Legal constraints on EU Member States as primary law makers

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A Case Study of the Proposed Permanent Safeguard Clause on Free Movement of Persons in the EU Negotiating Framework for Turkey's Accession

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To my family and friends

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List of abbreviations

AA	Ankara Agreement (EEC-Turkey Association Agreement)
AG	Advocate General
AP	Additional Protocol
BVerGE	Bundesverfassungsgericht (German (Federal) Constitutional Court)
CCT	Common Customs Tariff
CEECs	Central and East European Countries
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
Coreper	Committee of Permanent Representatives
EA	Europe Agreement
EAEC	European Atomic Energy Community
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice (also referred to as CJEU)
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
GATT	General Agreement on Tariffs and Trade
GG	*Grundgesetz* (Basic Law, i.e. the German Constitution)
GCC	German (Federal) Constitutional Court (BVerGE)
OEEC	Organisation for European Economic Co-operation
OJ	Official Journal
PSC	Permanent Safeguard Clause
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
TCN	Third-Country National
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom
UKTI	The United Kingdom Trade and Investment
WTO	World Trade Organization

1 General introduction

1.1 STARTING POINT

The European Economic Community (EEC) and Turkey signed an Association Agreement in Ankara on 12 September 1963 with the purpose to "facilitate the accession of Turkey to the Community at a later date".[1] Since 1963, Turkey's quest for joining the EU has often been resembled to a long, rough, winding road or to the story of Sisyphus,[2] who was doomed to roll a large rock up a hill, only to watch it roll back down and then try again. As difficult as Sisyphus' task seems to be, that of Turkey has been harder, as each time the rock rolled down, Turkey found a larger rock to roll and a higher hill to climb. The hill grew to become a mountain with a life of its own, which never stopped growing ("widening and deepening" in EU terminology), almost as if out of control of the Gods that had created it.

This story (thesis) is about the growing rock (*acquis communautaire*) and the mountain (the EU) rather than Sisyphus (Turkey). Sisyphus is the starting point, the excuse to tell the tale of the mountain, which managed to slowly escape the rule of its creator Gods (the Member States) to acquire a life of its own. The aim is to shed light on the process in which the once omnipotent and omnipresent Gods of the mountain saw their hands and feet tied on certain occasions. As will be demonstrated below, many elements in the mountain joined forces to form the spirit of the mountain (EU constitutional law) which, combined with tricks of faith and some magic, managed to constrain its creator Gods (the Member States) to some extent so that the mountain could develop to lead a relatively autonomous and independent life.

After setting the general plot of this thesis, what follows is the specific research question it aims to answer, namely whether Member States of the EU have a completely free hand in drafting Accession Treaties, or whether there are some legal constraints on their primary law making function. It is worth noting from the outset that the thesis focuses exclusively on Member States'

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1 See the preamble of the Agreement, OJ C 113/2, Eng. Ed., 24.12.1973.

2 For two examples, see A. E. Çakır (ed.), *Fifty Years of EU-Turkey Relations: A Sisyphean Story* (Routledge, 2011). T. Tayanç, *A long and winding road: Turkey-EU relations through cartoons* (Istanbul: Tarih Vakfi, 2012).

primary law making function under Article 49 TEU.[3] It argues that such constraints exist, and accordingly, tries to identify them as well as the sources they are flowing from, thereby hoping to provide some insight into the nature of the EU legal order. The point of departure as well as the main focus of the study is the proposed permanent safeguard clause (PSC) on free movement of persons in the Negotiating Framework for Turkey. It is with reference to the PSC that legal provisions, rules, principles and norms constraining Member States as primary law makers in the context of drafting an Accession Agreement are identified.

Before going into discussing how the issue is approached and structured, the term "legal constraints" is defined and discussed so as to enlighten us as to the types of constraints covered by this study. It should be noted that the focus is exclusively on constraints flowing from EU law, even though occasionally the most obvious constraints flowing from public international law might be mentioned as well. Since the concept of constraint and the premise on which this study is based, i.e. that the EU legal order is of constitutional nature, are inextricably linked they will be briefly elaborated on below simultaneously. After discussing the salient characteristics of the EU legal order that merit its categorisation as constitutional, analogies will be drawn from other constitutional legal orders, which have developed implicit and explicit rules (constraints) in order to protect their most basic and foundational characteristics from arbitrary change.

There are many examples, but the German, and Indian legal orders protected by their constitutions are particularly insightful for our purposes. Next, to complete the endeavour of defining "legal constraints", a working definition of the term is developed in light of the preceding discussion on the nature of the Union legal order. This working definition, as well as discussions underlying the characteristics of the term, lies at the basis of the methodology chosen for this thesis.

After explaining the methodological course adopted for this study and the rationale underlying this choice, the final term that needs clarification in the introduction is: the "permanent safeguard clause". After briefly discussing the vague wording provided in the Negotiating Framework, the term is defined in light of the common features of other safeguard clauses used in past Treaties and Accession Agreements. Last but not least, comes the description of the structure of the thesis, which identifies constraints flowing from three levels of analysis: the pre-accession level, the accession process itself, and the constitu-

3 It does not deal with issues or constraints on Member States in the context of Article 48 TEU. Primary law in the Union legal order is composed of the Treaties (Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)), the Charter of Fundamental Rights (CFR), and various Acts of Accession, which contain the terms of accession for new Member States. In other words, this thesis deals only with the last aspect of primary law. For more information on primary law in the Union legal order see, N. Foster, *Foster on EU LAW*, 3 ed. (OUP, 2011). 111.

tional foundations of the Union. The approach taken in those parts and their structure is explained below at the very end of this chapter.

1.2 EXISTENCE OF "LEGAL CONSTRAINTS": NATURE OF THE EU LEGAL ORDER

"Law not only constrains government but also constitutes and enables it."[4] It enables action by legitimizing assertions of authority by those who fulfil its requirements. Thus, it is argued that these enabling rules also act as constraints.[5] In other words, "constitutional constraint and empowerment are two sides of the same coin".[6] In the EU legal order the primary instruments that perform the function of constituting and enabling have been the founding Treaties, which have for long been regarded as "the constitutional charter" of the EC by the Court of Justice.[7] As early as in *Van Gend en Loos*, the Court held that the subjects of the new legal order created by the EEC Treaty were not only Member States but also their nationals. The new legal order conferred on individuals both rights and obligations. According to the Court, "[t]hese rights arise not only when they are expressly provided by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community".[8] This illustrates clearly that the Treaties are the main source of empowerment and constraint on Member States, as well as other actors operating within the Union legal order. Another source of constraint that is worth mentioning is the case law of the Court interpreting the Treaties.

Just like constitutions function in states, in the EU legal order the Treaties establish the actors/institutions as well as the procedures through which the legal order functions. One of these institutions, the Court of Justice of the EU (CJEU, the Court, or the Court of Justice) is empowered to "ensure that in the interpretation and application of the Treaties the law is observed".[9] In their functioning, both the institutions created by the Treaties, as well as the Member States, which have laid down the rules in the Treaties, are equally bound and constrained by them. The Treaties lay down both procedural and substantive constraints on the Member States as well as on other actors/institutions that function within their scope. For their actions to be legal and legitimate, all

4 C. A. Bradley and T. W. Morrison, "Presidential Power, Historical Practice, and Legal Constraint," *Columbia Law Review* 113(2013): 1124.

5 Ibid.

6 R. H. Fallon, "Constitutional Constraints," *California Law Review* 97, no. 4 (2009): 1035.

7 See, *Case 294/83 Les Verts*, [1986] ECR I-1339; and *Opinion 1/91 EEA*, [1991] ECR I-6084. Since Article 1(3) TEU provides that "[t]he Union shall replace and succeed the European Community", it could be argued that the Treaties are now "the constitutional charter" of the EU as well.

8 *Case 26/62 Van Gend en Loos*, [1963] ECR 1, 12.

9 See Article 19(1) TEU.

actors functioning within the EU legal order need to comply with both types of constraints.

It should be noted from the outset that it is not possible to find the word "constraint" in legal dictionaries.[10] One reason for its absence might be the fact that the nature and form of "constraints" in law ("legal constraints") are different in different jurisdictions as well as in different areas of law depending on whom they apply.[11] This brings the necessity to coin our own definition in light of existing literature on legal constraints and taking account of the specificities of the EU legal order (as well as using dictionaries providing the colloquial definition of the term).[12]

To begin with the nature of the EU legal order, as it serves as a stepping-stone to move from the issue of "existence" of constraints to that of "identifying" them, there is an overwhelming agreement among EU law scholars that despite their international law origins, the founding Treaties on which the legal order is founded, have gradually evolved over the decades and transformed the order to one of constitutional nature.[13] This process of constitutionalisation has been driven by the Court of Justice and consolidated by subsequent Treaty amendments. What causes some divergence of opinion as to the nature of the legal order is the fact that it contains both constitutional and international

10 B. A. Garner, *Black's Law Dictionary*, 8 ed. (USA: Thomson-West, 2007); B. A. Garner, *A Dictionary of Modern Legal Usage*, 2 ed. (OUP, 2001).

11 Different studies focus on the constraining power of different types of legal rules on different actors. For an example of legal constraints on the powers of the president in the US legal order, see Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint."; for a conceptual study on the sources of constraints on judges as decision makers, see E. Braman, "Searching for Constraint in Legal Decision Making," in *The Psychology of Judicial Decision Making*, ed. D. E. Klein and G. Mitchell (OUP, 2010), 204-16; for a study examining constitutional constraints on judicial as well as non-judicial actors in the US legal order, see Fallon, "Constitutional Constraints," 975-1037.

12 (1). A constraint is something that limits or controls the way you behave or what you can do in a situation. (2). Constraint is control over the way you behave which prevents you from doing what you would prefer to do. See, J. M. Sinclair, *Collins Cobuild English Language Dictionary* (London: HarperCollins, 1994). 302. Another dictionary provides the following definition: "the act of constraining; restraint, compulsion, necessity; a compelling force; a constrained manner; reserve, self-control. [OF constreign-, stem of constreindre, L constringere (stringere, to draw tight)]". See, B. Kirkpatrick, *The Cassel Concise English Dictionary* (London: Cassel Publishers Limited, 1989). 279.

13 J. H. H. Weiler, "The transformation of Europe," *Yale Law Journal* 100 (1990-1991): 2410; Dashwood qualified it as "constitutional order of states", see A. Dashwood, "States in the European Union," *European Law Review* 23(1998): 201-16; J.-C. Piris, "Does the European Union have a Constitution? Does it need one?," *European Law Review* 24(1999): 559; P. Craig, "Constitutions, Constitutionalism and the European Union," *European Law Journal* 7, no. 2 (2001): 125; E. Tanchev, "The Lisbon Treaty within and without Constitutional Orthodoxy," in *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, ed. I. Pernice and E. Tanchev (Baden-Baden: Nomos, 2009), 29; A. Cuyvers, "The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World," *European Law Journal* 19, no. 6 (2013): 712-13.

elements at the same time,[14] which makes it difficult to identify what kind of entity exactly it is; hence the use of the term *sui generis* to describe the nature of the legal order. As 'lame' as that description might be,[15] no new terminology reflecting the true nature of the legal order that is widely acknowledged has been coined yet.

The divergences of opinion on the role of Member States as primary law makers under Article 48 TEU and of the end product under the Treaty revision procedure is a good illustration for the latter point. While for some the Treaty revision procedure is "more compatible with an international treaty than with a constitution",[16] others see the procedure differently. While acknowledging the prominent role of the intergovernmental conference, Besselink argues that "this does not detract from its being embedded in the EU structures",[17] since Article 48(3) TEU stipulates that "the European Council shall define the terms of reference for a conference of representatives of the governments of Member States".

The controversial *sui generis* nature of the EU legal order necessitates a closer look at the qualities it manifested at its various stages of development and its current state. This discussion is important not only in its own right, but also because it will demonstrate the existence of "legal constraints". Without this discussion or demonstration, the thesis could be criticised on the ground that it is built on an assumption of the existence of constraints. In short, the brief discussion on the nature of the legal order in the introduction will demonstrate the *existence* of "legal constraints" and will enable us to move on to the issue of identifying those constraints in the following parts. Moreover, this discussion will also influence the definition of the term "legal constraints", which is central for the findings of this thesis.

Unfortunately, the difficulties are not only limited to the novel and unique nature of the legal order under analysis, but also extend to our use of ancient concepts, which have acquired different meanings over centuries, and were developed in the framework of the nation-state.[18] Hence, the need to define

14 A. M. G. Martins, "The Treaty of Lisbon – After all another Step towards a European Constitution?," in *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, ed. I. Pernice and E. Tanchev (Baden-Baden: Nomos, 2009), 74.

15 B. De Witte, "Treaty Revision Procedures after Lisbon," in *EU Law After Lisbon*, ed. A. Biondi, P. Eeckhout, and S. Ripley (Oxford: OUP, 2012), 51.

16 Martins, "The Treaty of Lisbon – After all another Step towards a European Constitution?," 74.

17 L. Besselink, "The Notion and Nature of the European Constitution After the Lisbon Treaty," in *European Constitutionalism Beyond Lisbon*, ed. J. Wouters, L. Verhey, and P. Kiiver (Intersentia, 2009), 268.

18 The problems arising out of the use of concepts that emerged in the context of the nation-state to describe the nature of the EU legal order has been called "the problem of translation". See, N. Walker, "Postnational constitutionalism and the problem of translation," in *European Constiutionalism Beyond the State*, ed. J. H. H. Weiler and M. Wind (Cambridge: Cambridge University Press, 2003), 27-54.

what is meant by those terms: the most central ones for this thesis being constitution, constitutionalisation (of the EU legal order) and constitutionalism (in the context of the latter order).

1.2.1 Constitutional or not?

As Grey eloquently puts it "[c]onstitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse."[19] To illustrate his point he provides examples of mutually inconsistent definitions of the term used by different scholars in different periods.[20] For our purposes the focus will be exclusively on the qualities of the term that fit the emergence and development of the EU/EC/EEC legal order, which goes back only around half a century. To begin with what is considered as the "one essential quality"[21] or "the centre piece"[22] of constitutionalism and constitutions respectively, it is their role as "a legal limitation on government"[23] or "the limitation of power"[24], in other words, their role as constraint on the exercise of public power.

"A central way the Constitution [the Treaties] constrains is by constituting or otherwise giving rise to institutions and legal practices [procedures] that perform constraining function."[25] As mentioned above, constraint and empowerment in this sense are inseparable. "Constraint inheres not just in threats of sanctions",[26] as will be discussed in more detail below, "but also in the incapacity to act with recognized authority beyond the sphere of tenable claims of lawful power, and in norms that define official roles and obligations."[27]

In the EU legal order, the founding Treaties laid down the institutional structure as well as the rules and procedures for its lawful functioning. In this "thin sense" of the term constitution, as the law establishing and regulating

19 T. C. Grey, "Constitutionalism: An Analytic Framework," in *Constitutionalism*, ed. J. R. Pennock and J. W. Chapman (New York: New York University Press, 1979), 189.
20 See, ibid. For more information on the features of 'ancient constiutionalism' versus 'modern constitutionalism', see M. La Torre, *Constitutionalism and Legal Reasoning: A New Paradigm for the Concept of Law*, Law and Philosophy Library 79 (The Netherlands: Springer, 2007). 1-12.
21 C. H. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947). 21; cited in Grey, "Constitutionalism: An Analytic Framework," 189.
22 D. Castaglione, "The Political Theory of the Constitution," *Political Studies* XLIV(1996): 417.
23 McIlwain, *Constitutionalism: Ancient and Modern*: 21; cited in Grey, "Constitutionalism: An Analytic Framework," 189.
24 Castaglione, "The Political Theory of the Constitution," 417.
25 Fallon, "Constitutional Constraints," 995.
26 Ibid., 1035.
27 Ibid.

the main organs of government and their powers,[28] the founding Treaties were indisputably of constitutional nature. As far as the Treaties encompassed the fundamental legal norms underlying the polity, in addition to establishing the institutional framework, which was to create general legal norms, they were also a constitution in a "material sense".[29] However, as Curtin explains, the material constitution refers to "*the totality* of fundamental legal norms that make up the legal order of the polity",[30] which is not limited to the Treaties, but includes the contributions of the Court of Justice. By developing the principles of supremacy, direct applicability and direct effect the Court instigated the development of the empirical constitution, which refers to the way in which the EU is organized and functions as a matter of fact.[31] What the Treaties have never been, however, is a democratic or political constitution, as the emphasis in the latter conception of the term lies in the manner in which the constitution is adopted, that is deliberated by the people directly or through their representatives.[32]

The "thick sense" of the constitution is more controversial as different scholars emphasize different features of the term.[33] For instance, Griller bases this "thicker" concept on the European Enlightenment, the gist of which is illustrated in Article 16 of the French Declaration of the Rights of Man and of the Citizen (1789): "Any society in which the guarantee of rights is not secured, and in which the separation of powers is not determined, has no constitution at all."[34] Hence, according to Griller, a constitution needs to perform three important functions: firstly, to recognize the rights of citizens;

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28 J. Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries," in *Constitutionalism*, ed. L. Alexander (Cambridge University Press, 1998), 152-53; cited in Craig, "Constitutions, Constitutionalism and the European Union," 126.

29 S. Griller, "Is this a Constitution? Remarks on a Contested Concept," in *The Lisbon Treaty: EU Constitutionalism without a Constiutional Treaty?*, ed. S. Griller and J. Ziller (Austria: Springer, 2008), 30.

30 Emphasis added. D. Curtin, "The Sedimentary European Constitution – The Future of 'Constitutionalisation' without a Constitution," in *Ceci n'est pas une Constitution – Constitutionalisation without a Constitution?*, ed. I. Pernice and E. Tanchev (Baden-Baden: Nomos, 2009), 77.

31 Ibid.

32 Ibid., 77-80.

33 Craig cites seven features that Raz finds important for a constitution to be considered a constitution in the thick sense: firstly, it needs to be *constitutive*, i.e. define the main institutions of government and their powers; secondly, it needs to provide a *stable* framework for the legal and political institutions; thirdly, it needs to be enshrined in one or few *written* documents; fourthly, it needs to be *superior law*; fifthly, it needs to be *justiciable*; sixthly, it needs to be *entrenched*, i.e. amendable only by special procedures; and lastly, it needs to express a *common ideology*. Craig acknowledges that any constitution will contain these elements to a lesser or greater degree. Not all constitutions will contain all the elements listed. Yet, it is important to identify them in order to understand the nature of constitutions in general. See, Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries."; cited in Craig, "Constitutions, Constitutionalism and the European Union," 126-27.

34 Griller, "Is this a Constitution? Remarks on a Contested Concept," 29-30.

secondly, to organize the relations between the government and those governed; and lastly, to establish a system of checks and balances among the various branches of government. In the EU, there are now rules in place that fulfil all these criteria.[35]

To begin with the first of Griller's criteria, the Court established at the very beginning that individuals (Member State nationals) are granted rights by the Treaty on which they can rely and have enforced in national courts.[36] Yet, that was just the beginning. Subsequently, taking the hints of some national constitutional courts, the Court also established that individuals have fundamental rights, which Union institutions and Member States need to respect when they act within the scope of EU law. Drawing inspiration from the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the common constitutional traditions of the Member States, the Court established that fundamental rights constitute general principles of EU law. Those rights are now enshrined in a Charter (Charter of Fundamental Rights (CFR)), which has the same status as the Treaties.[37]

Another monumental development in the history of European integration was the move from economic to political integration with the signature of the Maastricht Treaty and the inclusion of intergovernmental cooperation in the two new pillars of the EU: Common Foreign and Security Policy, and Justice and Home Affairs. To mark the importance of this shift, and create a concept that would bring Member States' nationals closer to the integration project, the status of Union citizenship was introduced.[38] While the concept of Union citizenship was regarded as empty and superfluous at the beginning, the Court managed to flesh it out. It proclaimed that it "is destined to be the fundamental status of nationals of Member States".[39] In short, in terms of securing rights of individuals, the EU legal order has moved a long way forward compared to its early days.

As to the latter two criteria, separation of powers is foreseen both vertically and horizontally in the EU.[40] The Treaties lay down the division of competences between the Union and its Member States, and provide for procedures through which the Union institutions interact in order to be able to legislate. The Court makes sure that those procedures and the balance between the

35 Curtin also identifies modern constitutionalism with three elements. Those are limited government, adherence to the rule of law and protection of fundamental rights. See, Curtin, "The Sedimentary European Constitution – The Future of 'Constitutionalisation' without a Constitution," 80.

36 *Case 26/62 Van Gend en Loos*.

37 See Article 6(1) TEU.

38 See Article 20 TFEU.

39 *Case C-184/99 Grzelczyk*, [2001] ECR I-6193, para. 31.

40 See Articles 5 and 13 TEU.

institutions is respected,[41] which leads Griller to the conclusion that the Treaties can be qualified as a constitution.[42]

1.2.2 Evolution towards further entrenchment of rights

Since the French revolution individual rights, together with representative government, (which according to Bellamy was largely assimilated to the principle of separation of powers), have defined constitutionalism for a long time. However, rights have become predominant in recent years. "Rights, upheld by judicial review, are said to comprise the prime component of constitutionalism, providing a normative legal framework within which politics operates."[43] While rights have risen to provide the substantive aspect of the constitution, political mechanisms and procedures have been relegated to a secondary role. Accordingly, argues Bellamy, "constitutionalism has come to mean nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process".[44] In the same vein, Dworkin pointed out that constitutionalism is increasingly understood as being no more than "a system that established legal rights that the dominant legislature does not have the power to override or compromise".[45] The question is whether that is the case in the EU legal order as well, and if so, to what extent? The experiences of the German and Indian constitutional orders, which are briefly discussed below, provide useful clues and guidance that enable us to draw some conclusions for the EU legal order as well.

The latter definition of constitutionalism implies the entrenchment of certain individual rights or a hierarchically superior position in comparison to other provisions of a constitution. While many constitutions declare that it is "the people" who are sovereign and exercise that power through the democratic process, they also establish limits on what can and cannot be done within that process. As far as individual rights constrain and limit the legislature, this is viewed as the clash of democracy versus rights,[46] or the clash of ancient versus modern constitutionalism,[47] also referred to as the counter-majoritarian

41 See *Case 138/79 Roquette Fréres*, [1980] ECR 3333; *Case 139/79 Maizena*, [1980] ECR I-3393; *Case C-70/88 Parliament v Council*, [1990] ECR I-2041.

42 Griller, "Is this a Constitution? Remarks on a Contested Concept," 32.

43 R. Bellamy, "The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy," *Political Studies* XLIV(1996): 436.

44 Ibid.

45 R. Dworkin, "Constitutionalism and democracy," *European Journal of Philosophy* 3, no. 1 (1995): 2.

46 E. Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment," *Columbia Journal of Law and Social Problems* 29(1996): 252-53.

47 La Torre, *Constitutionalism and Legal Reasoning: A New Paradigm for the Concept of Law*: 1-12.

difficulty.[48] What led to the rise of constitutionalism in the latter sense were events such as the atrocities committed during the Second World War, post-colonialism, and military interventions in troubled democracies.[49] They resulted in the insertion of "immutable constitutional clauses" protecting the rights of the individual in the constitutions of many states.[50]

While some of those rights were spelled out explicitly by the constituent power (*pouvoir constituant*) that had drafted the constitution in some states, such as Germany and Brazil,[51] in others, the same result was achieved by judicial activism. Constitutional courts in countries, such as India,[52] South Africa[53] and Colombia,[54] developed doctrines to protect individual rights

48 The counter-majoritarian difficulty is seen as the "intrinsic constitutional dilemma", which arises in legal systems in which the judiciary has the ultimate authority to interpret the constitution and is able to overrule unconstitutional acts of the executive and legislative branches through judicial review. See, Michael Freitas Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," *The International Journal of Human Rights* 15, no. 5 (June 2011): 765.

49 This logic can be seen in Klass Case of the GCC: "The purpose of Article 79, paragraph 3, as a check on the legislator's amending the Constitution is to prevent the abolition of the substance or basis of the existing constitutional order, by formal legal means of amendment …. and abuse of the Constitution to legalize a totalitatrian regime." See, Privacy of Communications Case (Klass Case), BverfGE, 1 (1970).

50 Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 765-67. Not all examples of immutable clauses deal directly with the protection of individual rights. Often, it is the form of government that is protected. For instance, Article 89 of the 1958 French Constitution, Article 139 of the 1947 Italian Constitution, Article 288 of the 1975 Portuguese Constitution and Article 4 of the 1982 Turkish Constitution protect the republican form of government. An interesting example to note is Article 112 of the 1814 Norwegian Constitution, which protects the "spirit" of the constitution. It provides that constitutional amendments "must never […] contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution". See, K. Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Turkey: Ekin Press, 2008). 52-53 and 70.

51 See, H. Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany," *NUJS Law Review* 1(2008); D. P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40(1991); Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority."; R. O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms," *Journal of Civil Liberties* 4(1999); R. Albert, "Nonconstitutional Amendments," *Canadian Journal of Law and Jurisprudence* XXII, no. 1 (January 2009).

52 S. Prateek, "Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations and the Future of Political Progress in India," *NUJS Law Review* 1(2008); Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 770-72; G. J. Jacobsohn, "An unconstitutional constitution? A comparative perspective," *International Journal of Constitutional Law* 4, no. 3 (July 2006): 470-76.

53 Albert, "Nonconstitutional Amendments," 25-28; Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority."

as well as certain aspects of their systems, which they viewed as defining or essential for their constitutional identity.[55] In the case of Germany and Brazil, their constitutions laid down the so-called "eternity clauses" or "petrified clauses" (*cláusulas pétreas*), which future legislatures acting as constituted powers (*pouvoir constitué* or also called "derived constituent power") would not be able to amend.[56] In Germany, it is Article 79(3) of the Basic Law (*Grundgesetz*; henceforth GG) that prohibits the amendment of the constitution "in such a way as to change or abrogate the principles laid down in Arts. 1 and 20 GG".[57] While Article 20 GG lays down the central qualities of the German State such as democracy, republican State order, federal organization etc., Article 1 GG enshrines one of the constitution's "most fundamental, 'supra-positive' principles",[58] which declares human dignity inviolable. Article 60 of the Brazilian constitution plays a similar function.[59]

The existence of the immutable clauses should not be taken to mean that the German and Brazilian courts were less activist compared to their Indian or Colombian counterparts.[60] The German Constitutional Court (GCC) has widened the scope of application of Article 79(3) GG by providing a broad interpretation to the concept of human dignity.[61] In the same vein, its Brazilian counterpart has extended the immutability doctrine to almost all

54 C. Bernal, "Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine," *International Journal of Constitutional Law* 11, no. 2 (2013).

55 For a comparative study including various traditions of judicial review of constitutional amendments, see Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study*.

56 The distinction between constituent and constituted powers is traced back to Emmanuel Joseph Sieyès. While the former refers to the sovereign power of the people to create a new constitutional regime without any restraints (also called "original constituent power"), the latter refers to the power to reform the constitution in accordance with the procedural and/or substantive limits set by the original constituent power (also called "derived constituent power"). See, E. J. Sieyès, *What is the Third Estate?* (New York: Praeger, 1963); cited in J. I. Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," *Constellations* 18, no. 3 (2011): 366.

57 R. Herzog, "The Hierarchy of Constitutional Norms and Its Functions in the Protection of Basic Rights," *Human Rights Law Journal* 13, no. 3 (1992): 90.

58 Ibid.

59 It prohibits any proposition to abolish: "(a) federative form of the state; (b) the concealed, direct, universal and periodic right to vote; (c) the separation of powers and (d) individual rights and guarantees." See, Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 773.

60 O'Connel argues that the doctrine of "unconstitutional constitutional norms", proclaimed in the Southwest Case, 1 BVerfGE 14 (1951), is controversial, since there is no explicit authorization in the Basic Law for the review of legality of constitutional amendments. That power was claimed by the GCC in order to "protect the objective order of values on which the Constitution rests". See, O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms," 54.

61 Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany," 408.

constitutional provisions that confer rights on individuals.[62] However, those clauses are not the only means employed by constitutional courts to guarantee the identity and continuity of the constitutions, whose guardians they are. It is worth citing more extensively from the case law of the GCC, since it forms part of the constitutional tradition on which the jurisprudence of the Court of Justice is built and serves as a source of inspiration for the doctrines developed by other constitutional courts, such as "the basic structure doctrine" of the Indian Constitutional Court.[63]

In German constitutional theory, the constitution is seen as a coherent and unified structure of principles and values.[64] Hence, the GCC provided that:

> 'An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an *inner unity*, and *the meaning of any part is linked to that of other provisions*. Taken as a unit, a constitution reflects certain *overarching principles* and fundamental decisions to which individual provisions are subordinate.
> …
> That a constitutional provision itself might be null and void, is not conceptually impossible just because it is part of the constitution. There are constitutional principles that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene these principles.'[65]

The court clarifies that both harmonious interpretation as well as invalidation are possible options. In a later case, it also explained that fundamental constitutional change was possible, but only if it were in line with the overarching principles and the logic/identity of the constitution, i.e. if it were carried out "in a system-immanent manner".[66] Hence, a constitutional amendment could

62 Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority," 773.

63 Prof. Dietrich Conrad, a German scholar of Indian politics and law, is seen as the instrumental name in acquainting Indian judges with the German experience. See, Jacobsohn, "An unconstitutional constitution? A comparative perspective," 477; see also, Chapter I titled "Sanctity of the Constitution: Dieter Conrad – the man behind the 'basic structure' doctrine", in A. G. A. M. Noorani, *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability* (New Delhi: OUP, 2006).

64 Kommers, "German Constitutionalism: A Prolegomenon," 851; Jacobsohn, "An unconstitutional constitution? A comparative perspective," 478.

65 Emphasis added. The Southwest Case, 1 BVerGE 14 (1951), cited in W. F. Murphy, "Slaughter-House, Civil Rights, and Limits on Constitutional Change," *The American Journal of Jurisprudence* 32(1987): 13-14.

66 Privacy of Communications Case (Klass Case), BverfGE, 1 (1970). The GCC declared as follows: "Restrictions on the legislator's amending the Constitution … must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional

be nullified to the extent that it transformed the constitution into something "fundamentally incoherent".[67]

Similarly, in one of the most important cases of Indian constitutional law, *Kesavananda Bharati v. the State of Kerala*,[68] the Supreme Court of India ruled by a narrow majority (7-6) that the constitution could be amended following the procedure stipulated in Article 368, however, no part could be amended so as to change its "basic structure". Six of the Justices argued that Article 368 did not empower the Parliament to abolish fundamental rights because it contains "inherent or 'implied limitations'"[69] that protect the "basic structure" of the constitution. The other six disputed the existence of such limitations. The Justice tilting the balance (Justice Khanna) rejected the theory of implied limitations but argued that the word "amendment" itself contained limitations. He argued that "[t]he power of amendment under Article 368 does not include the power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution."[70] That is the same argument that lies at the basis of "the constitutional replacement doctrine" developed by the Colombian Constitutional Court.[71]

It is argued that the doctrine developed by the Indian Court constitutes a version of the coherence requirement developed by the GCC. As far as it also emphasized the need to preserve the identity of the Indian constitution, it is viewed as a more demanding criterion,[72] even though both are interlinked. As Jacobsohn argues, "the incongruities and inconsistencies that could lead to a finding of constitutional incoherence might only mean that the document's identity has been obscured in a manner that seemingly casts doubt on its fundamental character and commitments".[73] As to the vexing issue of what

principles in a system-immanent manner", cited in Jacobsohn, "An unconstitutional constitution? A comparative perspective," 477.

67 Ibid., 478.

68 AIR [1973] SC 1461.

69 Noorani, *Constitutional Questions and Citizens' Rights: An Omnibus Comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability*: xv.

