

*Lauso Zagato*

**A Europe of Variable Geometry: Still a Winning Model?**

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## 1. INTRODUCTION

The tragic scenes of exodus from Africa, which perturb the current debate on the future of Europe, strongly recall the dominant (but perhaps too hastily forgotten) apocalyptic predictions of a decade ago with regard to the anticipated waves of mass migration from Eastern and South-East Europe, from the Central Asian republics of the former Soviet Union and furthermore, from the endless hinterland of Southern Asia. Such predictions did not come true. It is unanimously agreed that the situation evolved differently, thanks to the decisive role played by the EU. It is, therefore, useful to analyse in detail the complex process of subdivision and re-composition in a hierarchy of State and sub-State entities on a primarily (but not exclusively) territorial basis and to examine the sophisticated system of legal instruments utilized by the EU institutions to win a difficult match. The most tangible trophy of this victory is the recent enlargement.

This research, however, is not inspired by futile optimism. Indeed it will become clear through analysis that it is not possible to confront other "geographical fronts" of the global movement of populations with similar panoply of instruments. A more complex task will be to offer some introductory reflections on the relationship between a Europe of variable geometry and a Europe of rights in the context of the new EU, as well as to indicate the contradictions on the horizon marked out by the Constitutional Treaty.

## 2. THE LEGAL INSTRUMENTS OF ENLARGEMENT

It is imperative to start by taking time to survey, in brief, the panoply of legal instruments which the Europe of variable geometry makes use of. The reason for this is not to list a pointless catalogue of sources and acts, but to enable us to understand better how it has been possible for such a Europe to take shape and know what its working mechanisms are.

In the first place, the development of a relationship between the EU and the Central and Eastern European Countries (CEEC) throughout the 1990s materialized specifically by recourse to a wide range of Treaty provisions. On the one hand, it stands out that even the Treaty of Nice did not bring together external

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competences<sup>1</sup> under a single Title.<sup>2</sup> On the other hand, provisions relevant for the purposes of enlargement do not only concern external relations, but, on the contrary, also substantially pertain to other fields, including in particular Economic and Social Cohesion (Title XVII, Articles 158–162) and the Area of Freedom, Security and Justice (AFSJ).<sup>3</sup> This has given rise to uncertainties and confusion, thus contributing to the strong discretionary element that, as we shall see, has characterised the policy of the EU-apparatus towards the candidate countries right up to the eve of enlargement.

Only the Europe Agreements (EA), stipulated in the 1990s between the EU and its Member States on one hand, and the single CEEC on the other,<sup>4</sup> are international agreements concluded in solemn form. However, we should also add the Stabilization and Association Agreements (SAA) concluded or currently being concluded with the West Balkan States (WB).<sup>5</sup> As is well known, the single EA initially envisaged the establishment of a common market between the EU and the individual candidate countries for 2004, not the entry of those States into the EU.

<sup>1</sup> Among recent contributions on this issue: Enzo Cannizzaro (ed.), *The European Union as an Actor in International Relations* (The Hague: Kluwer Law International 2002), pp. 1–345; Enzo Cannizzaro, “Le relazioni esterne della Comunità dopo il Trattato di Nizza,” *Diritto dell’Unione Europea*, VII (2002), pp. 182–191; Luigi Daniele (ed.), *Le relazioni esterne dell’Unione europea nel nuovo millennio* (Milano: Giuffrè 2001), pp. 1–359; Alan Dashwood, “External Relations Provisions of the Amsterdam Treaty,” *Common Market Law Review*, 35 (1998), pp. 1019–1045; Ian McLoad, I.A. Hendry and Stephen Hyett, *The External Relations of the European Communities* (Oxford: Oxford University Press 1998), pp. 1–432; Antonio Tizzano, “Note in tema di relazioni esterne dell’Unione europea,” *Diritto dell’Unione Europea*, III (1998), pp. 464–491; Ramses A. Wessel, “The Inside Looking Out: Consistency and Delimitation in EU External Relations,” *Common Market Law Review*, 37 (2000), pp. 1135–1171.

<sup>2</sup> On one hand, external competences are divided between the EC Treaty and the TEU (Title V: Foreign and Security Policy). On the other hand, the EC Treaty provisions relating to external competences are scattered in different Titles of the Treaty. Only the Treaty Establishing a Constitution for Europe—if and when it comes into force—provides for a unified structural settlement of the matter (Part III Title V, Articles III-193 to III-231, of the Draft Treaty).

<sup>3</sup> The provisions relating to the AFSJ are divided between the EC Treaty (Title IV: Visas, asylum and immigration) and the TEU (Title VI: Justice and Home Affairs).

<sup>4</sup> On mixed agreements as the normal practice in the EU external relations system and for an extensive bibliography, see Stefano Nicolini, “Modalità di funzionamento ed attuazione degli accordi misti,” in Luigi Daniele (ed.), *Le relazioni esterne dell’Unione europea*, op. cit. n. 1, pp. 177–213.

<sup>5</sup> Only the SAA with Macedonia and Croatia have been concluded, for the moment. See Stabilisation and Association Agreement between the European Communities and their Member States, on one side, and the former Yugoslav Republic of Macedonia (the Republic of Croatia), on the other, done in Brussels, 26 March 2001 (9 September 2001). See also the Communication from the Commission to the Council and the European Parliament, 21/05/2003, *The Western Balkans European Integration*.

It was only later, at the Copenhagen Summit of 1993, that the EU set in motion the enlargement process, thus accepting the request to do so from the countries of Central and Eastern Europe.<sup>6</sup> No new International Agreement was concluded, however. In other words, the EU did not undertake formal commitments: even the Copenhagen Declaration, with its pronouncement of the famous three criteria for enlargement, is a purely *unilateral* act, issued by the Union through the Council, which does not commit the Union itself to accepting the membership request of the associated countries, even where the latter effectively comply with the said criteria.

What took place, rather, in the years that followed, was a series of converging acts effectuated internally by each legal system, especially in relation to the third Copenhagen criterion (implementation of the Community *acquis*).<sup>7</sup> On one hand, we find the EU making use of a wide range of non-binding instruments (White Paper, Agenda 2000) and binding instruments. A particularly important instance of these is Regulation 622/98<sup>8</sup> establishing the Accession Partnerships and the ensuing Partnerships decided in relation to the relevant CEEC (thus, despite the name, these are unilateral instruments of the Union!); these instruments envisage an elaborate system of punishments and rewards that the EU Council may apply at its discretion depending on the progress or lack of it made by each CEEC along the way. On the other hand, we find the relevant CEEC beginning to issue a stream of acts within its national legal system that are mainly binding in character, so as to ensure the implementation of the Community *acquis* envisaged by the Community instruments as an indispensable precondition for membership. This is done over a certain period of years following the stages set by the *Accession Partnerships*. This

<sup>6</sup> On the first phase of the EA: Elisa Baroncini, “Gli accordi europei di associazione con i paesi dell’Europa centrale ed orientale,” *Nuove Leggi Civili Commentate*, XIX (1996), pp. 130–151; Marc Maresceau, “Les Accords Européens: Analyse générale,” *Revue du Marché Commun et de l’Union Européenne*, 369 (1993), pp. 507–515; Marc Maresceau and Elisabetta Montaguti, “The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation,” *Common Market Law Review*, 32 (1995), pp. 1327–1367; Lynn Ramsey, “The Implications of the European Agreements for an Expanded European Union,” *International and Comparative Law Quarterly*, 44 (1995), pp. 161–171; Antonio Toledano Laredo, “L’Union européenne, l’ex-Union soviétique et les Pays de l’Europe centrale et orientale: un aperçu de leurs accords,” *Cahiers de droit européen*, XXX (1994), pp. 543–562.

