Negotiating Effectively for Accession to the European Union: Realistic Expectations, Feasible Targets, Credible Arguments*

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Introduction

As the European Union is preparing to launch the discussions that will eventually lead to the admission of the Czech Republic, Estonia, Hungary, Poland, Slovenia and Cyprus, a question that is increasingly being asked by the prospective members is what should they hope to obtain from those discussions or accession negotiations. They have already been told that the negotiations will determine their terms of accession and will ascertain their ability to assume the obligations of membership or '*acquis communautaire*'. In fact what they like to know is whether they could receive any exceptions or special treatment that will ease the pain of adjustment to life inside the EU.

They want to know whether and how they can obtain derogations from the *acquis*. Yet, 'derogation' is a dirty word in the European Union. No one admits it exists, nor that it is possible to obtain any during the accession negotiations. This short paper attempts to separate myth from reality and highlight what may be realistically pursued in the negotiations.

As a general rule, it is correct to say that prospective members of the Union are expected to apply the full *acquis communautaire* without any exception. But there are exceptions to all rules and this rule is no exception in this respect.

No country has ever been able to apply all the rules on the date of entry into the Union. Some exceptions must necessarily be granted because public administration and private companies need time to adjust to the conditions of membership. On the other hand, exceptions may also be needed to avoid too sudden and too large shifts of resources from one sector of the economy to another. Yet, some other exceptions are introduced because the Union itself needs to adjust to the strains of expanded membership. So it is not absolutely true that derogations are requested only by the prospective members.

These exceptions are often asserted to be only temporary or transitional. The 'official' view is that if a country will never be able to comply with the *acquis*, then it should consider whether it really fits into the EU. This view is again generally correct (although permanent derogations are not unknown) and in this context it should be noted that the term 'accession negotiations' is a misnomer. It is more appropriately to call them 'entry examination' because this term describes more accurately what actually happens during accession negotiations. The actual negotiating part is rather small, while the largest part is devoted to checking whether a prospective member fulfils the conditions of membership.

Even the negotiation of temporary exceptions is not as simple as it may appear at first glance. There is no fixed length of time, which means that the length of a transitional arrangement has to be agreed by both sides. Therefore, requests for such transitional exceptions have to be justified in a manner that is understood and acceptable to the EU.

The rest of this short paper explains why negotiations are necessary, reviews the various types of derogations and provide examples from past accession negotiations to indicate what appears to be a feasible request for derogation and how past applicant countries presented and justified their requests.

Why are negotiations necessary?

If prospective members are supposed to comply fully with the *acquis communautaire* why is there any need to negotiate at all? There are three general answers to this question; a political, a legal and an economic.

First, the members of the EU are sovereign states. They are not simply individuals joining a club. In effect they are conceding part of their sovereignty and, in the process, they have an impact on the character or shape of the EU. It is natural that they would want something in return. This 'compensation' is agreed during the accession negotiations.

Second, the existing *acquis* does not make reference to the rights of future members. The Treaty, for example, does not specify how many votes they may have in the Council. Again this is a matter of agreement between the existing and prospective members. Legally, all Community acts that make references to member states also have to be revised to include the names of the new members. Consequently, accession negotiations are in essence inter-governmental conferences and the acts of accession modify slightly a very large part of the *acquis*.

Third, prospective members can also be 'desirable' members. Existing members may be more than willing to accommodate them by changing the rules appropriately so as to make their entry into the Union more attractive. The expansion of the Union is in itself a political act that shifts outwards its frontiers.

The Treaty hardly lays down any rules on the process and objectives of the accession negotiations. It only provides in article O that the 'conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant state'. This short reference implies that adjustments are in principle possible, although one of the objectives of the Union, as specified in article B, is 'to

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* The views expressed in this paper are purely personal and do not constitute advice on the conduct of the accession negotiations.

Un bref résumé de cet article en français figure à la fin.

maintain in full the *'acquis communautaire' '*.

Therefore, the purpose of the accession negotiations is to define the terms of admission and the necessary adjustment to the Treaties (new members enter simultaneously into the Union, the three Communities and all the other treaties and agreements among the member states and between member states and third countries, unless it is agreed otherwise).

