THE LEGAL OBLIGATIONS OF A NEW EU MEMBER STATE

Christen Boye Jacobsen*

ABSTRACT: *The article is centered around three assumptions:*

First, that the acquis communautaire, as defined by the accession acts, comprises about 20 categories and thus many more categories than the treaties, directives, and regulations.

Second, the duties under the Copenhagen Criteria comprise much more than implementation of the acquis. It implies the accession to a large number of international treaties, and the introduction of law in areas where the EU has no competence such as bankruptcy, criminal law, and land registration, and the introduction of general legal reforms. This is required to meet the implicit requirement on democracy, rule of law and a modern (West-European) market economy and infrastructure.

Third, it is necessary to take an interest in the whole legal structures, which add up to much more than the sum of normative acts, including the basic theoretical training which the universities give under the normal law studies.

1. Introduction: What Is Required from Any New Member State

When a new member state accedes to the European Union, it undertakes a number of legal obligations in The Accession Act. In short, on day one of membership (at latest) it must implement the whole body of EU law – the acquis communautaire - unless the Accession Act stipulate otherwise.

In principle, and on surface, this may not appear very different from any other accession to a treaty. But this should not lead us to underestimate the nature or size of the duties.

First and foremost, the legal nature of the Union makes the EU – unlike e.g. NATO – into much more than a political organisation. The EU is a legal community built upon law and the rule of law. In classical treaty law the fulfilment of treaty obligations was a prerogative for the government and the legislature. Here it is largely given as a right to citizens and enterprises, supported by courts, including the EU courts[1]. This makes over time an enormous difference, especially in countries with huge bureaucracies and scant tradition for rule of law.

The next is that the acquis is a complicated mass, consisting of various categories. This is the subject for part 3 of this article. Linked to this is the sheer size of the acquis. Currently we speak of "the 80.000 pages", but when Romania shall accede in some years' time it may easily approach 100.000 pages.

This is both mitigated and sharpened by the fact that many of the legal obligations confirm obligations which the acceding state has already undertaken. Such duties may stem from other international obligations, of which the WTO is the most important. They may also come from the Europe Agreement[2]. Many come from the Accession Partnership, or from agreements or unilateral undertakings during the negotiation process, including the annual progress report.

* *Christen Boye Jacobsen is a lawyer and Deputy State Secretary in the Danish Ministry of Economy and Business. He is a specialist in Commercial and Internal Market law. For the last 7 years he has been working as an adviser to the Danish Pre-Accession Assistance Program for Eastern and Central European Candidate Countries (EU-Program). The subject of this article is further discussed in his papers "Adaptation of the Legal Systems of Candidate Countries – the Case of the Baltic States, DUPI Working Paper 2001/8 (Copenhagen 2001) and "Implementing the acquis communautaire – the fight over 80.000 pages" RGSL Working Papers no. 7 (Riga 2002).*

[1] *This is discussed in all good textbooks on EU law. As examples, I can refer to Craig & Burca: EU Law (Ox-ford UP 1998) p. 163 et seq and p. 255 et seq., and Wyatt & Dashwood:European Union Law (Sweet&Maxwell 2000) p. 59 et seq.*

[2] *The most important concern competition law, state aid and intellectual and industrial property. Some of these provisions may have direct effect.*

In any accession negotiation there are some "implicit expectations" concerning the structures and systems of candidate countries, and which must be fulfilled if the EU shall function. In earlier accession rounds these expectations were fulfilled, but due to the historical inheritance they cannot be assumed to be present in the Central and Eastern European countries. This led to some legal and political requirements outside the acquis, known as the Copenhagen Criteria.

2. The Copenhagen Criteria. What and Why

If we compare the countries which acceded in 1995 (Austria, Finland, and Sweden), with the Central and Eastern European countries, acceding under the Athens Treaty 2003, there are some glaring differences. Finland and Sweden are among the richest, most uncorrupted, and most efficient societies in the whole world. Their bureaucracies and courts are honest and efficient, and the state administration and the legislation reflect a modern post-industrialist economy and service mindedness.

Such benefits should be among the advantages, which the citizens of acceding countries win as a consequence of EU membership. But when we read the Commission's annual progress reports, or publications from other organisations, including the World Bank and Transparency International[3], another impression emerges on the Central and Eastern European countries.

