999 Estonian Report, 10), or in case of Latvia in the 1998 Report, where the Commission informed the readers about the Constitutional amendment, reducing the voting period in Parliamentary elections from two days to one (1998 Latvian Report, 8).

It is difficult to interpret such statements made by the Commission: generally, it is unclear whether it welcomes the development, wants to recommend it to other candidate countries, or just demonstrates that it is informed about it.

Usually, no assessment of the reform in relation to the Copenhagen political criteria is given. The same applies not only to the minor changes in electoral laws, but also to the important ones, like lifting the linguistic knowledge requirements for the candidates standing in parliamentary elections (2002 Estonian Report, 21; 2002 Latvian Report, 20).

It seems reasonable to interpret any mentioning by the Commission of a legislative development in a candidate country as an acknowledgement of the positive character of the development in question, unless stated otherwise. Thus, the paper adopts a 'positive assessment' presumption, concerning the information provided in the Opinions and Reports (in case no analysis is given by the Commission). Of course there are cases when the Commission gives a positive assessment of a certain development, such examples being, however, extremely rare. It especially concerns the regulation of State and private financing of the political parties and their expenditure (1999 Lithuanian Report, 11; 2001 Polish Report, 16; 2002 Polish Report, 21; 2001 Slovak Report, 15; Latvian Report, 24). It is one of the few areas related to electoral law where the Commission unambiguously states that '[the developments] mark an important step towards ensuring transparent working of the political system' (2001 Polish Report, 16).

Besides the reluctance of the Commission to explore the intricacies of the elections in the candidate countries, it is clear from the Reports that in order to satisfy this part of the Copenhagen Democracy and the Rule of Law criterion it is necessary to have regular elections without, probably, any severe irregularities.

What is unclear is how many election rounds would be needed in order to qualify as a country satisfying the criterion. The Copenhagen-related documents are not helpful with an answer to this question. As the Slovakian example shows, one election can drastically change the Commission's assessment: unable to meet the political criteria in 1997, in 1999 it was already considered democratic enough. Although it supposedly met the criteria because of the improvements in the field of the minority protection, and the functioning of the Parliament and the Executive, it is also possible to link the change in the Commission's assessment with the fact that Mr. Meciar was no longer in power.

III.b. The National Parliaments

National Parliaments (see Ram 2001), according to the Commission, should 'carry out [their] duties in conditions which comply with the normal rules for the operation of democracy' (Slovak Opinion 1997), which follows from the Commission's Opinion on the Slovak application for membership of the European Union, and which was not the case in Slovakia in 1997.

The majority of Reports inform that ‘Parliament continues to operate satisfactorily, its powers are respected and the opposition plays a full part in its activities’ (1998 Bulgarian Report 8; 1999 Bulgarian Report 12; 1998 Czech Report, 8; 1998 Estonian Report, 8; 2000 Estonian Report, 14; 2001 Estonian Report, 16; 1998 Hungarian Report, 8; 1998 Romanian Report, 8; 1998 Latvian Report, 8). Although very short, such an assessment provides necessary information in order to create a list of elements of the criterion. Coupled with the Regular Reports’ assessment of developments in the light of assuring better minority representation in Parliament, the Commission’s assessment of a Parliament, meeting the Copenhagen political criteria includes a number of elements.

In order to meet the Copenhagen political criteria it is necessary to have a Parliament:

1. Which operates satisfactorily;
2. The powers of which are respected;
3. With an opposition playing full part in its activities and
4. Where the minorities (in case they are present in the state) have a possibility to be represented.

Besides the 1997 Opinion on Slovak application and the 1998 Slovak Report, there were no cases when the Commission would announce that the country fell short of meeting the Copenhagen political criteria. Thus the majority of examples of insufficient operation of Parliament included into the Copenhagen-related documents represent the dissatisfaction of the Commission with some practices, which, however, does not mean that the practices in question prevent the candidate countries from being characterised as ‘meeting the Copenhagen political criteria’.

The analysis of the Copenhagen-related documents reveals the following picture of a Parliament satisfying the criterion of Democracy and the Rule of Law.

The Commission presumes that a Parliament satisfying the criterion of Democracy and the Rule of law should respect the scope of powers of other branches of power and be harmoniously integrated into the system of State organs⁽³⁶⁾; be efficient⁽³⁷⁾ and adopt legislation in a timely manner,⁽³⁸⁾ without ever slowing down the tempo of adoption of legislation (2002 Polish Report, 22) and providing at the same time a reasonable⁽³⁹⁾ amount of scrutiny of the legislative proposals.

According to the findings of the Commission, the inability to scrutinise legislation properly is mostly caused by three factors: ever increasing volume of legislation, tight deadlines and insufficient resources (2002 Romanian Report, 21) from which it follows that in order to meet the Copenhagen political criteria a Parliament should be provided with necessary resources and time to deal with the legislation effectively.

Its powers and the mandates of the MPs should be respected and it should play a real role in the law-making, meaning that all the extraordinary legislative procedures, such as legislating by the executive ordinances, which ‘potentially mixes legislative and executive powers’ (1999 Romanian Report, 11) should be limited and well-justified (2001 Romanian Report, 17). The Commission has asserted that ‘normal Parliamentary procedures should be used in all but exceptional circumstances’ (2002 Romanian Report, 22).

The opposition should play a role in the work of the Parliament, which also includes being represented in the Committees (1999 Paper, 14; 1998 Slovak Report, 8) and being able to chair some of them (Slovak Opinion 1997). Problems might arise in the case when opposition parties, being offered places in the Parliamentary committees, do not accept them. The proper functioning of the

committees and supervisory boards in such a situation was qualified by the Commission as 'hampered' (2001 Slovak Report, 15; 2002 Slovak Report, 21).

All the stages of the legislative process, including the proposal of legislative amendments should enjoy the highest degree of transparency, giving the public a possibility to follow the process in real time (2002 Romanian Report, 21). Ethnic minorities should be represented in Parliament⁽⁴⁰⁾ and there should be no special linguistic knowledge requirements applied to the candidates running for office (2002 Estonian Report, 21; 2002 Latvian Report, 20).