70 Ibid.

71 Articles 241 and 379 of the Colombian Constitution empowers the Court to review constitutional amendments, however, only with respect to the rules establishing the amendment procedure. The Colombian Constitutional Court developed the "constitutional replacement doctrine" to circumvent this constraint. Put succinctly, it argued that the power to amend the constitution does not entail the power to replace it, but to only modify it. The Court has the power to check whether the amending authority is only modifying, or replacing the constitution. However, that requires an analysis of the content to be able to determine whether the constitution is modified or replaced. In short, the Colombian Court concludes that "the power to review whether the constitution has been replaced implies the competence to review the content of constitutional amendments". Bernal, "Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine," 340.

72 Jacobsohn, "An unconstitutional constitution? A comparative perspective," 478.

73 Ibid.

constitutes a state's identity, and when it could be considered to have changed, Aristotle provided the following answer: "a polis's identity changed when the constitution (referring to more than just a document) changes as the result of *a disruption in its essential commitments*".[74] Hence, we can identify the EU's identity by looking at its main goals and commitments. When those goals clash with the means to achieve them, according to Murphy, "it is the means that must yield, unless a people rethink and redefine their goals".[75]

What can be extrapolated from the German and Indian examples for the EU legal order? There are no explicitly set immutable clauses in the Treaties. However, it can be argued that there is an implied hierarchy within the Treaties, which is also confirmed by the case law of the Court.[76] Just as the Indian Supreme Court established that some fundamental rights form part of the "basic structure" of the Indian Constitution, which it protects, the CJEU established the fundamental nature of some principles, which form part of "the very foundations"[77] of the Union legal order, whose guardian it is. The Court did not hesitate to give negative opinions about signing agreements, which it found incompatible with principles that form part of "*the very foundations* of the Community",[78] or as it stated more recently, incompatible with "*the essential character of the powers* which the Treaties confer on the institutions of the European Union and on the Member States and which are *indispensable to the preservation of the very nature of European Union law*".[79]

Fundamental rights are now deeply entrenched in the EU legal order. They are called "constitutional principles" by the Court.[80] They are qualified as "constitutional core values".[81] This can be inferred both from the Treaty text itself, as well as from the case law of the Court. To begin with the latter, in *Kadi*, the Court explicitly stated that other Treaty provisions "cannot be understood …to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article

74 Aristotle, *The Politics of Aristotle*, trans. E. Barker (OUP, 1962). 99; cited in Jacobsohn, "An unconstitutional constitution? A comparative perspective," 478.

75 Murphy further warns that "means – institutional arrangements – inconsistent with those ends pose grave problems for the system's survival". See, Murphy, "Slaughter-House, Civil Rights, and Limits on Constitutional Change," 18.

76 See *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, [2008] ECR I-6351, paras. 288-90.

77 Ibid., para. 303. See also, *Opinion 1/91 EEA*; and J. L. C. Vilaça and L. N. Piçarra, *Are there material limits to the revision of the Treaties on the European Union?* , Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte Nr 46 (Bonn: Rheinische Friedrich-Wilhelms-Univesität Bonn, 1994).

78 Emphasis added. *Opinion 1/91 EEA*.

79 Emphasis added. *Opinion 1/09 of the Court of Justice*, [2011] ECR I-1137, para. 89.

80 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 285.

81 See, J. Kokott and C. Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?," *The European Journal of International Law* 23, no. 4 (2012): 1015.

6(1) EU [now Article 2 TEU] as a foundation of the Union".[82] The Court elaborated further, that other provisions, in this case Article 307 EC, "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights".[83]

The foundational or overarching character of fundamental rights can also be inferred from the clear wording of Article 2 TEU as well as their central place in the Treaty. As soon as Article 1 TEU declares the establishment of the European Union, Article 2 TEU lists the values (previously, principles listed in ex Article 6(1) TEU) on which the Union is built. According to Article 2 TEU:

> 'The Union is founded on the values of respect to human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
> These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Moreover, first among the list of the Union's objectives in Article 3(1) TEU is the promotion of peace, Union's values and the well being of its people. Article 6 TEU is also entirely devoted to demonstrate the central place of fundamental rights in the EU legal order. After declaring the rights and freedoms in the CFR have the same legal value as the Treaties in its first paragraph, Article 6(2) TEU mandates Union's accession to the ECHR. Last but not least, Article 6(3) TEU proclaims that fundamental rights as guaranteed by the ECHR and common constitutional traditions of the Member States constitute general principles of Union law.

The fact that the very first sentence of Article 49 TEU, which lays down the procedure for accession of new Member States mentions respect for the values in Article 2 TEU as well as commitment for their promotion as a precondition for application of EU membership, also illustrates their importance. However, arguably, the provision that implies their hierarchical superiority is Article 7 TEU. While other fundamental rights provisions in the Treaty apply on the proviso that Member States act within the scope of Union law, there is no such limitation in Article 7 TEU. The values enumerated in Article 2 TEU are considered to be so important, so vital for the EU legal order that a clear risk of serious breach of those values eradicates the "acting within the scope of Union law" requirement for Member States. Hence, the European Council is empowered to take punitive measures against a Member State in serious and persistent breach of these values, even when the latter breach falls under

82 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 303.
83 Ibid., para. 304.

the so-called "internal situation" rule.[84] Article 7 TEU clearly illustrates the degree to which protection of fundamental rights has been internalized in the EU legal order. Even though the process whereby fundamental rights were incorporated into the case law of the Court was instigated by the push of a few national constitutional courts, the EU now acts as a guarantor of rights both against the Member States (by virtue of Article 7 TEU) as well as against international organizations.[85] This clearly demonstrates the emergence of the EU legal order as a new and autonomous legal level between national and international law.[86]

The latter discussion leads us to a definition of constitutionalisation, which signifies the process by which the Treaties assert their normative independence *vis-à-vis* the Member States and become "the founding charter of a supranational system of government".[87] It is usually argued that the border between an international treaty and a constitution will be transgressed if future amendments are no longer a prerogative of the Member States.[88] In other words, the crucial question is to what extent the EU as the subject created by the Treaties can become legally independent from the Member States, which are the parties to the Treaties?[89]

While it is still the Member States that are "the Masters of the Treaty text",[90] as illustrated above, once ratified they escape their exclusive control.[91]

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84 In its Communication on Article 7 TEU, the Commission provided the following explanation concerning its application: "[t]he scope of Article 7 is not confined to areas covered by Union law. This means that the Union could act not only in the event of a breach of common values in this limited field but also in the event of a breach in an area where the Member States act autonomously." See, Communication from the Commission to the Council and European Parliament, on "Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based", COM(2003) 606 final, 15.10.2003, p. 5. See also, Communication from the Commission to the European Parliament and the Council, "A new EU Framework to strengthen the Rule of Law", COM(2014) 158 final/2, 19.3.2014, p. 5.

85 See, *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*.

86 According to Möllers, in the context of EU law, constitutionalisation denotes the developing autonomy of the legal order from intergovernmental action. It can also be defined as "a phenomenon of the gradual formation of a new legal level". See, C. Möllers, "Pouvoir Constituant – Constitution – Constitutionalisation," in *Principles of European Constitutional Law*, ed. A. von Bogdandy and J. Bast (Hart Publishing and Verlag CH Beck: 2009), 195. See also, *Case 26/62 Van Gend en Loos*; and G. De Búrca, "The EU, the European Court of Justice and the International Legal Order after Kadi," *Harvard International Law Journal* 1, no. 51 (2009).

87 T. Tridimas, *The General Principles of EU Law*, 2nd ed. (Oxford: OUP, 2006). 5.

88 Möllers, "Pouvoir Constituant – Constitution – Constitutionalisation," 176; see also, Besselink, "The Notion and Nature of the European Constitution After the Lisbon Treaty," 268.

89 Griller, "Is this a Constitution? Remarks on a Contested Concept," 23.

90 De Witte, "Treaty Revision Procedures after Lisbon," 36. J. Shaw, "Process and Constitutional Discourse in the European Union," *Journal of Law and Society* 27, no. 1 (March 2000): 29.

91 De Witte, "Treaty Revision Procedures after Lisbon," 36.

The enormous contribution of the Court of Justice to the development of the unwritten or empirical constitution was already mentioned. It is true that Treaty amendments "provide for a framework but it takes tradition, conventions and implementing law to make the system tick".[92] The process of development of these legal and institutional practices is incremental and cumulative, some of which lead to corresponding changes in the Treaties over time.[93] If Member States act as Masters of the Treaties from one amendment to another, while in between the system incrementally evolves and takes shape in the light of the interactions of the EU institutions, what conclusion does this lead us to?

As Walker explains eloquently:

> '… constitutionalism and constitutionalization should be conceived of not in black-and-white, all-or-nothing terms but as questions of nuance and gradation. There is no unitary template in terms of which constitutional status is either achieved or not achieved …'[94]

Accordingly, if "constitutional" and "not-constitutional" are seen as the two opposite ends of a spectrum, the constitutionalisation of the EU legal order can be viewed as a gradual and evolutionary process that has slowly but surely been moving towards the "constitutional" end of the spectrum spurred by the case law of the Court and Treaty amendments. Since EU constitutional law comprises both the Treaties as well as the case law of the Court, it is often compared to the unwritten constitution of the UK, which is comprised of charters, bills, declarations, Parliamentary statutes, constitutional conventions etc.[95] As argued above, Tanchev confirms that the concept of the unwritten EU constitution, though more difficult to comprehend, "reflects a relatively high level of independence of the Communities from the Member States and has a highly developed level of legally regulated power, institutional framework independently existent from the Member States".[96]

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92 Curtin, "The Sedimentary European Constitution – The Future of 'Constitutionalisation' without a Constitution," 82.

93 Ibid., 85.

94 N. Walker, "The Idea of Constitutional Pluralism," *The Modern Law Review* 65, no. 3 (2002): 339. Like other scholars cited above, Walker identifies a set of factors that enable one to identify and measure the degrees of constitutionalisation. His "indices of constitutionalism" can be summarized as follows: discursive self-awareness, authority, jurisdiction, interpretive autonomy, institutional capacity, citizenship and voice. For a more detailed elaboration of those indices, see pp. 343-354.

95 Tanchev, "The Lisbon Treaty within and without Constitutional Orthodoxy," 31; See also, Besselink, "The Notion and Nature of the European Constitution After the Lisbon Treaty," 262-67.

96 Tanchev, "The Lisbon Treaty within and without Constitutional Orthodoxy," 31-32.

The role of the Court of Justice in the constitutionalisation of the EU legal order can indeed not be overrated.[97] Sólyom draws attention to the importance of historical circumstances as well as the self-understanding of constitutional courts, since they actively shape their own competences and power.[98] In that regard, both the self-understanding of the Court of Justice,[99] which can be inferred from the Court's reference to the Treaties as 'constitution', 'constitutional' or 'the basic constitutional charter',[100] the historical circumstances under which it was established in the framework of the Communities in the aftermath of the Second World War, as well as the constitutional traditions of the Member States' constitutional courts from which it draws inspiration and with which it interacts, have been instrumental in how the Court shaped its own jurisdiction as well as the legal order within which it operates.[101]

In short, this overview serves to demonstrate how the process of entrenchment of fundamental rights in some of the European national legal orders was followed by the Court of Justice as well as other constitutional courts around the world. This process of emulation has, in addition to other factors and developments, contributed to the further constitutionalisation of the Union legal order. The more entrenched rights are in a legal order (that is the more deeply rooted they are), the more constraining they get for actors operating within it. For the purposes of this thesis, it is important to expose that a PSC on free movement of persons would violate rights that are deeply rooted in the Union legal order. In our case, such an exposition would imply that Member States would not have the power to override those rights, i.e. those rights would constrain them from including the PSC in a future Accession Agreement. A preliminary examination of the compatibility of the PSC with the legal order and some of its fundamental principles follows in 5.2.4.3.2.

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97 There are many scholars, who in defining the process of constitutionalisation, lay emphasis on the Court's contribution to the process. For instance, Tanchev provides the following definition: "[t]he constitutionalization is a mechanism through which the unwritten constitution is taking shape through the Court's jurisprudence". See, ibid.

98 L. Sólyom, "Comment," in *European and US Constitutionalism*, ed. G. Nolte (Cambridge University Press, 2005), 249.

99 For a brief elaboration of the constitutional powers exercised by the Court of Justice, see M. L. F. Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999). 23-25.

100 See *Opinion 1/76*, [1977] ECR 741, para. 12; *Case 294/83 Les Verts*, para. 23; *Joined Cases 46/87 and 227/88 Hoechst AG*, [1989] ECR 2859, para. 62; *Opinion 1/91 EEA*, para. 20; *Case C-314/91 Weber*, [1993] ECR I-1093, para. 8; *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, paras. 202, 81 and 316. For a deeper discussion of these cases, see Esteban, *The Rule of Law in the European Constitution*: 26-37.

101 It is argued that many "European constitutional courts were created out of a deep mistrust in the majoritarian institutions, which had been misused and corrupted during the Nazi, fascist, and communist regimes". It was this historical setting that led the judges to see themselves as guarantors of their democratic legal orders and explained their "self-conscious activism". See, Sólyom, "Comment," 249-50.

1.3 NATURE OF "LEGAL CONSTRAINTS": THEORETICAL DEFINITION

The preceding discussion on the nature of the legal order is important, as it provides important clues as to the types of legal constraints operating within it. It is possible to make different categorizations of the concept of legal constraints. So far, procedural and substantive constraints were mentioned, as well as those relating to the overall structure or identity of a constitution. While procedural constraints were just mentioned in passing, the significance of some substantive constraints, especially those flowing from the fundamental nature of some principles and norms, was emphasized. It was also argued that just like some national constitutional courts protect the "basic structure", identity or coherence of their constitutions, so does the Court of Justice protect "the very foundations" of the Union legal order. In other words, those "very foundations" place constraints on Member States and Union institutions, which need to be taken account of.

To begin with the theoretical underpinning of the concept of legal constraints in the literature, the constraining effect of law is typically considered to be based on internal and external considerations (internal (normative) versus external constraints). The first and most obvious way that law constrains is when relevant actors or institutions within a system have internalized legal norms derived from "authoritative text, judicial decisions, or institutional practice",[102] i.e. they have learnt what those texts or decisions say and act accordingly, out of belief they "ought to" do so. As far as the protection of fundamental rights in the EU legal order is concerned, it is not difficult to demonstrate how deeply internalized they are as they are mentioned widely in the Treaties, as well as in Member States' constitutions. Moreover, they have been incorporated into the case law of the Court as general principles of EU law as mentioned above, and have always been actively promoted by the political institutions.[103] All actors believe in the value of and need to act in accordance with established standards of fundamental rights. The last Chapter of this thesis provides a specific example of the general principle of equality.

Normative (or internal) constitutional constraint is a matter of law: it does not depend on what any particular actor or institution believes the law to be. However, since different actors can perceive the law differently, Fallon distinguishes further between "direct normative constraints" and "mediated constitutional constraints".[104] The former are about "the *perceptions* of constitutional obligation"[105] experienced by particular actors. Since different per-

102 Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1132; in the literature, this is referred to as the "Hartian" perspective. See, H. L. A. Hart, *The Concept of Law*, 2 ed. (1994).

103 See, Joint Declaration by the European Parliament, Council and the Commission concerning the protection of fundamental rights and the ECHR (Luxembourg, 5 April 1977).

104 Fallon, "Constitutional Constraints," 995-97.

105 Ibid., 1036.

ceptions might lead to a dispute about constitutional meaning, the importance of the latter concept comes to the fore, as "mediated constitutional constraint" is about the interpretation adopted by the judiciary, which further constrains the non-judicial actors and institutions.[106]

In the EU legal order, it is the Court of Justice that provides authoritative interpretation of provisions of both primary and secondary law.[107] To provide an example, it is not rare that different institutions have different understanding of what the Treaties provide for. In *Chernobyl*,[108] different understandings of what Article 173 EC (now Article 263 TFEU) meant (direct normative constraint) led to a dispute between the European Parliament and the Council. The Court held that the provision should be interpreted to allow Parliament to bring an action for annulment to safeguard its prerogatives, despite the fact that it was not listed as one of the institutions that could do so under Article 173 EC. The Court's pronouncement constituted an example of a "mediated constitutional constraint", which was thereafter, binding on all actors and institutions operating within the scope of Union law.

As to the second type of constraints, called external constraints, their power arises from "[t]he prospect of inefficacy and the threat of sanctions".[109] Actors within a legal order are aware of the boundaries of their competence and authority. They know that transgressing those boundaries would make their assertions of power inefficacious, and trigger sanctions in some cases. For instance, if the Council fails to follow the procedure prescribed in the Treaties, and tries to legislate without obtaining the consent of the Parliament as required, the promulgated legal act could be invalidated by the Court, for not fulfilling "an essential procedural requirement".[110] Similarly, there are procedures built in the system, for instance the infringement proceedings under Article 258 TFEU, whereby Member States, which fail to fulfil their obligations under the Treaty might end up incurring heavy financial sanctions.[111]

Despite the distinction between internal and external (sources of) constraints in the literature, scholars point out that in many contexts the two do not

106 Ibid.

107 See, Article 19(1) TEU and Article 267 TFEU.

108 *Case C-70/88 Parliament v Council*.

109 Fallon, "Constitutional Constraints," 1036. For a more detailed discussion of "external sanctions", see ibid., 997-1000; and Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1137-40.

110 *Case C-65/90 European Parliament v Council*, [1992] ECR I-4593, para. 21.

111 Bradley and Morrison explain further that enforcement does not have to be formal. Even formal modes of enforcement are considerably strengthened by informal mechanism, such as criticism and public shaming. See, Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1127.

operate independently.[112] Bradley and Morrison underline that often practices followed out of fear of external sanction become internalized as a result of habit. This is called "the normative power of the actual" and denotes people's inclination "to give normative significance to that with which they are familiar".[113] When applied to actions of States in the context of international law, that type of behaviour or practice results in the formation of 'custom'.[114] In political science, the latter logic is called "path dependency".[115] In the latter context, it is not necessarily borne out of fear of external sanction, but rather out of habit and the convenience of the familiar. Overall, given how the internal and external constraints are intertwined, this thesis does not make an effort to disentangle them or specify exactly what sort of legal constraints we are dealing with.

1.4 IDENTIFYING "LEGAL CONSTRAINTS": OPERATIONAL DEFINITION

In this thesis the focus is on constraints that limit Member States' behaviour as primary law makers in the particular context of drafting Accession Agreements. The focus is on constraints that find their source in the EU legal order. Even though our focus is on "legal" constraints, as it will become clear below, a wide interpretation of the term "legal constraint" is employed. Hence, what is covered is a wide range of rules, norms, principles and practices deriving from the pre-accession and accession process of a new Member State as well as from the constitutional foundations of the Union that constrain existing Member States and compel them to follow a particular course of action.

To be more specific about what falls within the scope of our broad definition of "legal constraints" in EU law, it is composed of three categories: directly effective law (justiciable law), or hard law; law that is not clear, precise and unconditional enough to produce direct effect (non-justiciable law); and established practices and procedures (written and unwritten). To begin with the first category of constraints, "directly effective law" comprises provisions, principles and norms that can be invoked in courts of law. Those could be invoked in their own right, such as directly effective Treaty provisions, as well

112 Ibid., 1040. Fallon agrees with that, but points out that there could be few instances when the two might diverge. For instance, in the American system voters could sanction a state court judge for upholding an unpopular but legally valid constitutional claim. See, Fallon, "Constitutional Constraints," 1036.

113 Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1140.

114 M. Koskenniemi, "The Normative Force of Habit: International Custom and Social Theory," in *International Law*, ed. M. Koskenniemi (New York University Press, 1992), 213-89.

115 P. Pierson, "The Path to European Integration: A Historical Institutionalist Analysis," *Comparative Political Studies* 29, no. 2 (1996): 145-46; J. Giandomenico, "Path Dependency in EU Enlargement: Macedonia'a Candidate Status from a Historical Institutionalist Perspective," *European Foreign Affairs Review* 14(2009): 89-112.

as to check the legality of other measures, such as the general principles of law, to provide two examples.

Second, come legal provisions with no direct effect, i.e. the so-called "quasi-legal" norms and principles, which can also be traced back to Treaty provisions or other legal measures. These norms, even though not suitable for reliance in courts of law, do affect Member States' behaviour; hence they need to be taken into account. The line between the political and legal is not always easy to draw.[116] What will distinguish the norms, principles and values identified in this category from the purely political, in other words what will qualify them as "quasi-legal" will be the fact that they are traceable to a given written binding legal source. For instance, while principles can be invoked in courts, we do not know whether the same is true for "values",[117] which are also mentioned in the Treaties. If we were to stick to a very strict definition of what "legal" is, we would be able to identify only some of the factors constraining Member States as primary law makers, and would miss many other significant ones.

Another reason for not being very strict with this category are the developments of the last twenty years. The EEC was initially a legal and technocratic project, but the EU is now far beyond that, which is visible in the TEU and TFEU. The Treaties are imbued with "fundamental rights and freedoms" language. As will be demonstrated in Part III of this thesis, which is on the constitutional foundations of the Union, the impetus for many legal developments was political. The creation of the citizenship concept or the incorporation of the CFR in the Treaties are all part of efforts to bring the Union closer to its citizens and thereby increase the legitimacy of the integration project. In other words, the political rationale underlying certain provisions can be seen as an additional force contributing to their power as legal constraints.

The third category of legal constraints consists of the established practices and procedures, which Member States and the institutions of the EU follow even if those are not to be found in strictly legally binding (or written) instruments. Those established practices are customs similar to the "constitutional conventions"[118] in UK law, or "customs" under public international law.[119] They also constrain Member States. In Part II, it will be illustrated how the process of the accession of a new Member State is governed by practice set

116 As Bradley and Morrison argue, law and politics are frequently intertwined. See, Bradley and Morrison, "Presidential Power, Historical Practice, and Legal Constraint," 1124.

117 Compare the wording of *ex* Article 6(1) TEU with the current Article 2 TEU.

118 A constitutional convention is defined as an informal and uncodified procedural agreement that is followed by the institutions of a state. For a more detailed elaboration see, P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis*, 2 ed. (Hart Publishing, 2012). 32-41.

119 See Koskenniemi, "The Normative Force of Habit: International Custom and Social Theory."; D. Kennedy, "The Sources of International Law," in *International Law*, ed. Martti Koskenniemi (New York University Press, 1992), 362-79.

by the first wave of accession (that of the UK, Ireland and Denmark). Even though there were some changes to accommodate the particular needs of every enlargement wave, the basics of this process were followed in all subsequent enlargement waves.

To sum up, the reason for the employment of a broad definition of legal constraints is to provide as accurate a picture as possible of the accession process, which culminates in the drafting and ratifying of an Accession Agreement. Focusing only on one or two of these dimensions would produce a picture that is blurred, patchy and incomplete, hence the need for a broader definition that provides a clearer and more accurate picture.

1.4.1 Methodology

This thesis is a case study, which aims to establish the existing legal constraints on Member States as primary law makers in the context of accession. There are many more types of constraints in operation in the Union legal order: of a political, economic or psychological nature to name but a few. For the purposes of this thesis, as discussed above, constraints of a "legal" nature are of relevance. Yet, there are a myriad of constraints of a legal nature. This thesis provides a case study of the PSC, which means that it aims to identify those "legal constraints", which would operate to preclude the inclusion of a PSC that would seriously breach them.

The method of a study needs to be suitable for the analysis of the material at hand. It should be able to help to extract a meaningful answer to the main research question. The methodology chosen for this thesis is firstly, determined by the operational definition coined for the concept of "legal constraints"; and secondly, by the nature of the (legal) material available in the three levels of analysis, i.e. constraints that flow from association law, enlargement law, and EU constitutional law.

The second important consideration in choosing an appropriate method, in addition to available material, is the nature of the area under analysis. While in some areas, such as in EU constitutional law, which is the area examined in Part III of this thesis, there are plenty of sources of a legally binding nature; treaty provisions, secondary law, case law, Opinions of the Court, in other areas, such as enlargement law examined in Part II of this thesis, there is one relevant treaty provision and a few cases that shed light on the interpretation of that provision. The rest of the picture is painted with the aid of non-binding documents of Union institutions (and academic literature) evidencing past practice in this area.

In short, analysis of every topic in each Chapter begins by examining hard law, that is the Treaties and existing secondary law. That is often complemented by the case law and Opinions of the Court, followed by academic discussion on the matter. If information generated is not sufficient to provide

a full or satisfactory picture or an explanation, established rules and procedures and common practices are also examined. The examination is also complemented by soft law: non-binding documents issued by Union institutions which have explanatory value in terms of revealing existing practices or policy choices of those institutions.

1.4.2 The Permanent Safeguard Clause (PSC)

The central role played by the PSC in this study requires a brief definition of the term, a preliminary overview of where it comes from, what it might entail and how it will be used for the purposes of this thesis. Last but not least, existing scholarly comments on the proposed clause are examined, as they provide a basis as to why it could be problematic and worth studying further.

Safeguard clauses are provisions that form the legal basis on which, after an authorisation obtained from an institution specified in the clause (usually the Commission), Member States are able to take protective measures to tackle an unforeseen situation that arises during a transitional period. In principle, they are tools available for a certain period of time: for instance, in the case of the original Treaties, Article 226 EC was available to the original Member States only until 31 December 1969,[120] that is the end of the transitional period.[121] Similarly, all safeguard clauses employed in previous Accession Agreements were available for a pre-determined period of time within which a new Member State was expected to adapt to the working of the internal market and eventually, assume full responsibility as an equal Member State of the Union. Likewise, the safeguard clauses provided the old Member States with time to adapt to the new circumstances of an enlarged internal market. In other words, these clauses functioned as safety valves during transitional periods dampening the effect of unexpected shocks by allowing protective measures to be taken either on the part of the old or new Member States.

120 Article 226 EC provided as follows: "1. If, during the transitional period, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the common market. 2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect. 3. The measures authorised under paragraph 2 may involve derogations from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objectives referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market."

121 For examples of other safeguard clauses used in that period, see P. J. Slot, "Vrijwaringsclausules en vrijwaringsmaatregelen in het recht van de Europese Economische Gemeenschap," *SEW: Tijdschrift voor Europees en Economisch Recht* 9(1976): 473-502.

As mentioned above, the PSC analysed in this thesis appeared in Turkey's Negotiating Framework. Neither its precise form nor its mode of operation has been specified. Its unprecedented nature makes those elements difficult to foresee. All these factors raise doubts as to the possibility of including such a clause in an Act of Accession as well as to its compatibility with the Treaties. To have a closer look at the exact wording of the Negotiating Framework, it refers to:

> 'Long transitional periods, derogations, specific arrangements or *permanent safeguard clauses*, i.e. *clauses which are permanently available as a basis for safeguard measures*, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as *freedom of movement of persons*, structural policies or agriculture. Furthermore, the decision-taking process regarding *the eventual establishment of freedom of movement of persons* should allow for a *maximum role of individual Member States*. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.'[122]

It is not possible to infer from this paragraph which type of measures will be employed regarding the different policy areas mentioned. The focus in this thesis is on the freedom of movement of persons, because of its paramount importance in the system of the Treaty. As previously mentioned, the most important novelty in the paragraph cited above is the reference to *permanent* safeguard clauses, which will be always available as a basis for taking protective measures. Bringing the word "permanent" next to the "safeguard clause" seems problematic in the context of EU law. As it will be illustrated in more detail in Part II, safeguard clauses are flexible tools and can take various forms. Even the institution authorizing the measure can change.[123] However, what has been constant over the decades was their "temporary" or "transitional" nature.

Like any provision derogating from the main rules of the Treaties, safeguard clauses are also to be interpreted strictly.[124] What the Court established regarding the application of temporary derogation clauses in Accession Treaties is insightful for our purposes. The Court ruled that "it was justified for the original Member States *provisionally* to accept such inequalities, it would be *contrary to the principle of equality of the Member States before Community law* to accept that such inequalities could continue *indefinitely*".[125] Hence, the Act

122 Emphasis added. Point 12, paragraph 4 of the Negotiating Framework for Turkey. Available online at: http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf

123 While it is usually the Commission, which plays the central role in the authorization of the employment of safeguard clauses, it was the Council that was responsible (upon the Commission's recommendation) to take the postponement decision under the membership postponement safeguard clause laid down in Article 39 of the 2005 Act of Accession for Romania and Bulgaria.

124 *Case 11/82 SA Piraiki-Patraiki and others v Commission*, [1985] ECR 207, para. 26.

125 Emphasis added. *Case 231/78 Commission v UK*, [1979] ECR 1447, para. 11.

of Accession had to be interpreted with due regard "*to the foundations and the system of the Community, as established by the Treaty*".[126]

The vague wording of the paragraph from Turkey's Negotiating Framework cited above lends itself to many interpretations. For instance, the statement that "the decision-taking process regarding *the eventual establishment of freedom of movement of persons* should allow for a *maximum role of individual Member States*", suggests that the clause adopted regarding free movement of persons might be only temporary, if *eventually* freedom of movement is to be established. However, if we were to put emphasis on the latter aspect of the statement, that individual Member States would be given a maximum role, it is not difficult to envision a scenario whereby such a clause might turn into a permanent derogation clause in the hands of some Member States. Hence, the possibility of various scenarios is taken into account throughout this thesis, and a broad approach is adopted aiming to identify whether Member States would be precluded from including such clauses effecting free movement of persons in an Accession Agreement and if so, what kind of legal constraints would play a role in that process? However, the primary focus is on the proposed PSC, which has also drawn some scholarly attention.

The prevalent view in the literature is that there is a difference between Articles 48 and 49 TEU. While the former provides for 'amendment' of the Treaties, the latter allows only for 'adjustments' necessitated by accession. It is argued that Accession Agreements have to respect the fundamental principles underlying the Union legal order, and any changes going beyond mere 'adjustments' have to be introduced via Article 48 TEU.[127] The proposed PSC has been qualified as a "Trojan horse"[128] threatening to undermine the fundamentals of the Union, first and foremost the principle of equality of its citizens,[129] as well as that of its Member States.[130] Such a clause would

126 Emphasis added. Ibid., para. 12.

127 C. Hillion, "Widen to Deepen? The Potential and Limits of Accession Treaties to Achieve EU Constitutional Reform," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (T.M.C. Asser Institute, 2007), 163-64; A. Ott, "A Flexible Future for the European Union: The Way Forward or a Way Out?," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (T.M.C. Asser Instituut, 2007), 153-54; K. Inglis, *Evolving Practice in EU Enlargement* (Martin Nijhoff Publishers, 2010). 48-55; U. Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," in *Jean Monnet Working Paper 15/01*, ed. Professor J.H.H. Weiler European Union Jean Monnet Chair (2001), 9. Contra, see B. De Witte, "The Semi-Permanent Treaty Revision Process," in *Convergence and Divergence in European Public Law*, ed. P. Beaumont, C. Lyons, and N. Walker (Oxford: Hart Publishing, 2002), 51.

128 M. Emerson, "Vade Mecum for the Next Enlargements of the European Union," *CEPS Policy Brief* 61 (Dec. 2004): 2.

129 See Article 9 TEU and Chapter III of the Charter of Fundamental Rights (CFR). See also, C. Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," *European Constitutional Law Review* 3, no. 2 (2007): 275-78; S. Baykal, "AB Hukukunun Temel İlkeleri Çerçevesinde AB'ye Katılım ve Türkiye'nin Müza-

blatantly discriminate on the basis of nationality, as its targets would be only future Union citizens of Turkish nationality.[131] The fact that the internal market, the historical crux of the integration project has been built on the principle of non-discrimination on the basis of nationality, which is still at the heart of its functioning, places a big question mark on the compatibility of the proposed PSC with the fundamentals of the Union legal order. Building on what has already been said and studied, this thesis aims to move beyond what has already been done by providing a holistic account of constraints in play during accession negotiations by examining all levels of EU law from which they might be flowing.

1.5 STRUCTURE OF THE THESIS

It is argued that in the context of drafting an accession agreement, there are constraints on Member States flowing from three levels: *the pre-accession level*, that is the existing legal framework around the EEC-Turkey Association Agreement, known as the Ankara Agreement (Part I); *the accession process level*, which is comprised of past practice and existing EU rules on enlargement (Part II); and last but not least, *the constitutional foundations of the Union* (Part III), which constrain Member States whenever they act within the scope of Union law as both primary and secondary law makers. It includes a case study of the specific role of the principle of equality as part of the very foundations of the Union, as an essential component of Union citizenship, the CFR as well as a general principle of EU law.