<sup>7</sup> See Graham Avery and Fraser Cameron, *The Enlargement of the European Union* (Sheffield: Sheffield Academic Press 1998), pp. 19–48; David Katz, “Les ‘critères de Copenhague,’” *Revue du Marché Commun et de l’Union Européenne*, 440 (2000), pp. 483–486; Richard Poláček, “Le débat élargissement-approfondissement dans la perspective de l’élargissement de l’Union européenne aux Peco,” *Revue du Marché Commun et de l’Union Européenne*, 425 (1999), pp. 112–120; Milada A. Vachudová, “EU Enlargement: An Overview,” *East European Constitutional Review*, 9(4) (Fall 2000), pp. 64–69.

<sup>8</sup> Council Regulation No. 622/98 of 16 March 1998, on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, Official Journal L 85, 20/03/1998.

practice evolves "freely", in order to earn the reward (passage to the next phase of the accession process) and avoid the punishment set by Article 4 of Reg. 622/98: formally, then, each of these States acts freely and has given no undertaking regarding the complete implementation of the *acquis communautaire* in its own legal order.<sup>9</sup>

On the international plane, it is obviously a case of an *agreement by conclusive conduct* between the two parties, a perfectly legitimate and operative accord thanks to the principle of freedom of form of international agreements. In fact, this is a type of accord that has met with a recent revival on the international scene; this revival may be linked in theory to the spread of *positive sanctions* as an instrument in relations between international subjects.<sup>10</sup>

We still need to inquire what the relationship is between this second agreement and the earlier accord (the Europe Agreement), incorporated within the legal orders of all the international subjects involved, according to the specific procedures of each. Each individual Europe Agreement not only remained in force, but further, became subsumed within the new pre-accession strategy, as is shown by the Partnership Agreements (PA), each of which peremptorily states in the introduction that the Europe Agreement in question continues to form the basis of the relationship between the EU and the candidate country. This amounts to saying, then, that the text of each Europe Agreement was tacitly amended by agreement between the Parties, according to a practice recognized by the international legal order.<sup>11</sup> The diversity of structure among the various generations of Europe Agreements carries weight in confirming the position stated above. Particularly in the most recent Europe Agreements (those with the Baltic States and Slovenia), there are

<sup>9</sup> Michael Blecher, "Aspetti istituzionali dell'allargamento EU verso est e principali strumenti di assistenza e sostegno dei Paesi candidati," in Marco Polo System (a cura di), *Il GEIE nella prospettiva di Agenda 2000* (Proceedings of the Seminar Held in Venice at the Fondazione Querini Stampalia, 28 September 2001), pp. 8–15; Kristyn Inglis, "The Europe Agreements Compared in the Light of the Pre-Accession Reorientation," *Common Market Law Review*, 37 (2000), pp. 1173–1210; Gilles Joly, "Le processus d'élargissement de l'Union européenne," *Revue du Marché Commun et de l'Union Européenne*, 457 (2002), pp. 239–246; Marc Maresceau, "From Europe Agreements to Accession Negotiations," in Mario Ganino and Gabriella Venturini (eds.), *L'Europa di domani: verso l'allargamento dell'Unione* (Milano: Giuffrè 2002), pp. 15–37; Phedon Nicolaidis et al., *Guide to the Enlargement of the European Union. A Review of the Process Negotiations, Policy Reforms and Enforcement Capacity* (Maastricht: European Institute of Public Administration 1999), pp. 1–103; Karen E. Smith, "The Conditional Offer of Membership as an Instrument of EU Foreign Policy: Reshaping Europe in the EU's Image," *Marmara Journal of European Studies*, 8 (2000), pp. 2–15.

<sup>10</sup> Lauso Zagato, "Qualche riflessione (e alcuni cattivi pensieri) sul processo di allargamento," in Marco Polo System (ed.), *Il GEIE nella Prospettiva di Agenda 2000*, pp. 16–29. On positive sanctions, see Bernardo Cortese, "International Economic Sanctions as a Component of Public Policy for Conflict-of-Laws Purposes," in Picchio Forlati and Sicilianos (eds.), *Economic Sanctions in International Law* (Leiden/Boston: Martinus Nijhoff 2004).

<sup>11</sup> Zagato, *op. cit.* n. 10, p. 17.

innovative elements that can only be explained in the framework of the prospect of *accession*, and not mere *association*.

A further development has taken place with the Stabilisation and Association Agreements (SAA): in this case, the enhanced approach typical of the final phase of the relationship with the CEEC has become the basis of the relationship with the five new countries. These States are asked to proceed immediately, *inter alia*, to a far more radical legislative alignment than the one on which the Europe Agreements are based, and with no prospect of entry into the EU in the medium term (except perhaps for Croatia).

We still have to focus on the instruments enacted by the EU to ensure implementation of the *acquis communautaire* on the part of the candidate countries. In the first place, the PHARE programme is prominent<sup>12</sup>: At the outset, this was used by the Commission for funding reform projects in a vast range of sectors, from restoration of sewerage systems to law reform. In other words, it was meant to ensure technical assistance for the transformation process, with no prior indication whatever that in future the countries in question would be admitted to full membership of the European Union. To give an example, legislative reform in the CEEC was carried forward in that period under the auspices of PHARE, but initially such reform did not coincide at all with straightforward implementation of the Community *acquis*. PHARE responded, rather, to the demands of the governments of the countries in transition without being tied to the framework of an association agreement and without a compulsory scheme of priorities. Strong criticism was rightly provoked by the dissipating effect of this type of assistance, unfortunately leading in the first place to a bureaucratisation of the programme.<sup>13</sup>

Starting with the Accession Partnerships, the entire range of Community assistance has been coordinated by the Commission: the reorientation of PHARE thus took place, accompanied by the launch of the ISPA and SAPARD programmes.<sup>14</sup> Since then, PHARE has been remodelled on the basis of the third Copenhagen criterion, that is to say, implementation of the Community *acquis* by the candidate countries. The programme has become the fulcrum of assistance for developing institutional capability to give effect to the principles of the European legal order,

<sup>12</sup> Council Regulation (EEC) No. 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, Official Journal L 375, 23/12/1989.

<sup>13</sup> Blecher, *op. cit.* n. 9, p. 10.