The legislation related to the adoption of the *acquis* should preferably be adopted with the help of special organs,⁽⁴¹⁾ special (*i.e.* simplified) legislative procedures, or bodies in Parliament (2001 Bulgarian Report, 15; 2002 Bulgaria Report, 20; 2001 Czech Report, 16; 2000 Lithuanian Report, 16) and be in line with the *acquis* (2001 Czech Report, 17). The goal of accession to the European Union should be clearly set.⁽⁴²⁾

All the above-mentioned being said, the picture of an 'ideal' Parliament satisfying the Copenhagen criteria is still far from being clear. The Commission does not seem to be consistent enough in its treatment of a number of issues. Picking topics for discussion sometimes differs strangely from country to country. Romania, for example, is criticised in one report for the lack of transparency of legislative procedure at the stage of the introduction of amendments and this issue never appears in the Reports again. Double standard in assessment of the legislative procedures is also apparent: while simplified legislative process is welcomed in the areas dealing with the adoption of the *acquis*, the use of it in other areas is heavily criticised. The assessment made by the Commission also differs depending on the country in question. The reluctance of Parliament to follow the Constitutional Court decision in Slovakia is taken by the Commission as a very alarming development, while in Hungary, the Constitutional Court Ruling announcing that the lack of minority representation in Parliament is unconstitutional is not paid attention to for more than ten years and the Commission considers the fact that several minority MPs managed to get to Parliament even without such a system in place as a positive development (2002 Hungarian Report, 20). In other words, the Reports can sometimes create a distorted picture of reality. This made scholars wonder 'why on certain sensitive political issues the Commission seems unable to perform its reporting function in a truly objective and independent manner' (Maresceau 2003, 34).⁽⁴³⁾

From the analysis of the Copenhagen-related documents it follows that the threshold for meeting the Copenhagen political criteria by Parliaments is very low. Only Slovakia once failed the political criteria test. All the other countries, however badly their Parliaments functioned, still managed to pass it. Following the criticisms of the Commission, it is possible to state that the criteria are met even if Parliament is not a necessary part of the structure of state machinery, absolute majority of legislation being adopted by the executive. The criteria are met even when the Constitutional Court decisions concerning Parliamentary election systems are ignored for years or the Parliament operates so slowly that it does not satisfy even the most urgent needs of the candidate country.

It follows that in order to meet the Copenhagen political criteria it is necessary to have a Parliament in the system of Governance, let it pass at least some legislation and assure that the body of MPs would change at regular intervals. Thus even in the cases when the Copenhagen-related documents are critical of certain practices in the candidate countries, it does not mean that those countries fall short of meeting the Copenhagen political criteria.

III.c. Functioning of the Executive

The Copenhagen-related documents generally pay more attention to the assessment of the functioning of the Executive than to the assessment of the Legislature.⁽⁴⁴⁾ There can be two reasons for this: either the Commission underlines the special importance of the executive or the area of the Executive is more problematic than that of the legislature in the view of the Commission. Having a look at several Reports might suffice to conclude that the second reason might prevail. The 1999 Czech Report, for example, emphasises that a unified system of public administration is absent, and that inadequate management, lack of training, low pay and the lack of coordination between the ministries determine the state of the Czech executive (1999 Czech Report, 12). This did not, however, prevent the Czech Republic from meeting the Copenhagen criteria.

Generally, the issue of the reform of the Executive, although discussed in a detailed way in the Regular Reports, is mostly ignored in the Composite Papers. Both of them do not contain a single word on this matter. The attitude towards the administrative reform is changed in the Strategy Papers. Each of them dedicates 4 or 5 lines to the consolidation and modernisation of public administration and to the creation of a legal framework for civil service (2000 Paper, 16; 2001 Paper, 10; 2002 Paper, 13). Some Papers also mention the division between political and administrative responsibilities and the establishing of the codes of conduct for civil servants (2002 Paper, 13).

Only the 1998 Polish Report contains a sub-division of the section dealing with the executive into two parts: 1. State Administration Reform and 2. Status of Civil Service (1998 Polish Report, 9). It is reasonable to adopt a more detailed division of the criterion, based on the actual text of the Regular Reports, where the Commission, while discussing the state of play in the Executive of the candidate countries, mostly concentrates on the following issues:

1. The creation of a unified system of civil service;
2. Decentralisation and the structural reform of administration;
3. Public access to information;
4. Effective consultation with interested parties and
5. The accountability of the administration.

The Civil Administration reform in the candidate countries should result in the creation of 'independent, efficient and professional civil service' (1998 Bulgarian Report, 8). The Commission puts much emphasis on reporting on the progress of the civil service reform in the candidate countries and on outlining the further necessary steps to be taken with a view to the timely and successful completion of reforms.

The Commission puts forth an ideal executive: effective, professional, accountable, well regulated and transparent. From the Copenhagen-related documents it follows that the reform of the executive should be based on a comprehensive government strategy⁽⁴⁵⁾ and include a complex of legislative amendments rebuilding the system of the executive.⁽⁴⁶⁾ A special emphasis is put on the necessity of adopting the Civil Service Law, in the absence of which reform is impossible (2001 Czech Report, 17). The reform of the legislation should include the promotion of the civil servant's status⁽⁴⁷⁾ guaranteeing a strict division between the career civil servants and political appointees,⁽⁴⁸⁾ which 'foster political independence and reduce the scope of political interventions in the appointment of the officials' (2000 Czech Report, 18).

Other important issues are increasing the transparency of appointments,(49) promotions (2001 Estonian Report, 16; 2002 Estonian Report, 22), remuneration(50) of civil servants and the increase of their salaries,(51) as well as the creation of a system of specialised training for the civil service officials(52) since the lack of qualified personnel is recognised as a common problem for all the candidate countries (1998 Estonian Report, 8; 1999 Estonian Report, 11; 2000 Estonian Report, 14). Training in EU affairs and languages is especially emphasised.(53) The adoption of the Codes of Ethics for civil servants (Kudyrka 1999) is another issue of great importance (2001 Bulgarian Report, 16; 2001 Czech Report, 17).

Special bodies(54) with real(55) powers should be created to assume responsibility for the management of all the civil service in the country, including appointments, training and the systematic assessment of the performance of civil servants.

The civil service should also be integrated and well structured both vertically, including a creation of municipalities and a degree of regional autonomy (Horváth 2000)(56) (going in line with the European Charter on Local Self-Governance);(57) and horizontally, including a clear structure and a comprehensive and balanced relationship between all the organs within the administration (2000 Romanian Report, 16). The gap between adoption of the acts and their effective implementation should be constantly diminishing (2000 Bulgarian Report, 15).

The creation of special units to deal with the *acquis*-related matters is always considered a positive step. There are numerous examples to this: the mentioning in the 2000 Bulgarian Report of the special units responsible for the EU integration created in every ministry (2000 Bulgarian Report, 14), creation of special European Committees (2000 Lithuanian Report, 16), Co-ordination Councils, to bring together the chairmen of all the units responsible for the chapters of the *acquis* in a particular candidate country (2000 Bulgarian Report, 15), appointment of Ministers, responsible for the European integration (2002 Bulgarian Report, 21).