The changes required can only result from a big and systematic effort. But in the EU this takes on a separate dimension. These immaterial "goods" are among the rights, which citi-zens and enterprises of all member states must enjoy, and in equivalent measure. Further-more, parts of the Union cannot function, unless there is a modern and well-functioning legislation, infrastructure, and civil service in all member states. Important examples are the customs union[4] and the common agricultural policy.

You can also state this in another way: Both politically and in law there is the presumption that member states are civilised and equally civilised, so that the acts of one member state be worthy of automatical, mutual recognition by the others. Of course we know that we are different. But as long as the differences are kept within the limits of "equivalence", it does not hamper the functioning of the Union. But when the Central and Eastern European coun-tries applied for membership in the mid 1990s, the differences between them and the mem-ber states were so substantial that the presumption was untenable. The declared political intentions of candidate countries are in themselves insufficient to bridge the gap. Legal ob-ligations on substantial reforms are required to ensure the rapid realisation of what the Court of Justice calls the "useful effects" of the EU.

Let us just rehearse some of the reasons, which require the EU to include obligations outside the acquis:

Rule of law and human rights are mostly based on international conventions and not on EU law.

The acquis often regulates only part of the subjects that need regulation by national norma-tive act. It is presumed that Member states have a legal framework which is capable of se-curing good governance for all parts of the legal system, whether they are harmonised or not.

Good administration and proper courts procedures require that the civil society, the

[3] *www.transparency.org.*

[4] *But even such notions change. Today the customs union also covers major parts of the consumer protection and products safety control which is linked to the common external borders.*

administration and the courts are guided by laws which in a transparent and complete way set out the material rights and formal procedures, in order to guarantee the citizens' rights, civilised standards and the useful effect-requirement of EU law.

A properly functioning EU, and especially the Single Market, requires a rather vast legislative regulation – in part as a "service" to economic life – in order to function properly and honestly. Without it there will be no "well-functioning market".

The acquis is in many cases related to international conventions applied in all Member states.

The transfer of external competencies to the EU requires an ever-increasing coordination.

Therefore we had to turn into explicit conditions many requirements that for the present member states were implicit "state of the art trappings" of a modern society. This explicitation is contained in the Copenhagen Criteria established by the European Council in 1993:

- Political democracy, the rule of law, the enforcement human rights, and efficient, com-petent and honest judges,
- A well-functioning market economy, that can sustain the competitive pressure of the Internal Market,
- 100% correct implementation of 100% of the acquis
- Institution building, so that the state administration corresponds to the needs of a mod-ern economy and a member state with competent, efficient, and honest civil servants.

The Copenhagen Criteria are ambitious standards. The "well"-functioning economy, the "full" acquis implementation, and "fit and proper" institutions are qualitatively high standards, (especially if we use the standards of Northern European societies). And it appears clearly from these criteria that the obligations go much beyond the mere implementing of the acquis.

These obligations are discussed in parts 4 – 6.

3. The Acquis Is a Very Complex and Heterogeneous Group

When speaking about the acquis, most think of the EU and EC Treaties, regulations, and directives. But they are only part of the story, in fact only two out of 20 categories, if we look to the Accession Act of the Athens Treaty:

Group 1: "provisions of the original Treaties", art. 2.

Group 2: "acts adopted by the institutions", art. 2. (This comprises regulations, directives, decisions, and recommendations).

Group 3: "acts adopted by the European Central Bank", art. 2.

Group 4 "decisions and agreements adopted by the Representatives of the Governments of the Member States meeting within the Council", art. 5(1) 1'.

Group 5: "declarations or resolutions of, or positions taken up by the European Council or the Council', art. 5(3).

Group 6: " declarations or resolutions ... concerning the Communities or the Union adopted by common agreement of the Member States", art. 5 (3).

Group 7: "the provisions of the Schengen acquis as integrated into the framework of the European Union by the Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community …, and the acts building upon it or otherwise related to it, listed in Annex I to this Act," art. 3(1)

Group 8 "the provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in [group 7] ", art. 3(2)

Group 9: "Agreements concluded by the Council under Article 6 of the Schengen Protocol", art. 5(3)

Group 10: "conventions provided for in article 293 of the EC Treaty", art. 5(2).