<sup>14</sup> See Council Regulation No. 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation No. 3906/89, Official Journal L 161, 26/06/1999; Council Regulation No. 1267/1999 of 21 June 1999 establishing an Instrument for Structural Policies for Pre-accession (ISPA), Official Journal L 161, 26/06/1999; Council Regulation No. 1268/1999 of 21 June 1999 on Community support for pre-accession measures for agriculture and rural development (SAPARD) in the applicant countries of central and eastern Europe in the pre-accession period, Official Journal L 161, 26/06/1999.

since it is in this domain that the greatest problems of all the candidate countries lie. After the SAA, implementation of the *acquis communautaire*, meant as full legislative alignment with Community law is also the object of the Community Assistance for Reconstruction, Democratization and Stabilization programme (CARDS) addressed to the West Balkan States (WB).<sup>15</sup>

Also among the array of instruments to which the European Union has had recourse are instruments implementing the EU policy for *economic and social cohesion*,<sup>16</sup> and in particular, the INTERREG III programme, aimed at ensuring a "cross-border, transnational and interregional cooperation intended to encourage the harmonious, balanced and sustainable development of the whole of the Community". To complete the picture, another Community policy should be mentioned, one characterized both by the wide involvement of public and private subjects and by its growing concern with the States of Eastern and South-East Europe, candidate countries in the near or more distant future: reference here is to the policy for research and technological development, in particular in the light of the Fourth Framework Programme.<sup>17</sup> This Programme gives unusual scope for the participation of public and private bodies of the States affected by the programmes indicated above, especially as far as universities are concerned.

As regards in particular the area of freedom, security and justice (AFSJ),<sup>18</sup> it must be underlined at once that the commitments undertaken by candidate countries in relation to external border controls, asylum and immigration "go far beyond the

<sup>15</sup> Council Regulation No. 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, Official Journal L 306, 07/12/2000.

<sup>16</sup> Council Regulation 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, Official Journal L 161, 26/06/1999. Article 20 paragraph 2 specifies that under the INTERREG Initiative "due attention should be given to cross-border activities, in particular in the perspective of enlargement, and for Member States which have extensive frontiers with the applicant countries, as well as to improved coordination with the PHARE, TACIS and MEDA programmes. Due attention shall also be given to cooperation with the outermost regions". See: Council Regulation (EC, Euratom) No. 99/2000 of 29 December 1999 concerning the provision of assistance to the partner States in eastern Europe and Central Asia (TACIS), Official Journal L 12, 18/01/2000 and Council Regulation No. 2698/2000 of 27 November 1999 amending Reg. 1488/96 on financial and technical measures to accompany the reform of economic and social structures in the framework of the Euro-Mediterranean partnership (MEDA), Official Journal L 311, 12/12/2000.

<sup>17</sup> Decision No. 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002–2006), Official Journal L 232, 29/08/2002.

<sup>18</sup> See: Joanna Apap, "Questioni pratiche e probabili conseguenze derivanti dall'ingresso nell'area Schengen: allargamento e area di libertà, sicurezza e giustizia, alla ricerca di un miglior equilibrio," *Diritto, Immigrazione e Cittadinanza*, V (2003), pp. 3–26; Christina

mere adoption of the EU *acquis*", with consequent, grave concerns relative to observance of those standards of human rights protection, which the EU declared in the Copenhagen Criteria to be a basic condition for enlargement.

### 3. A CITIZENSHIP OF VARIABLE GEOMETRY AND THE ROLE OF THE COURT OF JUSTICE

The concept of Community citizenship, as we all know, is evolving fast. This is particularly due to the activism of the Court of Justice, which has repeatedly intervened in recent years<sup>19</sup> to expand the content of the right of citizenship. Thus, albeit with innumerable precautions, the Court is leaning towards removing certain rights from the ties dictated by "economism" still present in the Treaty text at Articles 39, 43 and 46,<sup>20</sup> specifically the rights of Member States' citizens to freedom of movement, residence and establishment in other Member States.

Rather than getting to the heart of the concept of European citizenship, our concern here is to observe how the rights granted to non-EU citizens within the European Union act in relation to that concept. These are rights deriving from the various agreements concluded by the EU with the respective home States. The inner circle is made up of citizens of EEA countries<sup>21</sup>: both natural and legal persons

Boswell, "The 'external Dimension' of EU Immigration and Asylum Policy," *International Affairs*, 79 (2003), pp. 619–638; Charles Elsen, "Le Conseil européen de Thessalonique," *Revue du Marché Commun et de l'Union Européenne*, 471 (2003), pp. 516–518; Paolo Mengozzi, *Istituzioni di Diritto Comunitario e dell'Unione Europea* (Padova: Cedam 2003), p. 298 *et seq.*; Bruno Nascimbene, "Il 'Libro Verde' della Commissione su una politica comunitaria di rimpatrio degli stranieri irregolari: brevi rilievi," *Rivista italiana di diritto pubblico comunitario*, XIII (2003), pp. 445–449; Bruno Nascimbene (ed.), *Expulsion and Detention of Aliens in the European Union Countries* (Milano: Giuffrè 2001); Massimo Condinanzi, Alessandra Lang e Bruno Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone* (Milano: Giuffrè 2003), pp. 219–277; Catherine Phuong, "Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries," *International and Comparative Law Quarterly*, 52 (2003), pp. 641–663.

<sup>19</sup> See: Case C-85/96, *Maria Martínez Sala v. Freistaat Bayern*, [1998] ECR I-2691; Case C-274/96, *Criminal proceedings against Horst Otto Bickel and Ulrich Franz*, [1998] ECR I-7637; Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193; Case C-224/98, *Marie-Nathalie D'Hoop v. Office national de l'emploi*, [2002] ECR I-6191; Case C-413/99, *Baumbast*, [2002] ECR I-7091.

<sup>20</sup> With reference to the three Directives of 28 June 1990 (in Official Journal L 180, 13/07/1990): 90/364/EEC on the right of residence, 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity and 90/366/EEC on the right of residence for students. On the role played by the ECJ in the evolution of the concept of European Citizenship, Mengozzi, *op. cit.* n. 18. See also Condinanzi, Lang and Nascimbene, *op. cit.* n. 18, p. 26 *et seq.*

<sup>21</sup> Agreement on the European economic Area, done at Oporto on the second day of May in the year 1992 (Official Journal L 1, 3 January 1994).

coming from Iceland, Liechtenstein and Norway and are fully entitled to the rights of freedom of movement and establishment in a Member State in relation to the performance of economic activities (whether for wages or not), which until recently constituted the limits of the right of freedom of movement enjoyed reciprocally by citizens of Member States. A corresponding situation exists in relations between the EU and Swiss citizens.<sup>22</sup>

Apart from nationals of the States just mentioned, only citizens of Turkish nationality—and to a very small extent those of the Maghreb countries—enjoy directly applicable rights on which an action can therefore be founded directly before a national Court in the Union, following the Association Agreement of 1963 as integrated by certain decisions of the Association Council, in particular Decision 1/80.<sup>23</sup> Such rights mainly concern the prohibition of discrimination<sup>24</sup> and the right for families to be reunited (though there are some very serious restrictions, especially concerning the wife's status). Alone among migrant workers, the Turkish citizen also has the right to remain in the Member State where he has performed regular work for four years, and to have unimpeded access to the labour market of that same country.

For immigrants coming from any other country, it is true that a noteworthy variety of rights exists based on the different agreements stipulated by the EU with the home countries. Nevertheless, the fact remains that such agreements do not confer directly effective rights, even where they include a certain number of provisions that are favourable to immigrants, as in the case of the cooperation agreements with the ex-Soviet Union countries. It was thought that the same applied to the provisions contained in the Europe Agreements.