1.5.1 Part I: Legal constraints flowing from EEC-Turkey Association Law

To begin with Part I, the centrepiece of this Part is the Ankara Agreement and Ankara Association Law built around it by the Contracting Parties, the Court of Justice as well as the Association Council. However, before going into discussing the constraints flowing from Association Law, Chapter 2 focuses on the concept of association as an instrument of EU external relations, in order to place the Ankara Agreement in context, as a genuine pre-accession agreement, among different types of association agreements. After defining the main

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kere Çerçeve Belgesinde Yer Alan Esaslar," *Ankara Avrupa Çalışmaları Dergisi* 12, no. 1 (2013): 21-22.

130 See Article 4(2) TEU. See also Inglis, *Evolving Practice in EU Enlargement*: 54; Emerson, "Vade Mecum for the Next Enlargements of the European Union," 2; Ott, "A Flexible Future for the European Union: The Way Forward or a Way Out?," 152-54; Baykal, "AB Hukukunun Temel İlkeleri Çerçevesinde AB'ye Katılım ve Türkiye'nin Müzakere Çerçeve Belgesinde Yer Alan Esaslar," 25.

131 See Articles 18-20 TFEU.

characteristics of the relationship of association, which are laid down in Article 217 TFEU (ex Article 238(1) of the EEC Treaty), an overview of different types of association agreements signed in the past between the EEC/EC/EU and third European states is provided. While the range of association agreements signed with third countries is much broader, the reason to restrict our analysis to agreements with European states is the requirement enshrined in Article 49 TEU that only "European" states may accede to become Union members. The analysis in Chapter 2 reveals how association agreements signed with European states have mostly evolved into becoming stepping-stones for membership, even when that was not the original intention. As to the Ankara Agreement, just like the Athens Agreement, it is undoubtedly among the most ambitious association agreements having the explicit aim to facilitate Turkey's accession to the Union once it is ready to take on obligations flowing from membership.

Chapter 3 starts by examining the aims, structure and content of the Ankara Agreement, and is followed by a brief discussion of the most developed area of the association that is the Customs Union. The rest of the Chapter is devoted entirely to the analysis of rules on free movement of persons, as it is argued that the rules applicable in this area could constrain Member States from introducing a PSC on free movement of persons when they are drafting an Accession Agreement. Those rules are expected to constitute, as a minimum, a solid building block that will have to be complemented with other rules of the *acquis communautaire* on free movement of persons at the time of Turkey's accession.

Hence, the Chapter tries to lay down the current state of affairs regarding the free movement of workers, services and freedom of establishment. However, surprisingly, that is not an easy task, as the area is in a state of flux. The Association Council failed to take all the necessary decisions for the implementation of the freedoms; however, it took the very first steps regarding free movement of workers by adopting Decisions 2/76 and 1/80, which include standstill clauses. Though, left unimplemented, the schedule for establishing free movement of workers, and a standstill clause in the area of free movement of services and freedom of establishment was also laid down in an Additional Protocol. The case law of the Court of Justice instigating change to the rules on free movement of persons recently, revolves around the standstill clauses, which prohibit Member States from introducing "new restrictions" on those freedoms. The analysis of the Court's case law reveals the state of development of the three freedoms, and the fact that introducing a PSC would in certain cases contravene even the existing standstill clauses. Hence, it is argued that the existing level of development of the freedoms as well as the commitments entered into in the Ankara Agreement as well as subsequent rules of the Association Law, would act as constraints on Member States in drafting the future Turkish Accession Agreement.

1.5.2 Part II: Legal constraints flowing from the Accession Process

The focus of Part II is on constraints that flow from the accession process. Since Article 49 TEU is the provision regulating the process, it is placed under the spotlight to identify both the procedural and substantive constraints flowing from that provision. As important as this provision is, as illustrated in Chapter 4, which focuses on the procedural constraints flowing from Article 49 TEU, it merely provides the basic contours of the process and is far from reflecting in full what happens in practice. Hence, to provide a clearer account of the dynamics of the process in practice, starting from the precedent set by the first enlargement and the principles governing the process set therein, an overview of subsequent waves of enlargement is provided in tandem with the evolving roles of the Union institutions involved thereby. This involvement is interpreted as a strong indication of the supranational character of the process, in addition to its well-known inter-governmental component. Last but not least, it is argued that the established practice of past enlargements in combination with the consistent application of the principles governing accession, have created (and consolidated) a well-trodden path with a centripetal force that induces Member States to follow it again and again, i.e. what political scientists call "path dependence".

Chapter 5 begins by analysing the main substantive constraint that flows from the wording of Article 49 TEU, namely that of "adjustment". While the English language version uses the concept "adjustments" for changes in primary law, it uses "adaptations" for changes in secondary law. Other language versions use one and the same concept for both. Hence, different language versions of the concept, the Court's pronouncements on the term "adaptations", as well as past Accession Agreements and their content are examined with a view to shedding light on the scope and meaning of the concept "adjustment". Subsequently, follow analyses of other measures, which even though they do not fall, strictly speaking, under the category "adjustments" or "adaptations", are worth looking into as they share the same broad purpose, namely: facilitating the full integration of new Member States into the Union. Finally, measures that do not share that broad purpose, and as such arguably go beyond being mere "adjustments", by creating permanent exceptions in certain areas, are analysed to identify their nature, scope, and effects on the internal market, so as to establish whether they could be considered as precedents paving the way for introducing the proposed PSC.

1.5.3 Part III: Legal constraints flowing from the constitutional foundations of the Union

Part III analyses the constraints that flow from the constitutional foundations of the Union. Chapter 5 begins by trying to identify the existence of those

foundations based on the Treaties, Opinions and case law of the Court. The latter illustrate the Court's conviction that such an area, which constitutes the "very foundations" of the Union, exists and provides examples of past cases in which Member States were precluded from introducing agreements that violate those very foundations. Next, it aims to identify the substance of those "very foundations" with a view to establishing whether they contain elements capable of precluding Member States from introducing a PSC on free movement of persons in a future Accession Treaty. The fundamental freedoms, and more specifically free movement of persons, Union citizenship, and fundamental rights are identified as areas containing elements that form part of those "very foundations", which could preclude Member States from introducing a PSC clause that could violate the core principles underlying all three areas/ concepts. Lastly, the Chapter looks into the application of the constitutional constraints that flow from the "very foundations" of the Union by the Court of Justice. It concludes by examining the recent *Pringle* case, which confirms that prior to their ratification, i.e. prior to becoming primary law, measures introduced in the primary law making process or procedures are also subject to judicial review.

Chapter 7 provides a case study of the principle that would be most seriously breached by the inclusion of a PSC on free movement of persons: namely, the principle of equality or more specifically the principle of non-discrimination on the basis of nationality. This Chapter demonstrates that equality is one of the most important principles constituting part of the "very foundations" of the Union legal order identified in Chapter 6, and as such would be able to constrain Member States from including such a clause in a future Accession Agreement. To illustrate its foundational role for the integration project, the evolution of the principle as well as its various roles and functions are examined with the purpose to demonstrate its ever widening scope and increasing importance in EU constitutional law. Chapter 7 demonstrates the latter point by providing examples of the principle as a general principle of Union law, as constituting an inalienable component of citizenship as well as an important part of the CFR. Lastly, it argues that a PSC would also be in breach of the principle of the equality of Member States, which has been recently codified to become Article 4(2) TEU.

1.6 SUMMARY

The introduction laid down the scene for the following Chapters by introducing the research question, identifying the essential characteristics of the Union legal order, as well as introducing the most important concepts on which this thesis is built, namely "legal constraints" and the PSC. It established that this study aims to answer the question whether there are legal constraints on Member States when they act as primary law makers during the accession

process of a new Member State, and if so, to identify those constraints. The research question is answered by providing a case study of the proposed PSC on free movement of persons mentioned in Turkey's Negotiating Framework. Scholars have indicated their doubts as to the possibility of including such a clause, which would trample on the fundamental principles on which the Union is built. Hence, this thesis aims to establish whether these principles or other legal measures are capable of constraining Member States in the context of accession negotiations and what sources they are flowing from.

The first step in the introduction was to discuss the nature of the Union legal order. The fact that there is an agreement that it evolved to become more constitutionalised over the decades enabled us to make analogies with national legal orders as well as to move from the issue of existence of legal constraints to that of identifying them. It was argued that just like some constitutional courts protect the "basic structure", identity or coherence of their constitutions, so does the Court of Justice protect "the very foundations" of the Union legal order. The "very foundations" of the legal order were identified as the first and most obvious constraint on Member States.

Next, both a theoretical and operational definition of the concept of "legal constraints" was provided so as to understand its nature and the criteria according to which it could be identified. It was emphasised that the aim behind this exercise was not to establish all legal constraints on Member States as primary law makers in the context of accession, but only those that relate to the proposed PSC. In other words, the thesis is a case study based on the proposed PSC, and its compatibility with the fundamental principles underlying the Union legal order. Hence, the following step was to briefly define what kind of measures safeguard clauses were, how they had been used in the past, and last but not least, why scholars thought the proposed PSC would be problematic.

Lastly, the overall structure of the thesis was introduced. Three levels, or three sources, of constraints were identified: the pre-accession level, the accession process itself and lastly the constitutional foundations of the Union. These could also be considered as three temporal stages; starting from 'aspiring to be' a Member State, to 'becoming' one, and extending to 'being' a Member State. Put differently, the thesis tries to identify legal constraints on Member States flowing from association law, EU enlargement law, as well as constitutional law.

PART I

Legal Constraints flowing from EEC-Turkey Association Law

INTRODUCTION

The first part of this thesis tries to lay down the constraints that would flow from the EEC-Turkey Association Law on Member States when negotiating Turkey's accession. Before going into the particularities of the Ankara Agreement and the legal regime created around it, Chapter 2 focuses on the legal basis, aims, scope, as well as past practice of establishing association agreements with third European countries. The EU has signed association agreements with many countries around the world. The reason for restricting our analysis to agreements signed with European countries is the geographical constraint under Article 49 TEU stipulating that only "European" States may apply to become members of the Union. In other words, what is of interest for our purposes are association agreements that have the potential to be used as stepping-stones for EU membership. Chapter 2 examines association agreements of different kind with a view to placing the Ankara Agreement in context, and demonstrating that it is a genuine pre-accession agreement.

Chapter 3 examines the Ankara Agreement in detail, as it constitutes the main legal framework within which EU-Turkey relations take place. As such, it not only shapes and constrains existing relations, but also forms the (legal) basis of future relations and constitutes an important building block towards the negotiation of a possible future Accession Agreement, hence, the need for its in-depth analysis. After introducing the general structure and objectives of the Agreement, the focus shifts on the provisions on free movement of persons, that is free movement workers, service providers and establishment, since the objectives set and the legal rules established around those provisions could arguably constrain Member States and preclude them from introducing a PSC in Turkey's future Accession Treaty.

To demonstrate the level of development of the Ankara *acquis*,[132] the instruments introduced as a first step for the implementation of free movement of persons, that is the Additional Protocol of 1973, as well as Decisions of the Association Council are briefly introduced. Ironically, today, what is more

132 The terms Ankara *acquis* and Ankara Association Law are used interchangeably throughout this thesis to refer to all legal rules flowing from the Ankara Agreement, its Additional Protocols, Association Council Decisions as well as the case law of the Court of Justice interpreting those instruments.

interesting and instrumental for the further development of free movement are not any instruments taken to complete the final stage of association as envisaged by the Ankara Agreement or its Additional Protocol, but the case law of the Court of Justice which interprets the provisions of the instruments just mentioned.

It should be noted that the case law of the Court delivered during the first decades of the Association dealt mainly with the rights of Turkish workers who were already established in a Member State and the rights of members of their families. It is only in the last fifteen years that the Court has been delivering judgments which have direct implications for free movement of workers, freedom to provide services and freedom of establishment *between* Turkey and Member States of the EU. Chapter 3 focuses on these more recent cases, which deal with the long forgotten standstill clauses. Those clauses were introduced in the instruments that were supposed to lay down the groundwork for the future establishment of the freedoms, by prohibiting the introduction of any new restrictions as a firs step. Since no second or third steps were taken, those clauses were either forgotten or not taken seriously. The cases that provide for the establishment of some freedom of movement in certain fields nowadays is a result of the Court's rulings identifying some of the Member States' measures obstructing free movement as new restrictions prohibited by the standstill clauses.

The examination of the case law on the standstill clauses reveals not only the extent to which free movement of persons is liberalised at the moment, but also provides clues for the possibility of its further liberalisation prior to Turkey's entry into the Union. The case law has also exposed the limits of those clauses, i.e. areas in which liberalisation of free movement is not possible by judicial fiat, such as the free movement of service recipients. In short, Chapter 3 shows that even with the existing limitations, the Ankara Association Law contains one of the most advanced free movement regimes between the EU and a third State, second only to the EEA. The more developed the free movement of persons regime gets under the Association, the more credible (both political and legal) constraint it would constitute on Member States when negotiating Turkey's accession.

2 Association as a stepping-stone to membership

2.1 INTRODUCTION

Association has proved to be a versatile instrument for the EEC/EC/EU external relations. Not only have associations with different countries had different aims and content,[133] but also association as a form of relationship with specific countries proved flexible enough to evolve over time in line with the changing needs and desires of its contracting parties.[134] This flexibility was made possible by the vague wording of Article 217 TFEU (*ex* Article 238 of the EEC Treaty, and *ex* Article 310 EC), which constitutes the legal basis of those agreements. Thus, for a better understanding of what an association entails, an analysis of the wording of Article 217 TFEU and the Court's interpretation of it will be provided first. To complement the latter analysis, principles governing the use of association agreements will be deduced from past practice as well as relevant documents. Last but not least, a brief account of the evolutionary trajectory of association will be provided so as to be able to place the Ankara Agreement on it.

2.2 DEFINING 'ASSOCIATION'

To begin with the wording of Article 238(1) of the EEC Treaty (now, Article 217 TFEU), it provided that the Community (now the Union) "may conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures". The second paragraph of the same provision laid down the procedure according to which such agreements were to be concluded,[135] i.e. that they were to "be concluded by the Council, acting

133 D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (England: Sheffield Academic Press, 1999). 17.

134 While initially not drafted with membership prospects in mind, the early association agreements with the CEECs were later reoriented towards the attainment of that prospect. See, ibid., 18-19. See also, K. Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," *Common Market Law Review* 37(2000): 1175-90.

135 The procedure for the conclusion of association agreements is now laid down in Article 218 TFEU.

unanimously after consulting the Assembly [European Parliament]."[136] Lastly, Article 238(3) provided that "[w]here such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236 [now Article 48 TEU]".

The brief definition of association as a relationship that involves "reciprocal rights and obligations, common action and special procedures", does not say much. Arguably, the drafters of the Treaty wanted to provide the Community with as much flexibility as possible in defining the aim, scope and content of each association agreement. This is confirmed by the statement of the first president of the Commission of the EEC Walter Hallstein, according to whom "association can be anything between full membership minus 1% and a trade and cooperation agreement plus 1%".[137] The fact that an association constitutes a relationship that goes beyond a mere trade agreement can also be inferred from the Court's *Demirel* ruling, in which it established that an association agreement creates "*special, privileged links* with a non-member country which must, at least to a certain extent, take part in the Community system".[138]

To look more closely at the different components defining association, the first is "reciprocal rights and obligations", which according to the Court, should not be interpreted as "reciprocity" or "equality" in the obligations assumed by the parties.[139] In an association, depending on the level of development of the associate country, rights and obligations may be taken on over time and on an asymmetrical basis, as illustrated by the Ankara Agreement that is discussed in more detail below. However, the parties do not have a completely free hand in this regard. They are, or at least the EC/EU is, constrained by their commitments with regard to international trade. The EC/EU's participation in the General Agreement on Tariffs and Trade (GATT), and the World Trade Organization (WTO) since 1995, means that it can only grant unilateral trade preferences to an associate country under the Article XXIV (5) GATT exemption, that is if the association leads to the "formation of a customs union

136 The role of the European Parliament in the conclusion of association agreements was upgraded with the Single European Act, after the entry into force of which the procedure required "the assent of the European Parliament which shall act by an absolute majority of its component members". See, M. Maresceau, *Bilateral Agreements Concluded by the European Community* (Martinus Nijhoff Publishers, 2006). 315.

137 See, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 23.

138 Emphasis added. *Case 12/86 Demirel*, [1987] ECR 3719, para. 9.

139 Maresceau, *Bilateral Agreements Concluded by the European Community*: 316. See also, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 24; and S. Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," in *The General Law of E.C. External Relations*, ed. A. Dashwood and C. Hillion (Sweet & Maxwell, 2000), 169.

or a free trade area".[140] Since the agreement between the founding six was that an association should go beyond a mere free trade area,[141] in practice, this was not a problem.

The second component of the definition of association is "common action". Although it has been interpreted by the Court to mean to "take part in the Community system",[142] as Maresceau argues, the expression in the Treaty "has perhaps a less ambitious significance than the Court seems to suggest",[143] since associated countries have never taken part in the Communities' decision-making system.[144] Hence, "common action" seems to refer to the implementation of the objectives of the association through the common institutions created in the framework of the association, such as association councils and/or association committees. Moreover, it is not difficult to deduce that the objectives of the association and any common action will need to be in line with, that is parallel to, those of the Treaty. According to this principle of parallelism established in the *AETR* case:

The Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined by the Treaty. This authority arises not only from an express conferment by the Treaty, but may equally flow from measures adopted, within the framework of provisions, by the Community institutions.[145]

The Court elaborated on this principle in *Kramer*, by stating that the authority of the EC to enter into international commitments may arise "not only from express conferment by the Treaty, but may equally flow *implicitly* from other provisions of the Treaty, from the Act of Accession and from measures adopted within the framework of those provisions, by the Community institutions".[146] The implication of this principle for association agreements was that common action could cover only areas where the EC had "an explicit or implicit internal competence to act".[147] However, association agreements entailing matters beyond the EC's treaty-making powers were signed in the past,[148] and today agreements that include cooperation in the field of CFSP can be signed as well. The method employed to overcome the competence constraint in signing an

140 Moreover, any customs union had to cover "substantially all the trade between the constituent territories of the union" (Article XXIV (8)(a)(i) GATT) and had to contain "a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time" (Article XXIV (5)(c) GATT). See, the Text of the 1947 General Agreement on Tariffs and Trade. Available online at: http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf

141 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 30.

142 *Case 12/86 Demirel*, para. 9.

143 Maresceau, *Bilateral Agreements Concluded by the European Community*: 317.

144 Ibid.; and Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

145 *Case 22/70 Commission v Council (AETR)*, [1971] ECR 263, para. 1 of the summary.

146 Emphasis added. *Joined Cases 3, 4 and 6/76, Kramer and Others*, [1976] ECR 1279, paras. 19-20.

147 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 25.

148 Ibid., 27.

association agreement has been to have both the EC/EU and its Member States individually sign and approve the envisaged association agreement, which would then be classified as a "mixed agreement".[149] According to Phinnemore, the use of this method has broadened the scope of association "well beyond that already available under the flexible provisions of Article 238 (310) [Art. 217 TFEU]".[150]

As to the last component of association laid down in Article 217 TFEU, that is "special procedures", it refers to the establishment of an institutional framework to ensure the proper functioning of the association. This institutional framework created separately under each association agreement, which usually consists of an association council, an association committee and a joint parliamentary committee,[151] provides the forum in which, decisions and "common action" are taken, so as to materialize the objectives of the association.[152]

2.3 Principles of practice and association as a flexible and evolving tool

Efforts to establish the EEC's approach on association were put forth as soon as it was created. What follows is a brief account of the Member States' changing views on the nature and aims of association over time, as well as an endeavour to identify some of the principles of practice that have not changed since their inception.

The founding six Member States of the EEC considered the idea to create a European free trade area with other OEEC (Organisation for European Economic Co-operation) countries, which was referred to as the European Economic Association at the time. To that effect an Interim Committee was established already back in 1957 in order to coordinate the position of the six on what such association should entail. It was agreed that an association should go beyond a free trade area to include the coordination or harmonization of

149 Schermers defined mixed agreements as follows: "A mixed agreement is any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence". H. G. Schermers, "A Typology of Mixed Agreements," in *Mixed Agreements*, ed. D. O'Keeffe and H. G. Schermers (Kluwer, 1983), 25-26. For a comprehensive and up-to date account of challenges posed by mixed agreements, see C. Hillion and P. Koutrakos, *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford: Hart Publishing, 2010).

150 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 28.

151 An association council is composed of representatives of the Council and of the government of the associate state; an association committee is composed of Commission officials and senior civil servants of the associate state; and a joint parliamentary committee contains parliamentarians from both the European Parliament as well as the national parliament of the associate state. See, ibid., 26-27.

152 Ibid.; Maresceau, *Bilateral Agreements Concluded by the European Community*: 317.

commercial policy, the conditions of production, as well as provision of adequate safeguards.[153] This list was extended in the 'Ockrent Report' of October 1958 to include the coordination of trade policies, rules on competition, the harmonization of social conditions and rapprochement of legislation, the convergence of economic, and free movement of workers,[154] which led to the collapse of the talks with countries of the OEEC, as the list was considered to be too ambitious. The Report emphasised the following principle, which was to govern negotiations and their conclusion. It provided that "[the European Economic Association] Agreement must not in any way prejudice either the content or the implementation of the Treaty of Rome".[155] In other words, the implementation and safeguarding of the Treaty of Rome had priority. The fear the associations could slow down or compromise the EEC's own development led to the exclusion of associates from participation from the EEC institutions.

As Phinnemore succinctly summarizes, the basic principles that emerged during the first few years regarding the use and content of association agreements were as follows: "first, no association should impede integration within the EEC; secondly, association should not involve simply a free trade area, but entail policy coordination if not harmonization; and thirdly, involvement of the associate in the EEC's internal decision-making processes was not on offer".[156] These principles can be deduced not only from the early reports of the European Parliament, but also from the content and structure of the first two Association Agreements with Greece (1961) and Turkey (1963).[157] Member States' views on association in the 1960s and 1970s did not go beyond these principles. Neither the Member States nor other community institutions managed to formulate a consistent policy in this period.

One of the important differences of opinion was on the issue whether association should be made available exclusively to those states aspiring to become members in the future or whether it should also be employed as a permanent, long-term alternative to membership. The divergence of opinion is visible in the early reports of the European Parliament. While the Birkelbach

153 L. N. Lindberg, *The Political Dynamics of European Economic Integration* (Stanford and London: Stanford University Press & OUP, 1963). 141-42.

154 What is referred to, as the "Ockrent Report" in the literature is a Memorandum of the Council of Ministers of the EEC, of 17 October 1958, forwarded to the Intergovernmental Committee of the OEEC for the establishment of a free-trade area in Europe. Available online at: http://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/c517d312-8554-4e08-9c75-ce5a347fd619/Resources#d697fac3-ec53-4c75-b7dc-eaf90db58e8c_en&overlay

155 Ibid.

156 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

157 Agreement establishing an Association between the European Economic Community and Greece (Athens Agreement), OJ 26/294, 18.2.1963; and Agreement establishing an Association between the European Economic Community and Turkey (Ankara Agreement), OJ 113/1, 24.12.1973.

Report (1961) outlined the association possibilities with the EEC,[158] it emphasized that "the norm for European states should be EEC membership and not association".[159] However, two years later a second report by the European Parliament, the Blaisse Report (1963) was published. While acknowledging the view held by some that "an "association" agreement can be concluded only with countries which later intend to become full members of the Community",[160] in its following page the Report states that association is also possible "for countries which, though unable or disinclined to join the Community, are nevertheless prepared to play their part in the integration process by harmonising their economy with that of the Community to a really appreciable extent".[161] In other words, countries, which did not wish to join the EEC, could also become associates, provided they were ready to commit to a certain degree of integration.

Despite the existence of supporters of both views, the prevailing, yet unofficial view in 1960s, was that association had to be limited to less developed countries, such as Greece and Turkey, which could use the relationship to develop their economies and become members in the future. That can be deduced even from the first two concluding paragraphs of the Blaisse Report. While acknowledging there is no reason why the applications of the neutral countries (Austria, Sweden and Switzerland) should not be considered, it stated that:

> 'The Treaty of Rome provides for the association of non-member countries, although *what its authors had in mind was perhaps more a temporary association of countries still not sufficiently developed economically to become full members*. Thus the association with Greece is undoubtedly the purest form of application of Article 238.'[162]

The principles mentioned above became formal principles in 1987 when the Commission laid down its position on the future of EC-EFTA relations.[163] These principles, which were referred to as the Interlaken Principles, envisaged

158 The first possibility was that of an association based on a customs union leading to possible future membership; the second possibility was an association based on a free trade area; and lastly, a relationship based on a special economic cooperation agreement. See, M. Willi Birkelbach (Rapporteur), "Rapport fait au nom de la commission politique de l'Assemblée parlementaire européenne sur les aspects politiques et institutionnels de l'adhésion ou de l'association à la Communauté" (Birkelbach Report), 19 December 1961, pp. 25-28. Available online at: http://www.cvce.eu/content/publication/2005/6/1/2d53201e-09db-43ee-9f80-552812d39c03/publishable_fr.pdf

159 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 31.

160 P. A. Blaisse, "Report prepared on behalf of the Committee on External Trade on the common trade policy of the EEC towards third countries and on the applications by European countries for membership or association", European Parliament Working Papers, No 134, 26 January 1963, p. 31.

161 Ibid, p. 32.

162 Emphasis added. Ibid, pp. 35-36.

163 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 38-39.

"priority for internal integration, preservation of the Community's autonomous powers of decisions and the need to achieve balanced results (a fair balance between benefits and obligations)".[164] A second set of principles came out from the Commission proposals for Europe Agreements (EAs) with the Central and East European Countries (CEECs). The conclusion of such agreements was to take place on the condition that prospective associates gave "practical evidence of their commitment to the rule of law, respect for human rights, the establishment of multi-party systems, free and fair elections and economic liberalization with a view to introducing market economies".[165] The commitment to democracy and the latter principles, (which later in 1993 were proclaimed officially as the "Copenhagen criteria"), have always been one of the unwritten prerequisites for establishing an association, however, this was made explicit only in 1990.[166]

The Commission's proposals on the EAs undoubtedly reaffirmed earlier principles. However, according to Phinnemore, they deviated in one important respect from the earlier requirement that an associate be a democracy. He argues that Spain was seen as ineligible for association in 1960s not only because it was not a democracy, but also because association at the time was seen as stepping-stone to membership. Whereas in the case of the CEECs, the EAs were "proposed as sui generis agreements and not as pre-accession agreements".[167] Even though future membership was not entirely ruled out, at least in the earlier EAs (those with Hungary, Poland, the Czech and Slovak Federal Republic), the link between association and membership was not explicitly acknowledged. It was only after the 1993 Copenhagen European Council that the EAs were reoriented as pre-accession tools.[168]

One of the most creative uses of "association" as a tool has been within the Stabilisation and Association Process (SAP) initiated in 1999,[169] with the

164 Bulletin of the European Communities, Vol. 5 – 1987, p. 65.

165 European Commission, "Association Agreements with the Countries of Central and Eastern Europe: A General Outline", COM(90) 398 final, Brussels, 27 August 1990, p. 20.

166 C. Hillion, "The Copenhagen Criteria and their Progeny," in *EU Enlargement: A Legal Approach*, ed. C. Hillion (Oxford, Portland, Or.: Hart Publishing, 2004); Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 39.

167 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 39. See also, M. Maresceau, "A Typology of Mixed Bilateral Agreements," in *Mixed Agreements Revisited: The EU and its Member States in the World*, ed. Christophe Hillion and Panos Koutrakos (Oxford: Hart Publishing, 2010), 18.

168 See P.-C. Müller-Graff, "East Central Europe and the European Union: From Europe Agreements to a Member State Status," in *East Central Europe and the European Union: From Europe Agreements to a Member State Status*, ed. P.-C. Müller-Graff (Baden-Baden: Nomos, 1997), 16; Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," 1173; Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

169 Communication from the Commission to the Council and the European Parliament, on "The Stabilisation and Association Process of countries of South-Eastern Europe (Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, former Yugoslav Republic of Macedonia and Albania", COM (1999) 235 final, Brussels, 26.05.1999.

purpose to stabilize and democratize the Western Balkans by offering "a perspective of EU membership"[170] once the Copenhagen criteria are fulfilled. Hence, conditionality is the cornerstone of SAP and its novelty was that it applied even in the absence of any contractual links between the EU and the countries of the region.[171] Blockmans calls this "a graduated process", as increasing levels of conditionality apply from the start of negotiations to the conclusion of the Stabilisation and Association Agreements (SAAs) and later until eventual accession.[172] As a result of this process SAAs were signed with Croatia (2001), Macedonia (2001), Albania (2006), Montenegro (2007), Bosnia and Herzegovina (2008), and Serbia (2008). Negotiations for a SAA with Kosovo started on the 28 October 2013.[173] In its preamble, each of the agreements confirms that the respective associate is "a *potential* candidate for EU membership",[174] thereby creating officially an additional status for states aspiring to join the EU.

In short, this overview illustrates the changing views and policies in the EU on what association should entail. There were always diverse views on the matter, as illustrated by the early Parliamentary reports mentioned above. While the prevailing view in that early period was of developing association as a relationship to assist less developed countries, such as Greece and Turkey, to build their economies so as to prepare them for full membership in the future, the EAs of the early 1990s were far less ambitious. However, no matter what the initial intention was, as far as association agreements signed with European countries were concerned, they could (and often would) be reoriented towards attaining membership as soon as consensus to that effect appeared. Not only the EAs, but also the 1995 enlargement to the EFTA countries is a good illustration of the fact that, more often than not associations with European countries serve as a road that sooner or later seems to lead to EU membership.

170 See, Common Position concerning a Stability Pact for South-Eastern Europe 1999/345/CFSP, OJ L 133, 28.05.1999, pp. 1-2.

171 Another novelty was the paramount importance given to regional cooperation. While cooperation between the CEECs was encouraged, it was considered crucial for the stabilisation of the Western Balkans. Hence, it constituted an explicit condition that reappeared in the SAAs again and again. See, S. Blockmans, "Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia and Serbia and Montenegro, including Kosovo)," in *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration*, ed. S. Blockmans and A. Lazowski (The Hague: T.M.C. Asser Press, 2006), 338.

172 S. Blockmans, "Consolidating the Enlargement Agenda for South Eastern Europe," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (The Hague: T.M.C. Asser Press, 2007), 67-68.

173 See European Commission, MEMO/13/938, 28.10.2013. Available online at: http://europa.eu/rapid/press-release_MEMO-13-938_en.htm

174 Emphasis added.

2.4 DIFFERENT MODELS OF ASSOCIATION

As briefly discussed above, the nature of association agreements signed over the decades between the EEC/EC/EU and third countries have changed. Before going into categorizing them on the basis of the trade regime they entail, it should be noted that "[t]he Community's [now the Union's] classification of agreements is governed by politics, not law".[175] That is especially the case with mixed agreements. Hence, scholars warn against approaching them from a purely legal perspective, as they occupy the "complex grey zone where law and politics meet".[176] That partially helps explain, why the Ankara Agreement, which is considered as "a genuine pre-accession agreement",[177] has not led to accession, while the Agreements with Malta and Cyprus, which were considered to be "nothing more than advanced trade agreements",[178] have done so.

While the place of an association agreement in the classification below does not automatically determine the fate of an associate state in terms of its eventual accession to the Union, it is still very important, as the scope, content, aim and degree of integration envisaged by each type of agreement is taken into account by the Court of Justice when interpreting those agreements. It will not be wrong to say that the deeper integration an agreement envisages, the more the Court is inclined to give it an interpretation in line with EU law. Thus, the first cluster of agreements, which envisaged the establishment of a Customs Union and the eventual accession of Greece and Turkey to the Community/Union, are among the agreements that have been given the widest interpretation by the Court.[179]

The following classification of association agreements has been borrowed from Phinnemore and has been updated.[180] It is chronological, as clusters of agreements signed in different periods reflect the Community's/Union's evolving association policy in those respective periods of time. The first cluster of agreements are the ambitious association agreements signed with Greece and Turkey in the 1960s, immediately followed by the more modest agreements signed with Malta and Cyprus in the 1970s. Thirdly, comes the EEA: the most

175 Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 175.