In practice the terms of admission define:

- the new member's participation in the institutions of the Union
- any exceptions from the *acquis* that may be granted to it
- the nature and length of the transitional period(s)
- the contribution to the budget and receipts from particular EC programmes
- any adjustment of common policies to accommodate the new member
- any special programmes to ease the adjustment of the new member.

Why are transitional arrangements necessary?

The main reason why transitional arrangements are defined is to enable the economy and public administration of the prospective member to adjust to the conditions of membership. Not only does the economy have to cope with increased competitive pressure and comply with new rules, the administration itself needs some time to introduce those new rules into the domestic legislation and start implementing them.

Some EU rules can be adopted before the actual date of membership (e.g. prohibition of cartels, tariff classification, technical standards), while others, especially those concerning implementation of Community programmes, have to await entry into the EU (e.g. the price intervention mechanisms of the common agricultural policy, regional support programmes).

The implementation of the *acquis* may require the establishment of national or local agencies and/or enforcement procedures. The setting up of the appropriate administrative machinery may also require considerable amount of time.

Transitional arrangements are absolutely necessary in the case of the financial contributions and receipts of a new member. The contributions can be calculated and effected almost from the moment of entry. By contrast, new members experience a delay in drawing funds from the budget of the EU because the amount they are able to receive depends on the extent to which they are integrated in the various Community programmes. More importantly, the overall share of a member in the structural funds is a matter of political agreement rather than of automatic and objective application of rules.

Agriculture is a case in point. Member states' receipts from the funds of the common agricultural policy are determined on the basis of the previous year's output. These statistics do not exist for new members, because the previous year's output was not generated within the CAP framework. Of course, it is possible to calculate notional output figures for different products, but those are themselves subject to negotiation. The same happens, for example, in the case of structural policy programmes. The initial imbalance between receipts and payments is redressed by a mechanism of temporary and declining credits for new members.

Finally, the gradual introduction of new members into Community programmes or the gradual application of EU rules may be requested by the EU itself in order to adjust to expanded membership. For example, in the past existing EU farmers and steel workers requested gradual application of the principle of free trade so that they could be temporarily protected from the products of new members. The same happened in the case of Luxembourg, which maintained a ten-year restriction on inward movement of Portuguese workers. Indeed all countries that entered the EU after its founding date had to face temporary restrictions on the movement of workers. The movement of workers is likely to be an issue of particular concern to EU in the forthcoming enlargement because of the current very high unemployment level in the Union.

What should be sought in the accession negotiations?

It would be wrong for a prospective member to focus its demands or requests only on derogations during the accession negotiations. Derogations are sought whenever a country expects to have difficulty (political, social or economic) in complying with the *acquis*. But such difficulties can be overcome by other means.

Instead of asking for an exception from the rules because compliance is costly or otherwise difficult (negative attitude), a prospective member could ask for assistance to be able to comply (positive attitude). Such assistance may take the form of a special Community programme supporting adaptation (e.g. de-commissioning polluting factories), introduction of new practices (e.g. training) or improving existing capital and infrastructure (e.g. investment). For example, special assistance schemes were established for Portugal and for the adaptation of Spanish steel industry.

Note, however, that resources in the EU, as anywhere else, are limited. Not all demands for assistance can be met and prioritisation of needs is necessary. Moreover, the entry of an applicant country into the EU requires approval by all existing member states. An applicant may have difficulty gaining that approval if it is perceived to be a competitor for the EU's limited funds.

A different way of avoiding difficult adjustments without asking for derogations is to persuade the EU to change itself. Instead of adaptation of the candidate, there is adaptation of the *acquis* (which is supposed to be immutable). This happened with respect to environmental, health and safety standards in the accession negotiations of Austria, Finland, Norway and Sweden. In that case, the Union committed itself to review its standards with a view to raise them to the level of the candidate countries.

Another example is that of Norway which had a particular problem with opening up its oil fields to companies from other member states. Instead of insisting on an outright derogation (even though that was its initial demand) in the end it settled for a protocol (no. 4 in the act of accession) in which both the EU and Norway acknowledged that all member states had the right to define exclusive rights with respect to petroleum exploration and exploitation. This was an interpretation of

the *acquis* that applied to all rather than only to Norway.