Instead, the CJEC has taken a stand on the direct effect of the EA, with a substantial set of judgments handed down between late 2001 and January 2002,<sup>25</sup>

<sup>22</sup> See Bilateral Agreements between Switzerland and the EU, done in Luxembourg, 26 June 1999. The Agreements became effective on 1 June 2002 (in Official Journal L 114, 30 April 2002).

<sup>23</sup> Agreement Establishing an Association between the European Economic Community and Turkey, done at Ankara 12 September 1963 (Council Decision 64/732 of 23 December 1963 in Official Journal 217 of 29 December 1964); see also Decision No. 1/80 of the Association Council of 19 September 1980 on the Development of the Association.

<sup>24</sup> In the Association Agreements with Tunisia (done in Tunis, 25 April 1976, in Official Journal 265 of 27 September 1978), with Algeria (done in Algiers, 27 April 1976, in Official Journal 264 of 27 September 1978) and with Morocco (done in Rabat, 27 September 1976, in Official Journal 263 of 27 September 1978) only Article 40 (abolition of any discrimination based on nationality between workers of the Member States and workers of Algeria, Morocco and Tunisia as regards employment, remuneration and other conditions of work and employment) is subject to direct application. See Judgment of the Court of 31 January 1991, C-18/90, *Kziber*, [1991] ECR I-199.

<sup>25</sup> Judgments of the Court of 27 September 2001: Case C-63/99, *Głoszczuk*, [2001] ECR I-6369; Case C-257/99 *Barkoci and Malik*, [2001] ECR I-6557; Case C-235/99, *Kondova*,

pronouncing in particular on the provisions contained in the Agreements with Poland, the Czech Republic and Bulgaria concerning freedom of establishment. The Court lay down that the provisions of the EA concerning the free movement of workers, the right to be reunited with one's family and the right to national treatment in the matter of the right of establishment, all have direct effect. This position was adopted despite the fact that the Member States had taken steps to protect themselves in advance by inserting in each EA a safeguard clause (Article 58 or 59) asserting that "nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services . . .".

The Court went further: it is true that the right of establishment granted by the EA does not exclude preventive control by the Member State of entry over the conditions for issue of a visa (necessary in the case of stays that are by definition longer than three months), such control to be carried out in the country of departure; however, the Court declared that such controls cannot be performed in such a way as to deprive of its sense the right granted to the non-Community national by the Europe Agreement with the EU.

It is not within the scope of this article to examine the matter in depth. It is sufficient to establish that the Court has shown favour towards citizens coming from the countries that have concluded the Europe Agreements with the EU, in such a way as to distinguish their situation from that of any other class of migrant. Since the category in question also includes immigrants from Romania and Bulgaria, countries which have concluded Europe Agreements with the EU but are expected to enter the Union only years from now, it will be possible to verify whether the Court has established a way to achieve *de facto* regularisation for migrants coming from those countries, or whether it means to stop short of that.

In not dissimilar terms, the Court's most recent case law concerning the application of the Association Agreement with Turkey shows further receptiveness compared with the previous cautious approach that had still inspired the set of judgments pronounced in 2000.<sup>26</sup> The judgment in the *Bülent Kurz* case of 19 November 2002<sup>27</sup> sheds light on this development.

[2001] ECR I-6427; Judgment of the Court of 20 November 2001, Case C-268/99, *Jany and Others*, [2001] ECR I-8615; Judgment of the Court of 29 January 2002: Case C-162/00, *Pokrzepowicz-Meyer*, [2002] ECR I-1049. See: Martin Hedemann-Robinson, "An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident within the European Union, with Particular Reference to the Case Law of the European Court of Justice," *Common Market Law Review*, 38 (2001), pp. 525–586; Christophe Hillion, "Case Law," *Common Market Law Review*, 40 (2003), pp. 465–491.

<sup>26</sup> Judgments of the Court: 10 February 2000, Case C-340/97, *Nazli*, [2000] ECR I-957; 16 May 2000, Case C-329/97, *Egart*, [2000] ECR I-1487; 11 May 2000, Case C-378/98, *Savas*, [2000] ECR I-2927; 22 June 2000, C-65/98 *Safet Eyüp*, [2000] ECR I-4747.

<sup>27</sup> Judgment of the Court of 19 November 2002, C-188/00, *Kurz*, [2002] ECR I-10191.

Something remains to be said about the SAA; in effect, these Agreements are extremely careful to exclude provisions liable to be applied directly. Thus, the provisions on freedom of establishment at the moment apply exclusively to freedom of establishment of undertakings; Article 48(4) of the SAA with Macedonia<sup>28</sup> provides, for example, that the SAA Council (the supervisory body for the application of the Agreement) will only take into consideration the possibility of extending the provisions on freedom of establishment to nationals of both sides who intend to perform work as “self-employed persons” in the territory of the other side, once five years have elapsed from the date the Agreement entered into force and on the basis of the situation in the labour market *and the development of the case law of the CJEC*. The rules governing freedom of movement of employees are also extremely cautious. However, we should not be too worried by the defence screen: even the EA of the early 1990s seemed to leave no room for possibilities of direct applicability.

In conclusion, a picture emerges, based to a large extent on the case law, of a citizenship of the Union of variable geometry. Possible outcomes and consequences of that picture can only emerge at the end of this article, once we have completed our scrutiny of how the EU-apparatus has used the wide range of legal instruments that we have seen were available to it, in the process of enlargement.

#### 4. EXPORTING THE COMMUNITY *ACQUIS* BY MEANS OF THE LEGAL INSTRUMENTS DESCRIBED ABOVE: BETWEEN A GUIDING FUNCTION AND A TAKEOVER

##### 4.1. Foreword

During the process of German reunification a controversy arose over whether, with respect to the way it was handled, it was correct to talk about the “accession” of East Germany based on freedom of contract, or whether it was correct to speak of a basic acquisition or “takeover” by the Federal Republic.<sup>29</sup> This allusion brings up some necessary considerations about the way the countries of Central and Eastern Europe have implemented the Community *acquis*, not only after 1989, but especially since Copenhagen and by the standard of the third criterion set there.

It might appear to some that the problem is on the way to being solved: on 1 May 2004, these countries entered the EU, and the singular forced implementation of the Community *acquis* (to speak plainly, the legislative takeover) imposed on these States has become history. This is not quite right: in the first place, Bulgaria and Romania did not join the EU immediately; in the second place, the process is being repeated with greater force in relation to the West Balkan States. In fact, the latter are required to ensure prompt, immediate and full incorporation of the Community *acquis a priori*, with no assurance as to the future and Turkey is also in the background. In the third place, and chiefly, the scope and effects of the policy of

<sup>28</sup> See *op. cit.*, n. 5.

<sup>29</sup> Blecher, *op. cit.*, n. 9, p. 8.

Accession Partnerships developed over the last decade need to be precisely assessed with respect to the current situation.

##### 4.2. Vertical Instruments, or the Tough Side of Asymmetry in the EU-CEEC Relationship (and Beyond)

We need to observe, in general terms, how exporting the *acquis* has often consisted in a blind, bureaucratic operation, carried out in some countries without any criterion. There are some salient examples. One instance is the implementation by one candidate country's legal system of Community law on consumer contracts, which took place, at the very beginning, without the participation of consumer associations, with hostile indifference on the part of the judiciary and with notable legislative confusion; all this occurring in a situation complicated by a political crisis, with total silence from the press.

