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The Political Criteria for Accession to the EU in the Experience of Croatia

Tanja CERRUTI*

Croatia became the twenty-eighth member of the European Union following an intense preparation process that was heavily influenced by adherence to the so-called political criteria set for the fifth enlargement of the Union, but that were implicit also in previous phases. The additional conditions laid down in the criteria applied to the preparation process of the Western Balkan Countries reflecting the historical and political context of what was characterized, in the 1990s, by bloody ethnic conflicts. The strict application of the political criteria and the careful monitoring of their application by the European Institutions have spurred in Croatia a number of significant reforms, both at legislative and constitutional level, particularly concerning the judiciary. The outcome of the preparation process not only led to Croatia's accession to the EU, but also benefitted the Country itself. However, the management of this process and the overall EU scenario pose a number of questions on how and if the enlargement of the Union should be further pursued.

1 CROATIA'S ACCESSION TO THE EU

On 1 July 2013 Croatia became the twenty-eighth Member State of the European Union. Accession was preceded by a gradual approximation process which implied serious preparations.

The approximation process consisted of forging closer relations between Croatia and the EU that started with the early institutional relations set-up by the EU with the Western Balkan Countries in the second half of the 1990s and evolved over the next few years, leading to Croatia's application for EU membership.

During that time, preparation activities were geared towards ensuring that Croatia meets a set of requirements laid down by Brussels through a process that was partly based on the model applied to the accession of the twelve countries that became Members in 2004 and then in 2007, and partly characterized by peculiarities designed specifically for subsequent enlargements.

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The objective of this article is to provide an analysis of Croatia's process of approximation with reference to the accession criteria required by the EU, particularly in the political sphere. As regards this aspect, the article will analyse the influence that compliance to the said criteria has had on the accession process as well as on the need to amend the country's constitutional framework. In the light of all of the above, the article will draw some general conclusions on Croatia's membership of the EU by comparing this case to the procedures that characterized prior enlargements, and in terms of impact on the candidate country, leading to more general considerations on the enlargement process.

2 POLITICAL CRITERIA FOR ACCESSION TO THE EU (OVERVIEW)

On the occasion of the first enlargement waves of the European Community, a set of accession criteria structured as that used after 1993 was not available to the EU Institutions and the national frameworks of the countries aspiring to become Members were assessed mostly in terms of compliance with economic conditions. A careful analysis of the documents of the time shows, however, that certain aspects of their constitutional political systems were regarded as critical for the purpose of accession to the European *koiné*.¹

The documents related to the accession of Mediterranean Countries – whose recent past was marked by dictatorial regimes – paid a greater attention to the political condition of the applicant States² while starting from the SEA and, above

¹ About the membership of other Countries, the Treaties originally only envisaged that 'Any European State may apply', Art. 98 ECSC; Art. 237 EEC; Art. 205 EURATOM. As regards the first enlargement, see EC Commission, *Preliminary Commission Opinion on the Applications for Accession Submitted by the United Kingdom, Ireland, Denmark and Norway*, Brussels, 29 Sep. 1967, point 33: 'From the political angle, the accession of States whose political traditions of stability and democracy are so long-standing and so deeply rooted would be of great value for the Communities ...' (subsequent versions of the Opinion, dated 1969 and 1972, contain similar provisions).

² In the case of Greece, the Commission subjected its entry into the Community to the 'consolidation of Greece's democracy' (point 15, *Commission Opinion on Greek Application for Membership of the European Communities*, 29 Jan. 1976, *EC Bulletin*, Suppl. 2/76). For Spain, see the EC Commission, *Opinion on Spain's Application for Membership*, 29 Nov. 1978, point 2, in *EC Bull.*, Suppl. 9/78, as well as the European Council Conclusions, Maastricht, 24 Mar. 1981 and for Portugal, the *Opinion on Portuguese Application for Membership*, 19 May 1978, point 2-3, *EC Bull.*, Suppl. 5/78. In nearly all the Commission Opinions related to the fourth enlargement, which took place when the Maastricht Treaty was already approved, it is openly stated that 'a State which applies for membership must satisfy the three basic conditions of European identity, democratic status and respect for human rights' (Conclusions, *Commission Opinion on Sweden's Application for membership*, 31 Jul. 1992, *EC Bull.*, Suppl. 5/92; *Commission Opinion on Finland's Application for Membership*, 4 Nov. 1992, *EC Bull.*, Suppl. 6/92; *Commission Opinion on Norway's application for membership*, 24 Mar. 1993, *EC Bull.*, Suppl. 2/93). In the Opinion about Norway (which has never entered the Union, as it is well known), for the first time in a document of this type the Commission analysed the situation of a minority group, the Sami. In the *Commission Opinion on Austria's Application for Membership*, 1 Aug. 1991, *EC Bull.*, Suppl. 4/92, only some references are made to 'political conditions' (in the Foreword). On criteria applied in previous

all, from the Maastricht Treaty, Treaties began to refer to the political conditions of their Member States as well.³

In view of the fifth enlargement – more specifically on the occasion of the European Council of Copenhagen in 1993 – the European Union enunciated for the very first time the criteria for accession, determining that ‘the associated countries in Central and Eastern Europe that so desire shall become members of the European Union’, provided that they complied with conditions of a political, economic and legal nature. Political criteria were identified with *stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*.⁴ Subsequent developments in the relations between the EU and Candidate Countries from Central and Eastern Europe show that while all evaluation criteria were carefully examined, political aspects weighed in more significantly on progress in negotiations.⁵

3 RELATIONS BETWEEN THE BALKAN COUNTRIES AND THE EU.

3.1 GENERAL FRAMEWORK

While preparing the fifth enlargement, the European Union laid the groundwork for a new expansion of its borders that would further extend to the Western Balkan Countries (beyond those already existing with Greece). Since the very

enlargements, see E. Tucny, ‘L’Élargissement de l’Union Européenne aux Pays d’Europe Centrale et Orientale’ (Paris: L’Harmattan, 2000): 12–21.

³ See the Preamble of the Single European Act, 26 Feb. 1986, the points starting with ‘determined’, ‘convinced’ and ‘aware’; and the Maastricht Treaty, 7 Feb. 1992, in the Preamble, the point starting with ‘confirming’. On this point, it should also be mentioned the Declaration on Democracy, annex to the Copenhagen European Council Conclusions of 7–8 Apr. 1978 and the Declaration adopted during the Stuttgart European Council of 17–19 Jun. 1983.

⁴ European Council Conclusions, Copenhagen, 21–22 Jun. 1993, point 7. The Madrid European Council, 15–16 Dec. 1995, added to these criteria the so called administrative capacity, id est ‘the adjustment of the administrative structures’ of the Candidate States. Among the numerous publications on the Copenhagen criteria see K.E. Smith, ‘The Evolution and Application of EU Membership Conditionality’, in *The Enlargement of the European Union*, ed. M. Cremona (Oxford-New York: Oxford University Press, 2003): 105–140; C. Hillion, ‘The Copenhagen Criteria and their Progeny’, in *EU Enlargement: a Legal Approach*, ed. C. Hillion (Oxford-Portland: Hart Publishing, 2004): 1–23; C. Pinelli, ‘Conditionality and Enlargement in Light of EU Constitutional Developments’, *Eur. L. J.* 10, No 3 (2004): 357; T. Cerruti, ‘L’Unione Europea alla Ricerca dei Propri Confini. I Criteri Politici di Adesione e il Ruolo dei Nuovi Stati Membri’ (Torino: Giappichelli, 2010): 32–59.

⁵ At the Luxembourg European Council, 12–13 Dec. 1997, it was clearly established that ‘*Compliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations. Economic criteria and the ability to fulfil the obligations arising from membership have been and must be assessed in a forward-looking, dynamic way*’ (see the Conclusions, point 25). In application to this rule Slovakia, despite having achieved good results in the economic sector, was denied the opportunity to start accession negotiations in 1998, together with the first group of Central and East European Countries. On the Luxembourg Council’s statement see S. Giusti, ‘Verso la Grande Europa. I Criteri per l’Adesione’, in *Dall’Europa a Quindici alla Grande Europa. La Sfida Istituzionale*, ed. A. Manzella, F. Guerrieri, F. Sdogati (Bologna: Il Mulino, 2011): 114.

early steps taken to 'approach' those countries, the EU has always stressed that closer relations would be rooted in the Copenhagen criteria in conjunction with additional parameters concerning the recent historical and political past of some countries in particular.⁶

All the Western Balkan States, except for Albania, had been part until 1990 of a unitary State, the Socialist Federal Republic of Yugoslavia. In 1991 four of the six republics that made up the federation – Slovenia, Croatia, Bosnia-Herzegovina and Macedonia – declared their independence. In the first three cases, their action triggered the response of the federal armed forces, which by that time were mostly made up of Serbian and Montenegrin members. In Slovenia the war soon ended, but in Croatia and Bosnia-Herzegovina the conflict would be longer and much bloodier.

In 1991, in Croatia two Regions characterized by a significant presence of Serbian citizens became the self-proclaimed Serbian Republic of Krajina and a bloody conflict ensued between the Yugoslav army and the Croatian troops, that fought to defend their territory and to conquer back the two regions that had proclaimed their independence.

The war, that saw the intervention of the international community, ended in 1995 with the liberation by the Croatian army of all the occupied territories, with the exception of a region that remained under the aegis of the UN until 1998.