The Union may also accept to expand the *acquis* to apply to cases and/or issues not covered by prevailing rules. This happened again in the case of the negotiations with the four countries mentioned above, when the Union added an 'objective 6' to its structural policy targets so as to accommodate the polar regions of Finland and Sweden with their peculiar regional characteristics which did not fit into the criteria used in the EU structural policies until then. Note, however, that objective 6, together with all the other objectives, will be re-evaluated in 1999 at the expiry of the current regulation on the structural funds.

Types of derogations

As mentioned earlier, most derogations granted by the EU are temporary. This does not mean that a prospective member has no negotiating room for manoeuvre. Temporary derogations are not pre-determined. Their time length varies. Greece had an overall five-year transitional period (for certain products the period stretched to seven years). Spain and Portugal had a seven-year transitional period (although for certain sensitive issues the period was ten years). The most recent members have had transitional periods varying from one year to nine years, with an average period of about three years. So there is much negotiating to be done on the precise time length of temporary derogations.

Prospective members may strengthen their negotiating position by making references to the transitional periods allowed in various EC directives and regulations for existing members. For example, basic telecommunications services are supposed to be liberalised as of 1 January 1998. Yet, some member states have been granted an exception until 2000. The EU will not have enlarged by the year 2000, but prospective members may be able to invoke the same reasons justifying gradual adjustment as those used by existing member states. An even more apt example is a 1994 directive on waste packaging (requiring recovery and recycling of waste package). The directive has transitional periods extending up to ten years because of the substantial cost of adjusting manufacturing and marketing processes to recover and recycle waste. It would indeed be paradoxical if some existing members have up to 2006 to implement the directive but new members have to demonstrate compliance as of the date of their entry into the EU.

Temporary derogations may be granted for a fixed and short period of time but there is no formula for what is fixed and/or short. Their length varies according to the estimated difficulty and extent of adjustment. The fixing of transitional periods is not as simple as it may appear at first glance. Some derogations may be prolonged, if deemed necessary. In this context, the important question is who deems it necessary. The experience of Austria illustrates this point well.

During its accession negotiations, Austria requested restrictions on the transit of heavy vehicles through its alpine region for environmental reasons. The agreement that was reached in the end allows for extension of the present transitional regime if independent studies can show that there is excessive damage on the environment.

Note that those independent studies will play a decisive role because the discretion of both Austria and the Commission on this matter is effectively reduced. Resorting to this kind of impartial arbitration may be indispensable in resolving differences of opinion.

Judging from past enlargements, derogations may be defined in terms of products (e.g. peaches), sectors (e.g. banking), standards (e.g. environmental measures), factors of production (e.g. workers), tax measures (e.g. VAT rates or exempt activities), regions (e.g. certain islands), area of operations (e.g. amount of re-insurance that can be carried out in the domestic market by foreign companies), business practices (e.g. establishment of companies), or private practices (e.g. purchase of land or currency transfers). This list is non-exhaustive and many more examples may be garnered from past accession treaties.

Derogations may be extremely specific and refer to the particular provision of a certain legal act. On the other hand, they need not be specific at all. They may also be general and they may not even take the typical form of an exception. Instead of requesting an outright exception, a prospective member may ask instead the EU to recognise its special needs. This was achieved by Ireland, Greece, Portugal and Spain which had in their treaties of accession protocols acknowledging their efforts towards economic development.

All those protocols begin by noting that economic development and the improvement of living standards and working conditions are fundamental EU objectives. Then they pledge adequate use of Community resources for that purpose and appropriate application of the provisions of the Treaty. Subsequent derogations, especially with respect to article 92 on state aid, have been extended with reference to those protocols.

When a prospective member anticipates difficulties in complying with the *acquis* in a particular area, it may seek safeguards instead of derogations. Such safeguards allow for exemptions from the rules only if the need arises, so it is not imperative to define specific derogations during the negotiations. General safeguards, especially in manufacturing sectors, were agreed in all previous enlargements.