The whole system of the Executive should be transparent(58) and accountable, open to consultation and to the coordination of policies with the affected parties in the society.(59) It should also be completely demilitarised, including the police (2000 Bulgarian Report, 15; 2001 Romanian Report, 18), which should be composed of ‘civilian public servants, serving the rule of law’ (2002 Romanian Report, 24).

Such an ‘ideal’ executive should also be timely in conducting reforms. On several occasions the Reports were explicitly pushing the candidate countries to speed up the reform. This is clear not only in the cases of legal gaps, but also as applied to the transitional periods for entry into force of the most important pieces of legislation. The 2002 Czech Report, for example, is critical about the 2006 deadline for full entry into force of the Czech Civil Service Act, stating that ‘an acceleration of the timetable for implementation would be desirable’ (2002 Czech Report, 21).

Just as in the case of the legislature, even in a situation when almost all the aforementioned features of the executive are absent, the country still meets the Copenhagen political criteria. The majority of the candidate countries did not have any difficulties with meeting the political criterion related to the organisation and functioning of the executive in 1997 when the Commission’s Opinions were released and at the same time only few of them had a Civil Service law back then. The Commission itself used to admit that training had been insufficient, salaries – too low, the transparency of administration had only existed on paper and the appointments had often been highly politicised; not to mention the military nature of the police, the unclear structure of organs and a number of other

factors.

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Thus it follows that the threshold for meeting the criteria in the field of the structure and regulation of the executive is even lower than that applied to Parliaments. The most important element of reform, as it seems, is to demonstrate the willingness to move forward towards the 'ideal' executive. Once the Commission is assured of that, this element of Democracy and the Rule of Law criterion is met.

III.d. Functioning of the Judiciary

As far as the judiciary is concerned, the 'inherent weakness of the judiciary' (1998 Paper, 3) is listed among common problems of all candidate countries. Recognising the importance of the issue, the Composite Papers did not, however, allocate much space to the discussion of the judicial reform in the candidate countries. The 1999 Paper, for example, only says that

A common challenge for all the candidate countries is the strengthening of judiciary. Considerable effort has been made to train judges, fill vacancies and launch a process of reforms aimed at improving the handling of cases (1999 Paper, 15; also 2000 Paper, 16).

A change in the assessment of reform in this field only came about with the adoption of the 2002 Strategy Paper, which included the six most important elements of reform, praising the candidate countries for their progress in the adoption of basic legislation, strengthening the human resources of the judiciary, improving working conditions, the introduction of the mechanisms of due-enforcement of court decisions, the improvement of citizens' access to justice and the tackling the problem of backlogs (2002 Paper, 13). Together with the emphasis put on the importance of the independence of the judiciary in the 2001 Paper (2001 Paper, 10) and the discussion of the issue in the 1998 Opinions and Regular Reports, the Paper provides enough information for the analysis of this aspect of the Copenhagen political criteria.

Following the most important reform-grounds it is possible to structure the discussion of the elements of the Copenhagen political criteria related to the candidate countries' judiciary as follows:

1. Independence of the judiciary;
2. Training of judges;
3. Filling the judicial vacancies;
4. Improvement of people's access to justice;
5. Improvement in the handling of cases;
6. Effective enforcement of court decisions.

From the textual analysis of the Copenhagen-related documents it follows that in order to meet the criterion of Democracy and the Rule of Law, the judiciary should be independent⁽⁶⁰⁾ well staffed⁽⁶¹⁾ and well trained,⁽⁶²⁾ well paid,⁽⁶³⁾ efficient, respected⁽⁶⁴⁾ and accessible to people. The self-governance of it should be real, including the non-interference of the other branches of power in the training of judges in a special Judicial Institute,⁽⁶⁵⁾ the work of their self-governing bodies⁽⁶⁶⁾ and their appointment,⁽⁶⁷⁾ as well as the work of courts.⁽⁶⁸⁾ The Lithuanian Constitutional Court ruling which found that some powers of the Ministry of Justice of the republic in the administering of justice contradicted the Constitution (*Jarašiūnas et al.* 2003, 588) was welcomed by the Commission and mentioned in the 2000 Regular Report.⁽⁶⁹⁾ The budget of the judiciary should also be largely in the hands of the judges.⁽⁷⁰⁾ The Reports also demonstrate that lowering of the judges' salaries is a breach of judicial independence: 2002 Lithuanian Report regards the Lithuanian Constitutional

Court's decision on prohibition of lowering of salaries of judges(71) as a positive development (2002 Lithuanian Report, 23).

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The handling of cases should be speedy and efficient, with no backlogs, as judges should be specialised in different fields (2001 Hungarian Report, 17; 1999 Lithuanian Report, 12), well trained (72) and assisted by auxiliary staff (2001 Czech Report, 19), whose competences have to be clearly assigned by law (1999 Bulgarian Report, 12). The courts' infrastructure should be 'of good standard and remains further upgraded' (2002 Estonian Report, 25). Training of judges should include human rights (2001 Czech Report, 19; 2002 Czech Report, 23), functioning of market economy (2000 Bulgarian Report, 17) and European Union law (2002 Czech Report, 23; 2000 Lithuanian Report, 17).

According to the Commission, the situation with the training of judges in the field of EU law is especially good in Hungary, where judges are obliged to follow a postgraduate course in EU law(73) and Poland, where training in EU law is also compulsory (2001 Polish Report, 20). In several cases, the Reports point at obvious conflicts between the principle of judicial independence and an urgent necessity to improve the training of the judiciary. The Czech Constitutional court found that independence of the judiciary is incompatible with either compulsory training or re-evaluation of judges' competence. Unlike the academics, who saw a source of concern in such a development (Šlosarčík 2002), the Commission, reporting on it remained neutral (2002 Czech Report, 22).

Another example is provided by Estonia, where the re-training of judges is compulsory and the Reports assess the progress of the Estonian judiciary very positively. At the same time, the fact that '60% of judges and prosecutors have undergone 112 hours of training each' (2000 Estonian Report, 15), reported by the Commission, does not mean that enough progress has been achieved. The Report continues finding that 'lowest-level courts decisions are unsatisfactory' (2000 Estonian Report, 15). In-service training of the judiciary is also practiced in other candidate countries, for example Romania (2000 Romanian Report, 17).