In Bosnia-Herzegovina the war took on more brutal connotations than in nearby Croatia. The situation was made more complex by the presence of a Muslim component, in addition to the Serbian and Croatian ones. During the war both the Serbs and the Croatians proclaimed the independence of two separate entities in two areas of Bosnia-Herzegovina. Initially the Croatians allied with the Muslims to fight the Serbs, but later they turned against each other. The war in Bosnia, that ended in late 1995 with the signing of the Dayton Agreements,⁷ is

⁶ The group of 'Western Balkan Countries' includes Croatia, Serbia, Montenegro, Bosnia and Herzegovina, Albania, the Former Yugoslav Republic of Macedonia, and Kosovo. It is widely agreed that the term 'Balkan' took on a rather negative connotation at the time when the region was characterized by a process of disruption that was the exact opposite of what was happening in Western Europe, V. Cvrtila, 'Republika Hrvatska – Gateway prema Jugoistočnoj Europi' (Republic of Croatia – Gateway to South-Eastern Europe), *Politička Misao* 37, no. 1 (2000): 166. On the 'European journey' of these Countries after the breakup of former Yugoslavia, see S. Vukas, S. Fabianić Gargo, 'Pravnopovijesne i Međunarodnopravne Odrednice (Des)integracijskih Procesa Država Sljednica SFRJ' (Historical and international juridical options in the (dis)integration processes of the States of Former Yugoslavia), *Zbornik Radova Pravnog Fakulteta u Splitu* 48, no. 3 (2011): 577–612.

⁷ *General Framework Agreement for Peace in Bosnia Herzegovina and the Annexes thereto*, concluded by the Republics of Croatia, Bosnia Herzegovina and Yugoslavia the 21 Nov. 1995 and subscribed in Paris the 14 Dec. 1995, available in www.ohr.int. The Erdut Agreement were concluded by Yugoslavia and the Republic of Croatia the 12 Nov. 1995, thus ending the war in Croatia; the text is available in www.usip.org.

remembered in particular for the atrocities committed in particular by the Serbs against the Croats and the Muslims.

The wars in the Balkans left open a number of problems and unsolved questions. One of the main issues concerned the status of the refugees, those citizens who before the war resided in a republic other than the one they belonged to by nationality. After the war broke out, they were forced to emigrate and to leave behind any property that they owned in those places.

With regard to that framework, in 1997 the General Affairs Council underscored the fundamental relevance of conditionality principles by stating that they 'will govern the development of the Union's relations'. As a result some general parameters would apply to all interested countries, while others would refer specifically to each of them individually.

The former includes the country's commitment towards the return of refugees and displaced persons; compliance with the Peace Agreements; the commitment to engage in democratic reforms; the commitment to safeguard human and minority rights and to hold free and fair elections; the absence of discrimination against minorities and independent media; the implementation of economic reform measures; good neighbourly relations.⁸ Specific conditions for Croatia mainly concerned its relations with some of the neighbouring countries. Great emphasis was placed to regional cooperation, i.e., to the need for countries in this region to put an end to residual tensions – particularly in some specific cases – that persisted after the conclusion of the conflict that led to the break-up of former Yugoslavia and to the cooperation with ICTY.⁹

Those conclusions have provided the legal framework on which the EU based the definition, in 1999, of the *Stabilization and Association Process* (hereinafter SAP),

⁸ Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of South-East Europe, 29 Apr. 1997, *EU Bull.* 4/97, 158. The Council partially reiterated what it had already stated in the General Affairs Council of October 1995, February, May and October 1996, respectively in *EU Bull.* 10/95; *EU Bull.* 1-2/96; *EU Bull.* 5/96; *EU Bull.* 10/96. On this point see also the European Council Conclusions, Florence (21–22 Jun. 1996, *Declaration by the European Council on Former Yugoslavia*) and the Report from the Commission to the Council and the European Parliament, *Common principles for future contractual relations with certain countries in South-Eastern Europe*, COM(96) 476 final, in *EU Bull.*, 10/96.

⁹ ICTY is the International Criminal Tribunal for the former Yugoslavia, located in The Hague, here in after ICTY. This aspect was strongly criticized by many in the belief that it would have been preferable for the International Community to promote the consolidation of a transitional national justice system, I. Rangelov, 'EU Conditionality and Transitional Justice in the Former Yugoslavia', *Croatian Yearbook of European Law & Policy* 2 (2006): 365–375. Others claim that the relevance attached to this parameter reflected the fact that some Balkan Countries – including Croatia – are still 'far from the adherence to EU norms, values and identity', thus leading to the imposition of 'a stricter set of EU membership criteria', J.M. Maki, 'EU Enlargement Politics: Explaining the Development of Political Conditionality of "Full Cooperation with the ICTY" towards Western Balkans', *Politička Misao* 45, no. 5 (2008): 73.

a programme aimed to gradually build closer links and integration between political and economic systems of the Balkan Countries and the EU. SAP would have operated in synergy with other initiatives that were already in place in the region and among its tools were – on condition of fulfilling a number of criteria – the signing of Agreements known as Stabilization and Association Agreements.¹⁰ With reference to the Stabilization and Association Agreements, the document clarifies:

The conditions for the start of negotiations on such Agreements would remain those set out in the Council Conclusions of 29 April 1997 on the opening of negotiations for contractual relations. Obviously, to conclude such an enhanced relationship with the EU, a country would also have to have attained the high level of political and economic development required to meet the increased reciprocal and mutual obligations of the relevant *acquis*. In addition, taking into account the context of the Stabilization and Association process, the Stability Pact and the future EU Common Strategy, there would be increased emphasis on progress in developing regional cooperation.

The Process was officially launched at the *Zagreb Summit* in 2000, with the participation of Heads of State and Government of EU Member States and all the Countries of this region.¹¹

¹⁰ The Process was proposed by the Commission, Communication from the Commission to the Council and the European Parliament on the Stabilization and Association Process for Countries of South-Eastern Europe, COM(1999) 235, 26 May 1999. The instruments that were already in place, that would interact with the Process, were Regional cooperation and the Stability Pact for South Eastern Europe. On the relevance of regional cooperation in South Eastern Europe, R. Vukadinović, 'Regionalna Suradnja na Jugoistoku Europe' (Regional cooperation in South Eastern Europe), *Politička Misao* 37, no. 2 (2000): 77 e A. Petričušić, 'Regional Cooperation in the Western Balkans – a Key to Integration into the European Union', *Croatian Yearbook of European Law & Policy* 1 (2005): 20; M.A. Vachudova, 'Strategies for Democratization and European Integration in the Balkan', in *The Enlargement of the European Union* (*supra* n. 2): 141–160. About regional cooperation as an additional element of the SAA in respect of the European Agreements with Central and Eastern European Countries M. Braniff, 'Transforming the Balkans? Lesson Learning and Institutional Reflexivity in the EU Enlargement Approach', *European Foreign Affairs Review* 14, no. 4 (2009): 556.

¹¹ For the final Declaration of the summit see http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/er/Declang4.doc.html. On the opportunity to provide a Stabilization process due to the conditions of the area see the *European Parliament Report on the Communication from the Commission on the Stabilisation and Association process for Countries of South-Eastern Europe* (extracts), in *European Foreign Affairs Review* 5, No 2 (2000): 244. On the SAP see also K. Grabar Kitarović, 'The Stabilization and Association Process: the EU's Soft Power at Its Best', *European Foreign Affairs Review* 12, no. 2 (2007): 121–125; on the importance of the conditionality ('the glue' of the Process) S. Blockmans, 'Eastern Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia and Serbia and Montenegro, including Kosovo)', in S. Blockmans, A. Lazowski (Den Haag: TMC Asser Press, 2006): 327. In the SAP Framework, Candidate Countries were subject to Commission's evaluation report even before acquiring Candidate status. The first SA Agreement were signed in 2001 with Croatia and FYROM (for Croatia, see para. 3.2).

In subsequent years the prospects of accession of the Western Balkan Countries to the EU, anticipated at the Cologne meeting of 1999,¹² has been reiterated by several *European Councils*, starting in Feira in 2000.¹³

It was at the European Council of Thessaloniki in 2003 that the pace of the process was stepped up with the organization, in addition to the traditional meeting of European Heads of State and Government, of a meeting with their colleagues from the Balkan Countries that led to the adoption of a *Declaration* and an *Agenda* that would serve as the basis for future developments in relations.¹⁴

As is known, in 2006 the enlargement process took a ‘new direction’ that was characterized by greater caution in evaluating future expansions of the EU borders. The new approach required the fulfilment of three cardinal criteria – conditionality, consolidation and communication – and, in line with the attention that EU Institutions had been giving for a few months on the issue, it attached greater weight to the so-called fourth criterion of Copenhagen, that is the capacity of the European Union to expand without altering the pace of integration.

Consolidation required the fulfilment of the commitments undertaken with all the then-Candidate Countries, but negotiations would depend on progress based on the actual level of adherence to the accession criteria.¹⁵

¹² In Cologne ‘*The European Council Reaffirms the Readiness of the European Union to Draw the Countries of this Region Closer to the Prospect of Full Integration into its Structures*’, European Council Conclusions, 3–4 Jun. 1999, point 72.

¹³ See, the Conclusions of the European Councils of Lisbon, 23–24 Mar. 2000, point 47; S. Maria da Feira, 19–20 Jun. 2000, point 67; Nice, 7–9 Dec. 2000; Göteborg, 15–16 Jun. 2001, point 66; Copenhagen, 12–13 Dec. 2002, point 23; Brussels, 20–21 Feb. 2003, point 82. Since those Declarations, the EU forged the category of ‘potential Candidate Countries’ that was not used in the past.

¹⁴ See the Conclusions of the Thessaloniki European Council, 19–20 Jun. 2003, points 40–43. The Declaration confirmed the European perspective of the Western Balkans, underlining the importance of the guidelines contained in the Agenda and in SAP. The Agenda, drafted by the General Affairs Council (16 Jun. 2003) and endorsed by the Thessaloniki European Council, was officially adopted by the Euro Balkan summit of 21 June as the starting point for future relations between the EU and the Countries of the region. In the meantime, a new instrument of dialogue between the EU and the Balkan countries was launched: the EU-WB Forum.