Finally, note that for disagreements on legal issues that are of minor importance, it may be more useful not to allow them to block progress on other more important issues. Yet, instead of simply making concessions, it may also be possible for the two sides to 'agree to disagree'. That is, some disputes are on purpose left unresolved until a later stage when the Court, for example, could provide its own impartial interpretation should the need arise. For example, the sixth VAT directive is subject to continuous legal interpretation and there is a growing jurisprudence on its various technical annexes. Austria had a different view than the EU as to how that directive could be applied to the letting of apartments. In the end, the two sides chose a phrase that was general enough that both their views could be accommodated.

How can requests for derogations be justified?

Derogations are not granted lightly. There must be an evident need. Such a need is more easily understood if it can be quantified, or otherwise, if it can be shown that vital national interests, traditions or important social policies are significantly affected by adoption of the *acquis*.

Requests for derogations from fundamental Community principles are unlikely to be treated sympathetically (e.g. the four freedoms of the internal market). Deviations from such fundamental principles change the character of the Union and a candidate country that wants to change the character of the Union will inevitably be asked to reconsider its application. Even on these issues, however, one cannot be absolute. If, for example, the EU insists on transitional arrangements for the movement of workers or the trade of agricultural products, it will be virtually impossible for it to refuse to grant compensatory derogations to prospective members.

Prospective members would hardly have any problem arguing their case if the derogations they requested were of minor importance to the EU but of major social significance to them. For example, Sweden had little difficulty obtaining a derogation on the marketing of moist snuff tobacco which is illegal in all other EU countries yet it is somehow inconceivable to Swede users that they would have to live without it. Situations like that, however, are rare. Prospective members have to be prepared to argue, to argue convincingly and to argue for feasible derogations.

Given that there is hardly any chance that any of the current prospective members will obtain any permanent exception, they should focus on temporary derogations. Temporary derogations need to be just that – temporary (it does not mean, however, that renewal or extension is inconceivable). Hence, the probability of securing a derogation is higher if the country that requests it, can also demonstrate how it will eventually be able to comply with the *acquis*. The greater the possibility for eventual compliance, the lower the reluctance of the EU.

The most forceful argument that prospective members have at their disposal is the existence of exceptions for existing members provided in the Treaty and in secondary legislation. In the Treaty (articles 36, 55, 56) some restrictions on the freedom to trade, move and establish may be allowed for specific reasons such as the protection of national security or public morality. But the permitted restrictions are very few, very narrowly defined and have to be applied in a non-discriminatory manner which must be proportional to the intended effect. Other exceptions may be possible under article 90(2) for services of general economic interest and under article 92 on state aid.

Secondary legislation contains many more exceptions and, therefore, prospective members need to know well that legislation and the jurisprudence of the Court so that they can back up their arguments with reasoning that is compatible with the EU's own practice. For example, the second banking directive allows under certain conditions the imposition of restrictions for the maintenance of the liquidity of the banking system. The directives on the liberalisation of air transport and maritime transport, respectively, allow for the maintenance of special measures for the encouragement of transport services with remote or island regions.

Indeed, the practice in past accession negotiations should also be considered carefully by prospective members. It will be more difficult for the EU to refuse to grant exceptions similar to those granted in the past or to extend similar treatment.

Every country, however, is unique and past or current EU practice may not provide any useful precedents. In this case, the prospective member has to rely on more general arguments. Insisting that adjustment is costly is certainly not enough. By definition, adjustment is always costly. The prospective member will have to explain how adoption of the *acquis* will somehow cause it permanent and irreparable damage or reduce its welfare (e.g. reduction of economic activity, reduction of national standards, etc). In addition, that country needs to demonstrate that the cost is substantial, that there are no other means of avoiding that cost without a derogation, that the derogation is not contrary to the general principles of the EU (e.g. raise levels of prosperity, reduce regional disparities, etc) and that the requested derogation does not have an appreciable effect on intra-EU trade and competition. Quantified evidence can only help in making such arguments convincing. The steps in preparing a persuasive and credible negotiating argument are identified in greater detail in the table at the end of the paper.