The appointment of judges should be transparent (2000 Bulgarian Report, 17) as well as their promotion opportunities (2000 Bulgarian Report, 17; 2002 Estonian Report, 24). Their performance should be evaluated (2000 Bulgarian Report, 17; 1999 Latvian Report, 12) based on 'the uniform methods and criteria' (2002 Bulgarian Report, 25), not interfering with the independence of the judiciary. Access to legal aid should be provided to all,(74) and speedy(75) court decisions, based on modern law,(76) have to be respected and willingly executed by other branches of power and the parties, assisted by a bailiffs (2001 Czech Report, 18; 2002 Latvian Report, 21) system in place.

The recommendations of the Commission might sometimes be really far-reaching, including the requirement of Constitutional change. 2001 Bulgarian Report, for example, demands that the Constitution of the republic be changed in order to better address the magistrate's immunity (2001 Bulgarian Report, 17) and the structure of judiciary.(77)

No need to mention that the system of judiciary in all the candidate countries was quite different from the 'ideal standard' by the time they were recognised by the Commission as meeting the Copenhagen criteria.

This is to say in order to meet the Copenhagen political criteria as far as the judiciary is concerned, a heavily understaffed and insufficiently trained body of judges without any technical assistance, slowly passing 'unsatisfactory' decisions, which are often not executed at all (a picture following from the Commission's criticism of the candidate countries which 'met the criteria') seems to be enough.

Thus, the existence of the system of courts and adherence to the goals of independence and effectiveness of the judiciary and the rule of law make up the necessary threshold in order to meet the Copenhagen political criteria.

III.e. Anti-Corruption Measures

The last element of the structure of the Copenhagen political criterion of Democracy and the Rule of Law relates to anti-corruption measures. Obviously, logically speaking, the section on the fight with corruption does not go well within the classification based on the assessment of the state of play in all the branches of power of the candidate countries. The majority of issues discussed in the anti-corruption section have already been covered by the sections dealing with the state of preparedness for accession of the branches of power of the candidate countries. At the same time, once it has been decided to stick to the classification to be found in the Regular Reports in order to be as close to the Commission's view as possible in the present assessment, it is necessary to discuss the Commission's attitude to this element of 'democracy and rule of law' criterion.

The fight with Corruption is outlined as a separate subject in all the Commission Papers (1998 Paper, 3; 1999 Paper, 15; 2000 Paper, 16; 2001 Paper, 10; 2002 Paper, 13) and all the Regular Reports. While the Papers mostly talk about the importance of the problem and some improvements, the Reports provide a rather detailed analysis of progress in the area of fight against corruption.

According to the Commission, corruption is widespread in the candidate countries in various sectors, including, in particular, customs service, municipalities, medical services, the police, taxation authorities and courts (1999 Bulgarian Report, 13). Unfortunately, the authorities do not respond to it adequately (1998 Polish Report, 11).

It is possible to divide the anti-corruption sections of the Reports into two main elements: internal, including the elaboration of national programmes of fight against corruption, amendments to national legislation, simplification of licensing regimes, *etc.* and external, including ratification of the main international anti-corruption documents and participation in the Council of Europe Group of Countries for Fight Against Corruption (GRECO).

The internal aspect of fight against corruption mostly consists of several elements: drafting and implementation of a comprehensive anti-corruption programme (1998 Bulgarian Report, 9; 2001 Bulgarian Report, 19; 2001 Hungarian Report, 18; 1999 Polish Report, 15), adoption of special Anti-corruption acts (1998 Bulgarian Report, 9; 1999 Estonian Report, 11; 2002 Lithuanian Report, 25), amending national penal legislation (1998 Bulgarian Report, 9; 1999 Bulgarian Report, 13; 2000 Bulgarian Report, 18; 2002 Bulgarian Report, 26; 1998 Czech Report, 9; 1999 Czech Report, 14; 2001 Czech Report, 20; 1999 Hungarian Report, 12; 2002 Hungarian Report, 26) and the structure of the law-enforcement organs (2001 Czech Report, 20; 1999 Hungarian Report, 12), introduction of tighter controls over the civil servants,⁽⁷⁸⁾ improvement of regulation of lobbying activities (2001 Hungarian Report, 18; 2000 Lithuanian Report, 18), adoption of public procurement laws (2000 Bulgarian Report, 18) and simplification of licensing regimes (2001 Bulgarian Report, 20; 2002 Bulgarian Report, 26; 1999 Polish Report, 15).

The Commission also welcomes the creation of special organs and posts outside the law enforcement machinery, like the Czech Minister without portfolio, whose task is to deal with corruption and the Analytical Commission headed by him (1999 Czech Report, 14), or the Corruption Prevention Division of the State Revenue Service (1999 Latvian Report, 13), or the High Commission of Ethics in Office (1999 Lithuanian Report, 12).

External aspect of fight against corruption includes ratification of a number of international documents⁽⁷⁹⁾ and participation of the Council of Europe Group of States against Corruption (GRECO).

IV. Conclusions [↑]

The changes, introduced into the legal regulation of enlargements with the fifth enlargement round are enormous. This unprecedented enlargement also served a testing ground to try some new approaches to the enlargement regulation. The Copenhagen criteria rightfully occupy one of the leading places among the newly-introduced enlargement regulation instruments. The majority of the criteria formulated by the Copenhagen European Council in 1993 represent a codification of the enlargement practices existing before. The European Council and the Commission, together with the Council of Ministers managed to build the whole enlargement regulation around these criteria. This process started with making the Reporting on the compliance with the criteria a regular exercise and was further enforced by two developments: firstly by the attaining by the criteria of a legally binding effect, following the entry into force of the first Accession Partnerships and secondly, by giving the Copenhagen political criteria a priority among the whole set of criteria, which allowed the Union make the criteria instrumental at all the stages of the enlargement process. Not only was the accession in itself but also the time of opening of accession negotiations linked to the compliance with the criteria. Based on the political conditionality and on the Copenhagen criteria as its main tool, a concept of merit-based enlargement was introduced. Only the state of preparedness of the candidate countries, impartially assessed by the Commission could be the basis for the decisions to include an applicant among the candidate countries and to start the enlargement negotiations.

At the same time, already after the release of the Opinions on the Application for Membership of the European Union by the Commission it became clear that the fifth enlargement did not really become a merit-based process. The Commission failed its task to make the Regular Reports on preparedness to the accession full and impartial. The reason for this can be found in the Copenhagen criteria themselves. With a wording so broad and overinclusive, neither the candidate countries nor the Commission really knew how to apply them in practice. The general uncertainty about the meaning and the scope of the criteria resulted in a situation when the preparation to enlargement could be compared at a certain point to a game of guesses. The enlargement process suffered because of ambiguity of the meaning and vagueness of the Copenhagen criteria.