An equally salient example is that of Albania. This country found itself having to put into effect a law reform which, after having been designed on the basis of a plan to enact two separate codes (civil and commercial), then made an about turn (1994–1995) seeing the enactment of a single code. The change was fortunate, but none the less abrupt, and perhaps not everything in the new code had been adequately thought through.<sup>30</sup> In both these cases the decision was taken by experts from the Member States and by a succession of team leaders, in a situation that increased the bewilderment and difficulties of the (few) local experts. It was also severely testing for the very institutional structures of the new State, faced with new problems and not helped to take on the role of protagonists in the process of legislative reform.

It is useful at this point to mention the way the accession policy introduced by the *White Paper* and launched with *Agenda 2000* (with its resulting tacit amendment to the content of the EA) has influenced trade in goods between the Parties. In fact, creating an area of free trade in goods is quite different from creating an internal market, which involves not only a customs union, but also complete freedom of movement of goods, persons, services and capital, as well as setting common policies in the sectors concerned. We must consider in the first place that the results of the asymmetrical bargaining power between the EU and the CEEC were discernible right from the start of negotiations on trade liberalization, i.e. before the opening up of the accession policy. True, with the Europe Agreements, the EU offered the CEEC rapid and asymmetrical liberalization of trade in industrial products; but in the same Agreements the EU reserved wide anti-dumping and safeguard measures for itself and, moreover, imposed a series of exceptions precisely in those sectors in which the CEEC's economies, or at least some of them, were competitive:

<sup>30</sup> Lauso Zagato, “I contratti di distribuzione nel recente codice civile albanese: suggestioni comunitarie,” *Rivista di Diritto Civile*, XLII (1996), pp. 537–558.

agriculture, coal, iron, steel and textiles. As a result, these countries worked up a permanent trade deficit with the Community, particularly in the case of the more advanced CEEC economies.<sup>31</sup>

Second, and in broader terms, it should be stated that the paradigmatic shift from the prospective creation of a free trade area and the approximation of laws to the prospect of accession has had a mixed, if not mainly negative, influence overall on the relative competitiveness of the CEEC in relation to the Member States of the European Union. It should be noted that the prospect of accession referred to involved no commitment at the time on the part of the EU, but immediate, complete and actual acceptance of the Community *acquis* on the part of each CEEC; and in some respects, the negative consequences converged on the CEEC best prepared for accession. This is particularly evident in the areas of *competition* and protection of *intellectual property*.

To take *competition* policy first: as far as the rules aimed at undertakings are concerned (Articles 81 and 82 CE), it can be said that the CEEC have largely completed implementation of the *acquis* by now. Paradoxically, however, this has ended up weighing especially heavily on the legal systems of the more advanced CEEC, the first States which managed to enact legislation on competition (Poland, the Czech Republic and Hungary). In these countries the provisions were modelled *roughly* on Community law, but had their basis in the local system. This is particularly true of the Polish legislation on concentrations. Local experiences of this sort (involving the creation of expertise on the part of administrative and judicial organs, and of the operators themselves) have been wrecked by the activity conducted by the Association Councils of issuing Implementing Rules (IR). The latter have naturally imposed immediate implementation, pure and simple, of primary and secondary EU law, in the manner of pre-accession strategy. The question is different again on the subject of *State aids* and above all as regards the competition rules applicable to public undertakings or undertakings entrusted with the operation of services of general economic interest (Article 86 EC, formerly Article 90).

Indeed, there is cause to reflect on the difficulties encountered at EU level *in subiecta materia*, despite the fact that an organised Community structure independent of the Member States exists, and further, that individual organs of the States may find themselves in a subordinate position to the Community apparatus. For this reason, and also because of their past experience in terms of political and economic organisation, it is impossible to see how the States of Central and Eastern Europe can go ahead with the reorganisation of their systems required by the EU legal order, beneath the goad of decisions taken unanimously by structures such as the Association Councils. It is no coincidence that there is a lack of such

<sup>31</sup> See Frank Schimmelfenning, "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union," *International Organization*, 55 (2001), pp. 55–56.

decisions *in subiecta materia*.<sup>32</sup> The telecommunications sector is an exception and in fact this is the sector most clearly regulated at Community level.

There are equally remarkable things to be said about *intellectual property*.<sup>33</sup> From the first angle, given that the CEEC had in any case to adjust to international law in this area, they would clearly encounter greater difficulty and burdens (such as costs, but also for productive renewal needed by undertakings) as a result of renouncing the standard of protection laid down by the TRIPS Agreement, which is lower than that required by EU law. Further, the TRIPS standard is to be reached by each State within five years of the WTO Agreement entering into force (or of WTO accession for States that were not founder Members). States would renounce all this in the name of immediately having to adjust to the far more penetrating parameters for protection in force in the EU.<sup>34</sup> It is equally clear that the price paid by some countries to do this is all the more dramatic in proportion to how distant the prospect of actual accession to the EU is.

From the second angle, we must focus our attention on an issue pertaining directly to the free movement of goods: the *exhaustion* of intellectual property rights. The principle of *exhaustion* is only applicable within the Union, i.e. it is valid as *Community exhaustion*: consequently, the holder of the right cannot oppose the importation and circulation within a Member State of products that have been marketed in the exporting State by the holder itself or with its consent, or by a person bound to the holder by legal or economic ties. However, the principle is not applicable to *association* agreements or *free trade* agreements, as the Court of Justice held in the well-known *Polydor* case in 1982.<sup>35</sup> This is so much the case that when, in an Association Agreement—specifically the European Economic Area (EEA)—the extension of the application of the principle of *exhaustion* later to the ex-EFTA States was desired, provision was explicitly made for this so as to avoid future disputes.

<sup>32</sup> See Lora Borissova, "Promoting Competition, Liberalisation and Regulation of the Telecommunications Sector in the Central and Eastern European Countries," *European Competition Law Review*, 22 (2001), pp. 59–73; Christopher Harding and Marian Kepinski, "The Polish Law against Monopolistic Practices," *European Competition Law Review*, 22 (2001), pp. 181–188; Inglis, above n. 9, pp. 1203–1205.

<sup>33</sup> For an overall view, see "The Enforcement of Industrial Property Rights in Eastern Europe," *International Review of Industrial and Copyright Law*, 32 (2001), pp. 875–1002, with an Introduction by Adolf Dietz.

<sup>34</sup> There is one exception, though it concerns the field of telecommunications, not intellectual property: Slovakia claimed reliance on its status as a less developed country under the GATS Agreement on Telecommunications so as to delay privatisation in the field of voice telephony for 5 years. It accordingly implemented the rules concerned in 2003, instead of 1998, as the EU had asserted.

<sup>35</sup> Judgment of the Court of 9 February 1982, Case 270/80, *Polydor*, [1982] ECR 329 *et seq.* (points 15–16). See also Opinion 1/91 of 14 December 1991, [1991] ECR 6079 *et seq.* (point 22).

This amounts to saying that the *free trade area* created between the EU and CEEC States before accession was decidedly weakened by its being confined exclusively to products not incorporating rights (in practice, to goods low in technological or commercial content). The holders of rights were easily able to partition the market corresponding to the *free trade area* between the internal market on one side and the single national markets of the CEEC on the other.