Finally, note that the drafting of credible arguments very much depends on prioritisation of the prospective member's needs and clear ranking of its capabilities. Effective internal preparation is of the utmost importance for the successful conclusion of the negotiations. Moreover, a prospective member should not ignore the hard bargaining that will inevitably have to take place internally, among the various ministries and between the government and the various economic and social groups. Here the experience of past applicants is also instructive. They put a lot of effort in public information campaigns to persuade the sceptics about the benefits from membership of the European Union.

How hard can the prospective members bargain?

There are many factors that determine the bargaining power of a prospective member. But irrespective of size, level of economic development and political importance, any country applying for membership of the EU starts from a position of weakness for at least three reasons. First, it is the applicant that seeks entry into the Union, not the other way around. Second, the applicant has to negotiate on a very large and very complex body of law which may not be well known to it. Third, it is confronted with 16 views and faces across the negotiating table (15 member states plus the Commission which does not formally negotiate but has an important role in making technical proposals for adoption or amendment by the member states).

Even though a prospective member talks with the Presidency that represents the member states, it still has to take very seriously into account that the common positions presented by the Presidency are the result of negotiations within the EU itself. Its structure and complex decision-making procedures make the EU a very tough negotiator because it is very difficult for outsiders to understand and identify its weak points.

At the forthcoming accession negotiations, applicant countries may have an even more difficult task because the EU has formulated the so-called Accession Partnerships which establish a procedure for compliance with the *acquis*. The applicants are, therefore, expected to be able

to adopt the *acquis* at least in the internal market area before they enter the Union. The onus will indeed be on the applicants for the additional reason that the provisions of the Europe Agreements will have to be implemented irrespective of the progress of the accession negotiations.

Moreover, the fact that at least initially the EU will be conducting six negotiations in parallel will probably make it even less willing to make any concessions to anyone applicant because the others will naturally demand similar treatment. This may mean, of course, that what one gets, all will get. Also, it will not be surprising to see a kind of competition emerging among the applicants, creating pressure on them to compromise so as not to be left behind in case the others manage to reach agreement quickly on particular issues and move on to new ones.

There is another reason why a prospective member's bargaining power may be affected by developments which are only indirectly related to its own accession negotiations. That reason is that the EU itself needs to adjust to receive new members. The EU has embarked on an internal process of policy reform in the areas of agriculture and regional/structural development. The outcome of this process, which has a lot to do with how the EU supports farmers and poorer regions, will to a considerable extent determine the attitude of existing members towards enlargement. As mentioned earlier, a prospective member should not been seen as a significant competitor for EU funds. If the internal EU debate turns out to be too acrimonious and if the end result is too divisive, prospective members may have to re-think their requests for EU assistance.

In light of the above, it is perhaps not premature to conclude that the prospective members would be more effective in the negotiations by concentrating their efforts in mastering the *acquis* and using the precedents from the EU's own practice in order to support their requests for derogations or special treatment.

Finally, note that even when everything else fails, it does not mean that the prospective member will have to accept 'defeat'. Even a very short derogation may be sufficient because the position of the applicant will change from prospective to actual member. Once inside the Union, that country will have more room to negotiate simply because it will have multiple channels through which to influence decision-making in the Commission and the Council. A case in point is the derogations granted to Sweden and Finland for retaining restrictions on alcohol and tobacco allowances for travellers. The derogations were for a fixed period of just two years, yet in December 1996 those two countries arguing from the inside managed to extend them for another five years!

Conclusions

The EU is a tough negotiator. Prospective members need to master their portfolios and devote sufficient resources to that purpose.

Derogations should be sought sparingly. They should be well motivated and well defined, with the appropriate time length in each case. References to the EU's own practice is indispensable.

Prospective members should remember that it is membership they seek. Whatever their needs and circumstances might be, they should demonstrate how the derogations they request are compatible in some broad sense with the objectives of the European Union.