¹⁵ Conclusions of the Brussels European Councils, 14–15 Dec. 2006, points 4–9 (which specify ‘To sustain the integration capacity of the EU the acceding countries must be ready and able to fully assume the obligations of Union membership and the Union must be able to function effectively and to develop. Both these aspects are essential for ensuring broad and sustained public support, which should also be promoted through greater transparency and better communication’) and 15–16 Jun. 2006, points 53–56 (which also recall the Salzburg Declaration of 11 Mar. 2006, in http://www.eu2006.at/en/News/Press_Releases/March/1103EUWesternBalkansStatement.html and the Communication from the Commission, *The Western Balkans on the Road to the EU: Consolidating Stability and Raising Prosperity*, COM(2006) 27 final, 27 Jan. 2006). The EU applies to the Balkan Countries a double form of conditionality: a positive one (which allows the Candidate Country, if it is in line with the criteria, to get benefits like membership, trade preferences or participation in Community programmes) and a negative one (which allows the EU to withdraw such benefits in case of non-compliance), L. Zuokui, ‘EU’s Conditionality and the Western Balkans’ Accession Roads’, *European Perspectives – J. on European Perspectives of the Western Balkans* 2, no. 1 (2010): 84.

According to the procedure used for the fifth enlargement, the European Union not only described the 'model' Member State that it set out to forge,¹⁶ but also concretely supported those who aspired to become Members by setting up and completing a preparation process that relied on a number of financial and operational instruments.

The approximation process of the Balkans towards the EU was thus characterized by the creation of financial instruments that aimed to support reforms in very concrete terms. Access to such instruments was subject to compliance with certain requirements, including political ones.¹⁷

In 2007, almost all those instruments were unified into one, known as IPA (Instrument for Pre-Accession Assistance), that was initially envisaged to span from 2007 to 2013 but later extended for seven more years. The IPA is based on five lines of action, the first two (Institution and Transition Building and Cross-Border Cooperation) concerning all the Countries involved, while the remaining three (Regional Development; Human Resources Development; Rural Development) pertain only to the candidate countries.

From an operational standpoint, the programme of preparation for Balkan Countries is characterized by elements that are common to all the national frameworks involved, but the timing to achieve subsequent stages depends on each Country's level of compliance with the objectives.

Since the early days, Croatia appeared to be the 'lead' Country on the path towards membership.¹⁸

¹⁶ C. Hillion, *supra* n. 4: 22.

¹⁷ The PHARE (Poland and Hungary: Assistance for Restructuring their Economies), initially adopted for Poland and Hungary has been progressively extended to other Central and Eastern European Countries and to the Balkan Countries; OBNOVA was the name of a 1996 regulation on which was based the EU aid to the Balkans. In 2001 they have been replaced both by CARDS (Community assistance for reconstruction, development and stabilization), whose objective was to enable the Countries of South-Eastern Europe to participate in the Stabilization and Association Process. According to the regulation establishing the programme, the respect of democratic principles, the rule of law, fundamental freedoms, human and minority rights were preconditions for receive the EU's assistance (Regulation EC 2666/2000, point 7). On CARDS see also C. Pippan, 'The Rocky Road to Europe: The EU'S Stabilization and Association Process for the Western Balkans and the Principle of Conditionality', *European Foreign Affairs Review* 9, no. 2 (2004): 231, s. Since 2005 Croatia took part in ISPA (Instrument for Structural policies for Pre-Accession) and SAPARD (Special Pre-Accession Assistance for Agriculture and Rural Development). On financial instruments for the Balkan States see E.T. Fakiolas & N. Tzifakis, 'Transformation or Accession? Reflecting on the EU's Strategy Towards the Western Balkans', *European Foreign Affairs Review* 13, no. 3 (2008): 391, who pinpoints the deficiencies of IPA both in terms of too little money and of areas left without assistance.

¹⁸ On the 'leading' role taken on by Croatia at the start of negotiations and the implementation of the SAP, see V. Samardžija & M. Staničić, 'Croatia on the Path towards the EU: Conditionality and Challenge of Negotiations', *Croatian International Relations Review* 10, no. 36–37 (2004): 98–100.

3.2 CROATIA

Croatia participated in some form of relations that the EU has set-up with Western Balkan Countries and even with the Eastern European Countries (as the Phare). In the framework of SAP, in 2001 Croatia signed the corresponding Agreement with the EU that came into force in 2005.

Regardless of the numerous references to the political criteria contained in the Preamble (e.g., sanctioning commitment towards stabilization, political freedom, the return of refugees, the full implementation of international documents, like the Universal Declaration of Human Rights, the Charter of Paris for a New Europe, the Erdut and Dayton Agreements), Article 2 defines 'basis of the domestic and external policies of the Parties and essential element of the Agreement' some principles, between which the 'respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a new Europe, respect for international law principles and the rule of law'.¹⁹

The SAA was followed in 2004 by the *European Partnership* (that after the candidature became an *Accession Partnership*), that was subsequently adjusted over the years.²⁰

For what concerns conditionality, the 2004 Partnership stressed that the Community assistance to Croatia would be 'conditional on further progress in satisfying the Copenhagen political criteria and subject to the conditions defined by the Council on the 29 April 1997'. The document described the priorities that the Country should reach, identifying them with political, economic and juridical criteria.²¹

In 2003, Zagreb applied for accession to the European Union. Its national framework was evaluated by the European Commission that, as envisaged in the Treaties, issued an opinion based on the country's adherence to political, economic

¹⁹ Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, in *OJEU*, L 26/3, 28 Jan. 2005; on the Agreement see also S. Rodin, 'Croatia', in *The European Union and its Neighbours*, ed. S. Blockmans, *supra* n. 11: 366, ss; D. Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?', *European Foreign Affairs Review* 8, No. 1 (2003): 82.

²⁰ All the documents mentioned above are available at <http://ec.europa.eu/enlargement>. On the implementation of the SAA, see Lj. Mintas Hodak, 'Legal harmonisation on Croatia's path towards the EU', in *European Union & Association. Necessary adaptation for a Successful EU Membership* (International conference papers, Zagreb, 7-8 Oct. 2005), ed. Lj. Mintas Hodak (Zagreb: Zagrebačka Škola Ekonomije i Managementa, 2005): 156-159.

²¹ The European Partnership was the Annex of the Decision 2004/648/EC, which was repealed by Decision 2006/145/EC and then by Decision 2008/119/EC. The conditionality formula expressed in point 5 has been lightly modified in the subsequent versions of the Partnership. It refers to the Copenhagen criteria without specifying 'political' and includes the need to meet the requirements set by the Stabilization and Association Agreement. The criteria mentioned by the Partnership are the same scrutinized by the Commission in the annual reports (see para. 4).

and legal criteria. While the opinion pinpointed a number of criticalities, that will be analysed below, the overall assessment was positive, thus allowing the European Council to declare that Croatia was a Candidate for accession²² and that negotiations would be starting in March, 'provided that there is full cooperation with ICTY'.²³

In 2005, the year that should have marked a new phase in the journey of Croatia towards the EU, the Country came to deal with an unexpected development.

Negotiations were set to start on 17 March 2005, but the previous day the EU Ministers meeting at the General Affairs Council opted instead for a postponement in light of the fact that the Candidate Country had not complied with one accession requirement, namely collaboration with the ICTY.²⁴ Specifically, the country had failed to hand over (or to collaborate in locating) a Croatian general who had actively participated in military operations during the war of secession from the former Yugoslavia, Ante Gotovina. The decision by the EU was met with widespread frustration in the country, where part of the population regarded General Gotovina as a sort of national hero.²⁵

In the months that followed, the vicissitudes of the small Balkan State entwined with those of another Candidate Country, Turkey, that had long aspired to become a Member but whose accession notoriously lacks the unconditional support of all EU Member States. After offsetting the reticence of some countries against the accession of Turkey with the warmer feelings inspired by Croatia, on 3 October 2005 the Council decided to start negotiations with both candidates. The accession of Croatia was justified by a positive opinion expressed a few days earlier by the Chief Prosecutor of the ICT in The Hague concerning its collaboration, even if in fact no significant change had occurred since March with regard to the Croatian military chief who remained at large. This apparent contradiction led some to believe that the Council's decision was based more on the need for

²² European Council Conclusions, 15–16 Jun. 2004, points 33–39 and *Communication from the Commission. Opinion on Croatia's Application for Membership of the European Union*, COM(2004) 257 final, 20 Apr. 2004.

²³ European Council Conclusions, 16–17 Dec. 2004, points 14–16.

²⁴ See the General Affairs Council Conclusions, 16 Mar. 05, DOC. No. 7138/2/2005 REV 2. The decision to postpone the start of accession negotiations came as a 'cold shower' for Croatia, 'breaching every political illusion about fast-track EU membership', Lj. Mintas Hodak, *supra* n. 20: 162.

²⁵ Gotovina was apprehended in December 2005 and deferred to the ICTY in The Hague. He was found guilty in April 2011, but in 2012 he was acquitted on appeal. In 2011 reactions to his sentence by Croatian general public and institutions were extremely critical, J. Kuntz, '(Re)entering Europe: the Post-communist Transition of Croatian Political Culture', *Politička Misao* 48, no. 5 (2011): 230.

political ‘balance’ rather than on the effective compliance with the criteria, that has been repeatedly put in question.²⁶

The negotiating *framework* contained terms and conditions that were not present in previous, similar documents concerning the opening of negotiations with the ten countries of Central and Eastern Europe, Malta and Cyprus. Consider the emphasis placed on the *open-ended* nature of the enlargement process, the envisaging of strict controls over the implementation of the conditions laid down in negotiating frameworks, and more specifically the introduction of a provision envisaging the suspension of negotiations – contained in the same framework – in case of violations of ‘freedom, democracy, fundamental rights and freedoms, and the rule of law’, which witness the relevant importance of political criteria.²⁷

The following year negotiations between the EU and Croatia started in earnest, with the aim to lead to the opening and closing of no fewer than thirty-five chapters referring to specific areas in which the Candidate Country had reached *initial* and *final benchmarks* set by Brussels.

Negotiations continued smoothly until the end of 2008, when once again they came to a sudden halt.