After the reporting on the candidates' progress towards accession became regular, the body of the documents related to the implementation of the Copenhagen criteria started growing incredibly fast: dozens of documents were released every year.

The structure of the elements of the first Copenhagen political criterion "Democracy and the Rule of Law" proposed by this paper is based only on the documents released by the Union in relation to the criteria, which allows understanding the Union's standpoint better. These documents can help clarify what meaning the Union conveyed to Democracy and the Rule of Law for the purposes of accession.

Surprisingly, it is clear that the Union does not make a distinction between the principles of democracy and the rule of law, uniting them in one 'organic combination'. As the paper has demonstrated, these notions are not synonymous and their fusion can potentially be problematic. It is possible to observe that the Copenhagen related documents give priority to the assessment of the rule of law, without concentrating on the analysis of the democratic process in the candidate countries in necessary detail.

Overall, the democracy and the rule of law criterion, as understood by the Institutions, consists of five elements, including

1. free and fair elections;
2. the functioning of the legislature;
3. the functioning of the executive;
4. the functioning of the judiciary and
5. the fight against corruption.

There are also 16 sub-elements of the criterion (see figure 1).

Figure 1

From the structure adopted by the Commission for the assessment of the candidate countries' compliance with the criterion it is clear that the division of powers is a necessary element of the criterion.

The Copenhagen-related documents do not provide an in-depth analysis of the criterion, which follows, firstly, from a marginal amount of space dedicated to the analysis of democracy and the rule of law in the documents (even the criterion of Minority protection is analysed in greater detail) and, secondly, from the general approach of the Commission to the assessment exercise. The Commission does not give reasons for picking certain issues for discussion while being silent on other matters. Generally following the same structure, in its reports the Commission raises different questions. This difference does not only vary from country to country, but also from one reporting round to another. Also, the assessment of developments given by the Commission is often ambiguous. Some developments in the candidate countries are mentioned without any positive or negative accompanying assessment, which sometimes makes the interpretation of such statements very difficult. This paper adopts a 'positive assessment' presumption, interpreting such statements made by the commission as acknowledgements of positive developments.

Following from the analysis of the Copenhagen-related documents, the main problem in relation with the criterion of Democracy and the Rule of law is that the Union put the threshold to meet this criterion so low that the main idea behind the introduction of the criteria was disregarded. The Commission clearly was not critical enough in its conclusions. According to the reports, the criterion of democracy and the rule of law is met, for example, even in the situations when the executive legislates instead of Parliament, when the quality of court decisions is 'unacceptable', the system and legal regulation of Civil Service are absent and bribery is flourishing. An ambiguous situation was created, where the texts of the reports mainly contradicted the conclusions drawn from them.

As a result, the institutions and especially the Commission failed the task of linking the acknowledgement of the fulfilment of the Copenhagen criteria with the real progress in the candidate countries. By announcing in 1997 that all the CEECs applicants apart from Slovakia met the criteria, the Commission deprived itself of needed room for manoeuvre.⁽⁸⁰⁾

In the light of these observations it becomes clear that while from the procedural point of view the fifth enlargement was very different from the previous enlargement rounds, substantively, the requirement to have the institutions guaranteeing democracy and the rule of law in place was very similar to a formal condition applied during the previous enlargement rounds and reflected in the Commission's submissions in *Mattheus* case.

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Abbreviations used: *CDE* Cahiers de droit européen; *CMLRev.* Common Market Law Review; *Eur. F. Aff. Rev.* European Foreign Affairs Review; *Eur. L.J.* European Law Journal; *Int'l Pol.* International Politics; *LGI* Local Government and Public Service Reform Initiative Newsletter; *LGI DP* Local Government and Public Service Reform Initiative Discussion Papers; *RMCUE* Revue du marché commun et de l'union européenne; *W. Eur. P.* West European Politics; *ZEI DP* Zentrum für Europäische Integrationsforschung Discussion Papers

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Endnotes [↑]

(1) Especially the passage about 'drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society the central role of the human person and his or her inviolable and inalienable rights, and respect for law', *OJ C* 169, 2003.

(2) See e.g. the Commission's opinion on accession of Greece: European Commission, Opinion of 23 May 1979, *OJ* 1979 L 291, at 3; and on the accession of Portugal and Spain: European Commission, Opinion of 31 May 1985, *OJ* 1985, L 302, at 3.

(3) 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.

(4) 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.

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

(6) Case 93/78 *Mattheus v. Doego* [1978] ECR 2203, at 2208.

(7) The Council is not obliged to follow Commission's Opinions on application for membership. According to Art.49(1) TEU it "acts unanimously after consulting the Commission". Similar wording was contained in Arts. 237(1)EEC and 205(1) EURATOM ("acts unanimously after obtaining the Opinion of the Commission").

(8) Accession Treaty signed on 20 May 1979, OJ 1979 L 291/5 and entered into force on 1 January 1981.

(9) 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.

(10) Both these countries met the Copenhagen political criteria in 1997 but were not invited to join the Union together with other 8 Central and East European countries in the year 2004.

(11) The delay is easily explainable: the European Union was not itself ready to accommodate the new Member States. For this reason the possibility of enlargement was linked to a completion of the institutional reform of the Union, which has been stressed during several European Council meetings, starting with the 1993 Copenhagen European Council, where it was stated that 'The Union's capacity to absorb the new Members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries' (SN 180/93, at 12). That is why the opening of any accession negotiations was postponed until the conclusion of the 1996 IGC, see Presidency Conclusions of the Essen European Council (9-10.12.1994) and Florence European Council (21-22.06.1996).

(12) 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).

(13) *Agenda 2000 – Commission Opinion on Estonia's Application for Membership of the European Union*, Brussels, 15.07.1997, DOC/97/12 (further "Estonia Opinion"); DOC/97/13 ("Hungary Opinion"); DOC/97/14 ("Latvia Opinion"); DOC/97/15 ("Lithuania Opinion"); DOC/97/16 ("Poland Opinion"); DOC/97/17 ("Czech Republic Opinion"); DOC/97/18 ("Romania Opinion"); DOC/97/19 ("Slovenia Opinion"); DOC/97/20 ("Slovakia Opinion"). The Opinion on Malta was released two years later, following the March 1998 communication from the Maltese government stating the desire to reactivate Maltese application for membership in the EU. On 5 October the Council request the Commission to update its 1993 Opinion on the application of Malta, which resulted in the Commission's *Report Updating the Commission Opinion on Malta's Application for Membership*, Brussels, 17.02.1999, COM(1999) 69 final. The Cyprus Opinion was released on June 30, 1993; see DOC/93/5.