176 Maresceau, "A Typology of Mixed Bilateral Agreements," 16.

177 M. Maresceau, "Turkey: A Candidate State Destined to Join the European Union," in *From Single Market to Economic Union: Essays in Memory of John A Usher*, ed. N. Nic Shuibhne and L. W. Gormley (Oxford: OUP, 2012), 318. See also, A. Rizzo, "L'Accord d'Ankara: Accord d'Association ou de Véritable "Pré-adhésion"?," in *Turquie et Union européenne: État des lieux*, ed. B. Bonnet (Buxelles: Bruylant, 2012), 105-32.

178 Maresceau, *Bilateral Agreements Concluded by the European Community*: 319.

179 As to the EEA Agreement, which does not envisage eventual accession, but deep integration into the internal market, it should be noted that it is the EFTA Court that rules on issues of interpretation.

180 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 45-49.

advanced association regime created between the Union and a group of third countries. Though officially it is a relationship that does not envisage membership, in practice, as illustrated by the 1995 enlargement, membership is not entirely ruled out. Last but not least, come the EAs of 1990s and SAAs of the 2000s signed with the CEECs and those of the Western-Balkans.

2.4.1 Associations based on a Customs Union

The first two association agreements were the so-called Athens Agreement signed with Greece (1961), and Ankara Agreement signed with Turkey (1963). These were ambitious association agreements that aimed at the gradual establishment of a Customs Union and the harmonization of the economic policies of these two countries with that of the EEC in the medium-term, and preparing them for full membership in the long-term.[181]

The emphasis in these agreements was on establishing a Customs Union because that was also the EEC's priority at the time. The very first sentence of Article 9 of the EEC Treaty, which is situated in Part Two: Foundations of the Community, under title I: Free Movement of Goods, stipulates that "[t]he Community shall be based on a customs union …". Both Agreements, even though the Ankara Agreement was less detailed,[182] can be called mini-Treaties of Rome, as they covered the EEC Treaty's entire subject matter.[183] Both agreements provided for future free movement of goods, workers, services, capital, freedom of establishment, and the extension of the rules on agriculture, transport, and competition. The comprehensiveness of those agreements, particularly their economic provisions providing for the harmonization of policies between the associates, according to Feld,[184] strongly suggest that they provide for "more than the creation of a mere customs union".[185]

The conclusion that a relationship based on a Customs Union was suitable for associates, which aspired to become members in the future, but were

181 W. Feld, "The Association Agreements of the European Communities: A Comparative Analysis " *International Organization* 19, no. 2 (1965): 230-34.

182 The Athens Agreement is more detailed and is composed of 77 provisions, whereas, the Ankara Agreement is composed of only 33 provisions. Thus, the latter agreement had to be complemented by an Additional Protocol providing for the details of its implementation in 1971. See, J. N. Kinnas, *The Politics of Association in Europe* (Frankfurt: Campus Verlag GmbH, 1979). 61.

183 See, Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161.

184 He notes however, "that the provisions containing the elements of an economic union [in the Ankara Agreement] are not detailed regulations but only commitments for future action during the transition and final periods which will be spelled out in detail by the Supplementary Protocol". Feld, "The Association Agreements of the European Communities: A Comparative Analysis " 233-34.

185 Ibid., 233.

economically not ready to do so at the relevant time, such as Greece and Turkey, can also be deduced from the report of the Political Commission of the Parliamentary Assembly, which provided as follows:

> 'Les avantages d'une association sous forme d'union douanière consistent notamment dans un rapprochement progressif du pays associé au marché commun, posant ainsi les jalons de son adhésion future. *C'est pourquoi cette forme se recommande tout particulièrement pour les pays désireux d'adhérer, mais qui ne remplissent pas les conditions économiques nécessaires à l'adhésion.* Si ces pays sont prêts à tirer les conséquences d'ordre politique qui résultent des liens étroits de l'association, à respecter les principes établis, à se soumettre au système de contrôle institutionnel de l'association, l'union douanière leur offrira de plus grands avantages que les autres formes d'association.'[186]

Even though both countries were considered as "developing" countries at the time, Greece was better off than Turkey. That is why the Ankara Agreement provided first, for an extra "preparatory stage", in which Turkey was to strengthen its economy with the aid from the Community. While a detailed schedule for establishing a Customs Union was spelled out clearly in the Athens Agreement,[187] the Ankara Agreement provided for the drafting of such a schedule in an Additional Protocol that was to be adopted once Turkey was deemed ready to enter the next "transitional stage" of the association,[188] which was to precede the "final stage" that was to be based on the Customs Union.[189] Last but not least, both Agreements contained provisions referring to the examination of the possibility of their accession to the Community once they were ready to accept the obligations their memberships would entail.[190]

2.4.2 Associations based on a potential Customs Union

In the following decade, "the apparent centrality of a customs union to an association was challenged",[191] mainly because of the problems experienced with Greece and Turkey.[192] Thus, the association agreements signed with Malta

186 Emphasis added. Birkelbach Report, note 158 above, para. 103, p. 26.
187 For details see, Feld, "The Association Agreements of the European Communities: A Comparative Analysis " 230-34; and Kinnas, *The Politics of Association in Europe*: 56-61.
188 See, Articles 3 and 4 of the Ankara Agreement.
189 See Article 5 of the Ankara Agreement.
190 See Article 28 of the Ankara Agreement and Article 72 of the Athens Agreement.
191 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 46. See also, Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161-62.
192 There were both economic and political problems. The economies of both countries did not develop as quickly as expected to match those of their western counterparts. Moreover, the 1960s were marked by military coups and political turmoil in both.

(1970) and Cyprus (1972) were "a very limited form of free trade agreement[s]"[193] that envisaged the possibility to establish a Customs Union.[194] These agreements were not pre-accession agreements. They were not even mixed agreements, as they did not envision cooperation in any other area than free movement of goods.[195]

Neither the substantively limited scope of these agreements, nor the absence of any reference to accession in them, constituted a problem or an obstacle for the Maltese and Cypriot membership applications. Once they joined the Union in 2004, these limited agreements were replaced by the Accession Treaty,[196] demonstrating clearly that when there is (political) will there is a way.

2.4.3 The EEA: The Internal Market Association

This section provides only a brief overview of the EEA Agreement. Even though it is the most advanced economic regime created as a basis of relations with developed countries, the fact remains that it emerged as an alternative to EU membership, and currently none of the states parties to it seems to have any active membership aspirations.[197]

Iceland, Liechtenstein, Norway and Switzerland are the only remaining parties to the EFTA Convention.[198] While all of these states participated in the negotiations of the EEA Agreement, as a result of a negative referendum in December 1992, Switzerland failed to actually join the EEA. Subsequently, it

193 Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 161. See also, Maresceau, *Bilateral Agreements Concluded by the European Community*: 319.

194 The preamble of both agreements provide that "eighteen months before the expiry of the first stage, negotiations may be opened with a view to determine the conditions under which a customs union between the Community and [Malta/Cyprus] could be established".

195 Maresceau, "A Typology of Mixed Bilateral Agreements," 19.

196 Ibid.

197 There were two negative referenda on the issue of EU membership in Norway (in 1972 and 1994). A third referendum is not very likely in the near future. As to Iceland, it lodged a membership application in 2009, which was followed by the opening of accession negotiations in 2010. However, those negotiations were short-lived as the government of Iceland dissolved its accession team, and put the negotiations on hold. See, http://eu.mfa.is/documents/

198 The EFTA Convention was signed in Stockholm in 1960, and was updated on 21 June 2001 by the Vaduz Convention. The Vaduz Convention incorporated important rules and principles established in the EEA Agreement as well as in the Bilateral Agreements between the EU and Switzerland. As a result, all EFTA states now enjoy the same privileged relationship among themselves as they do with the EU. The EFTA Council regularly updates the Convention so as to reflect the developments under the EEA Agreement and the Bilateral Agreements with Switzerland. For more details, see EFTA, Communiqué of Ministerial Meeting of the European Free Trade Association, Vaduz, 21 June 2001, PR-E 3/2001. See also, www.efta.int.

established its own complex web of more than hundred bilateral agreements with the EU, which now govern their relations.[199] Since only a few of these agreements are formally based on Article 217 TFEU (or its predecessor provision),[200] from a legal point of view it is difficult to maintain that those constitute an association regime, even though there are academics arguing to the contrary.[201]

The EEA Agreement constitutes the most advanced economic regime created as a basis of relations with developed countries. In terms of free movement of goods, it does not go as far as establishing a Customs Union,[202] yet, in terms of free movement of persons, services and capital it entails the adoption of the entire internal market *acquis* by the associates, i.e. Iceland, Liechtenstein and Norway (the so-called EEA/EFTA states).[203] The EFTA Court, which deals

199 For a detailed analysis, see C. Tobler and J. Beglinger, *Grundzüge des bilateralen (Wirtschafts-) Rechts. Systematische Darstellung in Text und Tafeln*, 2 vols. (Zurich: Dike, 2013); T. Cottier et al., eds., *Die Rechtsbeziehungen der Schweiz und der Europäischen Union* (Berne: Stämpfli, 2014).

200 See, Agreement between the EC and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed on 21.06.1999 in Luxembourg, OJ L 114, 30.04.2002, p. 6; Agreement between the EC and the Swiss Confederation on Air Transport, OJ L 114, 30.04.2002, p. 73; Agreement between the EC and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road, OJ L 114, 30.04.2002, p. 91; Agreement between the EC and the Swiss Confederation on trade in agricultural products, OJ L 114, 30.04.2002, p. 132; Agreement between the EC and the Swiss Confederation on mutual recognition in relation to conformity assessment, OJ L 114, 30.04.2002, p. 369; Agreement between the EC and the Swiss Confederation on certain aspects of government procurement, OJ L 114, 30.04.2002, p. 430; Agreement on Scientific and Technological Cooperation between the EC and the Swiss Confederation, OJ L 114, 30.04.2002, p. 468; and Protocol to the Agreement between the EC and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons regarding the participation, as contracting parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic pursuant to their Accession to the European Union, signed on 26.10.2004 in Luxembourg, OJ L 89, 28.03.2006, p. 28. See also, G. Bauer and C. Tobler, "«Der Binnenmarkt ist (k)ein Schweizer Käse». Zum Assoziationsstatus der Türkei, der EWR/EFTA-Staaten und der Schweiz in ausgewählten EU-Politikbereichen, insbes. dem EU-Binnenmarkt," in *Schweizerisches Jahrbuch für Europarecht 2014/2015* (Berne: Stämpfli, 2015 (forthcoming)).

201 For an example, see R. Streinz, "Die Türkei als Partner – Formen der Zugehörigkeit zur EU," in *Jahrbuch Bitburger Gespräche 2005/II, Zur Frage einer Mitgliedschaft der Türkei in der Europäischen Union* (München: C.H. Beck 2006), 121.

202 The free movement of goods remains limited to a free trade area. See, P. J. Kuijper, "External Relations," in *Kapteyn & VerLoren van Themaat: The Law of the European Union and the European Communities*, ed. P. J. G. Kapteyn, et al. (Kluwer Law International, 2008), 1339.

203 Ibid., 1339-41. See also, A. Lazowski, "EEA Countries (Iceland, Liechtenstein and Norway)," in *The European Union and its Neighbours*, ed. S. Blockmans and A. Lazowski (The Hague: TMC Asser Press, 2006); EFTA-Court, *The EEA and the EFTA Court: Decentred Integration* (Oxford: Hart Publishing, 2014); C. Baudenbacher and in cooperation with the University of Liechtenstein, eds., *Handbook of EEA Law* (Heidelberg: Springer, 2015 (forthcoming)).

with EEA law for matters arising on the side of the EEA/EFTA states, qualifies the existing framework of relations as constituting "a fundamentally improved free trade area".[204]

While the existing system seems to function well, the first draft for an EEA Agreement is recalled by scholars as an example of a planned association that involved "too much integration".[205] The Court delivered a negative opinion on the first draft agreement as it considered it provided for a system of courts with competences that would damage the autonomy of the Community legal order; hence the agreement was found to be incompatible with "the very foundations of the Community",[206] and was accordingly revised.

2.4.4 Associations based on a Free Trade Area

In terms of the trade regime they create, the EAs together with the SAAs appear to be the least ambitious of the agreements covered so far. They envisage(d) the incremental establishment of a free trade area in industrial goods over a period of time that could extend up to ten years, determined in line with the level of development of each associate.[207] Including rules on competition and state aids was seen as a necessary corollary to introducing the rules on free movement of goods.[208]

Free movement of workers, services, capital, freedom of establishment, approximation of laws are referred to and included only "embryonically" in the EAs.[209] However, the substantive scope of cooperation was extended considerably after those agreements were reoriented towards full membership and were complemented by the introduction of the pre-accession strategy in 1994.[210] Even though there is no explicit mention of membership or accession

204 *Case E-2/97 Mag Instrument Inc v California Trading Company Norway, Ulsteen (Maglite decision)*, [1997] EFTA Court Report 127, para. 27.

205 Peers, "EC Frameworks of International Relations: Co-operation, Partnership and Association," 170.

206 *Opinion 1/91 EEA*. Cf. *Opinion 1/92 EEA*, [1992] ECR I-2821.

207 The periods envisaged in the EAs and SAAs varied among themselves. While the norm was a ten-year period for the EAs, Estonia was deemed ready to pursue free trade immediately. Latvia and Slovenia negotiated a four-year transition period, and Lithuania a six-year period. The SAAs also envisage different periods. For instance, while the Agreement with Croatia envisaged a six-year year transition period, the one with FYROM envisaged a ten-year period. See, Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 48; D. Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," *European Foreign Affairs Review* 8(2003): 89.

208 Müller-Graff, "East Central Europe and the European Union: From Europe Agreements to a Member State Status," 17.

209 Ibid.

210 Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 94. See also, Inglis, "The Europe Agreements Compared in the Light of Their Pre-accession Reorientation," 1175-90.

in the early EAs,[211] the Court of Justice explicitly acknowledged that objective in the interpretation of those agreements.[212]

Scholars agree that the structure and content of the SAAs were inspired by the EAs.[213] Thus, the emphasis here will be on the most important differences rather than similarities between the two types of agreements.[214] There are few important differences worth mentioning here. The first is the reference contained in the preambles of the SAAs to the associated countries as "potential candidates" for EU membership. While Phinnemore thinks that this reference "suggests that the SAAs enjoy a lesser status compared with the Europe Agreements",[215] Maresceau takes the contrary view and argues that by virtue of this reference, SAAs "at least conceptually, are more clearly pre-accession agreements than the Europe Agreements".[216] The author agrees with the latter view.[217] As mentioned above, the first EAs do not contain anything explicit

211 The references that can be interpreted to that effect in the EAs are under the title "Political Dialogue". See, Article 2 of one of the earliest EAs (signed in 1991), which provides that political dialogue and cooperation "will facilitate Poland's full integration into the community of democratic nations and progressive rapprochement with the Community". See also, the latest EA (signed in 1996), Article 4 of which provides for "Slovenia's full integration into the Community of democratic nations and its progressive rapprochement with the European Union".

212 While acknowledging the aim of the EA as "the progressive integration of the Republic of Poland into the Community" in *Pokrzeptowicz-Meyer*, the Court extended its case law on workers to the EA provisions. However, the same statement with the further addition of "with a view to its [Poland's] possible accession" in *G³oszczuk*, was not enough for the extension of the case law on freedom of establishment to the corresponding provisions of the EA. In short, acknowledging the aim of the EAs as accession did not mean the extension of corresponding EU Treaty rules and case law to the provisions of the EAs. For the respective citations, see, *Case C-162/00 Pokrzeptowicz-Meyer*, [2002] ECR I-1049, para. 42; and *Case C-63/99 G³oszczuk*, [2001] ECR I-6369, para. 50. For an in-depth analysis of the Court's case law on the interpretation of provisions of various EAs concerning free movement of persons, see C. Hillion, "Cases C-63/99 Secretary of State for the Home Department ex parte Wies³aw G³oszczuk and Elzbieta G³oszczuk; C-235/99 Secretary of State for the Home Department ex parte Eleanora Ivanova Kondova; C-257/99 Secretary of State for the Home Department ex parte Julius Barkoci and Marcel Malik; judgments of the Full Court of 27 September 2001; Case C-268/99 Aldona Ma³gorzata Jany e.a v. Staatssecretaris van Justitie, judgment of the Full Court of 20 November 2001; Case C-162/00 Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer, judgment of the Full Court of 29 January 2002.," *Common Market Law Review* 40, no. 2 (2003): 465-91.

213 See, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 96; and Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

214 For an extensive and in-depth comparison see, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 77-103. See also, Maresceau, "A Typology of Mixed Bilateral Agreements," 18-19.

215 Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?," 84.

216 Maresceau, "A Typology of Mixed Bilateral Agreements," 18.

217 Phinnemore might have reached that conclusion because he compares only the reference in the EA with Slovenia with those in the SAAs. As can be seen in more detail in note 211 above, the standard reference in the earlier EA agreements ("full integration into the

referring to accession or membership to the EU. The prospect of membership was introduced not by the first EAs, but by the Copenhagen European Council in 1993, following which special Accession Partnerships had to be developed to assist each country in its transition to democracy and establishing a functioning market economy in preparation for accession.

The second important difference between the SAAs and EAs is the emphasis placed on regional cooperation in the former. Regional cooperation was encouraged in the EAs as well, however, their focus was rather on economic and political reform. It is not surprising that there is a special title (Title III) devoted entirely to regional cooperation in the SAAs, as the underlying rationale of SAP is, first and foremost, to bring peace and "stability" to the Western Balkans.[218]

Last but not least, the SAAs impose a four or five-year waiting period before the respective Stabilisation and Association Councils are able to adopt measures regarding the implementation of the freedom of establishment for the self-employed.[219] There was no such waiting period in the EAs, only the application of the non-discrimination provision regarding the freedom of establishment was postponed until the end of the respective transitional period defined in each agreement,[220] or exceptionally in certain sectors, excluded all together.[221]

As argued above, there are more similarities than differences between the two types of agreements. Another important element borrowed from the experience of the accession process of the CEECs is the so-called "European Partnerships", modelled on the Accession Partnerships designed to complement

community of democratic nations") has become "full integration into the Community of democratic nations" in the EA with Slovenia. Obviously, capitalizing the word "community" has changed its meaning. In other words, if one judges only on the basis of the existence of an explicit reference to accession to the EU, being "a potential candidate for EU membership" seems more promising and concrete than "full integration into the community of democratic nations". However, on the whole, as Phinnemore's comparative analysis of the two types of agreements reveals, under many of the headings, the proposed scope of cooperation is bigger in the EAs. He also adds that the language employed in the two types of agreements proves the claim that the SAAs envisage a less intense form of association than the EAs. See, Phinnemore, "Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?."

218 Ibid., 84-85.

219 See for example, Article 50(4) of the SAA with Albania and Article 48(4) of the SAA with Macedonia, which impose a five-year waiting period after the entry into force of their respective agreements, while Article 49(4) of the SAA with Croatia and Article 53(4) of the SAA with Serbia impose a four-year waiting period. See also, S. Peers, "EU Migration Law and Association Agreements," in *Justice, Liberty, Security: New Challenges for EU External Relations*, ed. B. Martenczuk and S. Van Thiel (Brussels: Brussels University Press, 2008), 56.

220 For an example see, each indent of Article 44(1) of the EA with Poland.

221 For an example see, Article 44(6) of the EA with Poland, which reads as follows: "The provisions concerning establishment and operation of Community and Polish companies and nationals contained in paragraphs 1, 2 and 3 shall not apply to the areas or matters listed in Annex XIIe."

the EAs.[222] As to the change in the qualifying adjective of the partnership, the Croatian experience illustrated that once the necessary conditions for opening accession negotiations are fulfilled, it is not difficult to re-name and re-qualify the relationship.[223] Yet, as illustrated by the Turkish experience so far, neither the existence of Accession Partnership instruments,[224] nor the official opening of accession negotiations are a guarantee for a country's eventual accession to the EU.[225]

2.5 Conclusion

The purpose of this introductory part on various forms of association between the Community/Union and third European states was to illustrate that the latter relationship could take various forms and that it could evolve over time in line with the development of the Community/Union and the changing needs or wishes of the associates. However, as soon as the associates expressed their wish to join the club, and provided they were ready to do so, they were always welcome to join.

Association can be any kind of relationship, which goes beyond being a mere trade agreement but falls short of full membership.[226] As is illustrated in more detail in Part II, the rationale underlying the EU's latest enlargement policy, its creative design, use of various strategies and partnerships was to assist the associate states aspiring to join the EU in their preparation to become full members of the EU, so that they are able to take on fully their respective obligations flowing from the Treaties without disrupting the proper inner functioning of the Union.

Whether and to what extent the Union succeeded in preparing the candidates for their membership is another matter. However, as will also be demon-

222 Blockmans, "Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Macedonia and Serbia and Montenegro, including Kosovo)," 346.

223 It should be noted that the re-naming took place following the opening of accession negotiations with Croatia on 3 October 2005. See, Council Decision 2006/145/EC on the principles, priorities and conditions contained in the *Accession Partnership* with Croatia, OJ L 55/30, 25.02.2006, and repealing Council Decision 2004/648/EC on the principles, priorities and conditions contained in the *European Partnership* with Croatia, OJ L 297/19, 22.09.2004. Emphasis added.

224 For the first Accession Partnership developed for Turkey see, Council Decision 2001/235/EC on the principles, priorities and intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, OJ L 85/13, 24.03.2001; for the latest one see, Council Decision 2008/157/EC on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ L 51/4, 26.02.2008.

225 Accession negotiations with Turkey were opened on 3 October 2005.

226 Feld, "The Association Agreements of the European Communities: A Comparative Analysis" 227.

strated in the following Part, the Community/Union kept on developing and fine-tuning its instruments to that effect based on its previous experiences. This was essential, not only because the EU is a moving target, which kept "deepening" by acquiring new powers and competences, but also because the challenge of integrating new Member States increased tremendously, as there were not many "developed" countries left wishing to join the Union. Hence, if the Union wished to sustain its enlargement policy, it had to develop the appropriate instruments that would assist membership aspirants in their transformation in the quest to join the Union. In this context, association proved to be an invaluable framework within which those instruments could be employed in line with the corresponding needs of each associate.

As demonstrated above, different associations were developed on the basis of different (trading) models; hence, each relationship developed to a different extent. If an associate wished to join the Union, it had to live up to the challenge of taking on fully the obligations that flew from its accession to the Community/Union at the relevant time, which seemed to grow exponentially with each subsequent enlargement. At that point, the legal regime created by the association, with the rights and obligations it entails for the Contracting Parties as well as their nationals, has always served as the basis, which had to be complemented with the necessary policies and measures that would transform the associate into a full Member State. The more developed the legal regime under the association, the less complementary work was needed at the time of accession. This is clearly exemplified by the short period of time it took for the EEA States Austria, Finland, and Sweden to join the Union in comparison to other former associates.[227]

The purpose of this introductory part on different association regimes was to put the Ankara Agreement in the context of other association agreements so as to reveal its true nature. It was established that it is indisputably a genuine pre-accession agreement. Since the aim of this thesis is to establish the constraints on Member States in drafting Turkey's Accession Agreement, it is essential to lay down the existing legal regime created by the Ankara Agreement in more detail, as it serves as the basis for Turkey's accession process. The amount of work to be done is determined by the level of cooperation and approximation reached by the association regime along various policy lines. This basis is the minimum, the starting point, which is to be topped up in the process of accession and preparation for membership with the missing pieces of the jigsaw puzzle that will complete the picture and raise Turkey

227 Austria, Finland and Sweden signed the EEA Agreement on 2 May 1992. The EEA Agreement entered into force on 1 January 1994. See, Information concerning the date of entry into force of the Agreement on the European Economic Area and of the Protocol adjusting the Agreement on the European Economic Area, OJ L 1/606, 3.1.1994. Half a year later, on 24 June 1994, they signed their Accession Treaties, which entered into force on 1 January 1995, OJ L 1, 1.1.1995.

to the status of a full Member State. It is argued further that this minimum or this already acquired basis of rights and obligations will serve as a constraint on Member States in the accession process. In other words, the existing association regime can be characterized as a stepping-stone or a basis that needs to be further complemented; it is not something to be further reduced. If the latter is at stake, then we are no longer talking about an accession process, but simply about changing the existing nature of the association.[228]

As Hallstein put it, membership minus %1 is an association.[229] Hence, even if Turkey's full integration in other policy areas is ensured, it is argued that given the importance of free movement of persons to the European integration project, crippled free movement rights for Turkish nationals will mean nothing more than the changing of form of the existing association. Since the case study in this thesis is based on the possibility of including a PSC on free movement of persons in the future Turkish Accession Agreement, the analysis of the existing association regime that follows below focuses specifically on the *acquis* on free movement of persons.

228 For more detailed arguments to that effect, see Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," 273 and 80-81.

229 According to Hallstein, "association can be anything between full membership minus 1% and a trade and cooperation agreement plus 1%". He is cited in Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 23.

3 The Ankara Association Law

3.1 Introduction

The aim of providing a brief account of the Community/Union's association policy over the decades was to understand the nature of association as a legal relationship and to be able to put the Ankara Agreement in context. As briefly discussed above, it was one of the two most ambitious agreements signed in the 1960s, aiming to prepare Turkey for future accession to the Union. The following part firstly, lays down the aim and structure of the agreement, as well as the means that it puts at the Parties' disposal to achieve its objectives. Secondly, it briefly introduces the plan laid down in the agreement for the establishment of a Customs Union, after which, the focus shifts on the provisions of the agreement that envisage the gradual establishment of free movement of workers, services and freedom of establishment. Lastly, the rest of this Chapter examines the case law of the Court interpreting these provisions, since most developments in the *acquis* in this area are products of the case law of the Court rather than the institutions of the association.

The aim of this Chapter is to demonstrate that the free movement of persons regime established by the agreement is already quite developed, and that a PSC would not only be a step back from the Union *acquis* on free movement of persons but also a step back from the existing association *acquis* in some cases. It is argued that standstill clauses in the association agreement as well as similar clauses included in Accession Agreements constitute constraints on Member States, in addition to other constraints flowing from the accession process, which are examined in detail in Part II of this thesis.

3.2 Aims and structure of the Agreement

The Ankara Agreement was the second association agreement ever signed by the EEC and had ambitious objectives. It aimed at "establish[ing] *ever closer bonds* between the Turkish people and the peoples brought together in the [EEC]" and "to preserve and strengthen peace and liberty by *joint pursuit of ideals underlying the Treaty* establishing the [EEC]".[230] Its Article 2 provided

230 Emphasis added. See the preamble of the agreement, OJ L 361/1-2, 31.12.77.

further that the agreement was "to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people". That objective was to be achieved by the support given by the EEC, which would in turn "facilitate the *accession of Turkey to the Community* at a later date".[231]

The very first step in the attainment of that objective was the progressive establishment of a Customs Union, which was to be established over a preparatory, a transitional, and a final stage.[232] Those were also the three stages the association was going to be comprised of.[233] The purpose of the five-year preparatory stage was to give Turkey the time and opportunity to strengthen its economy. In this stage, Turkey would get aid from the Community, and prepare itself for undertaking the obligations that would be delegated on it in the following two stages.[234] The twelve-year transitional stage was to be composed of mutual and balanced obligations, during which the Customs Union was to be progressively established and the economic policies between Turkey and the Community were to be aligned.[235] The final stage was to be based on the Customs Union and would entail closer coordination of economic policies.[236]

Like the EEC Treaty, which it was modelled after, the Ankara Agreement was of programmatic nature and most of its provisions were drafted in general terms. Just like some of the Treaty provisions requiring the promulgation of more detailed secondary law for their implementation, some of the provisions of the Association Agreement required more detailed rules, which were to be issued by the Association Council, the main-decision making body of the Association.[237] It was to be composed of members of the governments of the Member States, members of the Council, the Commission, and members of the Turkish government, and would act unanimously. It could establish further committees to assist it in the fulfilment of its tasks.[238]

The preparatory stage ended when the Additional Protocol (AP), containing detailed rules and the timetable for the implementation of the transitional stage entered into force in 1973.[239] It should be noted that all the stages of the associ-

231 Emphasis added. See ibid.
232 See Article 2(2) of the Ankara Agreement (AA).
233 See Article 2(3) AA.
234 See Article 3 AA.
235 See Article 4 AA.
236 See Article 5 AA.
237 See Article 6 AA and Articles 22-25 AA.
238 See Article 23 AA.
239 This was provided for in Article 8 AA.

ation lasted longer than initially planned.[240] With hindsight, the initial planning was not very realistic. Under ideal conditions, (there were provisions providing for the extension of those stages if need be), the Customs Union (the final stage) could be in force as early as 1981. In terms of the economic development model adopted by Turkey in those years,[241] being part of a Customs Union with the industrialized countries of the West did not make much sense. However, as acknowledged by scholars, it was not economic considerations, but politics and the geostrategic considerations of the cold war that triggered economic cooperation in that period.[242]

The Customs Union was to cover all trade in goods,[243] including agricultural products.[244] The Agreement provided further for the progressive establishment of free movement of workers, and for the abolition of restrictions regarding freedom of establishment and freedom to provide services. Article 12, 13 and 14 AA lay down that in securing those freedoms the Contracting Parties agreed to be guided by the relevant articles of the EEC Treaty.[245] It is by virtue of these references to the EEC Treaty that some of the developments in Community/Union law were subsequently reflected to the case law on the Ankara *acquis*.

Other two indispensable principles for the functioning of the EEC/EC/EU legal order that found their place in the Ankara Agreement are the principle of loyal cooperation, embodied in Article 7 AA, and the prohibition of non-discrimination based on nationality, enshrined in Article 9 AA. Following Article 5 of the EEC Treaty, Article 7 requires the Contracting Parties to "take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement", and to "refrain from any

240 The preparatory stage, which was to last five years, lasted nine years. The transitional stage, which was planned as 12 years in the Ankara Agreement, took 22 years, in line with the plan laid down in the Additional Protocol (AP).

241 As it was the trend with other developing countries at the time, Turkey's growth strategy was based on import substitution. See, K. Boratav, *Türkiye İktisat Tarihi: 1908-2002* [Turkish Economic History], 8 ed. (Ankara: İmge Kitabevi, 2004).

242 J. Pinder, "Positive integration and negative integration: Some problems of economic union in the EEC," *The World Today* (March 1968): 92-93. For a detailed account, see A. Eralp, "Soğuk Savaştan Günümüze Türkiye – Avrupa Birliği İlişkileri," in *Türkiye ve Avrupa*, ed. A. Eralp (Ankara: İmge Kitabevi, 1997), 86-119; İ. Tekeli and S. İlkin, *Türkiye ve Avrupa Topluluğu I* [Turkey and the European Community I], vol. I (Ankara: Ümit Yayıncılık, 1993); Ç. Erhan and T. Arat, "AET'yle İlişkiler," in *Türk Dış Politikası I*, ed. B. Oran (İletişim, 2002); M. A. Birand, *Türkiye'nin Büyük Avrupa Kavgası 1959-2004* [Turkey's Big European Struggle 1959-2004], 11 ed. (İstanbul: Doğan Kitap, 2005); T. Saraçoğlu, *Türkiye Avrupa Ekonomik Topluluğu Ortaklığı (Anlaşmalar)* [Turkey EEC Association (Agreements)] (Akbank Ekonomi Yayınları, 1992).

243 See Article 10(1) AA.

244 See Article 11 AA.

245 For free movement of workers, Articles 48-50 of the EEC Treaty; for freedom of establishment, Articles 52-56 and Article 58 of the EEC Treaty; and finally for free movement of services, Articles 55-56 and Articles 58-65 of the EEC Treaty.

measures liable to jeopardize the[ir] attainment". Similarly, Article 9 AA provides that, without prejudice to any special provisions, "any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community".