In this case the stop was due not to EU institutions but to a Member State of the EU, Slovenia, that like Croatia had long been part of former Yugoslavia. Ljubljana and Zagreb seemed unable to see eye to eye on a number of issues following the break-up of Yugoslavia, including their borderlines. Slovenia claimed that by so doing Croatia was *de facto* violating one of the accession criteria, thus it vetoed the opening and closing of some of the negotiating chapters. At first the European Union attempted to mediate, but when its efforts proved unsuccessful the EU invited the two contenders to settle the issue. In the second half of 2009, as a new Prime Minister took office in Croatia, the two countries finally agreed to submit the issue to an arbitral tribunal that would rule on the matter by passing a

²⁶ A. Bouilhet, ‘Turquie: la négociation passe par Zagreb’, *Le Figaro*, 28 Sep. 2005. On this point, see T. Cerruti, ‘L’Apertura dei Negoziati di Adesione all’Unione Europea della Turchia e della Croazia’, *Quaderni costituzionali*, no. 1 (2007): 108 and M. Sošić, ‘Croatian Strategy for EU Integration 2000–2007’, *Politička Misao* 44, no. 5 (2007): 107–108.

²⁷ The conditions according to which Croatia would be monitored were the Copenhagen and SAP criteria (‘the Union expects Croatia to continue to fulfil the political criteria and to work towards further improvement in the respect of principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law; to cooperate fully with the ICTY; and to make further progress in relation to minority rights, the return of refugees, judiciary reform, regional cooperation and the fight against corruption’). Negotiating framework with Croatia, Luxembourg, 3 Oct. 2005, at http://ec.europa.eu/enlargement/pdf/st20004_05_HR_framedoc_en.pdf. When setting those conditions, the negotiating framework reiterated the decisions by the December 2004 European Council (*supra* n. 23) and by the Commission in the Communication from the Commission to the Council and to the European Parliament. *Strategy Paper of the European Commission on progress in the enlargement process*, COM (2004) 657 final, 8 Oct. 2004.

final judgment. Thus the negotiations resumed and came to a conclusion in June 2011.²⁸

In the fall of that same year the Commission issued yet another favourable opinion on Croatia's accession, in December the Council announced that the country will become a Member of the EU, and the Treaty was signed three days later.²⁹

In January 2012, Croatian voters approved the accession through a referendum.³⁰

Until Croatia became effectively an EU Member, the Commission continued to monitor its performance by drawing up evaluation reports every six months.

Croatia's process of accession (and especially the cautiousness by whom it was inspired) was also inevitably influenced by the previous experience of Romania and Bulgaria, whose entry in the EU was regarded as 'premature' by some, in that their legal systems had yet to achieve an adequate level of readiness, thus forcing the Union to create a control and monitoring system following their accession.³¹

²⁸ See the *Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia*, at http://www.vlada.si/fileadmin/dokumenti/si/projekti/2010/Arbitrazni_sporazum/10_a_Arbitra%C5%BEni_sporazum_-_podpisan_EN.pdf. On the origins of the question in 1993 and on its juridical aspects see, from a Croatian point of view, V.Đ. Degan, V. Barić Punda, 'Jednostrani Akti Država u Pravu Mora napose s obzirom na Spor Slovenije i Hrvatske na Sjevernom Jadranu' (Unilateral Acts of the States in the Sea Law ly with particular regard to the Litigation between Slovenia and Croatia in the Northern Adriatic Sea), *Zbornik radova Pravnog fakulteta u Splitu* 45, no. 4 (2008): 841–861 and, more recently, S. Rodin, 'Pristupanje Republike Hrvatske EU, Bilateralni Spor s Republikom Slovenijom i Lisabonski Sporazum' (The Accession of Republic of Croatia to the EU, the Bilateral Litigation with Slovenia and the Lisbon Agreement), *Informator* no. 5720–5722 (2008): 1, who that reaffirms its bilateral nature and its irrelevance with regard to EU law.

²⁹ *Commission Opinion on the application for accession to the European Union by the Republic of Croatia*, COM(2011) 667 final, 12 Oct. 2011; *General Affairs Council conclusions on enlargement and stabilisation and association process*, 5 Dec. 2011; *European Council Conclusions*, 9 Dec. 2011, point 10–11; *Treaty concerning the accession of the Republic of Croatia*, DOC. No. 14409/1, 17 Nov. 2011.

³⁰ Turnout for the referendum reached 43.51% and 66.27% voted in favour. The Croatian academic and cultural word supported accession in the belief that EU membership would lead to 'the improvement of the juridical system and the full affirmation of the rule of law and of trust into Institutions', see the 'Declaration issued by the Croatian Academy of Sciences and Art', *Informator* no. 6040 (2012): 1–2. Scholars have noted that the outcome of the referendum may be considered satisfactory in spite of the relevant negative factors that influenced it. These include the need to update the electoral roll – that currently enlist a number of voters higher than the actual number of Croatia's inhabitants – and the deficiencies that characterized the electoral campaign in terms of information given to voters and of the limited weight of the European Union in the syllabus of higher education institutions and Universities, D. Grubiša, 'Hrvatski Referendum za Europsku Uniju: Anatomija Zakašnjelog (Ne)uspjeha' (Croatian Referendum for the EU: anatomy of a belated (lack of) success), *Politička Misao* 49, no. 2 (2012): 45–72.

³¹ See the Mechanism for Cooperation and Verification for Romania and Bulgaria, according to which the Commission reports every six months on progress with judicial reform, the fight against corruption and, for Bulgaria, the fight against organized crime. On this point, M.A. Vachudova & A. Spendzharova, 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Romania and Bulgaria after EU Accession', www.sieps.se (2012); on the Mechanism as a new feature of

4 EUROPEAN COMMISSION'S VIEWS ON CROATIA

4.1 THE EVALUATION REPORTS

During the fifth enlargement an element of the accession strategy that has proved extremely relevant to the definition and the evaluation of the so-called criteria was the drafting of annual reports by the European Commission which contributed to giving a more concrete form to the abstract formula enunciated at Copenhagen. To this end, with special reference to political criteria, the European Commission identified as relevant requirements the organization of democratic and free elections, an active role of the opposition, the independence and impartial role of the judiciary (that often proved one of the most delicate issues), the efficiency of the administrative system both at central and local level, the adoption of effective measures to fight corruption, and, lastly, the protection of human rights with special reference both to those rights that had been subject to restrictions under previous regimes (e.g., freedom of speech in general and freedom of the press in particular), and to those that had become an issue following the transition (e.g., civil and social rights of minorities).³²

As regards Croatia, the Commission adopted the same approach. It provided for an initial opinion to be drawn up and to be followed by annual reports focusing on progress in the relations between the EU and the Candidate Country, placing particularly emphasis on compliance with political, economic and legal criteria.³³

The opinion and the reports were founded on the information obtained by Croatian authorities, Member State or international organizations (as Council of Europe, Stability Pact, OSCE), NGOs. Between the information given by the Candidate Country particular importance must be recognized to the national plans for EU accession, that illustrate the progress made and the means adopted to respond to the Commission's observations.³⁴

post-accession conditionality E. Gateva, 'Post-accession Conditionality: Support Instrument for Continuous Pressure?', <http://userpage.fu-berlin.de>.

³² See the European Commission annual Reports on each of the Candidate Countries to the fifth enlargement and the annual Strategy or Composite Papers (issued from 1998 to 2003 or 2006). On the pre-accession strategy see, among others, K. Inglis, 'The Pre-Accession Strategy and Accession Partnerships', in *Handbook on European Enlargement. A commentary on the Enlargement Process*, ed. A. Ott, K. Inglis (The Hague: The Asser Press, 2002): 103–112; M. Maresceau, 'The EU Pre-accession Strategies: a Political and Legal Analysis', in *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis*, ed. M. Maresceau, E. Lannon (Houndmills: Palgrave, 2001): 3–28.

³³ In the parts of the reports concerning political and economic criteria, the Commission examines the Candidate's compliance with political and economic conditions as defined in Copenhagen in 1993. In the part about legal criteria, the Commission analyses the state of negotiations and the progress achieved by the Candidate in each of the negotiating chapters.

³⁴ See the National Programmes of the years 2003, 2004, 2006, 2007, 2008 in www.sabor.hr.

The evaluation on compliance with political criteria can be divided in those concerning State organization; others concerning human and minority rights; and additional criteria established for Balkan Countries.

4.2 STATE ORGANIZATION

In the initial evaluation concerning State Institutions, the EU Commission acknowledged the democratic nature of government pursuant to the constitutional revisions of 2000 and 2001, and dwelled on the functioning of Parliament and the administrative system.³⁵ With reference to legislative aspects, as was the case with other candidates in prior enlargements, the Commission focused on the freedom of political minorities, their participation in parliamentary activities, the financing of political parties, the affirmation of less extremist and more pro-European stances on the part of nationalistic political forces – the latter remaining somewhat limited and still requiring consolidation. The Commission identified as critical the functioning of the *Sabor*, in that difficulties in achieving a quorum in Parliament reflected negatively on the duration of legislative processes.

In 2007, Brussels welcomed the adoption of a new electoral law and the measures on the financing of political parties, while still encouraging further developments concerning the capacity to scrutinize the legislative process.

As regards the Executive, the Commission initially acknowledged the reforms undertaken to reduce and reorganize the army and other security forces, but it also drew attention to the need to engage in more comprehensive reforms of the public sector, leading to more effective training and greater uniformity in the organization of different branches of public service. As regards relations between central and local powers, the Commission called for greater speed in the decentralization process afoot.

Subsequently, in spite of the introduction of important legislative innovations (i.e., a law on civil service in 2006, a law on administrative procedure in 2010³⁶), for some years it was stressed that *'the issue of public administration continues to represent a major challenge for Croatia'*.³⁷ In parallel the need for other initiatives

³⁵ In 2000 and 2001 the Croatian Constitution was amended. The main changes included limitations to the powers of the Head of State and the abolition of the Second Chamber of Parliament. In 2000, for the first time, the general election was won by a political coalition other than the one that had led the Country to independence in 1990 and that had governed uninterruptedly until then. To some, the year 2000 marked the start of Croatia's truly democratic political life, D. Dolenc, 'Europeanization as a Democratising Force in Post-communist Europe: Croatia in Comparative Perspective', *Politička Misao* 45, no. 5 (2008): 39 and a turning point in the relations with the EU, D. Jović, 'Hrvatska Vanjska Politika pred Izazovima Članstva u Europskoj Uniji', *Politička Misao* 48, no. 2 (2011): 12.