Group 11: "conventions … inseparable from the attainment of the objectives of the EC Treaty", art. 5(2).

Group 12: "conventions or instruments in the field of justice and home affairs which are inseparable from the attainment of the objectives of the EC Treaty", art. 4(2).

Group 13: "agreements concluded by the present Member States relating to the functioning of the Union", art. 5(1) 2'.

Group 14: "agreements concluded by the present Member States ... connected with the activities [of the Union]", art. 5(1) 2'.

Group 15: "agreements and conventions concluded by the Community or in accordance with Article 24 or Article 38 of the EU Treaty, with one or more third States, with an inter-national organization, or with a national of a third State ", art. 6 (1).

Group 16: "agreements and conventions concluded or provisionally applied by the present Member States, and any of the Communities, acting jointly", art. 6(2) 1'.

Group 17: "agreements concluded by those States which are related to [agreements and conventions concluded or provisionally applied by the present Member States, and any of the Communities, acting jointly]", art. 6(2) 1*.

Group 18: agreements specifically mentioned:

Various trading agreements, art. 6(2) 2' and (6),

The ACP Cotonou Agreement, art. 6(4)

The EEA agreement, art. 6(5)

The textiles agreements, art. 6(7),

The steel agreements, art. 6(8),

The fisheries agreements, art. 6(9).

Group 19: "internal agreements concluded by the present Member States for the purpose of implementing the agreements and conventions referred to in [Article 6] paragraphs 2 and 4 to 6", art. 6(11).

Group 20: " positions in relation to international organizations, and to those international agreements to which the Community or to which other Member States are also parties", art. 6 (12).

As we go through the groups, it is striking how much of it concerns the relations to third countries. Another expanding area is the Justice and Home Affairs and the Schengen acquis.

It is practically important to underline that most of the acquis will never be negotiated with candidate countries, and that most "negotiations" concern practical matters such as inserting corresponding terms in the Romanian language. Only in restricted number of cases there are substantive discussions e.g. on a transitional period. It should be noted that the Commission thinks that in the Internal Market area transitional measures are inappropriate.

A question for future candidate countries is whether the Convention draft will change this. Basically the draft articles I-32 to I-38 retain the present system (ECT art. 249-254 and 256) albeit with new names. But there are some new elements, especially the introduction of a distinction between legal acts of "legislative" nature and others which require clarification through practice.

4. There Are Substantial Obligations and Duties Beyond the Acquis

The duties outside the acquis fall into two groups: the duty to accede to a number of international conventions, and the duty to possess a number of modern, infrastructure laws.

As a schematic illustration we can classify the most important examples of such duties as follows:

If we assess these subjects overall, we can see that the EU takes an interest in virtually all areas of the modern state's activities. Many central areas of public policy, e.g. human rights, the refugee questions, criminal law, or anti-corruption, cover areas where a state undergoes the test of whether it is a modern democracy. And many of the laws listed here are the req-uisites of a well-functioning infrastructure and services of a modern economy.

Criterion	International treaties	Legislation
1. Rule of law & democracy	UN and CoE[5] human rights conventions, declarations etc. Anti- corruption Penal law conventions Refugee and asylum conventions	Administrative, civil and criminal courts procedure laws The penal code The prison regulations Anti-corruption laws Language laws
2. The well-functioning market economy	WTO, WIPO[6] Parts of CoE & OECD Transport conventions Hague conventions on Private International Law	Privatisation Competition & state aid Financial legislation Company law Land registration Bankruptcy law Patent, trade mark and intellectual rights protection
3. Correct implementation of the whole acquis, incl. interpretations	WTO, WIPO, EPO[7] CoE on collaboration, mutual recognition The data convention Transport conventions Administrative agreements between EU authorities	A law structure that permits to include the acquis in an efficient, coherent and transparent way
4. Fit and proper institutions	= in addition to the requirements of 1-3: Various conventions to advance honesty Various conventions on collaboration between public authorities	= in addition to the requirements of 1-3: Public administration laws Public salaries laws Public audition rules & practice The border control system CAP administration Part of education and post graduate training

[5] *CoE= Council of Europe*
[6] *WIPO= World Intellectual Property Organisation*
[7] *EPO= European Patent Organisation*