RÉSUMÉ

De l'efficacité des négociations d'adhésion à l'Union européenne: Attentes réalistes, objectifs réalisables, arguments crédibles

L'Union européenne est sur le point d'ouvrir des négociations d'adhésion avec le plus grand nombre de nouveaux membres jamais réunis jusqu'ici. Ces futurs membres sont censés adopter tous les actes et politiques communautaires connus sous le nom d'acquis communautaire. Cependant, aucun pays n'a jamais été capable d'appliquer toutes les règles à la date d'adhésion à l'Union. Il faut nécessairement accorder certaines exceptions dès lors que l'administration publique et les sociétés privées ont besoin d'un certain temps pour satisfaire aux conditions de leur appartenance à l'Union. Bien entendu, les futurs membres veulent savoir s'ils peuvent aussi obtenir des dérogations qui leur permettraient de supporter les inconvénients de l'ajustement.

La vue "officielle" est que seules des exceptions ou dérogations temporaires seront autorisées. Si un pays sait qu'il ne sera jamais à même de satisfaire à l'acquis, alors il doit se demander s'il a vraiment sa place dans l'UE. Cette vue est généralement correcte (même si l'usage de dérogations permanentes n'est pas inconnu en la matière) et, dans ce contexte, il y a lieu de souligner que le terme "négociations d'adhésion" prête à confusion. Il serait plus opportun de parler d' "examen d'entrée", puisque ce terme décrit plus précisément ce qui se passe réellement au cours des négociations d'adhésion. La partie négociation proprement dite est plutôt restreinte, la plus grande part étant consacrée à voir si un membre potentiel remplit les conditions d'adhésion.

Ce bref article tente de séparer le mythe de la réalité et met en exergue les objectifs que l'on peut raisonnablement poursuivre au cours des négociations. Il explique pourquoi les négociations sont nécessaires; il passe en revue les différents types de dérogations qui peuvent être accordées; et donne des exemples de négociations d'adhésion tirés du passé pour montrer quelles sont apparemment les requêtes réalistes en matière de dérogation et comment les pays candidats de l'époque ont présenté et justifié leurs demandes.

La conclusion de cet article est que l'UE sera un négociateur coriace. Les futurs membres devront maîtriser leurs portefeuilles et consacrer suffisamment de ressources à cette tâche. Ils doivent faire preuve de modération dans leurs demandes de dérogations. Celles-ci doivent être dûment motivées et bien définies, et assorties d'une période de transition appropriée dans chaque cas. Les références à la pratique propre à l'UE seront indispensables. Enfin, les futurs membres ne doivent pas oublier qu'ils cherchent à adhérer à l'Union. Quels que soient leurs besoins et circonstances, ils doivent montrer que les dérogations qu'ils souhaitent obtenir sont compatibles au sens large avec les objectifs de l'Union européenne. ❑

Twenty-eight Questions to Ask in Preparing a Persuasive Negotiating Position

Understand the acquis:

1. What are the relevant Treaty provisions?
2. What is the relevant secondary legislation?
3. Are there any relevant Court rulings?

Understand your own situation:

1. Why does compliance with the acquis cause problems?
2. What is the nature and magnitude of the problems?
3. Are remedies other than derogations unavailable?

Exceptions/safeguards in treaty or secondary legislation:

1. Are there any?
2. Have they been used or invoked by any existing member? How?

Exceptions/safeguards in past accession negotiations:

1. Did past applicant countries have similar problems?
2. What exceptions did they obtain in their treaties of accession?
3. Can you use similar arguments?
4. Do you have the same negotiating power?

Formulate your own position/request:

1. Do you need a permanent or temporary derogation? Of what time length?
2. Should it be general (recording your needs) or specific (modifying a certain EC act)?
3. Would a safeguard do, instead of derogation?
4. Will compliance with the acquis cause irreparable economic/social damage?
5. Is there no other remedy apart from derogation? Is it proportional to the intended effect?
6. Do your identified needs coincide with the objectives of the EU?
7. Do you suggest mechanisms for eventual compliance with the acquis?

Formulate your back-up position:

1. What is the minimum you can accept?
2. Can you accept a shorter derogation that can be extended after you enter the EU?
3. Can you propose "objective" means of deciding later on whether extension is necessary?

Understand the EU's position:

1. What is the EU's offer/target?
2. Are there disagreements among member states?
3. Will the EU itself ask for derogation?

Monitor the other applicant countries:

1. Have they obtained something you have not? Why?
2. Can you request the same?
3. Should you request the same?