³⁶ *Zakon o državnim službenicima*, NN no. 92 (2005) and *Zakon o općem upravnom postupku*, NN no. 47 (2009).

³⁷ See the 2006 and 2007 Reports, COM(2006) 649 final and COM(2007) 663 final.

became apparent, like de-politicizing public service, promoting greater decentralization and continuing to reform several key sectors, like the Police. The Comprehensive Monitoring Report in 2012 still underscored the need to consolidate administrative professionalism and capacity.³⁸

For what concerns judiciary – as well as fundamental rights – since the opening of negotiations with Croatia and Turkey they are now evaluated not only in the sections on compliance with political requirements but also in a negotiating chapter (number 23) that had not been present in previous enlargements.

As regards the former, the Commission's opinion focused on recruitment procedures and highlighted the fact that they were not based on an open competition system. It also identified weaknesses in the disciplinary and training systems (particularly with reference to EU law), an issue that the Croatian government had started to address by introducing innovative measures. Lastly, the Commission highlighted general deficiencies of a technological and structural nature.

With regard to the functioning of the judiciary, the Commission's opinion noted the overall inefficiency of the system and the fact that decisions by Higher Courts were not properly enforced.³⁹

In 2012, while acknowledging that important initiatives had been promoted since the early years (strategies, plans to deal with backlogs) and innovations had been introduced both at constitutional and legislative level (see below), the Commission still called for action on the functioning of self-governing bodies for judges and prosecutors, the appointment of judges, and a reduction in the considerable number of unsolved cases. Additionally, over the years the Commission repeatedly noted that the existing system made it difficult to

³⁸ Commission staff working document, *Comprehensive monitoring report on Croatia, accompanying the document Communication from the Commission to the European Parliament and the Council comprehensive monitoring report on Croatia's state of preparedness for EU membership*, SWD(2012) 338 final, 10 Oct. 12. This aspect has been identified as essential to ensure that Croatia takes on an active role in EU policy decision-making through effective involvement in the activities of working tables, K. Turkalj, 'Izazovi i promjene ulaskom Republike Hrvatske u Članstvo Europske Unije' (Challenges and Changes with the Entry of the Republic of Croatia into the EU), *Informator* no. 6120–6121 (2012): 3. This opinion is also an acknowledgement of the fact that no significant renewal has taken place in Croatia's administrative bodies after independence, S. Rodin, 'Identity and the Divergences of Discourses in Croatia and Europe', *Croatian Yearbook of European Law & Policy* 3 (2007): 237–239. On the difficulties in reforming Croatia's administration system and on connections with the process of Europeanization of the Country, see I. Koprić, A. Musa, G. Lalić Novak, 'Good Administration as a Ticket to the European Administrative Space', *Zbornik Pravnog Fakulteta u Zagrebu* 61, no. 5 (2008): 1555–1558.

³⁹ J. Czuczai, 'Impact of European Integration on the Role and Functioning of the National Judiciary', in *The Impact of EU Accession on the Legal Orders of the New EU Member States and (Pre) Candidate Countries*, ed. A.E. Kellerman, A. Albi, J. Czuczai, S. Blockmans, W.T. Douma (The Hague: TMC Asser Press, 2006): 281 observes 'the enormous amount of pending cases' and the consequence that "citizens have to wait five to seven years before receiving a final judgment".

guarantee the impartiality of justice, particularly in criminal processes concerning defendants who were not Croatian nationals.

Another critical aspect concerned the fight against corruption. While acknowledging that an ad-hoc institution had been set-up for this purpose (USKOK), the Commission initially noted that the said institution would need to operate more efficiently and that additional actions would need to be undertaken. Over the years perplexities had been raised particularly with reference to specific sectors (like the local or very high political level), but the final outcome of evaluations was eventually satisfactory. In addition to the activity of the USKOK, a Conflict of Interest Commission was set-up that will hopefully address the issue more effectively.⁴⁰

4.3 HUMAN AND MINORITY RIGHTS

As regards fundamental rights, the Commission's negative comments centred on the press and television and radio broadcasts, lamenting that 'some of the biggest publishers control more than 50% of the biggest distribution network' and reporting a lack of transparency in the appointment of supervisory bodies and an uncertain delimitation of the powers thereof. Over the years, gradual improvements have been reported. The press and telecommunications remain under close scrutiny to prevent political influence and a lack of transparency. Other aspects call for continued monitoring like the condition of children in orphanages while in 2012 one of the main *causes of concern* regarded tolerance towards homosexuals.

As was the case with Candidate Countries in 2004, national minorities made the object of a special assessment in the Commission's initial Opinion. Croatia's

⁴⁰ The two Croatian bodies appointed to fight corruption that are mentioned by the EU Commission are the Bureau for Combating Corruption and Organized crime (USKOK, *Ured za suzbijanje korupcije i organiziranog kriminaliteta*), active since 2001 and attached to the State Attorney Office, and the Conflict of Interest Commission (*Povjerenstvo za odlučivanje o sukobu interesa*), active since 2006 and elected by Parliament. Since 2000s several measures have been adopted to fight corruption in the Country, among which are the establishment of several bodies (in addition to those mentioned above, including a special section of individual Judicial Courts) and the adoption of specific plans by the Government. Nevertheless in the second half of the 2000s corruption was still on rise, Z. Malenica, R. Jeknić, 'Percepcija Korupcije i Borba protiv Korupcije u Republici Hrvatskoj' (The Perception of Corruption and the Fight against Corruption in the Republic of Croatia), *Zbornik Radova Pravnog Fakulteta u Splitu* 47, no. 4 (2010): 839–840. As regards the causes of such widespread corruption in Croatia, some maintain that it started in the 1990s when major privatization were undertaken, D. Grubiša, 'Political Corruption in Transitional Croatia: the Peculiarities of a Model', *Politička Misao* 42, no. 5 (2005): 65, while others connect it to the absence of mass parties and the presence of electoral parties that fuel its persistence, S. Ravlić, 'Izvori Političke Korupcije u Demokratskom Poretku: o Stranačkoj Korupciji' (Sources of Political Corruption in a Democratic System: on Party Corruption), *Zbornik Pravnog Fakulteta u Zagrebu* 60, no. 6 (2010): 1241–1264.

legal framework was evaluated positively, in particular following the adoption in 2002 of a specific new constitutional law.⁴¹

The Commission placed special emphasis on the Serb minority. While by far the largest minority group, Croatian Serbs who were once citizens of former Yugoslavia have become a national minority (in Croatia) and were involved in a conflict against the national majority (see paragraph 3.1). While Serbian political, school and cultural institutions did not present significant problems, intolerance appeared to be widespread and many of those who had fled during the war did not appear particularly eager to return home.

Another national group on which the EU Commission focused its attention – as was the case in many Central and Eastern European Countries – was the Roma, whose marginalization had repeatedly brought Zagreb before the Court in Strasbourg.

More recently, while some integration issues remain open with reference to both the Serb and the Roma minority groups, the only aspects that still attract criticism concern employment percentages in public service and, in general, the need for greater tolerance towards some national groups.

It should be noted that in the case of Croatia the conditions laid down by the EU for accession are stricter than those actually in place within the Union, particularly regarding some criteria, like the protection of fundamental rights (consider living conditions in prison, a serious issue in several Members States, like Italy). This paradox had been noted, at least formally, while preparing for the fifth enlargement, when a considerable gap emerged between the Copenhagen conclusions on political criteria and the then Article 6 of the TEU that did not make reference to national minorities.⁴²

4.4 THE 'BALKAN' CRITERIA (I. E., THE ADDITIONAL CRITERIA FOR THE BALKAN COUNTRIES)

After evaluating 'classic' political criteria, in 2004 the Commission examined those specifically concerning the Balkans. In this sense it focused on the condition of refugees (that required improvement particularly as regards the restitution of property), respect of Peace Agreements, and collaboration with the ICTY (that was

⁴¹ *Ustavni zakon o pravima nacionalnih manjina* (Constitutional Law on National Minorities), 13.12.2002, NN no. 155 (2002).

⁴² B. de Witte, 'The Impact of Enlargement on the Constitution of the European Union', in *The enlargement of the European Union* (supra n. 4): 238; G. Schweltnus, 'Double standards? Minority Protection as a Condition for Membership', in *Questioning EU Enlargement*, ed. H. Sjursen (London & New York: Routledge, 2006): 186–200. For the requests put to Croatia see Editorial Comment, *Common Market Law Review* 49 (2012): 487.

judged generally satisfying both in terms of legislation adopted in the Country and of the Country's actual collaboration with the Tribunal in The Hague).

In subsequent years, the Commission acknowledged remarkable progress on the condition of refugees and related restitutions of property; collaboration with the ICTY in spite of the difficulties encountered by the Tribunal to access documents available in Croatia and trials for war crimes in national courts of law, that were regarded as lacking impartiality.

As regard regional cooperation the Commission considered Zagreb's participation in all the initiatives concerning the Balkan Countries as satisfying ('*despite clear reluctance by Croatia to be considered a country of the Western Balkan region*'),⁴³ as it did for the bilateral relations between Croatia and its neighbouring States. With some of those, the Commission stressed the need to solve issues that have remained open, like common borderlines (with Serbia and Montenegro, and Bosnia and Herzegovina) or the mutual recognition of the right of citizenship (Bosnia).