(14) Council Decision concerning the Application made by Estonia was taken on 4.12.1995; Latvia on 30.10.1995; Lithuania on 29.01.1996; Poland on 18.04.1995; Czech Republic on 29.01.1996; Slovakia on 17.07.1995; Slovenia on 15.07.1996; Hungary on 18.04.1995; Romania on 17.07.1995; Bulgaria on 29.01.1996.

(15) Since the release of such documents is not regulated by the TEU or the Copenhagen (1993) European Council Conclusions, it was done upon the request of the European Councils, starting with

Luxembourg (12 and 13 December 1997). Agenda 2000 contained a proposal to make the assessment of progress on a regular basis.

(16) See *Bull. EC* No 8649, 2004, at 6.

(17) The first round (1998) did not include a Report on Malta, since the Maltese application was still suspended, and the last round (2003) only included three reports: on progress of Romania, Bulgaria and Turkey, since they were released after the signing of the 2003 Accession Treaty.

1998 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 4.11.1998 (further “1998 Reports”). All in all 12 reports were drafted.

1999 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 13.10.1999 (further “1999 Reports”). All in all 13 reports were drafted.

2000 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 8.11.2000 (further “2000 Reports”). All in all 13 reports were drafted.

2001 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 13.11.2001 (further “2001 Reports”). All in all 13 reports were drafted. Bulgaria – SEC(2001) 1744; Cyprus – SEC(2001) 1745; Czech Republic– SEC(2001) 1746; Estonia– SEC(2001) 1747; Hungary – SEC(2001) 1748; Latvia – SEC(2001) 1749; Lithuania – SEC(2001) 1750; Poland – SEC(2001) 1751; Romania – SEC(2001) 1752; Slovakia – SEC(2001) 1753; Slovenia – SEC(2001) 1754; Malta – SEC(2001) 1755; Turkey – SEC(2001) 1756.

2002 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 9.10.2002. See COM(2002) 700 final. All in all 13 reports were drafted. Bulgaria – SEC(2002) 1400; Cyprus – SEC(2002) 1401; Czech Republic– SEC(2002) 1402; Estonia– SEC(2002) 1403; Hungary – SEC(2002) 1404; Latvia – SEC(2002) 1405; Lithuania – SEC(2002) 1406; Poland – SEC(2002) 1407; Romania – SEC(2002) 1408; Slovakia – SEC(2002) 1409; Slovenia – SEC(2002) 1410; Malta – SEC(2002) 1411; Turkey – SEC(2002) 1412.

2003 Regular Reports from the Commission on Progress towards Accession by Each of the Candidate Countries were released on 5.11.2003. All in all 3 reports were drafted: for Bulgaria, Romania and Turkey.

(18) The Vienna European Council (11-12.12.1998) welcomed the first Progress Reports from the Commission and asked for the preparation of the second round of Reports, Presidency Conclusions, para 58; The third round of Progress Reports was asked by the Helsinki European Council (10-11.12.1999), Presidency Conclusions, para 6; and so on. Thus all in all 97 documents were drafted by the Commission in response to the Luxembourg European Council request.

(19) *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.

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

(21) *OJ* L236, 2003.

(22) As requested by the Presidency Conclusions of the Copenhagen European Council (12 – 13 December 2002), para 5.

(23) 2003 Comprehensive Monitoring Reports on Preparations for Membership by Each of the ten new Member States were released on 5.11.2003.

(24) *2003 Comprehensive Monitoring Report of the European Commission on the State of Preparedness for EU Membership of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia* COM(2003) 675 final.

(25) Art. 4 of the Regulation 622/98.

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

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

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

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

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

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

(32) Chapter 2 of 1998 Composite Paper, 2001 and 2002 Strategy Papers; Chapter 3 of the 1999 Composite Paper and 2000 Strategy Paper.

(33) 1998 Composite Paper dedicates to Political criteria a half of page 3 and page 4; 1999 Paper: pages 14, 15 and half of 16; 2000 Paper: half of 15, 16 and 17; 2001 Paper: pages 10, 11, 12; 2002 Paper: pages 13 and half of 14.

(34) Where it appeared in the TEU Preamble and Arts. J.1(2) (now Art.11(1) TEU) and 130u(2) (now Art.177(2)EC). Art.6(1) TEU introduced at Amsterdam increased the importance of the concept, especially in the light of the Art.7 TEU procedure, allowing for the suspension of the Member States' rights in case of a serious and persistent breach of the principle; and in the light of Art.49 TEU, as amended by Amsterdam, which introduced adherence to the principle of the Rule of Law as a necessary requirement for those willing to join the Union.

(35) Opinion 1/91 of 14 December 1991 (Draft agreement relating to the European Economic Area)

[1991] ECR 6097.

(36) The Commission criticised the creation of committees of enquiry with the terms of reference exceeding those granted by the Constitution, see Slovak Opinion, at 'functioning of Parliament'; instances when a Parliament ignored a Constitutional Court Ruling, see 1998 Slovak Report, at 9.

(37) The Commission demonstrated concerns with the situations when the candidate country's Parliament was only able to adopt a small part of draft laws introduced by the Government, see 2000 Romanian Report, at 15. The Commission welcomed progress in the field of Parliament's efficiency (see 2001 Romanian Report, at 16), including the reforms of the Parliamentary structure (see 2001 Slovenian Report, at 15). It also monitors the reforms of Standing Orders, see 1999 Slovenian Report, at 13; 2000 Slovenian Report, at 14 (outlining the problem); 2001 Slovenian Report, at 15 (monitoring the status of the new Standing Orders); 2002 Slovenian Report, at 20 (discussing the finally adopted Standing Orders).

(38) The Commission criticised the countries where the procedures to adopt legislation were too long, see Slovenian Opinion, at 'Functioning of Parliament', 1999 Czech Report, at 12; 2000 Slovenian Report, at 13.

(39) The situation when too much scrutiny is provided was criticized by the Commission, see 2000 Slovenian Report, at 14 and 2001 Slovenian Report, at 15. Too little scrutiny is not an admissible situation either, see 2002 Romanian Report, at 21.

(40) The Commission repeatedly pointed out the negative character of the lack of a system of minority representation in Hungarian Parliament, which is required by the Constitution, see 1998 Hungary Report, at 8; 1999 Hungary Report, at 11; 2000 Hungary Report, at 13; 2001 Hungary Report, at 15.

(41) See e.g. 2000 Bulgarian Report, at 14; 1999 Czech Report (concerning the Senate), at 12; 2000 Czech Report (concerning the Chamber of Deputies), at 16; 1998 Lithuanian Report, at 7; 2002 Polish Report, at 22.