Other economic provisions worth mentioning are quite broad. Article 15 AA provides for the extension to Turkey of the transport provisions contained in the Treaty taking into account its geographical situation. Article 16 "recognize[s] that the principles laid down in the provisions on competition, taxation and the approximation of laws contained in Title I of Part III of the Treaty establishing the Community must be made applicable" in the relations within the Association. In addition, there are provisions on economic policy, securing overall balance of payments, exchange rates, and payments or transfers relating to movement of goods, services, or capital.[246] The provision on free movement of capital is more modest compared to the provisions on other freedoms,[247] yet it reflects the pace of development of that freedom within the internal market.

Last but not least, comes Article 28 AA, which lays down explicitly the long-term objective of the Agreement. It reads as follows: "As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the *accession of Turkey to the Community*."[248] Obviously, Article 28 AA does not guarantee Turkey's future accession to the Community/Union,[249] it provides for the examination of that possibility once Turkey is ready to accept the obligations flowing from the Treaties. As argued by Lichtenberg, it provides for a fair procedure regarding Turkey's application, and "specifically excludes the possibility that, in making a decision on Turkey's membership, criteria other than those found in the *acquis communautaire* and the economic and legal functioning of the Association Agreement could be used".[250] However, more importantly, it makes the arduous discussion on Turkey's geographic location, i.e. the issue whether it is a 'European State', irrelevant for the purpose of accession.[251]

246 See respectively Articles 17, 18, and 19 AA.

247 Article 20(1) AA provides that "The Contracting Parties shall consult each other with a view to facilitating movements of capital between Member States of the Community and Turkey which will further the objectives of this Agreement."

248 Emphasis added.

249 According to Lasok, "it was an express intention of the contracting parties to use the Accession Agreement as a stepping stone to accession", and Article 28 AA expressed that intention, but gave "no guarantee but merely a prospect of admission". See, D. Lasok, "The Ankara Agreement: Principles and Interpretation," *Marmara Journal of European Studies* 1, no. 1-2 (1991): 36.

250 H. Lichtenberg, "Turkey and the European Union," *Marmara Journal of European Studies* 6, no. 1 (1998): 145.

251 Ibid.

3.3 ANKARA ASSOCIATION LAW

Having laid down the main objectives envisaged by the Association Agreement in the previous section, this one tries to briefly outline how far those objectives have been achieved. After providing a brief account of the development of the Customs Union, the focus will be on the rules laid down regarding free movement of workers, freedom of establishment and freedom to provide services. The emphasis will be on showing how far the latter rules on free movement of persons have developed, as the safeguard clause will affect them directly. The main argument that follows is that membership entails more extensive rights and obligations for nationals of a Member State than the nationals of an associate country, or at least equivalent. This is not only in line with common sense, but there is also a provision in the Additional Protocol to ensure that "Turkey shall not receive more favourable treatment than that which Member States grant to one another pursuant to the Treaty establishing the Community".[252] Hence, memberships should entail increase and not decrease in the rights enjoyed by Turkish nationals.

3.3.1 The Customs Union

"Believing that the conditions have been established for passing from the preparatory stage to the transitional stage", the Additional Protocol laying down the conditions, arrangements, and timetables for this intermediate stage entered into force on 1 January 1973.[253] It provided for the progressive abolition of customs duties and charges having an equivalent effect over a period of twenty-two years, at the end of which the Turkish Customs Tariff had to be aligned with the Common Customs Tariff.[254] Quantitative restriction on imports and exports and measures having equivalent effect had to be abolished at the latest by the end of the transitional stage.[255] Last but not least, if there were to be free movement of agricultural products between the Community and Turkey, over a period of twenty-two years Turkey would have to adjust its

252 Article 59 AP.

253 See the Preamble to the Additional Protocol signed at Brussels, 23 November 1973. The Additional Protocol was a mixed agreement that formed an integral part of the Ankara Agreement. See, OJ 1973 C 113/17.

254 See, Section I: Elimination of customs duties between the Community and Turkey (Articles 7-16 AP) and Section II: Adoption by Turkey of the Common Customs Tariff (Articles 17-20 AP) of the Additional Protocol. For a more detailed account of the establishment of the Customs Union, see H. Kabaalioğlu, "The Customs Union: A Final Step before Turkey's Accession to the European Union?," *Marmara Journal of European Studies* 6, no. 1 (1998): 113-40.

255 See Chapter II: Elimination of Quantitative Restrictions (Articles 21-29 AP) of the Additional Protocol.

agricultural policy to that of the Community by adopting the necessary measures.[256]

At the end of the envisaged period, the Association Council decided the final stage of the Association could begin on 1 January 1996. To that effect, the Association Council adopted Decision 1/95 on the implementation of the final phase of the Customs Union.[257] The Customs Union would cover "products other than agricultural products",[258] in other words industrial products. The Council reaffirmed the objective to move towards the free movement of agricultural products, but noted that an additional period is required to achieve that aim.[259]

As argued by Kabaalioğlu, Decision 1/95 imposes on Turkey many additional requirements, which do not fall strictly within the basic Customs Union structure. These sweeping requirements together with the Customs Union make sense only when considered as being parts of a temporary or transitional regime that is designed to prepare Turkey for full membership.[260] To provide few examples in order to give an idea as to the scope of these requirements, Turkey is required to provide equivalent levels of effective protection of intellectual, industrial and commercial property rights.[261] "With a view to achieving the economic integration sought by the Customs Union", Turkey had to ensure not only that its legislation in the field of competition law was compatible with that of the Community, but also that it was applied effectively.[262] Hence, it had to establish a competition authority to enforce those rules before the entry into force of Decision 1/95.[263]

When the content of the "Competition rules of the Customs Union" included in Decision 1/95 is examined more closely (Articles 32 to 38), it is surprising to see that most articles are identical copies of the competition provisions of the EEC Treaty, in which the phrase "common market" has been replaced by the "Customs Union".[264] Hence, Article 35 provides that those

256 See, Chapter III: Products Subject to Specific Rules on Importation into the Community as a Result of the Implementation of the Common Agricultural Policy (Article 31 AP); and Chapter IV: Agriculture (Articles 32-35 AP) of the Additional Protocol.

257 Decision 1/95 of the EC-Turkey Association Council on implementing the final phase of the Customs Union, 96/142/EC, OJ L 35/1, 13.02.1996.

258 See Article 2 of Decision 1/95. Special rules on agricultural products were set in Chapter II of the Decision.

259 Article 24 of Decision 1/95. Also note that "Processed agricultural products not covered by Annex II to the Treaty establishing the European Community" are dealt under Section V of Chapter I on "Free Movement of Goods and Commercial Policy" (Articles 17 to 23 of Decision 1/95).

260 Kabaalioğlu, "The Customs Union: A Final Step before Turkey's Accession to the European Union?," 123.

261 See Article 31 of Decision 1/95.

262 See Article 39(1) of Decision 1/95.

263 See Article 39(2)(b) of Decision 1/95.

264 Article 32 of Decision 1/95 is a copy of Article 85 of the EEC Treaty; Article 33 is a copy of Article 86 EEC; and Article 34 of Article 92 EEC.

provisions "shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty establishing the European Community and its secondary legislation".

The Decision further required Turkey to adapt all the aid it granted to the textile and clothing sector to the EC rules before the entry into force of this Decision.[265] All other aid schemes had to be adapted within two years after the entry into force of Decision 1/95.[266] It is notable that Turkey is treated almost like a Member State of the Union regarding the adoption of new aid schemes. It needs to notify the Community of any individual aid to be granted to an enterprise that would be notifiable under Community rules.[267] Similarly, Turkey needs to be informed on the same basis as the Member States "[r]egarding individual aids granted by Member States and subject to the analysis of the Commission".[268] Both parties are entitled to raise objections against an aid granted by the other party, which would be deemed incompatible with EC law. If there is dispute regarding an aid granted by Turkey, which is not resolved within 30 days, either party has the right to refer the case to arbitration.[269] If the dispute concerns an aid granted by a Member State, and the Association Council is not able to resolve it within three months, it may refer it to the Court of Justice.[270]

Other far-reaching provisions are Articles 41 and 42 of Decision 1/95. The former provided that by the end of 1996, Turkey had to ensure that regarding public undertakings and undertakings enjoying special or exclusive rights, the principles of the EEC Treaty, "notably Article 90, as well as the principles contained in secondary legislation and the case-law developed on this basis, are upheld". Article 42 required Turkey to progressively adjust any State monopolies of a commercial character by the end of 1997, so that there is no discrimination regarding the conditions under which goods are procured and marketed. Moreover, Article 43 of the Decision stipulated that the Party believing its interests are negatively effected by the anti-competitive conduct carried out on the territory of the other, "may notify the other Party and may request the other Party's competition authority initiate appropriate enforcement action".[271]

The Decision also includes provisions providing for negotiations aimed at opening the Contracting Parties' respective government procurement markets,[272] provisions on direct and indirect taxation,[273] as well as provisions

265 See Article 39(2)(c) of Decision 1/95.
266 See Article 39(2)(d) of Decision 1/95.
267 See Article 39(2)(e) & (f) of Decsision 1/95.
268 See Article 39(2)(f) of Decsision 1/95.
269 See Article 39(4) of Decsision 1/95.
270 See Article 39(5) of Decsision 1/95.
271 Article 43(1) of Decision 1/95.
272 See Article 48 of Decision 1/95.
273 See repectively Articles 49 and 50 of Decision 1/95.

on settlement of disputes by resorting to arbitration.[274] Lastly, it establishes "an EC-Turkey Customs Union Joint Committee" to oversee the proper functioning of the Customs Union.[275] The Customs Union Joint Committee is composed of representatives of the Contracting Parties, and as a rule meets at least once a month. It is entitled to establish subcommittees or working parties to assist it, if need be.[276]

Even a brief look at the provisions of Decision 1/95 suffices to conclude that it is not only about the Customs Union and Turkey's adoption of the Common Customs Tariff (CCT).[277] It goes way beyond that into aligning Turkey's commercial policy, competition policy, taxation and economic policy with that of the Union. Economically, it does not make sense for a state like Turkey, which is less developed, to adopt all these far-reaching policies in the absence of the prospect of EU accession. As advanced as the EEA regime might be, it should be noted that it does not go as far as adopting the CCT.[278]

In the absence of the membership perspective, it does not make sense either politically or economically for any state to be a part of the Customs Union, since under the existing arrangements, it has officially no say in the decision-making regarding the adoption or changes in the CCT. That can be acceptable only temporarily, as part of a long-term plan that is expected to pay off in other ways in the future, such as EU membership. Association without the membership perspective in the long run, places the associate in "the position of de facto satellite to the [EU]",[279] which, at least for Turkey as a medium-size state, is not that attractive. In short, as Lichtenberg put it: "Association and accession are not alternative options for the relationship between Turkey and the EC [now EU], both are progressive steps towards full membership".[280]

3.3.2 Free movement of persons

Since the test case in identifying the existence of constraints on Member States as primary law makers in the accession context is the PSC on free movement of persons mentioned in Turkey's Negotiating Framework, the free movement of persons aspect of the association regime is central to this study. It is argued that EU membership for Turkey is supposed to lift the remaining obstacles

274 See Articles 61 and 62 of Decision 1/95.
275 See Article 52 of Decision 1/95.
276 See Article 53 of Decision 1/95.
277 M. S. Akman, "Türkiye – Avrupa Birliği Gümrük Birliği İlişkisi ve Ortak Dış Ticaret Politikası," in *Yarım Asrın Ardından Türkiye – Avrupa Birliği İlişkileri*, ed. Belgin Akçay and Sinem Akgül Açıkmeşe (Ankara: Turhan Kitabevi, 2013), 226-35.
278 As noted by Kuijper, in the EEA "free movement of goods remains limited to a free trade area as opposed to a customs union". See, Kuijper, "External Relations," 1339.
279 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 119.
280 Lichtenberg, "Turkey and the European Union," 145.

in front of the free movement of persons, and not introduce new ones. As is illustrated below, the introduction of new obstacles to free movement of workers, services and establishment is prohibited under the existing association regime. Thus, it can be argued that this should be *a fortiori* the case after accession.

To be able to establish how much the existing legal framework would constrain Member States as primary law makers in drafting the Turkish Accession Agreement, one needs to establish the aims set and commitments undertaken regarding the development of free movement of persons under the Ankara Agreement, as well as the actual level of development of those freedoms under the existing association regime. Hence, what follows firstly, is an examination of the objectives of the provisions of the Ankara Agreement with relevance for free movement of persons; secondly, an examination of legal instruments adopted in order to implement those provisions; and lastly, the case law of the Court of Justice, which by interpreting these provisions, contributed greatly to their effective enforcement as well as their further development.

3.3.2.1 In the Ankara Agreement

It is important to begin by acknowledging the importance and enormous contribution of the free movement of persons to the establishment of the internal market and the integration project as a whole. Even though initially people were seen more as factors of production like goods and capital, whose circulation was expected to deliver economic benefits to the economies of both their host and home Member States, that view started changing as early as the first amendment to the Treaties were made with the Single European Act, which added the social provisions. While initially free movement was possible only for economically active nationals of Member States, soon free movement for other nationals who were self-sufficient became also possible. Lastly, as discussed in Chapter 6, free movement of persons was revolutionized and became even more central to the integration project with the introduction of the concept of Union citizenship into the Treaties and its interpretation by the Court of Justice, which inextricably linked Union citizenship and free movement.

In short, free movement of persons has always been part of the very crux of the integration project, and its importance has only increased in time. Its enormous contribution to achieving the ideals underlying the project is self-evident. Some of these ideals mentioned in the preamble of the EEC Treaty were the creation of "an ever-closer union among the peoples of Europe" by ensuring "economic and social progress of their countries" through the elimination of barriers dividing them and by striving for "the constant improvement

of the living and working conditions of their peoples". These lofty ideals were also reflected in the preamble to the Ankara Agreement.[281]

Title I of the Ankara Agreement begins with introducing the main "Principles" of the association, after which Title II of the Agreement on the "Implementation of the Transitional Stage" lays down some of its most important provisions for the purposes of this study. To begin with Article 8, it provides the procedure for the adoption of the Additional Protocol, which was supposed to "determine the conditions, rules and timetables for the implementation of provisions relating to the fields covered by the Treaty establishing the Community". The provisions worth citing for our purposes are the provision providing for the prohibition of discrimination based on nationality and the provisions on free movement of persons.

To begin with the non-discrimination provision, it reads ad follows:

> *Article 9*
> 'The Contracting Parties recognize that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, *any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty establishing the Community*.'[282]

The provisions providing for the free movement of workers, freedom of establishment and freedom to provide services read respectively as follows:

> *Article 12*
> 'The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.'
>
> *Article 13*
> 'The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.'
>
> *Article 14*
> 'The Contracting Parties agree to be guided by Articles 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them.'

Before proceeding to the examination of the provisions preparing the ground for the future implementation of these freedoms in the Additional Protocol, it is worth making a brief comment on the general wording of those provisions. The broad and general formulation of these provisions with reference to the

281 See the first paragraph under title "3.2 Aims and structure of the Agreement".
282 Emphasis added.

corresponding Treaty provisions, proved to be a blessing and a curse at the same time. It proved to be a curse; because Turkish nationals were not able to rely directly on these provisions in order to invoke the freedoms they aimed to establish. As will be analysed in more detail below, the Court ruled that these provisions were of programmatic nature, and were "not sufficiently precise and unconditional"[283] to be capable of conferring directly effective rights on individuals. According to the Court, it was up to the Association Council to take decisions of specific and unconditional nature that would materialize the objectives of those provisions.[284]

The broad formulation of these provisions with reference to corresponding Treaty articles was a blessing as it served as the justification/ground for the Court to give a dynamic interpretation to these provisions. By virtue of these references, the Court interpreted the terms in these provisions, as well as the terms in other measures adopted to implement these provisions, "as far as possible" in line with the meaning given to those terms under Union law.[285] As the meaning and scope given to some concepts was broadened under EU law, so was the case for those concepts under the Ankara Agreement. As generous as the Court seemed to be in that exercise, there are few recent examples in which the Court drew the boundaries between Association Law and EU law by declaring what it deemed not possible.[286]

3.3.2.2 In the Additional Protocol

While the provisions on "Free Movement of Goods" under Title I are many and quite detailed (Articles 2 to 35 AP), there are only seven general provisions under Title II of the Additional Protocol dealing with "Movement of Persons and Services" (Articles 36 to 42 AP). The Protocol set a timetable for establishing free movement of workers and prohibited the introduction of any new restrictions regarding free movement of establishment and freedom to provide

283 *Case 12/86 Demirel*, para. 23.

284 Ibid., paras. 20-21.

285 Van der Mei calls this "the Bozkurt-interpretation rule". See, A. P. Van der Mei, "The Bozkurt-Interpretation Rule and the Legal Status of Family Members of Turkish Workers under Decision 1/80 of the EEC-Turkey Association Council," *European Journal of Migration and Law* 11(2009). See also, N. Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," *Common Market Law Review* 46(2009); F. G. Jacobs, "Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice," in *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, ed. A. Dashwood and M. Maresceau (Cambridge: Cambridge University Press, 2008), 29-31.

286 For instance, it was not possible to extend the personal scope of the freedom to provide services under the Ankara Agreement so as to encompass service recipients, as is the case under EU law. See, *Case C-221/11 Demirkan*, judgment of 24 September 2012, n.y.r. See also, *Case C-371/08 Ziebell*, [2011] ECR I-12735. Compare the ECJ's approach with that of the EFTA Court in *Case E-15/12 Jan Anfinn Wahl*, judgment of 22 July 2013, n.y.r.

services, however, the specific measures that were to turn these freedoms into reality were to be taken by the Association Council.

To begin with the timetable set for the establishment of free movement of workers, Article 36 AP provided that it was to be achieved by progressive stages in line with the principles set out in Article 12 of the Ankara Agreement "between the end of the twelfth and the twenty-second year after the entry into force of that Agreement". Article 37 AP prohibited discrimination on the grounds of nationality between Turkish workers and workers who are nationals of Member States of the Community regarding conditions of work and remuneration. Article 39 AP directed the Association Council to adopt social security measures for Turkish workers and their families residing in the Community. Those measures had to enable Turkish workers "to aggregate periods of insurance or employment completed in individual Member States in respect of old-age pensions, death benefits and invalidity pensions, and also as regards the provision of health services".[287] Those measures had to ensure that Member States take into account periods completed in Turkey. These measures had to be adopted by the end of the first year after the entry into force of this Protocol. The proposal for the implementation of this provision, as well as Decision 3/80, most provisions of which are too general to be directly effective, has still not been adopted.[288]

As to establishing the timetable and rules on the abolition of restrictions on freedom of establishment and freedom to provide services, Article 41(2) AP designated the Association Council as the competent body. Until the adoption of those rules, Article 41(1) AP introduced a standstill instructing the Contracting Parties to "refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services". Since Member States did not refrain from introducing new restrictions, disregarding the standstill clause, the Court of Justice has recently delivered interesting cases concerning the scope and application of the latter clause.[289] Most of the recent developments regarding free movement of persons between Turkey and some of the Member States, which will be dealt with in detail below, are the result of the Court's judgments declaring some of these measures incompatible with Association Law.[290]

287 Article 39(2) AP.

288 See, Proposal for a Council Decision "on the position to be taken on behalf of the European Union within the Association Council set by the Agreement establishing an association between the European Economic Community and Turkey with regard to the provisions on the coordination of social security systems", COM(2012) 152 final, Brussels, 30.03.2012.

289 For an example, see *Case C-221/11 Demirkan*.

290 For an example, see *Case C-228/06 Soysal*, [2009] ECR I-1031.

3.3.2.3 In the Association Council Decisions

The Association Council took few decisions that lay down in concrete terms the rights to be enjoyed by Turkish workers that were already legally employed in a Member State; however, it failed to adopt any decisions that would facilitate the free movement of workers, services or freedom of establishment. The case law of the Court concerning the interpretation of provisions of those decisions with relevance for the free movement of persons between Turkey and the Member States of the EU is examined in detail in the following part. For our purposes, it suffices to mention the most important decisions adopted by the Association Council and the most important provisions contained therein.

3.3.2.3.1 Decision 2/76

The first decision adopted on the implementation of Article 12 of the Ankara Agreement, i.e. the provision providing for the establishment of free movement of workers, was Decision 2/76 of the Association Council.[291] It laid down the rules for the implementation of the first stage of free movement of workers, which was to last four years. It was replaced in time by Decision 1/80 on the Development of the Association.[292] Its only relevant and important provision for free movement of workers for our purposes today is the standstill clause contained in its Article 7, which read as follows: "The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their territory." In other words, the standstill obligation as far as the workers' rights are concerned goes back to 20 December 1976, when Decision 2/76 was adopted and is deemed to have entered into force.

3.3.2.3.2 Decision 1/80

Decision 1/80, which was adopted on 1 December 1980, aimed "to improve the treatment accorded to Turkish workers and members of their families in relation to the arrangements introduced by Decision 2/76 of the Association Council".[293] In what became Article 13 of Decision 1/80, the scope of the standstill clause, which was embodied in Article 7 of Decisions 2/76, was broadened to include the family members of Turkish workers. All other provisions contained in the Decision, concern the rights of Turkish workers who are already legally resident and employed in a Member State. Even though they have no implications for the free movement of workers between Turkey and the Member States of the EU, a brief account of the content of those provisions might be useful to provide an overall view of the extent of rights

291 It was adopted on 20 December 1976.
292 This decision was not published in the Official Journal.
293 See the preamble to Decision 1/80.

enjoyed by the Turkish workers and their families, once they are legally resident and employed in a Member State of the EU.

It is also important to underline that some of the provisions of the Decision were modelled after the first measures that applied regarding free movement of Community workers during the transitional period. Most of Article 6 of Decision 1/80, copies Article 6 of Regulation No. 15 of 1961,[294] which illustrates the intention that the progressive establishment of free movement of workers between Turkey and the EEC at the time, is to follow the steps of development of this freedom within the Community. Just like Council Regulation No. 15 did for Community workers, Article 6 of the Association Council provides for the gradual integration of Turkish workers into the labour force of a Member State. Article 6 reads as follows:[295]

> '1. … a Turkish worker duly registered as belonging to the labour force of a Member State:
> - shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available;
> - shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the Community, to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment service of that State, for the same occupation;
> - shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.'

The importance of Article 6 became apparent when the Court interpreted the right of access to the labour market in line with the Court's jurisprudence in this area, i.e. as necessarily implying a right to legal residence. The Court reasoned that a different interpretation would deprive the right of access to

294 The Regulation is not available in English. For the Dutch version, see Verordening No. 15 met betrekking tot de eerste maatregelen ter verwezenlijking van het vrije verkeer van werknemers binnen de Gemeenschap, Publicatieblad van de Europese Gemeenschappen, 1073/61, 26.08.1961.

295 Compare with the wording of Article 6 of Regulation No. 15, which provides as follows: "1. Na één jaar regelmatige arbeid op het grondgebied van een Lid-Staat heft de onderdaan van een andere Lid-Staat die een betrekking heft, recht op verlenging van zijn arbeidsvergunning voor hetzelfde beroep.
2. Na drie jaar regelmatige arbeid verkrijgt deze onderdaan vergunning om een ander beroep in loondienst uit te oefenen waarvoor hij de nodige vakbekwaamheid bezit.
3. Na vier jaar regelmatige arbeid verkrijgt de betrokken onderdaan vergunning om ieder beroep in loondienst te oefenen, onder dezelfde voorwaarden als die welke gelden voor nationale werknemers."

the labour market and the right to work of all effect.[296] In addition, Article 6(2) set out certain legitimate causes of interruption to employment.[297]

Article 7 of Decision 1/80 regulates the rights enjoyed by family members of a Turkish worker in the territory of a Member State.[298] Family members duly authorised to join the worker have to wait for a period of three years to be able to respond to an offer of employment, and then, only subject to the priority to be given to Community workers. Family members enjoy free access to employment of their choice only after five years of legal residence in the Member State concerned.[299] In addition, Article 9 provides for equal access to general education for children of Turkish workers.[300]

Another important provision interpreted generously by the Court is Article 10(1) of Decision 1/80,[301] which is the special provision providing for non-discrimination based on nationality regarding Turkish workers. It provides as follows: "The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers."

Last but not least, Article 14(1) of Decision 1/80 is worth mentioning as it provides that "[t]he provisions of this section shall be applied subject to

296 See, *Case C-192/89 Sevince*, [1990] ECR I-3461, para. 29; *Case C-36/96 Günaydin*, [1997] ECR I-5143, para. 26; *Case C-1/97 Birden*, [1998] ECR I-7747, para. 20.

297 Article 6(2) makes distinction on the basis of the type and length of periods in which a Turkish worker was not working. Accordingly, the first sentence of that provision concerns periods of inactivity involving only a brief cessation to work, such as absences for annual holidays, maternity leave, short period of sickness, etc. Such absences are treated wholly as periods of legal employment within the meaning of Article 6(1). The second sentence concerns periods of inactivity due to long term sickness or involuntary employment. While it is not possible to treat the latter periods of inactivity as legal employment, they may not always result in the Turkish worker losing the rights which he had already acquired. See, *Case C-230/03 Sedef* [2006] ECR I-157, paras. 49-51.

298 As to the definition of a "member of the family" of a Turkish worker, the Court interpreted the concept in line with the interpretation given to the concept in the area of free movement of Union workers. See, *Case C-275/02 Ayaz* [2004] ECR I-8765.

299 First and second indents of Article 7(1) of Decision 1/80. The Court established further that once a family member fulfills the condition of legal residence for three years stipulated in the first indent of Article 7(1), Member States are no longer entitled to attach conditions to his/her residence. This applies *a fortiori* to a family member who has legally resided in a Member State for at least five years. See, *Case C-329/97 Ergat*, [2000] ECR I-1487, paras. 38-39.

300 Article 9 of Decision No 1/80 provides as follows: "Turkish children residing legally in a Member State of the Community with their parents who are or have been legally employed in that Member State, shall be admitted to courses of general education, apprenticeship and vocational training under the same educational entry qualifications as the children of nationals of that Member State. They may in that Member State be eligible to benefit from the advantages provided for under the national legislation in this area."

301 For an evaluation of the precise scope of Article 10(1) by the Court, see *Case C-171/01 Wählergruppe Gemeinsam*, [2003] ECR I-4301.

limitations justified on grounds of public policy, public security and public health". Before the introduction of Directive 2004/38/EC (the Citizenship Directive), these concepts were interpreted in line with EU law, and the procedural guarantees and protection accorded to Community nationals regarding expulsion under Directive 64/221/EEC were also accorded to Turkish nationals falling within the scope of Association Law.[302] However, after the introduction of the Citizenship Directive, the Court in *Ziebell* ruled that it was no longer possible to extend the scheme of protection offered to Union citizens to Turkish nationals, as the status of Union citizenship "is intended to be the fundamental status of nationals of Member States, [… which] justifies the recognition, *for Union citizens alone*, of guarantees which are considerably strengthened in respect of expulsion".[303] *Ziebell* came as a surprise, since the Court had acknowledged only a year ago that it "follows from Article 2(1) of the Association Agreement, that [it] has the objective of *bringing the situation of Turkish nationals and citizens of the Union closer together* through the progressive securing of free movement for workers and the abolition of restrictions on freedom of establishment and freedom to provide services".[304]

3.3.2.3.3 Decision 3/80

Lastly, Decision 3/80 concerned the application of social security schemes of the Member States of the EC to Turkish workers and members of their families.[305] This proved to be the most problematic area concerning the rights of Turkish nationals. There was no specific provision on social security in the Ankara Agreement. As mentioned above, it was Article 39(1) AP that provided that "[b]efore the end of the first year after the entry into force of this Protocol, the Council of Association shall adopt social security measures for workers of Turkish nationality moving within the Community and their families residing in the Community".

It took the Association Council almost a decade to adopt Decision 3/80. Its aim was to coordinate Member States' social security schemes so as to enable Turkish workers employed or formerly employed in the Community, members of their families and their survivors to qualify for benefits in the traditional branches of social security. The Decision either copied the provisions of Regulation 1408/71/EC[306] or made direct references to them. However, the adoption of this decision was only a first step in granting full and equal social security rights to Turkish workers and their families. For the aim stipulated

302 See, *Case C-136/03 Dörr and Ünal*, [2005] ECR I-4759.

303 Emphasis added. *Case C-371/08 Ziebell*, para. 73. See, K. Hamenstädt, "The Protection of Turkish Citizens Against Expulsion—This Far and No Further? The Impact of the Ziebell Case," *German Law Journal* 41, no. 1 (2013): 239-67.

304 *Case C-92/07 Commission v Netherlands*, [2010] ECR I-03683.

305 OJ 1983 C 110/60.

306 Regulation (EEC) 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 194/2, 5.7.1971.

in Article 39 AP to be fully achieved, further measures implementing Decision 3/80 were required. Unfortunately, the initial interpretation provided by the Court in *Taflan-Met*, did not add much clarity to the field.[307]

On 8 February 1983 the Commission submitted to the Council a proposal for a Regulation to bring this Decision 3/80 into force within the Community and to lay down supplementary detailed rules for its implementation.[308] However that proposal, which concerned the social security rights of the largest group of third country nationals (TCNs) in Europe, was never adopted. A recently updated Commission proposal has been adopted by the Council as the position of the EU within the Association Council; however, the latter proposal has still not been adopted by the Association Council.[309]

In conclusion, Association Council decisions were important first steps towards achieving free movement of workers between Turkey and the Member States of the EU. Even though some of these steps, i.e. provisions of Decisions, needed to be complemented with further more specific steps to entitle individuals to directly effective rights,[310] Turkish nationals were able to rely on those which were sufficiently specific and precise. In that sense, the latter provisions could be qualified as an embodiment of already existing "legal constraints" on Member States, which could be placed in the first category of constraints consisting of directly effective, i.e. justiciable law. Since these rights were raised in more than sixty cases in front of the Court, by now most of them are well established and entrenched. They demonstrate the concrete minimum achieved on the way to establish full free movement rights.

While these specific provisions falling within the first category of "legal constraints" defined in the introduction constitute the current minimum, the broader programmatic provisions that do not have direct effect and fall within the second category, such as Article 12, 13 or 14 AA, embody the final objective pursued by those provisions. The specific provisions are just first steps taken

307 Compare *Case C-277/94 Taflan-Met and Others*, [1996] ECR I-4085; to *Case C-262/96 Sürül*, [1999] ECR-I 2685. See also, S. Peers, "Equality, Free Movement and Social Security," *European Law Review* 22(1997): 342-51; Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," 1652-53.

308 OJ 1983 C 110, p.1. *Case C-277/94 Taflan-Met and Others*, paras. 34-35.To a large extent, Commission's proposal was based on Council Regulation (EEC) No 574/72 of March 21, 1972 laying down the procedure for implementing Regulation (EEC) 1408/71, OJ L 74/1, 27.3.1972.

309 See, Council of the European Union, Interinstitutional File: 2012/0076 (NLE), Subject: Council Decision on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community, and Turkey with regard to the adoption of provisions on the coordination of social security systems, Brussels, 20 November 2012, 14798/12, SOC 820 NT 29.

310 For an example, see *Case C-277/94 Taflan-Met and Others*. For a brief discussion of the case, see Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," 1652-53.

to gradually fulfil the broader objectives contained in the Treaties. As demonstrated by the Court's case law below, that is the reason why if unclear, these specific provisions are interpreted in the light of the broader objectives they serve. It should be noted that the fact that general provisions are not directly effective does not mean that they are not binding. It simply means that individuals are not able to rely on those provisions in national courts. The Contracting Parties of the Agreement are under the obligation to give them effect. In short, since both types of provisions are legally binding, arguably both would equally constitute constraints on Member States when negotiating a future Accession Agreement.