As regards Slovenia, in the 2004 Opinion the Commission reported that four issues remained unsolved and called for their solution. These include the already mentioned common borderline, Croatia's unilateral creation of a *Fishing and Ecological Zone* in the Adriatic Sea in 2003, the nuclear power plant of Krsko and the Ljubljanska Bank issue.⁴⁴

This paragraph and the previous one lead to the conclusion that, while the two 'stumbling blocks' in EU relations with Croatia stemmed primarily from failure to comply with 'additional' political requirements (collaboration with the ICTY and bilateral relations with Slovenia), also with reference to 'classic' political criteria great efforts were required of Croatia that have led to a constitutional reform and to the reform of entire sectors, as will be illustrated below.

⁴³ See the *Commission Opinion on Croatia's Application for Membership*, *supra*: n. 22.

⁴⁴ The Fishing and Ecological Zone in the Adriatic See was unilaterally established by Croatia in 2003. It affected its relations not only with Slovenia, but also with Italy. The issue was resolved during the negotiations, with the agreement that the Ecological Zone would apply only to States not belonging to the EU. The Krsko nuclear power plant is located in Slovenia. Before the breakup of the former Yugoslavia, it was operated jointly by Slovenia and Croatia. After 1991, the two Countries become independent and a new arrangement became necessary to manage the power plant, that is still operated jointly to date in spite of repeated tensions. The Ljubljanska Banka was a bank that operated in Slovenia before the breakup of the former Yugoslavia and it managed savings of Slovenian citizens but also of customers from other former Yugoslav Countries. After the breakup of Yugoslavia, the Bank went bankrupt and at it was replaced by the Nova Ljubljanska Banka, that has so far failed to return the savings of Croatian customers.

5 AMENDMENTS TO THE CROATIAN LEGAL ORDER IN VIEW OF ACCESSION

5.1 CONSTITUTIONAL REVISION

Annual progress reports by the EU Commission on the state of preparedness of Croatia, that were briefly outlined in the previous paragraph, bear witness to the remarkable reforms put in place by the Candidate Country concerning not only legislative but also constitutional aspects.

The debate on the need to amend some articles of the Constitution began in Croatia as soon as the country started to participate in the programmes set-up by the EU. As early as 2001, there was general agreement on the need to amend the provisions that regulated the country's participation in supra-national unions, the scope of national and international laws, relations between constitutional bodies and national sovereignty. Such provisions appeared in conflict with the country's European aspirations.⁴⁵

During negotiations the issue gained momentum, since some of the amendments would have allowed or facilitated the closing of some negotiating chapters.

In addition to such specific amendments, it was believed that the Croatian Constitution – that could be interpreted so as not to prevent accession to the EU and fulfilment of all the obligations that would have ensued – would require further modifications in view of EU membership. Most notably, the Constitution would require – as had been the case with other Member States – the introduction of a section devoted to EU membership as well as changes in provisions on national sovereignty, membership of international organizations, the primacy of international and European law over national law, and related instruments to be made available to the national judiciary.⁴⁶

⁴⁵ Article 2, para. 1 ('The sovereignty of the Republic of Croatia is inalienable, indivisible and non-transferable') was perceived as too 'categorical and static' to allow not only EU accession, but even any association to an international organization, S. Rodin, 'Requirements of EU Membership and Legal Reform in Croatia', *Politička Misao* 38, no. 5 (2001): 97–100.

⁴⁶ On the desirability of the amendments D. Piqani, 'Constitutional Issues of Pre-accession: from CEE to SEE', *Diritto Pubblico Comparato ed Europeo* no. 4 (2008): 1963; I. Andrassy, 'Constitutional Implications of EU Membership: an Overview of Constitutional Issues in the Negotiating Process', *Croatian Yearbook of European Law & Policy* 4 (2008): 236–241 (who notes, however, that the Croatian Constitution would have allowed the accession to the Union even without any amendments) and T. Čapeta, 'Nacionalni Ustav i Nadređenost Prava EU u Eri Pravnog Pluralizma' (The National Constitution and Supremacy of EU Law in the Age of Legal Pluralism), *Zbornik Pravnog Fakulteta u Zagrebu* 59, no. 1 (2009): 81–86, 91. This Author proposes three possible interpretations of the Constitutional norms in force at the time to ensure the supremacy of EU law (including the possibility to consider alternative ways to allow the Country to become a member of international organizations). Other have noted that the Country's compliance with the criteria imposed by the EU would depend more on the State's political will than on constitutional amendments, J. Beqiraj, 'Le

The proposals that emerged during the accession negotiations, those envisaged by the theorist for the purpose of accession and other issues that were raised also by civil society were all accepted by the legislative authority. The Government and some MPs drew up a project of constitutional revision that was approved by the Assembly in June 2010.

The revision of the *Božićni Ustav (Christmas Constitution)*⁴⁷ led to the introduction of a specific section devoted to Croatia's EU membership and to the reform of other provisions. The section devoted to the European Union (Articles 143–146)⁴⁸ provides for Croatia's adherence to the EU's fundamental principles, the transfer of part of the State's powers to the Union, the role of Croatian constitutional bodies in the EU's regulatory processes, their representation within EU institutions, the value of EU law in the national framework, and the rights that will be enjoyed by Croatian citizens following Croatia's accession to the EU, as well as the possibility for all European citizens to enjoy the rights guaranteed by the legal framework of the EU in Croatia.⁴⁹

Amended provisions can be organized into three major groups: modifications required during accession negotiations, changes that were deemed instrumental to that end, and others that are apparently unrelated to the European dimension.

The former include limitations to the prohibition on the extradition of Croatian citizens, that was formerly granted across the board, for cases that fall outside of international and European agreements (so as not to hinder the application in the country of the rules on the European arrest warrant, Article 9); the recognition of the Croatian National Bank as an 'independent' as well as an 'autonomous' entity and the constitutional provision whereby the Bank is subject to the authority of the Governor (Article 53); the introduction in the Constitution of an audit authority as envisaged by law, which is defined as 'autonomous and independent' (Article 54); the guarantee for EU citizens of the right to 'vote and stand in elections' both at local level (Article 133) and with reference to the EU Parliament. This group of amendments also includes the provision, found in the

Sfide del Processo di Pre-adesione fra Modifiche Costituzionali, Consolidamento del Potere Giudiziario e Volontà Politica', *Diritto Pubblico Comparato ed Europeo*, no. 4(2008): 1701. On the reluctance of some smaller candidate Countries that regained their independence since 1991 to accept in the text of their Constitution provisions about the transfer of sovereign powers A.E. Kellermann, 'Hopes and Fears', in *The Impact of EU Accession on the Legal Orders of the New EU Member States and (Pre) Candidate Countries*, *supra* n. 39: 9.

⁴⁷ The Croatian Constitution is known as the 'Christmas Constitution' because it was adopted in December 1990, when Croatia was still formally a member of the Socialist Federal Republic of Yugoslavia.

⁴⁸ For the purpose of this paper, the number that identifies Constitutional articles refers to the current version that reflects the changes in numbering following the reform of 2010.

⁴⁹ All the norms contained in this section, except for those relating to adherence to the principles and the transfer of sovereignty to the EU, came into force only after the accession.

Constitution's EU section, on the extension of all rights that are guaranteed within the Union to all EU citizens in Croatia.⁵⁰

Modifications that were not directly requested but that were regarded as instrumental for accession concerned national minorities, whose list, in the preamble, was further enriched to include groups that were not included in the original version;⁵¹ the introduction of a ban on the statute of limitations for a number of war-related crimes (Article 31, c. 4), which may be interpreted as the will to pursue regional collaboration and to respect peace agreements, guaranteeing maximum justice against the perpetrators of war crimes; the replacement, in two instances, of the term 'laws' with the term 'law', with a more clear reference to non-national and particularly EU law (Article 5, c. 2; 119, c. 1⁵²) and the addition under Article 118, c. 3 ('Courts shall administer justice according to the Constitution and law') of the expression 'international treaties and other valid sources of law' (in line with the same purpose); the introduction of the right to access public documents (Article 38, c. 4). One of the most debated provisions in view of accession – the one concerning referenda – was amended with the elimination of a participation quorum (originally envisaged as half of total eligible voters plus one) both from the norm regulating referenda in general (Article 87), and the one on referenda on accession to international 'unions' (Article 142, c. 4).⁵³

⁵⁰ This norm could also be intended to address doubts, raised during the negotiations, on the rules regulating the purchase of property that were regarded as discriminatory towards EU citizens, I. Andrassy, *supra* n. 46: 225–235.

⁵¹ On the evolution of legislation on minority rights in Croatia until the Constitutional reform see A. Horvat, 'Autohtone Nacionalne Manjine i Ustavne Promijene 2009–2010' (Autochthonous National Minorities and Constitutional Changes 2009–2010), *Zbornik Pravnog Fakulteta u Zagrebu* 60, n. 2 (2010): 555–585 and M. Dicosola, 'Diritti delle Minoranze e Condizionalità in Croazia e nella ex Repubblica Jugoslava di Macedonia: *implementation o compliance?*', *Diritto Pubblico Comparato ed Europeo*, no. 4 (2008): 1702–1746, who notes a gap between the theoretical dimension and the practical application of the law. The decision to make explicit mention in the Preamble of the Constitution, since its original version, of certain minority groups has been regarded as an expression of the Country's 'lofty ideal', P. Häberle, 'Hrvatski Ustav (1991) u Europskoj Pravnoj Usporedbi' (The 1991 Croatian Constitution in the European Legal Comparison), *Politička Misao* 37, no. 1 (2000): 50.

⁵² Article 5 provides now for the following: 'All persons shall be obliged to abide by the Constitution and law ...' (*pravo* has a broader meaning than *zakon*, 'Act'); Art. 119 states that 'the Supreme Court... shall ensure uniform application of laws and equality of all before the law' (*pravo*).