(42) By either adoption by Parliament of its own strategy of integration into the Union (see 2000 Latvian Report, at 15), or of a special resolution (2001 Lithuanian Report, at 17). See also 2002 Czech Report, at 20.

(43) Discussing minority protection, Maresceau came to a conclusion that the reports produced by privately-sponsored Institutes are more detailed and often contradict the findings of the Commission. Maresceau (2003), 34. See OSI Reports: <<http://www.eumap.org>>.

(44) Such a conclusion can be made after a simple comparison of the average number of pages dedicated to the Legislature and the Executive in the Regular Reports.

(45) 1998 Bulgarian Report, at 8; 2000 Estonian Report, at 14 (emphasising the lack of a comprehensive strategy for public service reform); 1998 Romanian Report, at 8 (welcoming the fact that the strategy for reform is under elaboration).

(46) 1998 Czech Report, at 8; 1999 Czech Report, at 12; 2000 Czech Report, at 18; 1998 Lithuanian Report, at 8; 1999 Romanian Report, at 12; Slovak Report, at 10. (all stating that the Civil Service Law is absent); 1998 Polish Report, at 10, giving positive assessment to the draft of the new Civil Service law to amend the 1996 version of it and 1999 Polish Report, welcoming the revision of the Civil Service law, at 14.

(47) 2001 Latvian Report, at 15. A situation may arise when only a marginal proportion of those

employed in the administration has such a status. 2001 Polish Report, for example, points out that only 0.7% of the administration workers have a civil servant's status (at 18). The increase in percentage of those holding the status among the employees in the Administration is regarded by the Commission as a positive development: see 2001 Bulgarian Report, at 15.

(48) 2000 Lithuanian Report, at 16; 2000 Czech Report, at 18 (criticism of the fact that such a division is not in place).

(49) Recruitment of high level staff without an open competition via suspension of some provisions of the national Civil Service Act is not desirable: 2002 Polish Report, at 22.

(50) The situation when a large portion of remuneration is constituted by bonuses and allowances is criticised by the Commission as lacking transparency: 2001 Estonian Report, at 16. System of remuneration should be unified and should cover all the civil servants: 2001 Latvian Report, at 15.

(51) 2000 Bulgarian Report, at 14. According to the Commission, low salaries cause high turnover of staff in the civil service, consequences of which are harmful. See 1998 Estonian Report, at 8; 1999 Estonian Report, at 11.

(52) Including, for example, a special institute for Public Administration: 2000 Bulgarian Report, at 14; 2002 Czech Report, at 21; 2000 Lithuanian Report, at 16. Progress in the field of training of the civil servants is closely monitored: 2002 Bulgarian Report, at 23; 2000 Hungarian Report, at 14; 2000 Lithuanian Report, at 16.

(53) 2002 Czech Report, at 21; according to the Hungarian 2001 Civil Service Law, every civil servant is obliged to be proficient in at least one EU language and pass an examination on EU related matters, 2001 Hungarian Report, at 16.

(54) 2002 Czech Report, at 21 (discussing the General Directorate for Civil Service); 1998 Romanian Report, at 8 (welcoming the initiative to create a Commission for the Civil Service).

(55) The Reports provide examples where such a body is not *de facto* in charge of the management of civil service, which is not admissible. See 2001 Romanian Report, at 18.

(56) 1999 Bulgarian Report, at 12, discussing the creation of decentralised institutions in 28 *oblasti* (Bulgarian administrative regions); 1998 Czech Report, at 15, creation of 14 Higher Self-Governing Units; 1998 Polish Report, discussing the reform of all the three levels of Polish self-government, including the *voivodshps* (main regions); see also 2001 Polish Report, at 17; 1998 Romanian Report, at 8.

(57) European Charter of Local Self-Governance, CETS No. 122, Strasbourg, 15 October, 1985.

(58) Access to public information is very important in this context. Estonian Public Information Act of 2001 provides an example of legislation fully approved by the Commission: 2001 Estonian Report, at 17.

(59) 2000 Bulgarian Report, at 15 (insufficient coordination with the interested parties); 2001 Bulgarian Report, at 16 (consultation needs to be further improved).

(60) The lack of legal framework guaranteeing judicial independence is criticised. 1998 Bulgarian report, at 8; 1999 Bulgarian Report, at 12. In the view of the Commission judicial independence does not mean excessive immunity: 2001 Bulgarian Report, at 17.

(61) 1998 Bulgarian Report, at 8; 1998 Romanian Report, at 9; 1998 Czech Report, at 8, pointing at

the necessity to fill the judicial vacancies and outlining the importance of the problem.

(62) The training of judiciary is often found unsatisfactory (2001 Bulgarian Report, at 18; 1998 Czech Report, at 8; 1999 Czech Report, at 11) or even announced a top priority for reform (1998 Estonian Report, at 8).

(63) Some reports stress the fact that the salaries of judges are low (1998 Czech Report, at 8; 1998 Latvian Report, at 9), while in some countries the situation is different, the salaries of judges being 'relatively high' (2000 Czech Report, at 19; 1999 Lithuanian Report, at 12) or 'equal to the highest incomes in the public sector' (2000 Romanian Report, at 18).

(64) The Reports talk about the necessity to create a society where the courts enjoy public confidence: 1998 Bulgarian Report, at 8; 1999 Bulgarian Report, at 12.

(65) 2002 Czech Report, at 23; 1998 Romanian Report, at 9; 2000 Romanian Report, at 17. The Reports are critical of delays with granting the Romanian National Institute of Magistracy a self-governing status: 2002 Romanian Report, at 25.

(66) 2002 Czech Report, at 22; 2002 Estonian Report, at 23; 1998 Hungary Report, at 8; 2002 Lithuanian Report, at 23 (all either just stating that such an organ has been created or also containing its structure and scope of powers); 1999 Lithuanian Report, at 12.

(67) 2001 Romanian Report, at 20. The fact that too many members of the Superior Council of the Magistracy in Romania are appointed by the Ministry of Justice is in breach of the principle of judicial independence.

(68) The cases when the courts are administered by the executive are criticised. See 2001 Estonian Report, at 18; 2001 Latvian Report, at 19; 2002 Latvian Report, at 21. Any guidelines or directions given by the executive to the Courts are in breach of the principle of judicial independence: 2001 Romanian Report, at 20.

(69) 2000 Lithuanian Report, at 16.

(70) The Commission is critical about the practices of judicial budget cuts in some candidate countries: 2001 Bulgarian Report, at 18.

(71) Ruling 158 of 12 July 2001 of the Lithuanian Constitutional Court.