It should be emphasised however, that as a first step, these decisions aimed to ensure the rights of workers and their families who were already legally resident on the territory of a Member State of the EU. The next step, which was to institute free movement of workers between Turkey and the Member States, was to follow later. Those next steps were never taken. However, as far as free movement existed at the time the Additional Protocol or the first Decisions were adopted, it was protected by the standstill clauses contained in those instruments,[311] which seemed to have been forgotten for a while. Nowadays, it is those clauses that are the source of any change, since the migration policies of Member States were much more liberal in the 1970s and early 1980s.

Since it is the Court's recent case law on the standstill clauses that provides for the partial establishment or re-institution of free movement of workers, services and establishment between Turkey and some of the Member States of the EU, the focus in the following section is on those cases. They are important for our purposes as they demonstrate that if standstill clauses had been respected, there would already be substantial amount of free movement between Turkey and the EU, which would make the discussion on a PSC untenable as it could imply a step back even from the existing free movement regime. Even if the level of freedom of movement of the 1970s and early 1980s is not likely to be achieved under the existing Association regime, the case law of Court results in the removal of some of these "new restrictions".

3.3.2.4 Case law of the Court of Justice

So far the Court has delivered more than sixty judgments on EU-Turkey Association Law.[312] While some recent cases concern free movement of workers,

311 Article 7 of Decision 2/76, which was replaced by Article 13 of Decision 1/80; and Article 41(1) AP.

312 For an overview of EU-Turkey Association Law, see K. Groenendijk and M. Luiten, *Rechten van Turkse burgers op grond van de Associatie EEG-Turkije* [Rights of Turkish Nationals on the Grounds of the EEC-Turkey Association] (The Netherlands: Wolf Legal Publishers, 2010); N. Rogers, *A Practitioners' Guide to the EC-Turkey Association Agreement* (The Hague: Kluwer Law International, 2000); K. Groenendijk, "The Court of Justice and the Development of

service providers and freedom of establishment between Turkey and Member States of the EU,[313] which will be examined in more detail below, most of the cases in the area of Association Law concern the rights of Turkish workers and their families who are already legally resident and employed in a Member State, in other words cases concerning various provisions of Decision 1/80.[314] While it is important to take note of these rights, and the fact that they have been further complemented and strengthened with other measures aiming to improve the rights of TCNs,[315] the focus in the following part is on the rules of admission to Member States and free movement of persons between Turkey and the Member States of the EU.

Before proceeding to the part on free movement, what follows below is a brief historical account of the Court's case law establishing that it has interpretative jurisdiction over Association instruments, that they form integral part of EU law, and that individuals deriving rights from these instruments are able to rely on them. That case law is of paramount importance as it has emphasized again and again the objective of the Association regime as well as the central role played by the free movement of workers, services and

EEC-Turkey Association Law," in *Grenzüberschreitendes Recht – Crossing Frontiers: Festschrift für Kay Hailbronner*, ed. G. Jochum, W. Fritzmeyer, and M. Kau (C.F.Müller, 2013), 413-28; D. Martin, "The Privileged Treatment of Turkish Nationals," in *The First Decade of EU Migration and Asylum Law*, ed. E. Guild and P. Minderhoud (Martinus Nijhoff Publishers, 2012), 75-91.

313 A. Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?," *European Law Journal* 19, no. 3 (2013); M. T. Karayigit, "Vive la Clause de Standstill: The Issue of First Admission of Turkish Nationals into the Territory of a Member State within the Context of Economic Freedoms," *European Journal of Migration and Law* 13(2011); Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary."

314 T. Theele, "Rights of Turkish Workers on the Basis of the EEC/Turkey Association Agreement," in *Migration, Integration and Citizenship, Volume II: The Position of Third Country Nationals in Europe*, ed. H. Schneider (Forum Maastricht, 2005); K. Groenendijk, "Citizens and Third Country Nationals: Differential Treatment or Discrimination," in *The Future of Free Movement of Persons in the EU, Volume 2*, ed. J. Y. Carlier and E. Guild (Brussels: Bruylant, 2006); T. Takács, "Legal status of migrants under the association, pertnership and cooperation agreements of the EU: How far from EU citizenship?," in *Globalisation, Migration, and the Future of Europe: Insiders and Outsiders*, ed. L. S. Talani (Routledge, 2012), 82-88.

315 The most relevant instruments in this area are Directive 2003/86/EC on the right to family reunification, OJ L 251/12, 3.10.2003, applicable as of 3 October 2005; and Directive 2003/109/EC on the rights of long-term residents, OJ L 16/44, 23.01.2004, applicable as of 23 January 2006. For an extensive elaboration on how these instruments complement the rights of Turkish nationals under Association Law, see Peers, "EU Migration Law and Association Agreements," 53-87. See also, Groenendijk, "Citizens and Third Country Nationals: Differential Treatment or Discrimination."

establishment. By now it constitutes a solid body of case law that is followed and given effect by the national courts of some of the Member States.[316]

3.3.2.4.1 Establishing the Court's jurisdiction

The first case to reach the Court of Justice concerning the Ankara Agreement and its Additional Protocol was that of Mrs. Demirel. She came to rejoin her husband in Germany on a visitor's visa.[317] She overstayed her visa and was faced with an order to leave the country. She challenged the order relying on Articles 7 and 12 AA together with Article 36 AP. In addition to the preliminary references sent by the national court on the interpretation and application of those provisions, the Court also had to deal with the issue of admissibility raised by the German and the UK governments. They contested the Court's jurisdiction to interpret the Ankara Agreement and its Protocol, on the ground that the latter were "mixed" agreements and argued that as far as free movement of workers was concerned, Member States' commitments in this field concerned the exercise of their own powers.[318]

The Court disagreed. First, it reminded Member States of its earlier case law,[319] in which it had established that an agreement signed by the Council under Article 228 and 238 EEC is considered an act of one of the Community's institutions, and that "as from its entry into force, *the provisions of such an agreement form an integral part of the Community legal system*".[320] Hence, it followed that it had jurisdiction to give preliminary rulings concerning the interpretation of such an agreement. It further explained that:

> '…[s]ince the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent,

316 It is especially the national courts of Germany and the Netherlands, both of which host sizable Turkish communities, that follow and apply the Court's Association case law. In many instances they resolve arising issues in line with the case law of the Court, without making preliminary references. For an example, see N. Tezcan/Idriz, "Dutch Courts Safeguarding Rights under the EEC-Turkey Association Law. Case Note on District Court Rotterdam Judgments of 12 August 2010, and District Court Roermond Judgment of 15 October 2010," *European Journal of Migration and Law* 13(2011): 219-39. It should be noted however, that despite hosting large Turkish communities too, there has been no single reference from the Belgian, Danish or French national courts until 2014. See (forthcoming), K. Groenendijk, "The Court of Justice and the Development of EEC-Turkey Association Law," in *Degrees of Free Movement and Citizenship*, ed. D. Thym and M.H. Zoetewij Turhan (Martinus Nijhoff, 2015).

317 She was not able to obtain a family reunification visa, because of the stricter family reunification rules introduced in 1982 and 1984. Those rules increased the continuous and lawful residence requirement for Mr. Demirel from three to eight years. As he was working there since 1979, he was not able to meet the stricter requirement. See, *Case 12/86 Demirel*, paras. 2-3.

318 Ibid., para. 8.

319 The Court referred to *Case 181/73 Haegeman*, [1974] ECR 449.

320 Emphasis added. *Case 12/86 Demirel*, para. 7.

> take part in the Community system, *Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty*. Since freedom of movement for workers is, by virtue of Article 48 et seq. of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238.'[321]

Before establishing its jurisdiction to interpret the Ankara Agreement and its Protocol, the Court lastly recalled its *Kupferberg* judgment,[322] in which it ruled that "in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil … an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement".[323]

The rest of the judgment was disappointing for Mrs. Demirel. She was not entitled to rely on Article 12 and Article 36 AP, even if the deadline to establish free movement of workers between Turkey and the Member States of the EC at the time had expired. Since those provisions were of programmatic nature, they were not "sufficiently precise and unconditional to be capable of governing directly movement of workers".[324] This implied that Turkish nationals could rely on other provisions of the Agreement, which fulfilled the conditions of direct effect.

As important as *Demirel* was, it did not resolve all questions concerning Association Law. The issues that came up in the following case, *Sevince*, were: firstly, whether the Court had jurisdiction to interpret decisions of the Association Council; and secondly, whether the provisions of those decisions which were sufficiently clear, precise and unconditional, were capable of having direct effect.[325] The Court answered both questions in the affirmative.

In its reply to the first question, the Court referred to a judgment it had delivered in the framework of the Association Agreement with Greece,[326] in which it had already ruled that decisions of the Association Council were directly linked to the Agreement to which they give effect, and that as such they also "form an integral part, as from their entry into force, of the Community legal system".[327] Hence, the Court ruled that it also had jurisdiction to rule on the interpretation of Association Council decisions. In addition, according to the Court, its finding was reinforced by the function of Article 267 TFEU

321 Emphasis added. Ibid., para. 9.
322 *Case C-104/81 Kupferberg*, [1982] ECR 3641.
323 *Case 12/86 Demirel*, para. 11.
324 Ibid., para. 23.
325 See, *Case C-192/89 Sevince*. Mr. Sevince was a Turkish national, who tried to rely on the provisions of Decision 1/80 to challenge the refusal of Dutch authorities to extend his residence permit.
326 See, *Case 30/88 Greece v Commission*, [1989] ECR 3711, para. 13.
327 *Case C-192/89 Sevince*, para. 9.

"to ensure the uniform application throughout the Community of all provisions forming part of the Community legal system".[328]

As to the second question, the Court established that the provisions of an Association Council decision had to satisfy the same conditions as those applicable to the provisions of an Association Agreement mentioned in *Demirel*.[329] According to the Court, the fact that in *Demirel* it established that some provisions of the Ankara Agreement "set out a programme does not prevent the decisions of the Council of Association which give effect in specific respects to the programmes envisaged in the Agreement from having direct effect".[330]

Sevince and the following judgments, revealed how instrumental Association Council decisions were in implementing the general objectives set by the Ankara Agreement and its Protocols. Thanks to their specific and unconditional nature, Turkish workers and their family members were able to invoke most of the provisions of Association Council decisions in national courts. However, except for the standstill clause contained in those decisions, which the Court interpreted to cover "substantive and/or procedural conditions governing the first admission" into the territory of a Member State,[331] all other provisions concern the rights of Turkish workers who are already legally resident on the territory of a Member State.

In recent years it is possible to witness a limited movement of persons between Turkey and some Member States of the EU. This limited movement, did not result from instruments adopted by the Association Council to give effect to the freedoms, but from the case law of the Court of Justice interpreting the standstill clauses that are contained in the Additional Protocol and in the above-mentioned Association Council Decisions. This case law established that some measures introduced by some Member States, such as the visa requirement introduced by Germany on service providers, constituted "new restrictions" prohibited by the standstill clauses,[332] and by virtue of being incompatible with Association Law, they had to be removed. The removal of some of these barriers resulted in a complicated and fragmented regime, the effects of which are analysed in more detail below. However, before proceeding to the analysis of specific case law in different areas of free movement, first a general introduction as to the aims and nature of standstill clauses is provided, as all the cases that follow concern those clauses.

328 Ibid., para. 11.
329 Ibid., para. 14.
330 Ibid., para. 21.
331 *Case C-92/07 Commission v Netherlands*, para. 49.
332 See *Case C-228/06 Soysal*.

3.3.2.4.2 Aims and nature of the standstill clauses

To begin with the main aim of these two clauses, since it plays an important role in how the Court interprets them, they aim "to create conditions conducive to the gradual establishment of freedom of movement for workers, of the right of establishment and of freedom to provide services by prohibiting national authorities from creating new obstacles to those freedoms…".[333] Even if those provisions allow the retention of existing obstacles, the Court notes that "it is important to ensure that no new obstacle is introduced in order not to further obstruct the gradual implementation"[334] of those freedoms.

Standstill clauses performed an important function in the Community context as well. They were used during the transitional period and similarly aimed to prevent Member States from introducing new obstacles or aggravate existing ones, so as to prepare the ground for future harmonization measures. One of the first and most seminal judgments of EU law, *Van Gend en Loos*,[335] was a case concerning a standstill provision: Article 12 of the EEC Treaty, which had a similar nature and purpose to that of Article 41(1) AP.[336]

As to the nature of the standstill clauses, they have direct effect,[337] however, they do not confer any substantive rights on individuals. They rather serve as quasi-procedural rules which determine, *ratione temporis*, the laws of a Member State that must be referred to for the purposes of assessing the position of a Turkish national who wishes to exercise one of the freedoms in a Member State.[338] To put it differently, after the entry into force of the instruments containing the respective standstill clauses, that is 1 January 1973 for the Additional Protocol and 1 December 1980 for Decision 1/80, Member States are allowed either not to act, that is to keep the existing obstacles in place,[339] or take steps to lift those obstacles. However, it should be noted that once a Member State lifts an obstacle, it is not allowed to re-introduce it.[340] In other words, the standstill clauses freeze the most favourable conditions for the

333 *Case C-317/01 Abatay and Others*, [2003] ECR I-12301, para. 72.

334 *Case C-16/05 Tum and Dari*, [2007] ECR I-07415, para. 61.

335 *Case 26/62 Van Gend en Loos*.

336 Article 12 of the EEC Treaty provided as follows: "Member States shall refrain from introducing between themselves any new customs duties or imports or exports or any charge having equivalent effect and from increasing those which they already apply in their trade with each other."

337 *Case C-192/89 Sevince*, paras. 18 and 26; *Case C-37/98 Savas*, [2000] ECR I-2927, para. 49; *Case C-317/01 Abatay and Others*, paras. 58-59; *Case C-16/05 Tum and Dari*, para. 46; *Case C-228/06 Soysal*, para. 45.

338 *Case C-16/05 Tum and Dari*, para. 55.

339 *Case 77/82 Peskeloglou*, [1983] ECR 1085, para. 13; *Case C-317/01 Abatay and Others*, para. 81; *Case C-16/05 Tum and Dari*, para. 61.

340 *Joined Cases C-300/09 and C-301/09 Toprak and Oguz*, [2010] ECR I-12845.

exercise of a freedom and prohibit the Member States from taking backward steps. This has been dubbed as the "accumulative rights approach".[341]

To give a few examples as to what has been found to qualify as "a new obstacle" in the EU-Turkey Association context: introducing a work permit requirement for service providers,[342] making stricter immigration rules with regard to those seeking entry to establish themselves in a Member State,[343] introducing a visa requirement for service providers,[344] increasing the fees charged for issuing or extending residence permits,[345] and introducing a requirement for family members to prove a basic level of German language proficiency prior to their entry into Germany,[346] were all considered to constitute new obstacles prohibited by the two standstill-clauses.

Lastly, it should be noted that the standstill clauses used in Association Law are not absolute. There are some limitations to the application of those clauses. Firstly, these clauses do not apply to Turkish nationals whose position in a Member State is not lawful, that is Turkish nationals who have not complied with the rules of the Member State as to entry, residence, employment or establishment.[347] Secondly, by virtue of Article 59 AP, which stipulates that Turkish nationals shall not be treated more favourably than EU nationals, new restrictions on the freedoms are allowed as far as they also apply to EU citizens.[348] Finally, as proclaimed by the Court recently, derogations from these clauses are possible both on the grounds of public policy, public security, and public health, and on the ground of an overriding reason in the public interest.[349]

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341 A. Hogenboom, "Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)," *European Law Review* 35(2010): 713.

342 *Case C-37/98 Savas*. See, A. Ott, "The Savas Case – Anologies between Turkish Self-Employed and Workers?," *European Journal of Migration and Law* 2(2000): 445-58.

343 *Case C-16/05 Tum and Dari*.

344 *Case C-228/06 Soysal*.

345 *Case C-242/06 Sahin*, [2009] ECR I-8465; and *Case C-92/07 Commission v Netherlands*. See, Hogenboom, "Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)," 707-19.

346 *Case C-138/13 Dogan*, judgment of 10 July 2014, n.y.r.

347 *Case C-242/06 Sahin*, para. 53; *Case C-317/01 Abatay and Others*, para. 85.

348 For a more detailed elaboration, see *Case C-92/07 Commission v Netherlands*. See also, Hogenboom, "Moving Forward by Standing Still? First Admission of Turkish Workers: Comment on Commission v Netherlands (Administrative Fees)," 716-18. For another example of a compatibility check with Article 59 AP, see *Case C-325/05 Derin*, [2007] ECR I-6495; for details see, Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," 1662-64.

349 *Case C-225/12 Demir*, judgment of 7 November 2013, n.y.r., para. 40. Even though the Court mentioned the possibility of introducing these restrictions/derogations only regarding Article 13 of Decision 1/80, it is not difficult to foresee that these will apply by analogy to Article 41 AP. As the Court noted in an earlier judgment, the Court is of the opinion that the two standstill clauses are of the same kind and must be acknowledged to have

a) Case law on free movement of workers

Just like in the area of free movement of services and freedom of establishment, the case law carrying the potential to remove the barriers in front of free movement of workers is generated by the standstill clause contained in Decisions 2/76 and 1/80. Article 7 of Decision 2/76 provided that "[t]he Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers legally resident and employed in their respective territories". Article 13 of Decision 1/80 added the phrase "and members of their families" in order to broaden or clarify the scope of the provision. The most important case in this area is the recent *Demir* judgment delivered on 7 November 2013.[350] The judgment is cryptic and concise, however, it confirms the Court's dictum in *Commission v Netherlands* to the effect that issues relating to first entry fall within the scope of the standstill clause contained in Decision 1/80.[351] Hence, it is worth having a closer look at *Demir*.

However, for a better understanding of *Demir*, a brief overview of the Court's previous judgments interpreting the standstill clause would be useful, so as to show how the Court gradually changed its approach to the interpretation of that clause. Thus, the analysis below begins by the first case, in which this clause was ever mentioned, and proceeds to the more recent cases in which the Court broadened its interpretation of the clause, by drawing analogies from its case law on the standstill clause on the freedom of establishment and the freedom to provide services contained in Article 41 AP. Last but not least, follows the analysis of the *Demir* case.

– *First mention of the standstill clause*

When the wording of Article 7 of Decision 2/76 and Article 13 of Decision 1/80 are examined, one is left with the impression that both the material and personal scope of those provisions are limited. The material scope is limited to "the conditions of access to employment", whereas the personal scope is limited to "[Turkish] workers (and their families) legally resident and employed in [Member States'] respective territories". However, as the analysis below reveals, except for the first case in which the clause was implicitly mentioned (*Demirel*), the Court interpreted the scope of the standstill much more broadly than it appears to be at first sight.

In *Demirel*, which was discussed above, the Court implied that standstill had a limited scope. After underlining that Article 36 AP grants the Association Council "exclusive powers to lay down detailed rules for the progressive attainment of freedom of movement for workers in accordance with political

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the same meaning. See, *Case C-37/98 Savas*, para. 50; and *Case C-317/01 Abatay and Others*, 70-71.

350 *Case C-225/12 Demir*.

351 *Case C-92/07 Commission v Netherlands*, para. 49; referred to in *Case C-225/12 Demir*, para. 34.

and economic considerations arising in particular out of the progressive establishment of the customs union and the alignment of economic policies",[352] the ECJ acknowledged that the only decision adopted on the matter, Decision 1/80, concerned "Turkish workers who are already duly integrated into labour force of a Member State".[353] It added that, without explicitly mentioning Article 13, regarding those workers, Decision 1/80 prohibited "any further restrictions on the conditions governing access to employment".[354] However, emphasised the Court, there was no such decision taken in the area of family reunification.

Moreover, according to the Court, it was not possible to infer from Article 7 AA, the provision laying down the principle of loyal cooperation, "a prohibition on the introduction of further restrictions on family reunification".[355] What the latter provision did was to merely "impose on the contracting parties a general obligation to cooperate in order to achieve the aims of the Agreement".[356] It could not confer direct rights on individuals, which had not been conferred on them by other provisions of the Agreement.

In *Sevince*, the second case concerning Association Law, the Court established that "Article 7 of Decisions 2/76 and Article 13 of Decision 1/80 contain an unequivocal 'standstill' clause regarding the introduction of new restrictions on access to the employment of workers legally resident and employed in the territory of the contracting States".[357] This meant the clauses had direct effect.

– *Broadening the scope of the standstill clause by interpretation*

In *Savas*, which was the third case mentioning a standstill clause, it established that Article 41(1) AP is a provision of the same kind as Articles 7 of Decision 2/76 and Article 13 of Decision 1/80.[358] Even if the Court occasionally mentioned the different wording of Article 13,[359] it used its case law on the two clauses interchangeably to shed light on one another. In subsequent case law, it confirmed that the two standstill clauses are of the same kind and added that they must be acknowledged to have the same meaning and objective.[360]

As far as the substantive scope of Article 13 is concerned, the Court does not seem to limit it in any way. While a strict interpretation of Article 13 would mean that it applies only with regard to new restrictions *on the conditions of access to employment*, as the wording of the article suggests, in practice the Court

352 *Case 12/86 Demirel*, para. 21.
353 Ibid., para. 22.
354 Ibid.
355 Ibid., para. 24.
356 Ibid.
357 *Case C-192/89 Sevince*, para. 18.
358 *Case C-37/98 Savas*, para. 50.
359 *Case C-317/01 Abatay and Others*, para. 69.
360 Ibid., paras. 70-71; *Case C-242/06 Sahin*, para. 65.

seems to interpret the provision much more broadly. This is clearly illustrated in paragraph 63 of the *Sahin* judgment. It reads as follows:

> 'It is also settled case-law that the standstill clause enacted in Article 13 prohibits generally the introduction of *any new measure having the object or effect* of making *the exercise* by a Turkish national in its territory of the freedom of movement for workers subject to more restrictive conditions than those which applied at the time Decision 1/80 entered into force with regard to that Member State concerned.'[361]

This is quite a sweeping prohibition covering every new obstacle, which according to the Court affects *the exercise of free movement of workers*, i.e. not just access to employment in the territory of the host Member State. While the Court has been consistent regarding the broad substantive scope of Article 13,[362] it raised some doubts as to its personal scope recently in *Demir*.

In *Abatay*, the Court explained clearly why the substantive and personal scope of Article 13 should not be interpreted restrictively. It emphasized that the purpose of the clause could not be the protection of the rights of Turkish nationals as regards employment, "since those rights are already fully covered by Article 6 of that decision".[363] The German government argued that the standstill clause did not prevent it from introducing new restrictions, but merely from making them applicable to Turkish workers and their families who are already lawfully resident on its territory.[364] The Court found the latter argument:

> '… *paradoxical and liable to deprive Article 13 of any meaning*, since a Turkish national who is already lawfully employed in a Member State no longer needs the protection of a 'standstill' clause as regards access to employment, as such access has already been allowed and the person concerned subsequently enjoys, for the rest of his career in the host Member State, the rights which Article 6 of that decision expressly confers on him. On the other hand, the 'standstill' requirement as regards conditions of access to employment is intended to ensure that the national authorities refrain

361 Emphasis added. The Court refers to *Case C-317/01 Abatay and Others*, paras. 66 and second indent of 117; and by analogy, as regards Article 41(1) AP to *Case C-228/06 Soysal*, para. 47.

362 See *Case C-225/12 Demir*, para. 33.

363 *Case C-317/01 Abatay and Others*, para. 79.

364 The German government argued as follows in paragraph 75 of the Abatay judgment: "the Court cannot uphold the argument, relied on by the German Government inter alia, that Article 13 does not affect the right of the Member States to adopt, even after 1 December 1980, new restrictions on access to employment for Turkish nationals, but merely entails that they are not applicable to those Turkish nationals who are already lawfully employed and thereby have a right of residence in the host Member State when those restrictions are introduced. The German Government infers that interpretation from the wording 'workers and members of their families legally resident and employed in their respective territories' which appears in Article 13 of Decision No 1/80." In the following paragraph, the Court explains that the latter interpretation "disregards the system set up by Decision 1/80 and would deprive Article 13 thereof of its effect".

> from taking measures likely to compromise the achievement of the objective of Decision No 1/80, which is to allow freedom of movement for workers, even if, initially, with a view to the gradual introduction of that freedom, existing national restrictions as regards access to employment may be retained.'[365]

The fact that the standstill clause applies not only to workers, but also to their family members, whose reunion with the worker is not conditional on their exercise of paid employment (or in general to the performance of an economic activity), is another proof that the clause aims to protect *ratione materiae*, more than "access to employment", and *ratione personae*, more than only "Turkish nationals already integrated into the employment market of a Member State".[366] Thus, concludes the Court, the scope of the standstill clause is "not limited to Turkish nationals already integrated into the employment market of a Member State, that provision none the less refers to workers and members of their families 'legally resident and employed in their respective territories'".[367]

Given the arguments mentioned above, it can be convincingly argued that the confusion arises from the formulation of Article 13, which would reflect the overall aims of the decision better had it been formulated as 'workers and members of their families legally resident *or* [rather than 'and'] employed in their respective territories'. The following explanation provided by the Court, clarifies and confirms the latter point. It provides that the terms used in the standstill clause make it clear that the "clause can benefit a Turkish national only if he has complied with the rules of the host Member State as to entry, residence and, *where appropriate*, employment and if, therefore, he is legally resident in the territory of that State".[368] This formulation is much more accurate as it also includes family members, who in accordance with Article 7 of Decision 1/80, do have the right t reside, but not the right to work, during their first three years of presence on the territory of the host Member State.

– *Further broadening: Article 13 covers rules of entry into a Member State*

In *Sahin*, which was the first case in which the Court ruled on the excessive administrative fees imposed by Dutch authorities on Turkish nationals in their applications for residence permits and for the extension of their periods of validity, the Court recalled its analysis of Article 13 of Decision 1/80, mentioned above, in paragraphs 75 to 84 of its *Abatay* judgment and confirmed that Article 13 was "not subject to the condition that the Turkish national concerned satisfy the requirements of Article 6(1) of that decision and that

365 Emphasis added. *Case C-317/01 Abatay and Others*, para. 81; for comparison, the Court refers to *Case 77/82 Peskeloglou*, para. 13.
366 *Case C-317/01 Abatay and Others*, para. 83.
367 Ibid., para. 84.
368 Emphasis added. Ibid.

the scope of that Article 13 is not restricted to Turkish migrants who are in paid employment".[369]

The Court repeated its conclusion regarding the personal scope of Article 13 in *Abatay* to the effect that it "is not intended to protect Turkish nationals already integrated into a Member State's labour force".[370] It clarified further that it "*is intended to apply precisely to Turkish nationals who do not yet qualify for the rights in relation to employment and, accordingly, residence under Article 6(1) of Decision 1/80*".[371] Hence, the fact that Mr. Sahin, who entered the Netherlands legally to be able to live with his Dutch wife, and did not satisfy the requirements under Article 6, did not mean he could not rely on Article 13.

It was established that he complied with all relevant rules as to entry and employment, from 12 September 2000 until 2 October 2002, when the validity of his residence permit expired. He applied for the extension of his permit on 23 April 2003, but his application was refused on the ground that he did not pay the relevant administrative fee (EUR 169). Mr. Sahin contested the fee and the refusal of extension after paying for the fee. As stated by the referring court, his residence had to be deemed legal under domestic law after his application for extension. Moreover, it was not disputed that he would have obtained an extension had he paid the fee in time.[372]

Hence, the Court referred to its established case law according to which residence permits have "only declaratory and probative value".[373] Even though Member States are entitled to require from foreigners resident on their territory to be in possession of such permits and apply for their extension in time, and even if they are empowered to impose penalties for the breach of such obligations, "nevertheless Member States are not entitled to adopt in that regard measures which are disproportionate as compared with comparable domestic cases".[374]

As to the substantive scope of Article 13, the Court first repeated its mantra that it "prohibits generally the introduction of any new measures having the object or effect of making the exercise … of the freedom of movement for workers subject to more restrictive conditions that those which applied at the time when Decision 1/80 entered into force with regard to the Member State concerned".[375] Then, with reference to its parallel mantra regarding Article

369 Emphasis added. *Case C-242/06 Sahin*, para. 50.
370 See, *Case C-317/01 Abatay and Others*, para. 83-84; *Case C-242/06 Sahin*, para. 51.
371 Emphasis added. *Case C-242/06 Sahin*, para. 51.
372 Ibid., para. 55-58.
373 Ibid., para. 59.
374 Ibid.; see also the Court's reference to *Case C-329/97 Ergat*, paras. 52, 55, 56, 61, and 62.
375 *Case C-242/06 Sahin*, para. 63; the Court refers to *Case C-317/01 Abatay and Others*, para. 66 and second indent of para. 117; and by analogy to Article 41(1) AP, *Case C-228/06 Soysal*, para. 47.

41(1) AP,[376] it reminded its finding that it prohibits any new restrictions "including those relating to *the substantive and/or procedural conditions governing the first admission* to the territory of [the] Member State [concerned]".[377] Since those two standstill clauses were of the same kind and pursued identical objectives,[378] the Court reasoned that the interpretation of Article 41(1) AP regarding conditions of first entry into the territory of a Member State "must be equally valid as regards the standstill obligation which is the basis of Article 13 in relation to freedom of movement for workers".[379]

The Court repeated its latter finding even more explicitly in *Commission v. the Netherlands*, which dealt with the same issue raised in *Sahin*, the compatibility of the increase in the prices of administrative fees paid by Turkish nationals for their residence permits with the existing standstill and non-discrimination clauses in the Association Law. While the Court found the increase in the fees disproportionate and hence incompatible with both types of clauses, what is important for our purposes is that based on the same reasoning just mentioned above in *Sahin*,[380] the Court reached the following conclusion:

> 'It follows that Article 13 of Decision 1/80 precludes the introduction into Netherlands legislation, as from the date on which Decision 1/80 entered into force in the Netherlands, of any new restrictions on the exercise of free movement of workers, *including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to exercise that freedom*.'[381]

As clear as the Court's reasoning and finding was, Member States were not convinced. A standstill clause on free movement of workers interpreted as broadly as the standstill clause on freedom of establishment and freedom to provide services could have important implications on the immigration policies of Member States when considered in combination with the broadly formulated

376 The Court's parallel mantra provides that Article 41(1) AP prohibits the introduction of any new measures having the object or effect of making the exercise by a Turkish national of freedom of establishment or freedom to provide services on the territory of a Member State, subject to stricter conditions than those that applied at the time when the Additional Protocol entered into force with regard to that State. See, *Case C-37/98 Savas*, para. 69; *Case C-317/01 Abatay and Others*, para. 66; *Case C-16/05 Tum and Dari*, para. 49; *Case C-228/06 Soysal*, para. 47; *Case C-242/06 Sahin*, para. 64.

377 Emphasis added. *Case C-242/06 Sahin*, para. 64. See also, *Case C-16/05 Tum and Dari*, para. 69; *Case C-228/06 Soysal*, para. 49.

378 *Case C-242/06 Sahin*, para. 65; the Court refers to *Case C-37/98 Savas*, para. 50; *Case C-317/01 Abatay and Others*, paras. 70-74.

379 *Case C-242/06 Sahin*, para. 65.

380 See ibid., paras. 64-65; and *Case C-92/07 Commission v Netherlands*, paras. 47-48.

381 Emphasis added. *Case C-92/07 Commission v Netherlands*, para. 49.

Articles 12 to 14 AA. Thus, the issue was bound to reach the Court again, and it did in *Demir*.

– Demir*: Partial tightening of the scope of Article 13 by allowing for justifications*
Few years later in *Demir*, the Court was asked to rule on the same issue, namely: firstly, on whether Article 13 covers rules of entry into the territory of a Member States, and secondly on the meaning and relevance of the "legally resident" requirement mentioned in Article 13, i.e. its personal scope. Even though the Court confirms its previous finding that Article 13 should be interpreted as covering the rules applicable to a substantive and/or formal condition governing first admission of Turkish workers into a Member State, its answer in *Demir* seems to be more elaborate and nuanced, providing for the possibility of derogation on parallel justification grounds to those existing under EU free movement law. As important as this latest judgment is, it is difficult to interpret, as the Court's answers to the second question is not only difficult to reconcile with the first, but also with previous case law. In its response to the second question, the Court seems to be taking a step back from its previous findings on the personal scope of Article 13. However, since the national Court did the most logical thing to do, i.e. it ignored the answer given to the second question,[382] the focus in this section is on the first question as it has important implications for the immigration policies of Member States, which failed to respect the standstill clause.