⁵³ Based on the explanatory report on the project to revise the Constitution, submitted by the Government, the amendment aimed to prevent abstentions – also considering that many Croatian citizens live abroad – that would jeopardise the legitimacy of the outcome of the referendum. According to the above mentioned report, amendments in this group also include Art. 66 on free education, that was previously identified as 'elementary' education (eight years in Croatia) and that has now become 'compulsory'. See the 'Prijedlog Odluke o Pristupanju Promjeni Ustava Republike Hrvatske, s Prijedlogom Nacrta Promjene Ustava Republike Hrvatske' (Proposal of decision on changes to Constitution of the Republic of Croatia with the proposal of the draft of changes to the Constitution of the Republic of Croatia), at <http://www.cpi.hr/download/links/hr/12816.pdf>.

Among constitutional amendments that appear unrelated to EU accession are a number of provisions concerning the armed forces;⁵⁴ the right to vote for Croatian nationals residing abroad (with specifications on where to vote and the explanation on the fact that their vote may result in the election of three parliamentary representatives, Article 45); greater protection of family members of fallen war veterans (Article 58, c. 3); central budget (that shall now be approved by an absolute majority, Article 91, c. 2); the ombudsman (defined as autonomous and independent, whose immunity is similar to that of MPs and whose scope of activity is now extended to include the infringement of internationally recognized fundamental rights, Article 93); the appointment of constitutional judges (by the Parliament, with a two-thirds majority, Article 126).

5.2 THE JUDICIARY

Among the amendments requested for accession to the EU there is also an important process of reform of the judiciary, both at constitutional and at legislative level.⁵⁵

The previous text of the Constitution provided for judges to be appointed and relieved of office by two entities, one for prosecuting officers and the other for judges, with competence on all issues related to the status of all magistrates: the *State Prosecution Council (Državno Sudbeno Vijeće)* and the *State Judicial Council (Državnoodvjetničko Vijeće)*. Raising to the bench simply required the passing of a *bar exam* and multiannual work experience, a requirement that varied according to the tribunal of choice. The first appointment was followed by a five-year period during which appointed judges operated 'temporarily', while awaiting full admission to the bench. Both the President of the Supreme Court and the Chief Public Prosecutor were elected by Parliament, on a proposal by the competent Parliamentary Committee, the former on a proposal by the President of the Republic after consulting with the United Sections of the Court, the second on a proposal by the Government.

The two self-governing bodies were made up of members elected by Parliament among judges or public prosecutors (the majority pool), lawyers and

⁵⁴ The amendment concerns the powers of both the Armed Forces of Allied States within Croatia's national borders and the powers of Croatian Forces (Art. 7) and it's clearly connected to Croatia's accession to NATO, B. Smerdel, 'Ustav RH nakon Ustavnih Promijena 2010 Godine' (The Croatian Constitution after the 2010 Changes), *Hrvatska Pravna revija* September (2010): 4.

⁵⁵ After the fall of Communist regimes, relevant reform have swept the judiciary all over Central and Eastern Europe. Among the numerous works on the subject, see M. Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries', *European Public Law* 14, no. 1 (2008): 99–123.

university professors (the implementation law specified that the appointment was to be preceded by a proposal by the Minister of Justice).⁵⁶

As noted above, the EU Commission's reports repeatedly stressed the need to strengthen the independence and the autonomy of judges and the transparency of their appointment; to improve their training that was deemed inadequate both in terms of *quantum* and *quomodo*, particularly with reference to EU law; and to modify both the terms of their removal from office and their accountability. Additional remarks concerned the structure of the judiciary, that was characterized by a large number of bodies while remaining lamentably inefficient (leading to several proceedings also before the European Court in Strasbourg).⁵⁷

At constitutional level modifications consisted in deliberately attributing the judicial function to judges (Article 121, c. 1); adding a guarantee concerning the elimination of the initial temporary five-year term (Article 123, c. 2); reformulating the norm on the self-governing bodies for the purpose of ensuring their autonomy and independence.

The composition of both self-governing bodies is now sanctioned by the Constitution and provides for eleven members, of whom seven judges (or public prosecutors), two MPs and two university professors.⁵⁸

The constitutional amendments were preceded (in December 2009) and followed (October 2010) by two 'legislative packages' whose most innovative aspects include: the introduction of public competitions for the recruitment of judges; a reduction of the scope of their immunity; better training and professionalization, with the creation of a Judicial Academy; the redefinition of the competences of the two self-governing bodies, that are also entrusted with the

⁵⁶ Before the 2000 review, the Constitution provided for a single self-governing body for both prosecuting officers and judges. On the problems related to the first appointments made by that Authority, in the mid 90s and on related case law, see A. Uzelac, 'Hrvatsko Pravosuđe u Devedesetima: od Državne Nezavisnosti do Institucionalne Krize' (Croatian Judiciary in the Nineties: form Independence to Institutional Crisis), *Politička Misao* 38, no. 2 (2001): 18–23.

⁵⁷ On the compatibility of Croatian judicial system with the right to a fair trial as granted by Art. 6 of the European Convention for Human Rights, see A. Uzelac, 'Pravo na Pravično Suđenje u Građanskim Predmetima: Nova Praksa Europskog Suda za Ljudska Prava i njen Utjecaj na Hrvatsko Pravo i Praksu' (The Right to a Fair Trial in Civil Cases: new Case Law of the European Court of Human Rights and Its Impact on Croatian Law and Practice), *Zbornik Pravnog Fakulteta u Zagrebu* 60, no. 1 (2010): 101–148. It should be noted that the reform of the judiciary in Croatia was guided and monitored also by the Council of Europe.

⁵⁸ At the moment, the Constitution does not specify by whom the members of the two bodies are to be elected. However, this provision is contained in the laws amended in 2009, whereby judges and public prosecutors elect seven representatives of their category; University Law Professors elect two representatives and the Parliament elects the remaining two (one for the majority and the other for the opposition, the MPs replacing the two lawyers that were previously envisaged by law).

adoption of all measures concerning the career of public prosecutors and judges (appointment and removal, transfer, disciplinary proceedings).⁵⁹

From a structural point of view the court system underwent a comprehensive reorganization, with the elimination of some entities and the (belated) creation of others (like the Administrative Supreme Court).

The reforms described above required considerable effort on the part of Croatia and have certainly contributed to bringing its national framework closer to the definition of *democracy* and *rule of law* that lies at the heart of the Copenhagen political criteria and that should characterize all modern States.

6 CONCLUSIONS

As the previous pages have shown, the preparation process leading to accession of the 'small' Republic of Croatia⁶⁰ was extremely complex and it was defined by many as the strictest ever undertaken by the European Union.⁶¹

⁵⁹ Turkalj, 'Fullfilment of Croatia's Political Criteria in the EU Accession Negotiations with an Emphasis on the Implemented Amendments to the Croatian Constitution', in *Tackling Constitutional Challenges on the Road to the EU: Perspectives from South-East European Accession Countries*, at http://www.kas.de/wf/doc/kas_32813-1522-2-30.pdf?121201215040, (2012): 92–95. Among the various aspects of the judicial reform Rodin places great emphasis on the establishment of the Judicial Academy. He argues that the judiciary reform guided by the EU led to remarkable progress in many sectors (institution building, independence, a little in development of technical capacity), but not in legal interpretation, for several reasons. First, judges see themselves as 'administrators', their appointing authority is relatively independent from a political standpoint but 'creates an hermetic and not entirely transparent system'; second, they often rely on textual interpretation, since 'post-communist States lack huge parts of social experience that facilitate creation of legal rules'; third, they are not sufficiently familiar with the sources of law, because 'national education insists on memorization of legislation'; lastly, they are unfamiliar also with interpretative methodologies and they rely mainly on positive law while neglecting case law. On the obligations for judges to adhere to EU law (about the new Art. 145 Constitution), see again S. Rodin, 'Pravo Europske Unije i Pravni Poredak Republike Hrvatske nakon 20 Godina Hrvatskog Ustava' (European Union Law and the Legal Order of the Republic of Croatia 20 years after the Croatian Constitution), Opatija, Inter University Centre of Excellence, Working Paper, WP 2 (2010): 2–22, at http://excellence.com.hr/Opatija/w/wp-content/themes/ec/working_papers/20%20godina%20final%20WP%20Opatija.pdf, and S. Rodin, 'Hrvatski Sudac između Prava EU i Nacionalnog Prava' (Croatian Judge between EU and National Law), *Informator* 5871 (2010): 6. On the shortcomings in the application of EU law by Croatian judges (and particularly their approach based on positive law and formality) see also T. Čapeta, 'Courts, Legal Culture and EU Enlargement', *Croatian Yearbook of European Law & Policy* 1 (2005): 23–53; *Id.*, 'Interpretativni Učinak Europskog Prava u Članstvu i prije Članstva u EU' (Interpretative Effect of European Law in and before EU Membership), *Zbornik Pravnog Fakulteta u Zagrebu* 56, no. 5 (2006): 1487–1490.

⁶⁰ Croatia covers an area of 56.594 km² and has nearly 4.290.600 inhabitants while the rest of the EU extends over 4.324.782 km² wide and has 503.492.000 inhabitants.

⁶¹ Editorial comment, *supra* n. 42: 483; I. Andrassy, *supra* n. 46: 225; B. Smerdel, 'Hrvatska Ustavnost u Europskoj Uniji' (Croatian Constitutionalism in the EU), *Informator* n. 6015–6016 (2011): 1–3; Turkalj, *supra* n. 59: 106; for the initial phase, Lj. Mintas Hodak, *supra* n. 20: 168 e T. Marktler, 'The Power of the Copenhagen Criteria', *Croatian Yearbook of European Law & Policy* (2007): 363. L. Appicciafoco & M. Magrassi, 'Il Ruolo dello Stato... e dell'Integrazione Europea nell'Europa Sudorientale:

It was clear that conditionality would be rigorously applied to Croatia since the opening of accession negotiations, as it appeared from the framework (see paragraph 3.2) However, the initial rigidity could be justified by the fact that Croatia had started negotiations together with Turkey, towards which EU Member States have always shown a more cautious stance than towards other Candidate Countries.⁶² As noted, the attempt to avoid a repetition of the experience of the Romanian and Bulgarian cases also had its influence.