Certainly, the possibility of segmenting the market for the most innovative products (marked by the absolute prohibition of *parallel imports*) may also possess features of interest for the firms holding the rights, making localisation in certain CEEC markets attractive, while the same markets would present very few benefits if they were not partitioned. It goes without saying that only those CEEC currently furthest from accession will be able to benefit from this advantage if they are able, since these countries would offer a stable, partitioned market for a period of 10 years or so for products incorporating protected technology (industrial or commercial). The countries that have not acceded can certainly not benefit and over the last few years they have suffered only harmful consequences to their productive renovation as a result of this situation.<sup>36</sup>

The Polish Industrial Property Act (IPA) of 30 June 2000<sup>37</sup> deserves a more careful analysis. Indeed, the Act purposely regulated Geographical Designations in a way not coinciding in important respects with the provisions of Regulation 2081/92.<sup>38</sup> Geographical Designations are a new type of subject matter for the Polish system of industrial property rights protection.<sup>39</sup> This is to some extent surprising in the light of the long established tradition of Polish folklore, nevertheless it must be admitted that the choice made by the Polish legislator not to comply with the European law was not due to the strength of local legal traditions, nor can it have been a mistake. It was rather an attempt by the Polish legislature to develop adequate legal and administrative expertise in an increasingly important field in which Poland lacked previous experience. To achieve that, even "short term" legal provisions intentionally not complying with the *acquis communautaire*—the deadline being in any case 1 May 2004—became admissible. Further investigation is

<sup>36</sup> See Lauso Zagato, "Il rapporto tra Romania e UE in materia di proprietà intellettuale nel periodo che precede l'accesso," in Luigi Carlo Ubertazzi (ed.), *TV, Internet e new trends di diritti d'autore e connessi* (Milano: Giuffrè 2003), pp. 82–91.

<sup>37</sup> In Official Journal, 21 May 2001, n. 49, item 508. See Marian Kępiniski, "Geographical Designations under Polish Industrial Property law," *International Review of Industrial and Copyright Law*, 34 (2003), pp. 751–771.

<sup>38</sup> Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs of 14 July 1992 Official Journal L 208, 24/07/1992.

<sup>39</sup> On the historical reasons leading to this situation, and in particular the "partitioning powers" policy of not allowing the development of an organized Polish "folklore", Kępiniski, above, n. 37, p. 751.

needed, therefore, into legislation enacted in CEECs in the years preceding accession not fully complying with the *acquis communautaire*, with a view to establishing, case by case, the significance of the (transient) choice not to comply with the *acquis*.

A problem still to be mentioned is the uniformity of application of Community law as between the EU and associated candidate countries, and as among the latter group of countries themselves. Each *Europe Agreement* provides for an *Association Council* (AC), composed of members of the EU Council and Commission, on one hand, and government members of the single CEEC on the other. The Association Council's tasks are to deal with both the implementation of the Agreement—through the issue of decisions (*Implementing Rules*) binding on the Parties to the specific EA—and the resolution of disputes relating to it. If the parties fail to agree, certain procedures provide for a hazy solution using arbitrators, which would be very difficult to put into practice.

The obligation to comply not only with the *acquis communautaire* subsisting at the time of the signature of the EA, but also with the *acquis* subsequent to signature, had constitutional implications in the domestic systems of the candidate countries; all the more so when, as often happened, the IR were drawn up in vague terms. It is hardly surprising, therefore, that the constitutionality of some provisions of the EA and of the IR has been challenged before the Constitutional Courts of various CEEC. In particular, the Hungarian Constitutional Court<sup>40</sup> found Articles 1 and 6 of the Association Council IR, relating to the application of Article 62(2) of the EC-Hungary EA, unconstitutional.<sup>41</sup> According to that provision, "any practice contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules" of Articles 81 and 82 (*inter alia*) of the EC Treaty, dealing with competition law. As for Articles 1 and 6 of the IR, the former provided that the cases referred to in Article 62 EA were to be dealt with, on the Hungarian side, by the Office of Economic Competition (OEC), while the latter provided that, in applying Article 62, it was the OEC's task to ensure that the block exemption Regulations in force in the EU were applied in full; and this was so even though up to that moment no provision of Hungarian competition law contemplated any block exemption Regulation.

The Hungarian Supreme Court found Articles 1 and 6 IR unconstitutional on two grounds. First, according to Article 62 EA, the relevant criteria that the OEC had to take into account in the proceedings contemplated under the IR, were to be inferred only "by way of reference [...] to internal legal rules and to the legal practice of internal fora (European Commission, ECJ, CFI) of another subject of

<sup>40</sup> Hungarian Constitutional Court, Decision 30/1998 (VI.25) AB, in Hungarian Official Gazette, 1998/55, p. 4565. See Allan Tatham, "Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court," *International and Comparative Law Quarterly*, 48 (1999), pp. 913–920.

<sup>41</sup> Decision 2/1996, in Hungarian Official Gazette, 1996/120.

international law".<sup>42</sup> Secondly, the OEC was required to take into account criteria emerging in EC law and practice even after the signing of the EA. In other words, a Hungarian organ was required to apply directly criteria to be generated in the future by a legal order other than the Hungarian legal order. It must be underlined that the Hungarian Court, in this part of its decision, gets to the root of the asymmetry in the EC-CEEC relationship which characterizes the third Copenhagen criterion.

Still, the Court managed to avoid taking the consequences of its reasoning to the extreme. True, the OEC must apply exclusively the rules of Hungarian competition law; but the content of these rules must be determined in a manner allowing "the proper assertion in the domestic legal order of the relevant EC criteria". The "persuasivity" of the EC criteria for the OEC when interpreting substantive domestic competition law is strengthened in light of the fact that the aim of the Hungarian substantive competition law is proper harmonisation with EC substantive competition law. In the end, the Hungarian Supreme Court's decision appears to be consistent with the decisions of other CEEC high courts, in particular the Administrative Supreme Court in Warsaw and the Polish Constitutional Tribunal.<sup>43</sup> According to the latter Tribunal, although EC law had no binding force in Poland, by virtue of the provisions of Articles 68-69 of the EC-Poland EA, Poland was obliged to use "its best endeavours to ensure that future legislation is compatible" with Community legislation. The Constitutional Tribunal held that the duty to ensure compatibility also included "the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility".

It would be senseless to underline that the original EA provisions discussed here were supposed to refer only to a gradual approximation of laws between the EC and the candidate countries to be pursued over a period of years; the conclusive fact is that the constitutional courts of different CEEC have agreed upon the necessity for a "Euro-friendly interpretation of domestic legislation".<sup>44</sup> It is important to note how both the burden of controlling the degree of harmonisation of national legislation and the coherence of interpretative criteria used in applying national law fall in the last analysis on national judges deciding cases in candidate countries.

Have such judges been equipped to face this difficult task? In the case of the European Economic Area, this problem is solved by a clever system which guarantees that both the judicial decision in the Community and in the EEA *effectively*

<sup>42</sup> Tatham, above n. 40, p. 917.