Without the laws under the 2nd criterion, you cannot have a modern market economy, be-cause without such laws and their correct implementation most people are – normally for good reasons - afraid of investing, as is the case in Russia or in most 3rd world countries[8]. But there is in this also a novel notion that laws are not just an "emanation of the will of the nation/people" or the like abstractions. Laws are also a conscious service from the legislator to economic life, in order to keep it competitive and innovative. Thus without a civil code, a bankruptcy code, mortgage and land registration systems, and rules on enforcement of judgements, no bank system can finance economic life. Without intelligent laws on financial services and intellectual and industrial property rights it is not conceivable that a country can be in the modern economy. And the EU cannot have member states that remain outsid-ers to such modern laws, because such a country can easily become an economic and politi-cal dead-weigh.

Equally, the state cannot function at EU level without modern laws on the civil service, in-cluding salaries and training, and the corresponding institution building. And a modern state requires the efficiency that stems from absence of corruption. This is not just a human rights and ideal requirement. It is also a basic condition for economic efficiency.

A final remark concerns the 3rd criterion. It might appear illogical that there can be duties outside the acquis for implementing the acquis. But it is relatively simple to explain by two examples, which both have the starting point that a directive often does not harmonise the whole of a certain legal area, but only those sub-item mostly requiring it.

The first example comes from the protection of personal date. The data protection directive is drafted as a supplement to the Council of Europe convention of 28 January 1981. Thus the proper functioning of the directive presupposes that member states have implemented the convention also[9].

The second example comes from company law the 1st to 3rd Company law directives only harmonise part of material company law[10]. Nevertheless Denmark – even before the 2nd and 3rd directives were adopted (1976 and 1978) – totally reformed its company law by adopting two new acts in 1973. The reason was that the old act did not have a systematic and a structure that enabled the harmonious inclusion of the directives. Furthermore their inclusion in the old act would mean interpretation problems when provisions of different ages, traditions, and techniques stood side by side.

And this leads directly to the next point.

5. The Obligations under the Copenhagen Criteria May Consequence Major Re-forms of Basic Structures

When the Copenhagen Criteria have been duly implemented, the new member states will often discover that even this is not enough to be able to reap the full benefits from member-ship or to play their full part in the future Union. This requires further reforms.

This is true even for the old member states, as the current pension and health reforms in Germany and France demonstrate. But for the Eastern and Central European states it is a systemic

[8] *See especially Hernando de Soto: The Mystery of Capital (Bantam Press 2000).*
[9] *See preamble no 11 of directive 95/56, 24 October 1995, OJ 1995 281/31.*
[10] *The future of EU company law is discussed in the consultative document of the High Level Group of Com-pany Law Experts, (the "Winter Group") "A Modern Regulatory Framework for Company Law in Europe",* **http://europa.eu.int/comm/ internal_market/en/company/co/modern/consult/consult_en.pdf.**

problem. Huge areas of the legislation, and huge parts of the public administration may, after a few years of membership, need a comprehensive and systematic overhaul and modernisation. Albeit the new member states have lots of laws, and often quantitatively more than the old ones, they do not form a coherent system. But without a coherent and modern administrative and legal order that can qualify for the term "system", you cannot have a modern Western European society.

This could be discussed at length. But I will restrict the discussion to one example: The need to modernise the higher education, both contents and methods. This contributes to not just to better knowledge, but more importantly to modern attitudes and methods. And nowhere is this more required than in the law studies. The EU membership, the post-industrial market economy, the internationalisation, and the growing primacy of human rights law require a modern legal system staffed by qualified lawyers. This presupposes a modern ap-proach to methods on sources of law, new textbooks, new curricula, new teaching and ex-amination methods, and a modern post graduate training.

These are challenging tasks. It may take about a decade to establish a workable consensus on the necessity, and then another decade to realise them. But for every year consumed, huge opportunities are lost. For modern history demonstrates the importance of good timing.

The reforms are difficult to manage. They may have short-term costs, and they may conflict with vested interests [11]. And in our societies, the adversaries of reform are often more or-ganised and more outspoken than the adherents. Therefore it is important to establish some overall master plan ad modum the progress reports.