(72) Specific training is necessary before the entry into profession: 2000 Bulgarian Report, at 17.

(73) 1999 Hungarian Report, at 12; in Lithuania every applicant for a judicial post is supposed to be trained in EU law: 1999 Lithuanian Report, at 12.

(74) The situation when 'provision of legal aid remains fragmented' is not admissible, 2002 Estonian Report, at 25. See also 1999 Bulgarian Report, at 12; 2000 Bulgarian Report, at 17; 2002 Hungarian Report, at 25; 2001 Polish Report (stating that 'access to justice remains limited'), at 24.

(75) The length of proceedings (both criminal and civil) is often characterised as 'considerable'. See 2000 Czech Report, at 19; 2000 Latvian Report, at 17; 1998 Lithuanian Report, at 8

(76) Much attention is given to the amendments of legal acts, especially of procedural laws. See: 1998 Bulgarian Report, at 8; 1999 Bulgarian Report, at 12; 2000 Bulgarian Report, at 16; 2000 Czech Report, at 18; 2001 Czech Report, at 18; 2002 Czech Report, at 22; 1999 Estonian Report, at 11; 2001 Estonian Report, at 17; 1999 Latvian Report, at 13; 1999 Lithuanian Report, at 12; 2000

Lithuanian Report, at 17; 1998 Polish Report, at 10; 2000 Romanian Report, at 17. Special emphasis is made on the regulation of the investigation procedures (1998 Bulgarian Report, at 8) and pre-trial detention time (1998 Bulgarian Report, at 8; 1999 Bulgarian Report, at 12; 1998 Latvian Report, at 9).

(77) 2002 Bulgarian Report, at 23. Reforms of the structure of the judiciary are closely followed by the Commission and usually get positive assessment: 1998 Bulgarian Report, at 8; 2002 Czech Report, at 23; 1999 Lithuanian Report, at 12.

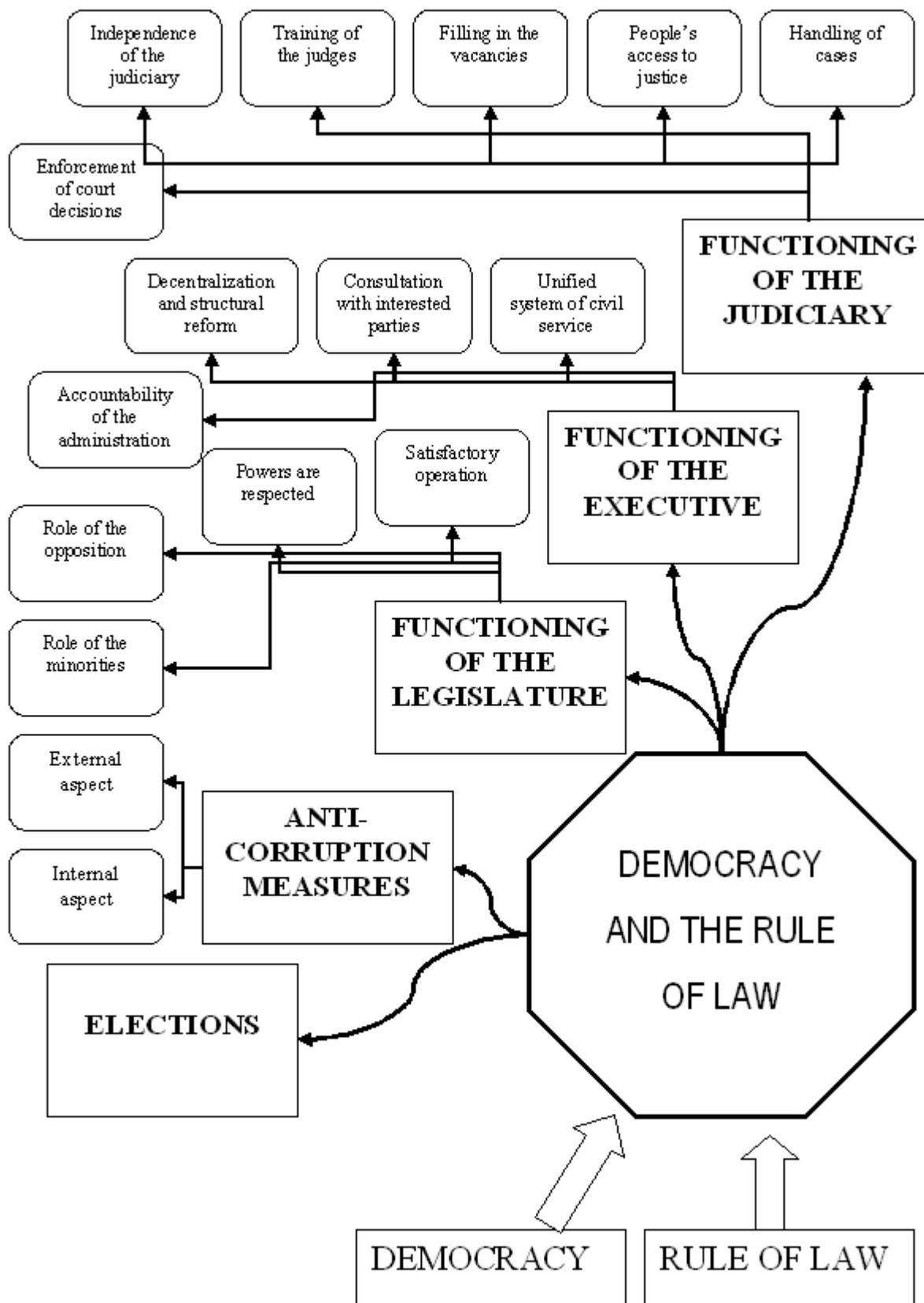
(78) 2000 Bulgarian Report, at 18; 2001 Hungarian Report, at 18. It also includes the requirement applicable to the officials to declare property, income and expenses (2000 Bulgarian Report, at 18; 2000 Lithuanian Report, at 18), and the lifting of immunity for prosecution of high ranking officers (2000 Lithuanian Report, at 18).

(79) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.XI.1990, ETS no.141; Council of Europe Criminal Law Convention on Corruption, Strasbourg, 27.I.1999, ETC no.173; Council of Europe Civil Law Convention on Corruption, Strasbourg, 4.XI.1999, ETC no.174; Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21.XI.1997, DAFFE/IME/BR(97)20.

(80) Arguably, the Union may change its tactics in the future. Especially in the case of Turkey it is clear that the criteria are applied more cautiously.

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Figure 1: Copenhagen Criteria of Democracy and the Rule of Law



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