<sup>43</sup> See Decision of the Czech High Court, Decision of 14 November 1996 (Re Skoda Auto, Collection of Decisions of the Constitutional Court, vol. 8, p. 149); Decision of Supreme Administrative Court in Warsaw, 13 March 2000 (English transl. in 1999-2000 *Polish Yearbook of International Law*, pp. 217 *et seq.*); Decision of the Constitutional Tribunal k. 15/97 (English transl. *East European Case Reporter of Constitutional Law*, pp. 271 *et seq.*). See Zdenek Kühn, "Application of European Law in Central European Candidate Countries," *European Law Review*, 28 (2003), pp. 551-560.

<sup>44</sup> Kühn, above n. 43, p. 553.

*develops in parallel*, and that the rules applied in the EEA are given uniform interpretation. The latter is ensured by special consultation procedures between the Court of Justice and the EFTA Court, and by the chance for an ex-EFTA State to allow its judges to refer to the ECJ where they consider it necessary, for a decision on the interpretation of the EEA rules. Nothing of the sort has happened in the case of the Europe Agreements. The national judges of each candidate country have been left completely alone to interpret a system of law and case law that is, on the whole, alien to them, with all the resulting lack of certainty.

In this connection it is useful to recall an event that took place during negotiations for the EA with Poland. Poland had proposed that a provision should be inserted in the Agreement which would allow the Polish national court to make a reference to the Court of Justice under former Article 177 (234 EC) when the domestic court was called upon to apply a provision that had become part of the national legal system in order to implement the Community legal system. The Commission refused, on the grounds that access to the European Court of Justice is reserved to judges of the Member States alone.<sup>45</sup> The fact remains that the Polish proposal had picked out right from the start a weak point in the framework about to be built with the passing of the Europe Agreements. At the present time, as the legal systems of the new Member States implement the Community *acquis* in the various fields more extensively and in greater depth, the problem of identifying instruments capable of ensuring *uniformity* of application of Community law as between the EU and associated candidate countries, and as among the candidate countries themselves, has become more and more urgent.

#### 4.3. *A Europe of Variable Geometry: Midway between Centralisation/Re-centralisation and Flexibility*

It is time to draw our conclusions about what has been stated so far. EU external relations with the CEEC developed in the 1990s on the basis of a complex network of legal instruments (almost always including also Article 308). The aim of arranging the process in this way was to ensure implementation of the Community *acquis* by the CEEC countries, meaning the body of primary and secondary legislation (as well as the case law of the CJEC) developed by the EU over 50 years. This process has displayed good and bad aspects.

It would be unjust, certainly, to burden the Community-apparatus with what lies outside its province; indeed, the asymmetry in relations between the Union and the candidate countries was already written into the Copenhagen criteria (especially the third), and into the practice decided at European Council level; the Accession Partnerships were the instrument for that practice.

It follows that the preferred use of vertical instruments to guide the incorporation of the *Community acquis* in these countries was inevitable. The Community

<sup>45</sup> As provided in Opinion 1/91: above n. 35.

authorities, as we have seen, reacted with force to the risk of the PHARE project becoming bureaucratized and centralised, for instance by favouring decentralisation in the performance of assistance projects to the advantage of the EU Delegations in the field. This means that the Delegation task managers can take an increasingly active part in performing the activities requested. In many cases, though, this has led to a bureaucratic re-centralisation of projects under the local Delegation (an effect still being felt in the Western Balkan States, following a chain reaction).

While wishing to avoid second-rate anecdotes, another point to make is that the choice of favouring, as far as possible, the admission of qualified local personnel to the Delegations, though positive in itself, has not always produced the effects hoped for. This strengthening of the local delegations also has repercussions on the consultancy firms that manage the projects. If they want to keep their reputations they must show that they have managed to trigger the change set out in their job descriptions. It becomes more difficult to form tacit agreements of non-interference with stubborn partners (in particular the bureaucratic structures of government organizations, which are particularly inflexible by tradition). On the contrary, the partners begin to recognise the pressure of project management, to become aware and within certain limits accept the pressure bearing on them. They also know that the Delegation will intervene at government level should reform projects under the accession partnership be put at risk.<sup>46</sup> The impression is that the Delegations have often ended up taking on characteristics comparable to the role of the East India Company before the English assumed direct responsibility.

It is a situation not devoid of dangers for the future, as we can see if we examine the CARDS Programme, the instrument of legislative assistance provided for in the SAA. We have already mentioned how, by the standard of the CARDS Programme,<sup>47</sup> the consolidated approach of the first 10 candidates in the final phase becomes the basis for relations with the new countries. Just to be able to begin negotiations on the SAA, the WB States are being asked to ensure a level of legislative alignment far higher than the level on which the EA were based. In this connection, signs of friction with Serbia, which cannot be further investigated here, must not be underestimated. The risk here entails a shift in legislative choices by the Serb Government apparatus towards US models (confirming the dissonant choice of Serbia compared with the other WB countries).

We have also seen, on the other hand, how the range of instruments governing the making of a Europe of variable geometry does not allow itself to be trapped in a pattern of exclusive recourse to vertical instruments on the part of the Community apparatus, which would be almost like a 'soft' version of the attempted takeover of Iraq by the world superpower and a group of allied States that is still ongoing.

From the outset, the use of instruments of *centralisation/re-centralisation* have been accompanied by the use of instruments giving transversal flexibility: the most

<sup>46</sup> Blecher, above n. 9, p. 14.

<sup>47</sup> See above n. 15.

recent example of the former being through the new Title XXI, the realignment of the PHARE Programme and its offshoots; of the latter, through the new wave of projects within INTERREG. The instruments giving transversal flexibility have somehow managed to act together in preparing the technical legal instruments needed for enlargement of the Union.

Bearing in mind especially the countries not due to enter the EU immediately and the new candidates, we should hope to see a more marked corrective contribution of the transversal type, in the nature of a plan that arises from the confluence of competent elements in the territory, and bringing in the bodies representing the different parts of European civil society that are affected; elements of a bottom-up approach should also be brought into play in the process of harmonising the whole of European society.<sup>48</sup> The Court of Justice has, moreover, made a contribution to the process just described. Following a technique already used on other occasions, the Court has intervened at the decisive moment, establishing that a significant part of the immigration law in force in the single Member State is essentially inapplicable to citizens of the EA countries.<sup>49</sup> One of the main obstacles to enlargement was thus cleverly circumvented (in part, at least) even before the final phase of negotiations with those States began. What is more, Romania and Bulgaria will remain outside the EU for many years yet.

As a result, following the case law of the Court, a category of non-Community immigrants has been created possessing rights that are not commensurable with those of any other group; it is a fixed term category, so to speak, since Romania and Bulgaria are due to enter the EU in time, but nevertheless it is a category that is destined to last for years. Further, a similar profile is beginning to take shape in favour of Turkish citizens.

Then, as far as the rights of citizens emigrating from the WB States are concerned, as these countries gradually conclude SAAs with the EU, the Member States cannot rely too securely on the clauses excluding direct applicability that exist in those agreements and are repeated at every turn. The developing sequence of the Community cycle is punctuated by the Court overcoming similar obstacles. All the elements therefore point to the formation of a legal hierarchy over the long term of the rights of citizens from non-Community countries within the EC.