To begin with the facts of the case, Mr Demir obtained a residence permit in 1993 to reside with his Dutch wife. His residence permit also allowed him to work without a work permit. The issue, giving rise to the current case, arose after his divorce in 1995, when his application for a permit of continued residence, as well as his subsequent appeals were all refused.[383] After concluding an employment contract for three years with a Dutch undertaking in 2007, for the first year of which he was also able to obtain a work permit, he applied for an ordinary fixed-term residence permit in view of employment. However, the latter application, which led to this preliminary reference, was refused on the ground that that he did not have a valid temporary residence permit issued for the same purpose as that of the application for a fixed-term residence permit. Since the law imposing the ground on which Mr. Demir's permit was refused, had been introduced only in 2001, he challenged the refusal on the ground that it violated the standstill clause embedded in Article 13 of Decision 1/80.

382 Raad van State, 2008054871/1/V3, judgment of 30 April 2014. For a detailed analysis of the case, see (forthcoming) N. Tezcan, "The puzzle posed by Demir for the free movement of Turkish workers: a step forward, a step back, or standstill?," in *Degrees of Free Movement and Citizenship*, ed. D. Thym and M.H. Zoetewij Turhan (Martinus Nijhoff, 2015).

383 *Case C-225/12 Demir*, paras. 23-25.

As to the national law that gave rise to the current case, on 1 December 1980, when the standstill clause entered into force, it was the Vreemdelingenwet 1965 (Law on Foreign Nationals, henceforth; Vw 1965) and the Vreemdelingenbesluit 1966 (Decree on Foreign Nationals, henceforth; Vb 1966) that governed the admission and residence of foreign nationals in the Netherlands. Even though, the version in force on 1 December 1980, required foreign nationals to have a valid passport and a valid temporary residence permit if they wished to reside for more than three months in the Netherlands, lack of such a permit on its own was not considered a sufficient ground for refusing admission.

On 1 April 2001, the Law of 23 November 2000 comprehensively revising the previous Law on Foreign Nationals (henceforth; Vw 2000) entered into force, as well as a new decree adopted pursuant to that law (henceforth; Vb 2000). Under Article 1(h) of the Vw 2000, 'temporary residence permit' is defined as "a visa for a stay of more than three months which is applied for by the foreign national in person at a diplomatic mission or consulate of the Netherlands in the country of origin and issued by that mission or consulate after prior authorisation has been obtained from the Netherlands Minister for Foreign Affairs".[384]

Under Article 8(a), a foreign national is entitled to reside in the Netherlands if he has a fixed-term residence permit. Under Article 8(f), a foreign national that has applied for such a permit is entitled to stay in the Netherlands pending a decision on the application. However, under Article 16(1)(a) application for such a permit may be refused if the applicant does not posses a valid temporary residence permit issued for the same purpose as that for which the fixed-term resident permit is sought. Lastly, under Article 3.71(1) of the Vb 2000, an application for a fixed-term residence permit is to be refused if the foreign national does not have a valid temporary residence permit.

It was impossible for Mr Demir to fulfil the requirements of the new law after his divorce, as his initial purpose of entry and residence, which was to live with his wife, had disappeared. In other words, while he entered and resided legally in the Netherlands, by changing the conditions for obtaining a fixed-term residence permit with the new law, which he was not able to satisfy, his residence on Dutch territory became illegal. Hence, the first question referred to the Court was whether the standstill clause covered rules, such as those in Vw 2000, relating to substantive and/or procedural conditions on first admission into the territory of a Member State, where those conditions had the objective to prevent unlawful entry and residence.

After repeating its previous findings on the substantive scope of Article 13,[385] the Court confirmed that the standstill clause was of no assistance to those whose position was not lawful. Hence, the measures taken against

384 *Opinion of AG Wahl in Case C-225/12 Demir*, delivered on 11 July 2013, n.y.r., para. 12.
385 See *Case C-242/06 Sahin*, para. 63; and *Case C-92/07 Commission v Netherlands*, para. 49.

unlawful Turkish nationals could be made more stringent.[386] However, the Court added that while such measures might apply to the effects of such unlawfulness, "they must not seek to define the unlawfulness itself".[387] It further explained that:

> '[w]here a measure taken by a host Member State … seeks to define the criteria for the lawfulness of the Turkish nationals' situation, by adopting or amending the substantive and/or procedural conditions relating to entry, residence and, where applicable, employment, of those nationals in its territory, and where those conditions constitute a new restriction of the exercise of the freedom of movement of Turkish workers, within the meaning of the 'standstill' clause referred to in Article 13, *the mere fact that the purpose of the measure is to prevent, before an application for a residence permit is made, unlawful entry and residence, does not preclude the application of that clause*.'[388]

Such a restrictive measure was prohibited according to the Court, unless it could be justified on the grounds mentioned in Article 14 of Decisions 1/80, i.e. public policy, public security or public health, or in so far as it was justified by an overriding reason in the public interest, and fulfilled the conditions of proportionality.[389] The Court added that "the objective of preventing unlawful entry and residence constituted an overriding reason in the public interest",[390] however, it concluded by repeating that the latter objective did not preclude the application of the standstill clause where the measure taken defined the criteria of lawfulness of the Turkish national's situation.[391]

In short, Vw 2000 constituted a new restriction as it defined the criteria based on which the lawfulness of Mr. Demir's residence was determined. The example of Mr. Demir is a clear illustration of how Member States can change the status of individuals from legal to illegal, by changing how they define legality in their laws. Therefore, even if the 'legality requirement' looks perfectly logical and legitimate at first sight, a closer look reveals the pitfalls attached. Thus, Turkish nationals whose status appears to be illegal should be able to rely on the standstill clause, as it might be the new tighter rules that pushed them to the status of illegality. As argued by Wiesbrock, after examining the merits of the case under the relevant national law, if the status of individual relying on the standstill clauses still does not change, or if there is an issue

386 See *Case C-242/06 Sahin*, para. 53; and *Case C-317/01 Abatay and Others*, para. 85.
387 *Case C-225/12 Demir*, para. 38.
388 Emphasis added. Ibid., para. 39.
389 To be proportionate, a measure needs to be "suitable to achieve the legitimate objective pursued and does not go beyond what is necessary in order to attain it". See, ibid., para. 40.
390 Ibid., para. 41.
391 Ibid., para. 42.

of abuse of rights, Member States are free to take any measures applicable under their laws to illegal migrants.[392]

It is worth noting that *Demir* is the first case in which the Court introduces the possibility to justify derogations to a standstill clause on the grounds of overriding reasons in the public interest. This is the transplantation of the "rule of reason" Association Law, which was foreseen by Göçmen.[393] Given the longevity of the "transitional period" within which the standstill clauses were to apply, it may be argued that it proved inevitable for the Court to introduce further legitimate grounds of derogation, (in addition to those existing under Article 14), akin to those introduced to free movement law in the Court's seminal *Cassis* ruling.[394] It will be interesting to see, whether this development (the possibility to justify derogations to a standstill clause on the grounds of overriding reasons in the public interest) will remain as something unique to Ankara Association Law, or the Court will introduce the latter possibility in other areas where EU law has made use of standstill clauses.

– *Current state of affairs*

The Court's answer to the first question in *Demir* has serious implications for the immigration policies of Member States. It should be noted that the standstill regarding workers' rights applies as of 20 December 1976.[395] While one would think that the standstill regarding the rights of their family members applies as of 19 September 1980 (since they were explicitly added to the standstill of Article 13 of Decision 1/80),[396] the Court's interpretation in *Dogan* suggests that if the right to family reunification were considered to be the right of the worker, without which he would be dissuaded from using that right,[397] then, arguably the reference date for the reunification of family members could still be considered to be 20 December 1976.

Turkey signed bilateral recruitment agreements with many West European countries in the 1960s.[398] Even though it is known that most of them stopped

392 *Case C-186/10 Oguz*, [2011] ECR I-6957, para. 31-33. See also, Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?," 434.

393 İ. Göçmen, "To Visa, or Not to Visa: That is the (only) Question, or is it? Case C-228/06 Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland [2009] ECR I-1031," *Legal Issues of Economic Integration* 37, no. 2 (2010): 158-61.

394 See *Case 120/78 Cassis de Dijon*, [1979] ECR 649.

395 The date when Decision 2/76, and the standstill clause contained in its Article 7, were adopted and were deemed to have entered into force.

396 The date of adoption of Decision 1/80.

397 *Case C-138/13 Dogan*, paras. 34-36.

398 Bilateral recruitment agreements were signed between Turkey and the Federal Republic of Germany – 30 Sept. 1961 (extended on 30 Sept. 1964); Austria – 15 May 1964; Belgium – 15 July 1964; The Netherlands – 19 Aug. 1964; France – 8 Apr. 1965; Sweden – 10 March 1967. See A. Y. Gökdere, *Yabancı Ülkelere İşgücü Akımı ve Türk Ekonomisi Üzerine Etkileri* [The movement of workforce to foreign countries and its effects on the Turkish economy]

the intake of Turkish workers after the first oil crisis of 1973, an investigation is needed, similar to that conducted by the Commission in the aftermath of *Soysal* case, to establish which of those agreements were still in force at the time Decision 2/76 entered into force. Moreover, as a follow up to *Dogan*, the rules on family reunification existing at the time need to be identified and revised accordingly, if they had been made more restrictive over time.

Hence, Member States, which had no restrictive measure hindering the access of Turkish workers and their family members to their national territory or employment markets in 1976, or when they acceded to the Union, would have to apply the liberal rules of the past. Once Turkish workers have access to the market of a given Member State and are legally employed and resident, they (and in some cases their family members as well) will be able to rely on the system established by Article 6(1) of Decision 1/80 for their gradual integration into the labour force of the host Member State. In the meantime, both workers and their family members would be able to rely on the wide prohibition of non-discrimination under Article 10(1) of Decision 1/80, and the standstill clause to fight any "new" obstacles making the exercise of their rights more difficult.

Demir shows how the standstill clause in combination with the liberal immigration rules Member States had few decades ago, might in practice amount to a market access right for Turkish workers regarding some of the Member States' territories. Obviously, it would be untenable for the nationals of a Member State as citizens of the Union, to be subject to a free movement regime that could in certain instances be more restrictive than the free movement regime of an associate country. For the purposes of our analysis, *Demir* demonstrates the possibility of how step by step prohibited restrictions could be identified and eventually removed, gradually leading to a more liberal regime on free movement. The rights and freedoms accumulated as a result of the Court's case law could undoubtedly be regarded as acquired rights, a minimum, and such compel Member States to go beyond that minimum during accession negotiations.

b) Freedom of establishment

As mentioned above, the Association Council did not prepare any schedule neither did it take any decisions for the implementation of freedom of establishment and the freedom to provide services. Thus, the legal framework regarding these freedoms is comprised of the generally formulated Articles 13 and 14 AA, the standstill clause contained in Article 41(1) AP, and the Court's case law interpreting these provisions.

(Türkiye İş Bankası Kültür Yayınları, 1978). 275 cited in; N. Abadan-Unat, *Bitmeyen Göç: Konuk İşçilikten Ulus-ötesi Yurttaşlığa* [The unending migration: From being a guest-worker to trans-national citizenship], 2 ed. (İstanbul Bilgi Üniversitesi Yayınları, 2006). 58.

The most important cases regarding the freedom of establishment with implications on the free movement of persons between Turkey and the Member States of the EU are the *Tum and Dari* and the *Dogan* cases. While the former case concerns whether the right to first admission of Turkish nationals seeking to exercise the economic freedom falls within the scope of Article 41 (1) AP, the latter case concerns whether they have the right to be joined by their family members and whether that right also falls under the scope of the standstill clause.

– Tum and Dari: *The right to first admission for the self-employed*

Tum and Dari was not the first case in which the Court was asked to interpret Article 41(1) AP,[399] but it was the first case in which the Court was explicitly asked to rule on whether rules of entry (first admission) into a Member State fall within its scope. Put more precisely, the question referred was whether the conditions of and procedure for entry of Turkish nationals seeking to establish themselves in business in a Member State fell within the scope Article 41(1) AP.

The applicants in the case were two Turkish nationals who sought admission on the basis of the Ankara Agreement and more specifically Article 41(1) AP, and requested that their applications be considered with reference to the 1973 Immigration Rules rather than the more restrictive rules of 1994, which were in force at the time.[400] Their applications were, however, considered under the latter immigration rules, which were much more difficult to fulfil. They were not granted leave to enter the UK, upon which they made claims for judicial review. The reviewing court found in their favour, and the Court of Appeal also upheld that decision.[401] The Secretary of State appealed those decisions to the House of Lords, which referred the matter to the Court of Justice for a preliminary ruling.

The Court ruled that Article 41(1) AP did not confer on Turkish nationals a right of entry into the territory of a Member State, since no such right could be derived from Community law. That right was still governed by national law. However, the Court explained that Article 41(1) was supposed to operate as a quasi-procedural rule which stipulated, *ratione temporis*, to which provisions of a Member State's legislation one had to refer to for assessing the

399 The first case on Article 41(1) was *Case C-37/98 Savas*. For a detailed analysis, see Ott, "The Savas Case – Anologies between Turkish Self-Employed and Workers?."

400 Mr Tum and Dari were granted temporary admission to the UK pending their asylum applications. Their applications were eventually refused. However, in the meantime both of the applicants had established their businesses and they applied to the immigration authorities for leave to enter the UK so that they could continue operating their businesses. They based their applications on the Ankara Agreement and Article 41(1) AP.

401 For details see, *Case C-16/05 Tum and Dari*, para. 32.

position of a Turkish national who wished to exercise freedom of establishment in a Member State.[402]

The Court examined the wording and the aim of Article 41(1) AP, and found there was nothing to limit its sphere of application. It was clear that the intention was to create conditions conducive to the progressive establishment of freedom of establishment by way of an absolute prohibition on Member States against introducing any new obstacles to the exercise of that freedom. Thus, the Court concluded that the standstill clause had to be regarded as applicable to rules relating to the first admission of Turkish nationals into a Member State in the territory of which they intend to exercise their freedom of establishment.[403]

In other words, even if in principle the first entry of Turkish nationals to a territory of a Member State is governed by the national law of that State, Member States do not have complete freedom in applying their immigration rules to Turkish nationals intending to establish a business or provide a service. Each Member State needs to determine for itself whether its current immigration rules are more onerous or restrictive compared to the rules that were applicable when the Additional Protocol entered into force with respect to that Member State. If its current rules are more onerous, it is under an obligation to apply the less restrictive rules.

The Court's judgment in *Tum and Dari* is particularly important. It had implications not only for the individual national immigration policies and measures of Member States, but also for measures introduced at Community level that might be considered to constitute new obstacles or new restrictions for Turkish nationals wishing to exercise their freedom of establishment or freedom to provide services in a Member State. In this respect, the logical question was whether Council Regulation No. 539/2001,[404] which lists Turkey as one of the countries whose nationals need to obtain a visa when crossing the EU's external borders, was one of these 'new restrictions', which were prohibited by Article 41(1) AP. Since the Schengen *acquis* in general and this Regulation in particular were introduced after 1 January 1973, when the Additional Protocol entered into force *vis-à-vis* the EEC, it seemed like these measures would also fall under the prohibition of the standstill clause. The *Soysal* judgment, which is dealt under the following sub-section, provided some clarity.

402 Ibid., para. 55.

403 Ibid., paras. 60-63.

404 Council Regulation No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81/1, 21.03.2001.

– Dogan: *The right of the self-employed to be accompanied by their family members*

Dogan is another recent case with important implications for free movement of persons between Turkey and the EU as it established that economically active people, such as workers and the self-employed, have the right to be joined by their family members, if that had been the case when the respective instruments containing the standstill clauses entered into force regarding certain Member States. In other words, it established that rules on family reunification also fall under the scope of standstill clause, which puts all the Member States under the obligation to freeze their most favourable conditions regarding family reunification in the period after the entry into force of those clauses. Any rules that have been tightened could be qualified as a "new restriction" by the Court, unless objectively justified and proportionate.

As to the facts of the case Mr. Dogan was the managing director of a limited liability company of which he was also the majority shareholder. He lived in Germany since 1998 and had a residence permit of unlimited duration since 2002. In 2011, his wife Mrs. Dogan applied to the German embassy in Ankara for a family reunification visa for herself and two of their children (they had four). In addition to other documents required, she submitted a language certificate issued by the Goethe Institute verifying she had passed a level A1 test with a 'satisfactory' grade (62 points out of 100). Her application was dismissed on the ground that she was illiterate and had obtained the grade by randomly answering multiple choice questions and learning three standard sentences by heart for the writing part of the test. After her application for reconsideration was also refused, Mrs. Dogan brought an action before Verwaltungsgericht Berlin arguing that the language requirement infringed the prohibition to introduce new restrictions under Article 41(1) AP. The national court referred the issue to the ECJ inquiring whether the requirement for family members to prove a basic level of German language proficiency prior to their entry into Germany fell within the scope of the standstill clause.

The Court started its analysis by establishing firstly, that the language requirement, which was introduced after the AP entered into force (1 January 1973), had tightened the conditions for family reunification; secondly, that Mr. Dogan was earning his income from a self-employed activity; and lastly, that his situation fell within the scope of the freedom of establishment. Hence, Mr Dogan's situation had to be analysed in the light of Article 41(1) AP. Then, the Court referred to a previous ruling, in which it had established that family reunification was essential to enable Turkish workers to lead a family life, which would contribute "both to improving the quality of their stay and to their integration in [the host] Member States".[405] Hence, reminding one of its rulings concerning the family rights of Union citizens, it provided that: "The decision of a Turkish national to establish himself in a Member State in order

405 *Case C-138/13 Dogan*, para. 34; the Court refers to *Case C-451/11 Dülger*, judgment of 19 July 2012, n.y.r., para. 42.

to exercise there a stable economic activity could be negatively affected where the legislation of that Member State makes family reunification difficult or impossible, so that that national could, as the case may be, find himself obliged to choose between his activity in the Member State concerned and his family life in Turkey".[406]

Accordingly, the Court ruled that the language requirement concerned constituted a 'new restriction' under Article 41(1) AP. Following its reasoning in *Demir*, the Court added that such a restriction is prohibited, unless justified by an overriding reason in the public interest, which is also proportionate, i.e. suitable to achieve the objective pursued and not going beyond what is necessary to attain it.[407] The Court established further that the prevention of forced marriages and the promotion of integration, the derogation grounds on which Germany relied, could constitute overriding reasons in the public interest. However, added the Court, the disputed language requirement went beyond what is necessary to achieve those objectives in so far as the absence of proof to that effect automatically led to the dismissal of the application for family unification. The Court noted that in their evaluation, the authorities had to take into account the specific circumstances of each case. Hence, Article 41(1) AP precluded the disputed measure.[408]

Dogan is significant, not only for confirming the application of the rule of reason to the Ankara *acquis*, but also for overturning the Court's finding in *Demirel*, which seemed to require the Association Council to adopt a specific decision to materialize family reunification.[409] Hence, what the Court established for self-employed under Article 41(1) AP, with reference to case law in the area of free movement of workers,[410] should also be valid for workers themselves under Articles 7 and 13 of Decisions 2/76 and 1/80 respectively. This means that Member States which introduced new restriction in the area of family reunification after the entry into force of Decision 2/76 (20 December 1976) and the Additional Protocol (1 January 1973) will have to remove those restrictions, unless they are able to meet the objective justification and proportionality requirements laid down by the Court.

406 *Case C-138/13 Dogan*, para. 35.

407 Ibid., para. 37; with reference to *Case C-225/12 Demir*, para. 40.

408 *Case C-138/13 Dogan*, paras. 38-39.

409 The entire paragraph reads as follows: "The only decision which the Council of Association adopted on the matter was Decision No 1/80 of 19 September 1980, with regard to Turkish workers which are already duly integrated in the labour force of a Member State, prohibits any further restrictions on the conditions governing access to employment. In the sphere of family reunification, on the other hand, no decision of that kind was adopted". See, *Case 12/86 Demirel*, para. 22.

410 See *Case C-138/13 Dogan*, para. 34.

– *Current state of affairs*

The UK took steps to implement *Tum and Dari* and created a new procedure whereby Turkish citizens who wish to establish themselves in business in the UK are granted entry clearance in line with the judgment. Applications are considered under the business provisions that were in place in 1973.[411] However, applicants who have participated in fraud in relation to their applications will not be accepted. Fraudulent activity has been defined broadly. Having made an asylum claim that has been discredited, for instance, is considered as a fraudulent conduct. This means that were Mr Tum and Mr Dari to apply under the current procedure, their applications would not have succeeded.[412]

As to the rules of other Member States regarding freedom of establishment, the Commission did not take any steps for the implementation of this judgment. There has been no action regarding *Dogan* either, as it is quite recent. In short, the rules on free movement of workers, freedom of establishment as well as the rules on family reunification in force in the Member States when Decision 2/76 and the Additional Protocol entered into force (the first nine Member States), or when the Member States acceded to the Union and took on the *acquis* (Member States that joined in and after the 1980s), is still to be established. *Dogan* is an additional step towards achieving free movement and contributing to the body of case law capable of constituting a constraint on Member States when negotiating Turkey's accession.

c) Freedom to provide services

Even though there are not many provisions that apply to this freedom, only Article 14 AA and Article 41(1) AA, this freedom is more complicated, than the freedom of establishment to which similar provisions apply, due to the Court's case law in this area. As is explained in more detail below, the Court ruled that the freedom to provide services could not be interpreted in line with the corresponding rules existing in EU law. To be more precise, this freedom can be interpreted in line with EU law only in so far as it covers the freedom *to provide* services. It does not cover the freedom *to receive* services, which according to the Court is too closely intertwined with the concept of Union citizenship and as such cannot be transposed to the Association Law with Turkey.

This part will analyse the case law of the Court starting with the *Soysal* judgment, which was delivered immediately after *Tum and Dari*. The issue referred to the Court in *Soysal* was whether the visa requirement introduced by a Member State after the entry into force of the Additional Protocol consti-

411 For details, see the the website of the UK's Border Agency: http://www.ukba.homeoffice.gov.uk/visas-immigration/working/turkish/business/.

412 N. Tezcan/Idriz and P. J. Slot, "Free movement of persons between Turkey and the EU: The Hidden potential of Article 41(1) of the Additional Protocol," in *CLEER Working Papers 2010/2* (The Hague: TMC Asser Institute, 2010), 15-16.

tuted 'a new restriction' to the freedom to provide services that fell within the scope of Article 41(1) AP. After the Court's affirmative reply, the issue in the following case (*Demirkan*) was whether the freedom to provide services under the Ankara *acquis* also covered the freedom to receive services, and if so, whether visa requirements introduced after the entry into force of the Additional Protocol *vis-à-vis* Turkish recipients of services could also be considered as new restrictions. Hence, what follows is an analysis of *Soysal* and *Demirkan*, as well as the measures taken to bring national and EU law in line with those judgments with the aim to establish the currently applicable free movement rules between Turkey and the Member States concerning this freedom.

– Soysal: *Establishing visa requirement is 'a new restriction' under Article 41(1) AP*

The main question referred to the Court in *Soysal* was whether the introduction of a visa requirement constituted a new restriction on freedom to provide services under Article 41(1) AP. Mr. Soysal and Mr. Savatli, the appellants in this case, were Turkish nationals who worked in international transport for a Turkish undertaking as drivers of lorries owned by a German company registered in Germany. They had to obtain Schengen visas to enter Germany[413] even though on the date on which the Additional Protocol entered into force they were permitted to enter the Federal Republic without a visa. The issue arose when Germany's consulate-general in Istanbul rejected their visa applications.

Firstly, the Court verified that, as claimed by the appellants, when the Additional Protocol entered into force with regard to Germany, namely 1 January 1973, Turkish nationals engaged in the provision of services had the right to enter German territory without having to obtain a visa. That requirement was only introduced as from 1 July 1980 with the German legislation on aliens. That legislation was later replaced by the Aufenthaltsgesetz, which implements Regulation No 539/2001 at the Member State level.

The Court ruled that national legislation that makes the exercise of the right to freedom to provide services conditional on issuing of a visa was "liable to interfere with the actual exercise of that freedom, in particular because of the *additional and recurrent administrative and financial burdens* involved in obtaining such a permit which is valid for a limited time".[414] Moreover, the denial of a visa, as in the main proceedings, entirely prevented the exercise of that freedom. Thus, the legislation at issue in the main proceedings consti-

413 That requirement arose under paragraphs 4(1) and 6 of the Aufenthaltsgesetz (German Law on Residence) of 30 July 2004 and Article 1(1) of Council Regulation (EC) No 539/2001, note 404 above . The regulation has been amended several times.

414 Emphasis added. *Case C-228/06 Soysal*, para. 55.

tuted a "new restriction" of the right of Turkish nationals resident in Turkey to freely provide services in Germany within the meaning of Article 41(1) AP.[415]

The Court added that its finding could not be called into question by the fact that the German legislation in force at the time merely implemented a provision of secondary Community legislation (Regulation No 539/2001). In that respect, the Court referred to an earlier judgment[416] in which it had already ruled that international agreements concluded by the Community have primacy over provisions of secondary Community legislation, which in practice means that the provisions of the latter must be interpreted, so far as is possible, in a manner consistent with the former.[417] The Court provided no guidance as to what should happen when it is not possible to interpret the piece of secondary law concerned in line with the provision of the international agreement. The primacy of international agreements would imply an obligation on the part of the EU to adjust the secondary legislation so as to make it compatible with its international obligations.[418]

After the Court declared that the procedure and conditions of first admission fall within the scope of Article 41(1) AP in *Tum and Dari*, it was much easier and straightforward for the Court to take the second step and pronounce that a visa requirement introduced after the entry of the Additional Protocol constituted "a new restriction" prohibited by Article 41(1) AP. Whether there would be a third step or not, was to be decided in *Demirkan*. Even though the Court expressly stated that Article 41(1) AP referred "*in a general way, to new restrictions* inter alia 'on the freedom of establishment' and that *it does not limit its sphere of application* by excluding, as does Article 13 of Decision No 1/80, certain specific aspects from the sphere of protection afforded on the basis of the first of those two provisions",[419] neither the Member States nor the Commission were willing to draw conclusions from existing case law. As it is shown below, the Court proved them right in their reluctance to take any steps.

– Demirkan: *Emerging limits of Association Law?*

In terms of its repercussions for free movement of Turkish nationals between Turkey and the Member States of the EU, *Demirkan* was the most promising judgment in terms of its potential to lift obstacles regarding free movement

415 Ibid., paras. 55-57.
416 *Case C-61/94 Commission v Germany*, [1996] ECR I-3989, para. 52.
417 *Case C-228/06 Soysal*, paras. 58-59.
418 Tezcan/Idriz, "Free Movement of Persons Between Turkey and the EU: To Move or Not to Move? The response of the judiciary," p. 1629-30.
419 *Case C-16/05 Tum and Dari*, para. 60.

of persons,[420] since none of the Member States of the EEC on 1 January 1973 required a visa from Turkish visitors and tourists. The first and most important question raised in the case was whether the scope of the freedom to provide services in Article 41(1) AP encompassed also the passive freedom to provide services.[421] In other words the referring court sought to ascertain whether or not freedom to provide services under Article 41(1) AP had to be interpreted in line with EU law to cover also service recipients. If so, the second question asked whether Article 41(1) AP could be extended to Turkish nationals, like the applicant, Ms. Leyla Ecem Demirkan, who planned to enter Germany not to receive a specific service, but to visit relatives relying on the possibility of receiving services.

The applicant, Ms. Demirkan was fourteen years old and lived with her mother in Turkey, while her stepfather lived in Germany. In 2007, she and her mother applied for a visa to visit her stepfather. Both applications were refused, upon which they appealed. During the appeal process, Ms. Demirkan's mother was issued a visa on the basis of family reunification. However, Ms. Demirkan's claim to a visa free entry, or in the alternative to a visitor's visa, was refused by a judgment of 26 October 2009. The judge found that the standstill clause did not apply to the applicant, even when she invoked receiving services, since that was not the primary aim of her visit but just an incidental result.

As to the legal regime of free movement of persons applicable between Germany and Turkey, when the visa requirement for visitors and tourists was introduced (1980), they were both parties to the European Agreement on Regulations Governing the Movement of Persons between the Member States of the Council of Europe since 1958 and 1961 respectively. The Agreement provided for visa free visits of up to three months for the nationals of other parties to the agreement holding one of the documents listed in its Appendix. Article 7 of the Agreement allowed the temporary suspension of the Agreement on grounds relating to *ordre public*, security or public health. Such a measure had to be notified to the Secretary General of the Council of Europe. Relying on Article 7, Germany introduced a general visa requirement for Turkish nationals as from 5 October 1980.[422]

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420 For an in-depth analysis of the case, see V. Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," *Common Market Law Review* 51, no. 2 (2014): 647-64; and T. Vandamme, "'Le temps détruit tout'? Het dienstverkeer binnen EU-Turkije Associatie na de uitspraak van het Hof van Justitie in Demirkan," *Nederlands Tijdschrift voor Europees Recht* 20, no. 2/3 (2014): 61-67.

421 *Case C-221/11 Demirkan*.

422 See the Declaration contained in a Note Verbale of the Permanent Representation of Germany, dated 9 July 1980, and registered at the Secretariat General on 10 July 1980. Available online at: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=025&CM=&DF=&CL=ENG&VL=1 See also the relevant national law: The Elfte Verordnung

Previously, Turkish nationals were required to obtain a visa prior to their entry to Germany only if they wanted to work there. There was no visa requirement for tourists or visitors. In addition to German law, the obligation to obtain a visa for Turkish nationals for stays not exceeding three months also flew from Article 5(1)(b) of Regulation (EC) No 562/2006,[423] which referred to Regulation (EC) No 539/2001 listing third countries whose nationals had be in possession of visas when crossing external borders in its Annex I.[424] Turkey was listed in Annex I.

In its answer to the fist question the Court firstly explained that the freedom to provide services under Article 56 TFEU, conferred on Member State nationals, who were also Union citizens, the "'passive' freedom to provide services, namely the freedom for recipients of services to go to another Member State in order to receive a service there, without being hindered by restrictions".[425] The Court emphasized that Article 56 TFEU "covers *all European Union citizens* who, independently of other freedoms guaranteed by the FEU Treaty, visit another Member State where they intend or are likely to receive services".[426] According to its established case law, (the Court refers to *Luisi and Carbone*), tourists, people receiving medical treatment and those travelling for educational purposes or business are to be regarded as recipients of services.[427] While the Court's emphasis here seems to be on the fact that it is the *Union citizens*, who are entitled to visit another Member State with the intention to receive services, its established case law dating back to the 1980s, that is prior to the introduction of the concept of Union citizenship, reveals that individuals were entitled to this right (to receive services) under Article 56 TFEU as *nationals of Member States of the EEC/EC.*

After citing its previous findings on Article 41(1) AP,[428] the Court acknowledged that under established case law "the principles enshrined in the provisions of the Treaty relating to freedom to provide services *must be extended, so far as possible*, to Turkish nationals to eliminate restrictions on the freedom to provide services between the Contracting Parties".[429] For a second time

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zur Änderung der Verordnung zur Durchführung des Ausländergesetzes (Eleventh regulation amending the DVAuslG), BGBl. I, p. 782.

423 Council Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105/1, 13.4.2006.

424 For details, see note 404 above.

425 *Case C-221/11 Demirkan*, para. 35. The Court refers to *Cases 286/82 and 26/83 Luisi and Carbone*, [1984] ECR 377, para. 16; *Case 186/87 Cowan*, [1989] ECR 195, para. 15; *Case C-274/96 Bickel and Franz*, [1998] ECR I-7637, para. 15; *Case C-348/96 Donatella Calfa*, [1999] ECR I-11, para. 16; N. Foster, *EU Law: Directions*, 2 ed. (Oxford: OUP, 2010). para. 37.

426 *Case C-221/11 Demirkan*, para. 36.