6. The Duties Stemming from the Copenhagen Criteria Must Be Initiated, and in Part Realised, before Day One Of Actual Membership

In 1998, the Commission practically added a further criterion to the Copenhagen Criteria called "the track record". It was defined as "the irreversible, sustained and verifiable implementation of reform and policies for a long enough period to allow for a permanent change in the expectations and behaviour of economic agents and for judging that the achievements will be lasting." To minimise problems later on, and to gauge the preparedness of candidate countries, it basically requires that the acquis should be implemented before membership, - in certain cases "well before accession" -, and for some core legislations even before substantive accession negotiations can begin [12].

Does this mean that the EU does not trust the new member states? To some extent the answer is yes. But basically the question would be misplaced, because trust and a modern and well functioning legal system are not alternatives. On the contrary, they march hand in hand. The basic reasons are set out under 4 and 5.

From a technical point of view we must also state that unless the reforms be begun well before membership, the new member states will face several problems during the first years of membership. Some are economic, but worse may be political obstacles, lack of absorption capacity, and lack of psychological familiarity with the requirements of a modern society.

One of the most important contributions of the Commission's annual progress report is that it brings such reform needs into the focus already now in a comprehensive, and EU-related way [13].

[11] This is evident when a state cannot in time establish the framework required for obtaining grants from the regional and structural funds.
[12] As mentioned under point 1, this may also follow from duties already undertaken.

7. Conclusion: Why the Copenhagen Criteria Are Just and Appropriate

The Copenhagen criteria may appear to be cumbersome conditions. But if we keep the objectives of the EU as our central focus, and then ask which are the mechanisms that render a union of this nature successful over the long term, then we arrive by necessity to something like these criteria. For experience of the post WWII years tells us that an undemanding or undynamic cooperation stands no longterm chances.

We might also underline that where there are real problems, there will also be a solution, be it transition, be it a new acquis, or be it support in experts and money to overcome problems. Indeed, my experience of a generation of negotiations is that those who come to Brussels with a good case, and who know how to advocate it properly, do not return empty-handed.

If we stick to the principles, let us first remind ourselves that he who wants to join a club or an association, must abide by its rules. This universal requirement is the core of all accession negotiations since 1962, and all applicants knew and accepted the Copenhagen Criteria. It is by all standards of law and politics just and justifiable. For the whole purpose of accession is to lift candidate countries up to EU standards, not to dilute the accomplishments of the EU during two generations.

This leads to a second point. Membership or not, the EU acquis represents the legislative level required by a modern market economy with the rule of law. Thus even states which will not apply for membership, from Switzerland to the Far East, but who are in quest for success, have introduced or are introducing rules whose substance mirrors the acquis. This is also reflected in the WTO accession conditions.

The Copenhagen criteria also helped to save the candidate countries from a worse fate. Look at the countries which have had major economic crises since 1997. They have some common characteristics: corruption and a low-quality and disfunctional legal system. And regard then the fate that befell Russia. Analysts debate whether economists, including the World Bank and the IMF, gave sound advice in the early 1990s, or whether different economic advice ought to have been given. But they also should discuss whether economists respected a couple of basic assumptions of their own science, i.a. that a good legal system is a condition for a well functioning market economy. Compare this to the careful timing aspects of the White Paper, Accession Partnership and the NPAA[14] – containing the meticulously elaborated EU requirements with their gradual approach accompanied by large-scale support and expertise - versus the hasty reforms in Russia.

We can with a good empirical basis state of the EU and the Copenhagen Criteria, what Sir Winston Churchill said about democracy: "It is certainly not (yet) infallible, but it has proved superior to anything so far seen. It may well be that the quality and quantity of the requirements have surprised applicant states at each accession so far" [15]. The accession procedure for Central and Eastern Europe, implementing the Copenhagen Criteria, is the best chance for a better future, which Europe can give itself. That the task sometimes may look like a superhuman one to accomplish at the technical level, is in the long-term context no more than ripples on the happy surface.

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[13] If this did not happen, there is a big risk that Phare and bilateral assistance cannot be applied in a way that guarantees the results sought.
[14] National Program for the Adoptation of the Acquis, a detailed legislative plan which all candidate countries are required to produce and update at regular intervals.
[15] Christopher Preston: Enlargement and integration in the European Union (London, Routledge 1997).