In conclusion, we find confirmation of the tendency during the course of enlargement to mix international law contours belonging to EU external relations, with transnational contours acting as a model and reference point for the activities of both local and foreign private parties. Indeed, the latter often tend to weigh

<sup>48</sup> Laura Picchio Forlati, "Il diritto dell'Unione europea tra dimensione internazionale e transnazionalità," *Jus*, XLVI (1999), pp. 461-473. Interesting points for reflection also in Marco Frigessi di Rattalma, "Il ruolo del contratto nei rapporti tra Enti pubblici territoriali appartenenti a Stati diversi," in *Regioni, Costituzione e rapporti internazionali* (Milano: Franco Angeli 1995), pp. 93-115.

<sup>49</sup> Sec. II, above.

themselves down with ambiguous supranational contours not justified by any basis in treaty law. This is due both to the attitude of the executive staff of the EU structure (and of the national experts) sent to the single candidate States, and to the acceptance of such a role by those at the receiving end of their activity, with the consequent withdrawal of the administrative apparatus of those States.

From the viewpoint of the international law scholar, what is remarkable is the extreme functionality revealed by the instrument of positive sanctions in the process outlined; in short, the positive sanction has proved to be decisive in achieving what seemed at first sight to be an extremely hard objective to attain.<sup>50</sup>

## 5. CONCLUSIONS

It is not the task of this chapter to examine in depth the prices paid and the risks that lay ahead, at the end of this first phase of the enlargement process, both for the former Eastern Bloc States and for the States historically belonging to the EU. From the viewpoint of the present paper, we must restrict ourselves to posing only certain problems.

In the first place, the way the instruments for a Europe of variable geometry are structured must be set in relation to the tumults going on in the south of the world, in particular in Africa. It is then easy to see how that panoply of instruments directed at creating reorganization and hierarchical system going from the centre to the periphery cannot be re-proposed in relation to the States on the southern side of the Mediterranean. The cardinal element of a Europe of variable geometry is in fact the positive sanction. This is an instrument that for obvious reasons can be used in an incomparably less effective way in relation to any countries other than the States of Central Eastern, South Eastern and Eastern Europe. Indeed the policy of granting economic aid as a means to a certain end is one thing (in this case, preventive control of migrations towards Europe, readmission agreements centralised at EU level for illegal immigrants who are nationals of that State or a third State, but are assumed to have crossed the frontiers of that State, etc.) while the outlook of co-opting the State apparatus over the medium or long term in the Union venture is quite another thing. Anyone who, like the present writer, has had the opportunity to witness at first hand the break-up of a Country's State apparatus (in this case, Albania) and then to see its unexpected return to life when confronted with an explicit takeover on the part of the Community apparatus, can easily appreciate how decisive such an element is.

The present author does not wish to escape the onerous consequences of this reasoning. The opposition between a short-sighted EU policy of externalising

repressive control of the migration phenomenon, as against a virtuous policy based on prevention, cherished in some scholarly writings<sup>51</sup> and relying on the successes achieved in South-East Europe, does not exactly hit the point. Since one of the two horns of the dilemma is unworkable, I fear that such a dichotomy would end up leaving room for the other—the repressive method—which really is workable in the short term. A watery Auschwitz would thus be round the corner.

Other solutions are to be thought of, then. They must be capable of claiming for themselves those aspects from the experience of a Europe of variable geometry, of interweaving between the transnational and international dimensions (enhancing the transnational) that have been developed in the last decade in relations with the CEEC and WB States.

From other standpoints, too, moreover, a Europe of variable geometry does not seem destined to end. This is not so much because of the geographical fact that there are still European countries waiting behind the acceding or candidate countries. What should be borne in mind, instead, is the formidable development that has taken place over the last decade of the issue of the protection of minorities, and above all, the transformation of that issue from a claim to prohibit forms of discrimination, to the active pursuit of a policy protecting individuals' right to their identities and cultural differences.

On the one hand, events in ex-Yugoslavia have influenced this development as well as the reflections on it sparked off both within the Council of Europe and at the EU. On the other hand, also as a consequence of global phenomena that there would be no point dwelling on here, we have witnessed a process of revival of local cultural entities in the Member States themselves; one scholar refers to this as an opportunity for a new, third way between Westphalia and Cosmopolis.<sup>52</sup> Again, we must not forget an important institutional aspect: in the tough political and administrative clash with the biggest Member States and their government apparatuses, and at the expense of a certain lack of coherence with the past (although one might speak of making an important evolutionary leap), the Commission has become the champion of the plurality of cultural identities within the EU in the hard-fought battle over the constitutional Treaty, both at State level and more especially at sub-State level.

So, the imminent enlargement creates a series of new contradictions and the task of this paper will be brought to a close by indicating what they are. On the one hand, minorities are pushing at the other side of the borders of States that are more or less close to joining the EU, and they can only be coped with in a trans-Union dimension (we refer firstly to the question between the Turks and the Kurds, but it is not necessary to look so far afield). Even involuntarily, this alone brings the

<sup>50</sup> See Laura Picchio Forlati, "La partecipazione al dialogo del diritto internazionale," in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, XIV (1992), pp. 799–781. Also Cortese, above n. 10, *passim*.

<sup>51</sup> Boswell, above n. 18, *passim*.

<sup>52</sup> Peter A. Kraus, "Cultural Pluralism and European Polity-Building: Neither Westphalia nor Cosmopolis," *Journal of Common Market Studies*, 41 (2003), pp. 665–686.

instruments of variable geometry into play.<sup>53</sup> On the other hand, the problem of protection of minorities affects the legislative choices of a nationalistic character of certain new Member States: see, for example, the recent Hungarian legislation on citizenship. To be sure, the Commission is watching over the problems stemming from that tendency.<sup>54</sup>

Nonetheless, it is the Commission itself that seems willing to take upon itself a policy of dramatic closure towards the planetary migrations of desperate hordes, in pressing for the creation of a European immigration agency, requiring new Member States meanwhile to incorporate in their laws the full weaponry with which the historical Member States are endowed: readmission agreements, etc.<sup>55</sup> There is a strong impression that the “archangel” approach within the Union and at its immediate borders counterbalances an extreme carelessness verging on cynicism on the part of the Unionist institutions in handling relations of a global character. Nor would this be for the first time.<sup>56</sup>

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<sup>53</sup> Christin Henrard, “The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility/Burden-sharing?”, *Maastricht Journal of European and Comparative Law*, 9 (2002), pp. 357–391.

<sup>54</sup> See Barbara Brandtner and Allan Rosas, “Human Rights and External Relations of the European Community: An Analysis of Doctrine and Practice,” *European Journal of International Law*, 9 (1998), pp. 468–490; Henrard, above n. 53; Gaetano Pentassuglia, “The EU and the Protection of Minorities: The Case of Eastern Europe,” *European Journal of International Law*, 12 (2001), pp. 3–38.

<sup>55</sup> See Caroline Forder, “Common Minimum European Standards in Immigration Matters,” *Maastricht Journal of European and Comparative Law*, 9 (2002), pp. 221–229; Catherine Phuong, above n. 18, *passim*.

<sup>56</sup> See Laura Picchio Forlati, “Contratto (diritto internazionale privato),” *Digesto delle discipline privatistiche, sezione civile*, IV (1989), p. 235.