Nevertheless, the events that have characterized Zagreb's accession have shown that the EU maintained the same caution throughout the entire process, monitoring closely the country's actual compliance with more and more detailed accession criteria and ensuring the absence of persisting bilateral issues with other Member States, like Slovenia.

The negotiating road was characterized by an alternation of ups and downs (as it was for previous enlargements) that led at times to a slowing down of the process both for lack of compliance with some accession criteria by the Candidate Country, and by issues of a broader nature concerning the overall EU system. To some, those issues are also related to the EU's rigorous attitude towards Zagreb, especially considering that while negotiating with Croatia the EU was suffering from '*enlargement fatigue*', generated by the previous enlargement wave that comprised a large number of Countries, including some for which certain problems remain outstanding like Bulgaria and Romania. The overall scenario was also permeated by a sense of uncertainty for the future of the Union, in light first of the negative outcome of the referendum on the Constitutional Treaty and then of the difficulties in the ratification of the Lisbon treaty, and lastly of the lingering economic crisis.⁶³

Additionally Croatia submitted its application alone (like in the case of Greece), thus exposing itself to greater scrutiny than would have been the case had the negotiations concerned ten or twelve Countries all preparing for accession at the same time. As a result, the process followed a different pattern than the one that characterized the fifth enlargement. In that case, whilst pursuing compliance with all the criteria on the part of the candidate countries, another goal consisted in

un'Introduzione', *Diritto pubblico comparato ed europeo* n. 4 (2008): 1670–1676, underline that the actual implementation of reforms requires not only EU influence but a clear commitment of the State itself.

⁶² D. Phinnemore, 'Beyond 25 – the Changing Face of EU Enlargement: Commitment, Conditionality and the Constitutional Treaty', *J. of Southern Eur. and the Balkans* 8, no. 1 (2006): 14–15, who also refers to the safeguard clauses imposed by the EU for the accession of Romania and Bulgaria.

⁶³ I. Andrassy, *supra* n. 46: 225, 241; K. Turkalj, *supra* n. 59: 106, who also mentions the 2004 'political climate' favourable to the reunification of Europe. On the connection between the difficulties in adopting a European Constitution and the slowdown in the Croatian accession process, see R. Podolnjak, 'Hrvatsko Članstvo u EU i Ustavne Opcije Europske Budućnosti' (Croatian Membership in the EU and Constitutional Options of European Future), *Zbornik Pravnog Fakulteta u Zagrebu* 56, no. 5 (2006): 1495–1530.

ensuring they would be accessing the EU together – except for Romania and Bulgaria.⁶⁴

Another aspect that certainly came into play lies in the fact that Croatia's membership was to provide an example to other Western Balkan Countries participating in the same approximation process to the EU.

The accession of their 'lead candidate' provided more concrete prospects for membership, but also reiterated the need to fulfil relevant criteria and to undertake necessary reforms.⁶⁵

Greater accuracy in the evaluation reports and a more complex decisional process – in spite of the introduction of new and leaner procedures in Lisbon – have become the inevitable consequence of decisions taken by no fewer than twenty-seven EU 'judges', following the fifth enlargement.

In conclusion, while in terms of 'absorption capacity' Croatia's influence may not tip the EU balance – except with regard to the redefinition of the members of collective bodies – it is clear that the EU has carefully evaluated the consequences of its membership. Rather than assisting the Candidate to complete the internal reform process after accession, the EU opted to accept the new Member State only after remarkable progress had been achieved.⁶⁶

From a standpoint more directly related to the Candidate Country, the effort required – in spite of the shortcomings that have emerged – was remarkable.

In some cases, the reforms touched upon extremely delicate sectors that represented wounds still open for the Croatian people. Consider the difficulty of accepting the EU's requests about the return of Serbian refugees and the restitution of their property, and about referring to the ICTY some Croatian military commanders who were regarded as national heroes in certain areas of the Republic. This was particularly true for those who had been directly involved in the war and in the occupation of the territory by the troops of former Yugoslavia. In those areas – mostly related to the so-called additional political criteria – the

⁶⁴ At the time of the fifth enlargement, some observers noted that the Commission tried to avoid dividing up Countries from the same region, like the Viségrad group or the Baltics. To this end, the Commission 'skipped over' the level of protection granted to minorities in one of the Baltic Countries in order to allow all three to progress together, P.A. Poole, 'Europe Unites: the EU' Eastern Enlargement' (Westport: Praeger, 2003): 44; G. Guliyeva, 'Lost in transition: Russian-speaking non Citizens in Latvia and the Protection of Minority Rights in the EU', *European Law Review* 33, no. 6 (2008): 843–869. On the lack of objectivity shown by the Commission in the application of pre-accession conditionality in view of the fifth enlargement see E. De Ridder & D. Kochenov, 'Democratic Conditionality in the Eastern Enlargement: Ambitious Windows Dressing', *European Foreign Affairs Review* 16, no. 5 (2011): 596, s.

⁶⁵ Today the example of Croatia is reflected in the process undertaken by Montenegro, now subject to even stricter terms of conditionality than Croatia itself, I. Goldner Lang, 'The Impact of Enlargement(s) on the EU Institutions and Decision-Making. Special Focus: Croatia', *Yearbook of European Law* 31, no. 1 (2012): 479, 485–487.

⁶⁶ B. Caratan, 'The European Union, South-Eastern Europe and the Europeanization of Croatia', *Politička Misao* 46, no. 5 (2009): 177.

need to meet set parameters focused on key aspects of the national *idem sentire*, at a time when the memories of war, death and destruction – not that long after the conflict's conclusion – remained vivid among the population here as in the other Countries involved, as witnessed by several questions that have remained unsolved.

Some other elements of that 'idem sentire' which do not comply with the requests for membership concern the fact that Croatia feels 'European' regardless of any external recognition but simply on the basis of its history and cultural tradition (as is the case of other European States like Switzerland);⁶⁷ the convictions that some social groups, like family members of war victims, should enjoy privileges and benefits, and that on economic matters national players should be granted greater support than others.⁶⁸

The efforts put in play by Croatia can be regarded positively even irrespective of EU membership.

If correctly pursued, the greater efficiency and effectiveness achieved in key public sectors – like public administration and the judiciary; a more comprehensive approach towards the protection of fundamental rights; the fight against corruption and the improvement of relations with neighbouring countries – are but a few of the elements that could bring about significant improvements for the country and its citizens.

From another standpoint – looking to the future of the European Union – it can be argued that while no imminent enlargements for the accession of Candidate or potential Candidate Countries are in the pipeline, the process of approximation of Montenegro to the EU is progressing. Conversely, one Member State that has historically been part of the Union claims to be considering withdrawal.

Thus, now more than ever this scenario calls for a rethinking of the enlargement policy, not to 'set it aside', but to view it more dynamically. Starting from a careful evaluation both of the condition of Candidate Countries and of the Union itself, Brussels should take into account alternative forms of privileged and reinforced relations that do not necessarily translate into

membership, but that aim to ensure peace and stability in Europe and to prevent 'shocks' to a system that appears for the time being somewhat unstable. In this direction is going the European Neighbourhood Policy.

This option could also prove effective in managing relations with Candidate Countries or those that do not fulfil certain criteria or whose accession would

⁶⁷ As recalled in the Declaration of the Croatian Academy of Sciences and Art (*supra* n. 30), 'Croatia, as a long-standing constructive element of the Western European civilization and tradition and of the Middle-European and Mediterranean cultural group, come back under the Europe's wing'.

⁶⁸ S. Rodin, *supra* n. 38: 231–233.

undermine the EU's integration capacity, in spite of the fact that the 'consolidation of commitments' policy would offer no alternative to membership proper.

The Croatian example shows that it would also be advisable to avoid 'rewriting' – at least institutionally and normatively – the entire legal framework of a Candidate Country in the name of rigorous conditionality. This would be in contrast with the principle, sanctioned by the Treaty, whereby the Union respects 'the national identity' of its Member States⁶⁹ and it would also underscore glaring discrepancies between old and new Members.

The well-deserved 'welcome' to Croatia should therefore be accompanied by the acknowledgement that the country is becoming a Member of the EU at a time when many conditions have changed and some aspects have become more relevant than they were in the past: the number of Member States, relations between Member States, the rigidity of accession criteria and related controls, and most notably the dynamism of the overall framework. In these times of deep economic crisis, the aspirations of new States that wish to become members should not be overlooked, nor should the whispered claims of 'old' ones to opt out be readily dismissed.

⁶⁹ Article 4 TEU. In Croatia, during the debate that surrounded the constitutional reform, some relevant voices spoke about the opportunity of 'defending' the Constitution, recalling its political value and fundamental role in leading the Country during the transition from the former Yugoslavia to Europe, B. Smerdel, 'Apel Eurorealista: Sačuvati Hrvatski Ustav!' (Appeal of Eurorealists: Save the Croatian Constitution), *Informator* no. 5949 (2011): 3; *Id.*, 'Hrvatska Ustavnost u Europskoj Uniji', *Informator* no. 6015–6016 (2011): 3. Even earlier, A. Bačić, 'O Mjestu i Značaju Ustavopravnog Identiteta Republike Hrvatske u Kontekstu Pridruživanja Europskoj Uniji' (On the Role and Significance of the Constitutional Identity of the Republic of Croatia in the Context of Association to the EU), *Zbornik Radova Pravnog Fakulteta u Splitu* 42, no. 4 (2005): 497–515. In the case law of the European Court of Justice Art. 4 TEU has been recently invoked to claim the use of a national language in some Member States (C-391/09 and C-202/11) or the derogation from the fundamental liberties of the internal market. The Court however gave a restrictive interpretation of this derogation (C-51/08); on this point see S. Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon', <http://papers.ssrn.com>, 2011 and B. Guastaferrò, 'Il Rispetto delle Identità Nazionali nel Trattato di Lisbona tra Riserva di Competenze Statali e "Controlimiti Europeizzati"', www.forumcostituzionale.it, 2011.