427 *Cases 286/82 and 26/83 Luisi and Carbone*, para. 16.

428 See *Case C-221/11 Demirkan*, para. 37-42.

429 Emphasis added. Ibid., para. 43. To that effect, the Court refers to *Case C-317/01 Abatay and Others*, para. 112 and the case law cited therein.

in the history of the Ankara Association Law,[430] the Court refers to the principle established in *Polydor*,[431] in which it ruled that the interpretation given to provisions of EU law relating to the internal market could not be automatically extended by analogy to the interpretation of an agreement concluded by a non-Member State unless there were explicit provisions to that effect in the agreement itself.[432]

According to the Court, the fact that the freedom to provide services embedded in Article 14 AA was "to be guided by" the corresponding Treaty provisions indicated that the latter provisions were to be considered merely as a source of guidance. There was no obligation to apply the provisions of the Treaty.[433] The Court added that the possibility to extend the interpretation of Treaty provision to a comparable, similar or identically worded provisions of an agreement concluded by a third State depended, *inter alia*, on the objectives pursued by each provision in its specific context. Hence, a comparison between the aims and contexts of the Ankara Agreement and those of the Treaty was needed.[434]

The Court argued that there were fundamental differences between the aims and context of Article 41(1) AP and Article 56 TFEU. To begin with comparing the aims of the agreements, regarding the Ankara Agreement, the Court cited its only former case, the *Ziebell* case, in which it established that the agreement "pursues a solely economic purpose".[435] In all other previous cases in which the Court had to identify the objective of the Ankara Agreement, it had consistently held that its objective was Turkey's accession to the Union. Mostly, those references were part of the "Legal context" under which "The EEC-Turkey Association" was described,[436] and sometimes part of the reasoning of the relevant judgment.[437]

Ironically, the reference to the ultimate objective of the Ankara Agreement, i.e. "*facilitating the accession of Turkey* to the Community at a later date" is present in the description of the legal context of the association in both *Ziebell*

430 The first time was in *Case C-371/08 Ziebell*, para. 61.

431 *Case 270/80 Polydor*, [1982] ECR 329.

432 *Case C-221/11 Demirkan*, para. 44. The Court refers to *Case 270/80 Polydor*, paras. 14-16; *Case C-351/08 Grimme*, [2009] ECR I-10777, para. 29; and *Case C-70/09 Hengartner and Gasser*, [2010] ECR I-7233, para. 42.

433 *Case C-221/11 Demirkan*, para. 45.

434 Ibid., para. 47. The Court further refers to *Case C-312/91 Metalsa*, [1993] ECR I-3751, para. 11; *Case C-63/99 G³oszczuk*, para. 49; and *Case C-162/00 Pokrzeptowicz-Meyer*, para. 33.

435 *Case C-221/11 Demirkan*, para. 50. The Court referes to *Case C-371/08 Ziebell*, para. 64.

436 *Case C-37/98 Savas*, para. 3; *Case C-171/01 Wählergruppe Gemeinsam*, para. 3; *Case C-317/01 Abatay and Others*, para. 3; *Case C-136/03 Dörr and Ünal*, para. 7; *Case C-16/05 Tum and Dari*, para. 3; *Case C-325/05 Derin*, para. 3; *Case C-228/06 Soysal*, para. 3; *Case C-242/06 Sahin*, para. 3; *Case C-371/08 Ziebell*, para. 3; *Joined Cases C-300/09 and C-301/09 Toprak and Oguz*, para. 3; *Case C-451/11 Dülger*, para. 3; *Case C-221/11 Demirkan*, para. 4.

437 *Case C-262/96 Sürül*, para. 70; *Case C-37/98 Savas*, para. 52. See also, *Case C-416/96 El-Yassini* [1999] ECR I-1209, para. 49.

and *Demirkan*.[438] That reference is in stark contrast to the Court's conclusion that "the EEC-Turkey Association pursues *solely a purely economic objective*".[439] One cannot help but remind judges not to take the existing legal framework for granted and refresh their memories once in a while, which is admittedly not very appealing given how tedious and repetitive the latter framework has been for the last four-five decades.

According to the Court, the fact that the aim of the Association Agreement is purely economic was reflected not only in the wording of the agreement but also in the titles of its various Chapters,[440] which the Court failed to mention, reflect entirely the titles and structure of the EEC Treaty. As explained above, the structure and content of the Athens and Ankara Agreements followed that of the EEC Treaty and were indeed purely economic, and so was the European *Economic* Community. The aim at the time was accession to the EEC. However, as will be discussed in the next Chapter, it was obvious that States wishing to join the Community/Union had to accept the latter as an evolving entity and had to adopt the entire *acquis communautaire* as it stood at the time of their accession. Hence, when the Community became the Union, the objective of accession to an economic Community was replaced with that of accession to a complex Union with many dimensions going beyond economy. This was verified at the 1999 Helsinki European Summit, in which Turkey's status as a candidate for membership to the *Union* was officially confirmed.[441]

The Court went on to explain that "[t]he development of economic freedoms for the purpose of bringing about freedom of movement of a general nature which may be compared to that afforded to European Union citizens under Article 21 is not the object of the Association".[442] The Court emphasized that there was no general principle of freedom of movement of persons between Turkey and the Union, but as explained above, that is simply because there was no such objective in the original EEC Treaty itself. Only economically active individuals were entitled to free movement initially, i.e. workers, self-employed, service providers and service recipients. As is briefly explained in Chapter 6, the right to free movement of persons with sufficient financial means emerged only in the 1990s.

The Court concluded that Article 41(1) AP could be invoked "only where the activity in question is the corollary of *the exercise of an economic activity* that the 'standstill' clause may relate to conditions of entry and residence of Turkish

438 Emphasis added. *Case C-371/08 Ziebell*, para. 3; *Case C-221/11 Demirkan*, para. 4.
439 Emphasis added. *Case C-371/08 Ziebell*, para. 72.
440 See *Case C-221/11 Demirkan*, para. 51.
441 See the Presidency Conclusions of the Helsinki European Council of 10-11 December 1999, para. 12, in which it was established that "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States". Available online at: http://www.europarl.europa.eu/summits/hel1_en.htm
442 *Case C-221/11 Demirkan*, para. 53.

nationals within the territory of the Member States",[443] implying that receiving services does not qualify as such. The Court contradicts itself immediately in the following paragraph, which explains the role of the passive freedom to provide services in establishing the internal market, which was the crux of the EEC project, as well as of the project to integrate Turkey gradually into that market by means of the association. To provide the Court's reasoning in full with the aim to avoid any misunderstanding, it read as follows:

> 'By contrast, under European Union law, protection of passive freedom to provide services is based on *the objective of establishing an internal market*, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market. It is precisely that objective which distinguishes the Treaty from the Association Agreement, which pursues an essentially economic purpose, as stated at paragraph 50 above.'[444]

The Court seems to be attaching a meaning to the internal market that goes beyond being merely economic.[445] And since it had established that the Ankara Agreement was merely economic, the objectives of those had to be different. As illustrated above, the Court's reasoning is at times contradictory and difficult to follow. It tries to justify it with unconventional and novel arguments, such the importance of "the temporal context" of provisions.[446] In principle, the Court's interpretation of a particular provision is retroactive, which means, it is considered to have always meant so, unless exceptionally the Court explicitly limits the temporal effect of a judgment due to previously unforeseen drastic economic consequences.[447]

Hence, the Court's argument that there was nothing to indicate that the Contracting Parties intended to include service recipients into the scope of the freedom to provide services, since *Luisi and Carbone* was delivered only in 1984, i.e. after the entry into force of the Additional Protocol in 1973,[448] is unconvincing.[449] The Court blatantly ignored the fact that there was secondary

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443 Emphasis added. Ibid., para. 55.

444 Emphasis added. Ibid., para. 56.

445 Hatzopolous successfully summarizes the Court's reasoning in one of the titles of his case note as the "regressive interpretation of the Ankara Agreement" and "idealistic projection of the EU Treaty". The author agrees with his opinion that "it is difficult to see the difference between "an internal market" on the one hand and "an agreement which pursues an essentially economic purpose" on the other". See, Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 657.

446 *Case C-221/11 Demirkan*, para. 57.

447 See *Case 43/75 Defrenne II*, [1976] ECR 455; *Case C-262/88 Barber*, [1990] ECR I-1889. See also, Foster, *EU Law: Directions*: 162.

448 *Case C-221/11 Demirkan*, para. 59-60.

449 With that type of logic one could argue against the extension of almost any principle or legal doctrine of EU law to the Ankara Agreement, since the latter was signed the year *Van Gend en Loos* (Case 26/62, [1963] ECR 1) was delivered. Then, one could even argue

law in place defining clearly the scope of the freedom to provide services dating back to 1964.[450] In other words, the Court did not come up with the interpretation of the concept of services in *Luisi and Carbone*, as it seems to suggest, but simply applied the definition of the concept, as it existed under secondary law.[451]

At the end, the Court ruled that "because of differences of both purpose and context between the Treaties on the one hand, and the Association Agreement and its Additional Protocol on the other, the Court's interpretation of Article 59 of the EEC Treaty in *Luisi and Carbone* cannot be extended to the 'standstill' clause in Article 41(1) of the Additional Protocol".[452] One cannot help but agree with Hatzopolous' that the latter finding in *Demirkan* was "[o]verall: Politically unavoidable yet legally embarrassing".[453]

After *Demirkan*, it is now possible to identify a clearly delineated area concerning the free movement of persons in the Association Law that will have to be brought to the level of the Union *acquis* at the time of accession. While there is some scope for the actual development of the other freedoms over time depending on how liberal the rules on free movement were in the past (when the relevant standstill clauses entered into force), free movement of recipients of services seems to emerge as an area in which the Union rules will have to be adopted in their entirety, in line with existing *acquis* and well-established accession practice that are identified in the next Chapter.

– *Implementation of* Soysal *and current state of affairs*

Ziebell confirmed that it was possible to interpret concepts used under the Ankara *acquis* in line with corresponding concepts of EU free movement (economic) law; however, it established that the latter interpretation could not go as far as encompassing rights and duties connected to the concept of "Union

against the extension of the principle of direct effect, as it was still controversial back in 1963.

450 Directive 64/220/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ 845/64, 4.4.1964, p. 115, was quite clear, as its Article 1(1)(b) stipulated explicitly that it applied to "nationals of Member States wishing to go to another Member State as *recipients of services*". Emphasis added. Moreover, Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ Eng. Spec. Ed. 1963-1964, p. 117, in its Article 1(1) also provided that its provisions "shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a *recipient of services*." Emphasis added.

451 See the Court's reference to the relevant Directives, *Cases 286/82 and 26/83 Luisi and Carbone*, para. 12.

452 *Case C-221/11 Demirkan*, para. 62.

453 Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 653.

citizenship".[454] *Demirkan* established that interpreting some of the economic provisions of the Ankara *acquis* in line with EU law, such as the provision of the freedom to provide services, was not possible either. Although not explained clearly by the Court, the underlying reason for the Court's ruling in *Demirkan* seems to be its view of the passive freedom to provide services as the harbinger to the free movement right linked inextricably to the concept of Union citizenship.[455] What the Court seems to be saying is that receipt of services as an economic activity is 'not economic enough' to justify its transposition to Association Law. Hatzopoulos argues that the Court's interpretation is legally untenable, as it "does not correspond to either EU and/or international legal practice or to economic theory".[456]

Since service recipients fall outside the scope of Article 41(1) AP, Member States are allowed to keep the new restrictions they introduced after the entry into force of the Additional Protocol in this area. In other words, unlike after *Soysal*, Member States do not have to take any steps for the implementation of *Demirkan*. After *Soysal*, visa restrictions introduced both at EU and Member State level after 1973, and for Member States joining the Union after their accession dates, had to be eliminated. What follows is an analysis of how *Soysal* was implemented, first at EU and then, at Member State levels, with a view to showing the current picture regarding the free movement of service providers between Turkey and the EU.

To begin with *Soysal*'s implementation at EU level, the most important measure was Council Regulation (EC) No. 539/2001, which listed Turkey as one of the countries whose nationals had to obtain a visa when crossing EU's external borders. Since the Schengen *acquis* in general and this Regulation in particular were introduced after 1 January 1973, when the Additional Protocol entered into force *vis-à-vis* the EEC, these measures also fall under the prohibition of the stand-still clause. The preliminary reference in *Soysal* confirmed precisely that point.

The first step taken by the Commission as a follow up to *Soysal* was to conduct an inquiry into the applicable laws of Member States concerning service providers at the time the Additional Protocol entered into force regarding their territories. The replies to the inquiry revealed that only four Member States allowed visa-free access to their territories at the relevant time: Germany, the UK, Denmark and Ireland. It should be noted that, for instance in Germany, visa-free provision of services was possible only with respect to certain services. Whether there were such restrictions on the types of services that could be

454 *Case C-371/08 Ziebell*. See, Hamenstädt, "The Protection of Turkish Citizens Against Expulsion – This Far and No Further? The Impact of the Ziebell Case."

455 See the Court's reasoning in *Case C-221/11 Demirkan*, para. 53. For the inconsistency compare with the Court's reasoning in para. 56.

456 Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 663.

provided on the territories of the UK and Ireland is not known. Since the UK and Ireland are not part of the Schengen area, they were also not included in the Commission's follow up documents issued to clarify the implementation of *Soysal*. Obviously, the fact that they are not part of Schengen does not absolve the UK or Ireland from taking the necessary measures to bring their current immigration rules regarding Turkish service providers in line with their rules applicable on 1 January 1973.

The first document adopted by the Commission was its Recommendation on amending the "Practical Handbook for Border Guards (Schengen Handbook)" adopted at the end of 2009.[457] In the Annex to the Commission Recommendation one finds the "Guidelines on the Movement of Turkish Nationals Crossing the External Borders of EU Member States in order to Provide Services Within the EU" (the Guidelines). According to the Guidelines entry without a visa for service providers is possible only to Germany and Denmark.[458] Three years later, the Commission had to add the Netherlands next to Germany and Denmark in its new Recommendation on amending the "Schengen Handbook",[459] as a result of a judgment of the Raad van State (highest general administrative court) of the Netherlands.[460] Raad van State established that the Netherlands did not require visa for service providers of Turkish nationality when the Additional Protocol entered into force. In their study, Groenendijk and Guild found out that just like the Netherlands, Belgium, France and Italy, also did not have visa requirement in place regarding for Turkish service providers on 1 January 1973.[461] Given how sensitive immigration issues are in most of the Member States, recourse to findings of academics or independent experts would have been more reliable.

The case of the Netherlands is a good example of 'internalization' of rules and case law of Court by the judiciary, which acted as constraint in this context. As far as Belgium, France and Italy are concerned, they are in no way constrained by theirs. It would be interesting to know whether the complete

457 Commission Recommendation of 29.9.2009, C(2009) 7376 final, on amending the Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons, C(2006) 5186 final.

458 For a more detailed account of the Guidelines see, N. Tezcan/Idriz and P. J. Slot, "Free movement of persons between Turkey and the EU: The hidden potential of Article 41(1) of the Additional Protocol," in *EU and Turkey: Bridging the differences in a complex relationship*, ed. H. Kabaalioglu, A. Ott, and A. Tatham (Istanbul: IKV, 2011), 82-86.

459 Commission Recommendation of 14.12.2012, C(2012) 9330 final, amending the Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook)" to be used by Member States' competent authorities when carrying out the border control of persons (C(2006) 5186 final).

460 Raad van State, 201T02803/1/V3, judgment of 14 March 2012.

461 K. Groenendijk and E. Guild, *Visa Policy of Member States and the EU Towards Turkish Nationals after Soysal*, 3 ed. (Istanbul: Economic Development Foundation Publications No 257, 2012). 37.

silence or inactivity of the judiciary in these states in the area of Association Law is due to absence of conflicts, which does not seem very likely; the ignorance of national judges on the topic; or their conscious choice to ignore that area of law.

It should be noted that neither the Commission nor the Member States have passively waited for *Demirkan*. A visa liberalization process was under way between Turkey and the EU in line with the precedent of the Western Balkans. The Council invited the Commission "in parallel to the signature of the readmission agreement between Turkey and the EU, to take steps towards visa liberalisation".[462] Under the readmission agreement, Turkey commits to take back not only its own nationals that are illegally on EU territory, but also all third-country nationals who have reached the EU illegally via Turkish territory.[463] Turkey signed the agreement on 16 December 2013, which was also the date on which the Visa Liberalisation Dialogue was launched.[464] It ratified the agreement on 26 June 2014.[465]

The Commission prepared a "Roadmap towards a Visa-Free Regime with Turkey",[466] which has already been adopted by the Council. It is part of "A Broader Dialogue and Cooperation Framework on Justice and Home Affairs between the EU and its Member States and Turkey",[467] though it is clear that there is not much to talk about or negotiate. The list of requirements in the Roadmap needs to be unilaterally fulfilled by Turkey. Given the Court's ruling in *Demirkan*, the Roadmap seems to be the only viable solution to visa-free travel for Turkish citizens prior to (or in the absence of) Turkey's accession to the EU.

To have a brief look at the implementation of *Soysal* at Member State level, the country to implement visa-free travel for service providers most swiftly was Denmark. It implemented visa-free travel in line with the Guidelines

462 Council of the European Union, Council conclusions on developing cooperation with Turkey in the areas of Justice and Home Affairs, Luxembourg, 21 June 2012, p. 2.

463 For Turkey's role in illegal migration to the EU see, "Facts and figures related to visa-free travel for Turkey," (Brussels: European Stability Initiative, 15 June 2012), 19-20.

464 European Commission – IP/13/1259, 16.12.2013,"Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey". Available online at: http://europa.eu/rapid/press-release_IP-13-1259_en.htm

465 European Commission, "Statement by Cecilia Malmström on the ratification of the EU-Turkey readmission agreement by the Turkish Parliament", 26 June 2014, STATEMENT 14/210. Available online at: http://europa.eu/rapid/press-release_STATEMENT-14-210_en.htm

466 See Annex II to the ANNEX, Council of the European Union, Brussels, 30 November 2012, 16929/12, LIMITE, ELARG 123, JAI 849, pp. 13-28. The Roadmap consists of a long list of requirements that Turkey needs to fulfill in areas related to the readmission of illegal immigrants, document security, migration management, public order and security and fundamental rights. These general titles are then broken into specific titles and then further into specific requirements to be fulfilled, which add up to a 16-page list of requirements.

467 See Annex I to the ANNEX, Council of the European Union, Brussels, 30 November 2012, 16929/12, LIMITE, ELARG 123, JAI 849, pp. 7-12.

issued by the Commission. The country that reported to the Commission that it had no visa requirement in place for service providers at the time the AP entered into force, but did not take any steps to remedy the situation (as far as the author is aware) is Ireland. Conversely, the Netherlands reported that it had no visa requirement in place. However, its national courts disagreed. After a series of appeals, its highest court on the matter (Raad van State) ruled that there was no visa requirement in place, upon which the Commission took steps to include the Netherlands in the Guidelines next to Denmark.

Germany, announced initially that Turkish nationals providing the services mentioned above would be able to enter Germany only after obtaining "visa exemption" from the German embassy in Istanbul, providing for a somewhat eased procedure which arguably still involved "*additional and recurrent administrative and financial burdens*".[468] Though obtaining the "visa exemption" is no longer mandatory, service providers who wish to do so are informed that they are able to obtain that document from the visa section of Germany's consulates and embassy in Turkey.[469]

The UK has taken some half-hearted steps to implement *Soysal*. On 1 May 2012, it introduced a visa facilitation package to improve economic relations between the two countries. In line with this package, Turkish companies were invited to register with the UK Trade & Investment (UKTI) by presenting a list of required documents. Once registration is completed, employees and partners of these companies are able to apply for visa only with a letter from their companies, fingerprints and photos. Moreover, while previously visas were issued for six months only, this period is extended to a year, 5 years or longer.[470] It was announced that visa facilitation would cover students and academics too.[471] As welcome as those steps are, they are a far cry from implementing *Soysal*. The UK had no visa restrictions in place concerning the provision of services in 1973 when the Additional Protocol entered into force, which means that its current visa regime is still incompatible with its obligations under the Ankara *acquis*.

Overall, Denmark and Germany seem to be the most-compliant Member States with the judgment, while Belgium, France, Ireland, Italy and the UK

468 Emphasis added. *Case C-228/06 Soysal*, para. 55.

469 Almanya Büyükelçiliği'nin 21 No'lu ve 05.06.2009 tarihli Basın Bildirisi (German Embassy's Press Release No 21 of 05.06.2009). Available online at: http://www.ankara.diplo.de/Vertretung/ankara/tr/03__Presse/Archiv__Pressemitteilungen/2009__21__pressemitteilung.html.

470 "Şirket çalışanları tek bir mektup ile İngiltere vizesi alabilecek", *Hürriyet*, 19 May 2012. Available online at: http://www.hurriyet.com.tr/ekonomi/20585135.asp. See also the electronic weekly bulletin of the Economic Development Foundation, İktisadi Kalkınma Vakfı E-Bülteni, 16-22 May 2012, "İngiltere Türk Vatandaşlarına Vize Kolaylığı Uygulamasına Ba?ladı". Available online at: http://www.ikv.org.tr/images/upload/data/files/ikv_e-bulten_16-22_mayis_2012.pdf.

471 "İngiltere'den vize kolaylığı", *TRT Haber*, 2 April 2012. Available online at: http://www.trthaber.com/haber/dunya/ingiltereden-vize-kolayligi-35046.html.

are labelled as "ostriches".[472] Like the Netherlands, Belgium, Italy and France seem to have provided incorrect information,[473] the difference being the absence of cases on the matter in their national courts. This provides a mixed picture for our conclusion. In the absence of 'internalization', the constraining effect of law is rather limited as demonstrated here. The Commission is reluctant to take any steps or start enforcement proceedings as far as non-compliance with Association law is concerned.[474] Hence, the need to analyse areas containing rules and procedures with stronger constraining power in the following two Parts of this thesis.

3.4 CONCLUSION

The aim of the first Chapter of Part I was to examine what kind of relationship "association" is and identify exactly what it entails so as to be able to establish the extent to which association agreements could be capable of constraining Member States when drafting an Accession Treaty. More specifically, the aim was to map out the legal regime on free movement of persons that developed under the Association law so as to see if it could preclude Member States from introducing a PSC on free movement of persons in the Turkish Accession Agreement.

Association proved to be a very flexible relationship capable of changing over time. The focus of this Chapter was on different types of Association Agreements signed between the EEC/EC/EU and third European countries. Chapter 2 revealed that even though some of those agreements had more modest objectives initially, as soon as the associates were willing and ready to join the Union, the agreements could be reoriented with the aid of additional instruments to achieve the objective of full membership. That was the fate of almost all association agreements signed with European countries,[475] which served as efficient springboards for EU membership.

Association comprises a wide range of agreements: it has been defined as "anything between full membership minus 1% and a trade and cooperation agreement plus 1%".[476] While the latter part of the definition is not so difficult

472 Groenendijk and Guild, *Visa Policy of Member States and the EU Towards Turkish Nationals after Soysal*: 39.

473 Ibid., 37.

474 Over the half-century in which the Association Law exists, the Commission has taken enforcement action only twice. See, *Case C-465/01 Commission v Austria*, [2004] ECR I-8291; *Case C-92/07 Commission v Netherlands*.

475 The main exceptions are the EEA Agreement (Norway, Iceland and Liechtenstein) and the regime of Bilateral Agreements with Switzerland. However, it should be noted that if these countries were to change their minds, their membership to the Union could be easily arranged, as they are already applying big chunk of the acquis.

476 Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?*: 23.

to establish, the definition of "full membership" is more complicated today than forty years ago due to increased differentiation and opt-outs. However, as it will be illustrated in Part II, permanent differentiation and opt-outs have generally been ruled out for new comers. Only transitional measures carrying the purpose of gradual but full integration of the acceding states to various policy areas are allowed. Hence, it will be assumed that full membership requires the adoption or at least the commitment to adopt the *acquis communautaire* in its entirety (as soon as the transitional period expires).

As discussed above, the Association Agreements with Greece and Turkey were the oldest and most comprehensive association agreements, which had the objective of preparing these countries for their future accession to the EEC/EC/EU. The priority of both agreements, which was also the priority of the EEC at the time, was to establish a Customs Union. Establishing an internal market by ensuring free movement of persons, services and capital was the next step. While Greece joined the EEC back in 1981, Turkey is still a candidate for EU membership. It achieved the objective of establishing a Customs Union back in 1996; however, its achievements in the area of free movement of persons are rather mixed.

Even though the Additional Protocol laid down a timetable according to which free movement of workers should have been completed by 1986, after the economic crises of the 1970s, as well as the political crises that Turkey went through in the early 1980s, Member States were not willing to take any steps on this front. The maximum they were prepared to do was to grant rights to Turkish workers who had already settled in the Member States of the EU. Hence, the Association Council adopted decisions providing for the gradual integration of Turkish workers into the labour force of the Member States in line with measures adopted for the integration of Community workers in their host Member States during the transitional period.[477]

While the case law of the 1990s focused on the consolidation of the rights of Turkish workers legally resident and employed on the territories of the Member States of the EU, in the new millennium, there were some cases dealing with the standstill clauses in the Ankara *acquis* that managed to lift some obstacles and provide impetus for the development of free movement of persons between Turkey and some Member States of the EU. Hopes were raised by the Court's wide interpretation of the two standstill clauses, which established that Member States had introduced new restrictions, such as visa requirements for the entry of service providers into their territories,[478] which were incompatible with Association Law.

Despite the different formulation of the standstill clauses, the Court established that both clauses were of the same kind and pursued the same objective. Hence, what was established for Article 41(1) AP was reflected to the case law

477 See footnotes 294-295 above.
478 *Case C-228/06 Soysal*.

on Article 13 of Decision 1/80, which meant that the entry (first admission) of Turkish workers into the territories of Member States was also found to fall within the scope of Article 13.[479] Some of these restrictions were removed and free movement resumed. However, as illustrated above, both the Commission and some Member States are dragging their feet in the implementation of the Court's judgments. This could be interpreted as a sign that Member States take Association Law less seriously than other areas of Union law, which would in turn imply that the constraining power of the former is weaker than the latter.

As courageous as the Court was in its first judgments on the standstill clauses, it was perhaps unrealistic to expect it to maintain that line in *Demirkan* regarding the interpretation of the personal scope of the freedom to provide services, especially given the fact that this would have repercussions for the free movement rules of all the first twelve Member States. Hence, the Court had to be cautious. As observed by Hatzopoulos, the political climate seems to have "compelled the Court to legal acrobatics, since the opposite solution seemed forthcoming from a legal point of view".[480]

Another case that could be considered as retreating from the Court's previous approach was the *Ziebell* case. In *Ziebell*, the Court established that the concept of public policy, which was previously interpreted in line with Directive 64/221/EEC,[481] could no longer be interpreted in line with Directive 2004/38/EC, which replaced the former Directive, and provided for a system of strengthened protection of Union citizens against expulsion. According to the Court, it was justified in recognizing for Union citizens alone this strengthened system of protection.[482] The Court's seems to have changed its view on the matter within a year, since in *Commission v Netherlands*, it had ruled that the objective of the Ankara Agreement was to bring "the situation of Turkish nationals and citizens of the Union closer together through the progressive securing of free movement for workers and the abolition of restrictions on freedom of establishment and freedom to provide services".[483]

The Court's steps back in *Ziebell* and *Demirkan* are in stark contrast to *Demir* and *Dogan*, which are the most recent additions to the list of cases with important repercussions for the free movement of persons between Turkey and the Member States of the EU. The latter two cases are important firstly, because the Court ruled that the first admission of Turkish workers fell within the scope of the standstill clause concerning workers (Article 13 of Decision 1/80 in *Demir*); and similarly, that national rules on family reunification also fell

479 *Case C-92/07 Commission v Netherlands*; *Case C-242/06 Sahin*.
480 Hatzopoulos, "Turkish service recipients under the EU-Turkey Association Agreement: Demirkan," 654-55.
481 See *Case C-136/03 Dörr and Ünal*.
482 *Case C-371/08 Ziebell*, para. 73.
483 *Case C-92/07 Commission v Netherlands*, para. 67.

within the scope of the standstill on freedom of establishment (Article 41(1) AP in *Dogan*). Secondly, these two cases do not only open the horizons for the free movement of new category of Turkish nationals, i.e. workers and the family members of economically active Turkish nationals, but they also seem to illustrate a return to the Court's previous approach in which it did not shy away from transplanting some of the free movement rules it developed in the framework of the internal market to that of association law. The transplantation of the rule of reason to the Ankara *acquis* in *Demir* and *Dogan* is the most important example to that effect.

Overall, despite the Court's occasional half-heartedness and retreat regarding its approach to Association Law, this does not change the fact that that law constitutes the most developed pre-accession legal regime. Even under the current restrictive interpretation of the standstill clauses, there is much room for the development of free movement of persons.[484] Association Law is crucial not only because it provides the legal context and the past of EU-Turkey relations, but also because it lays down the objectives and commitments as to their future. The case law of the Court, which generally interprets various provisions in the light of those general objectives, contributes further to their internalization and entrenchment. Thus, it could be argued that Association Law constitutes the minimum, the basis that will be complemented and topped up by other rules and policies at the time of accession. The more developed the basis, the less work there will be to do at the time of accession.

It is important to establish again that that the analysis above does not only serve to demonstrate the framework of pre-existing relations between EU and Turkey, but to demonstrate that these relations have been grounded in a solid legal framework with a clear objective that has been spelled out at the very start, i.e. EU membership. Downgrading the commitments established in the Ankara Agreement and subsequent legal instruments would clearly violate Article 7 AA, in which Member States as Contracting Parties to the Ankara Agreement committed to "take all appropriate measures … to ensure the fulfilment of the obligations arising [therefrom]", and to "refrain from any measures liable to jeopardize the attainment of [those] objectives". Another important principle worth emphasising here, though not autochthonous to EU law, is the building block of international law: *pacta sunt servanda*.

To sum up, after placing the Ankara *acquis* in the specific context of association as defined in time by Union law and practice, this Part demonstrated the extent to which free movement rights have already developed under the Association regime as well as the existing potential for their further development. By now Ankara *acquis* constitutes a complex area of EU Association Law

484 As noted by Wiesbrock, the rulings on the standstill clauses require substantial changes in the immigration policies of Member States. See, Wiesbrock, "Political Reluctance and Judicial Activism in the Area of Free Movement of Persons: The Court as the Motor of EU-Turkey Relations?," 438.

with its own *sui generis* rules and character. While there is a solid body of case law accumulated over the years on the rights of Turkish nationals legally resident and/ or employed on the territory of the Member States, the focus in Chapter 3 was on the case law on the standstill clauses which developed in the last fifteen years, since the latter case law has the potential to further remove some of the obstacles in front of free movement. The current state of affairs revealed that the implementation of those judgments was far from being perfect, exhibiting arguably the weaker constraining power of Association Law in comparison to what Member States consider as being hard core EU Law.

Identifying the constraints flowing from Association Law was important, however it is not sufficient to draw a complete picture of legal constraints that would be at work during the process of accession negotiations. The constraints identified here will join forces with constraints flowing from well-established practice and law of enlargement, the topic of Part II, as well as with constraints flowing from the constitutional foundations of the Union, the topic of Part III. Arguably, the combination of legal constraints flowing from all three levels will provide us with the most accurate appraisal as to the possibility of the eventual inclusion of a PSC in Turkey's future Accession Agreement.

PART II

Legal Constraints Flowing from the Accession Process

INTRODUCTION

This thesis tries to identify legal constraints on Member States *qua* primary law makers in the specific context of accession negotiations flowing from EU association law, enlargement law, as well as constitutional law. The first part examined the first "pre-accession" or "association" level, in which the main legal framework of relations between Turkey and the EEC was the Association Agreement signed back in 1963. It was argued that in terms of rights enjoyed by Turkish nationals, the existing legal framework constitutes the legal stepping-stone (a minimum basis, and as such a constraint), which would need to be complemented with further rights at the time of accession in order to be fully aligned with EU law in the area of free movement of persons. This argument leads us to the second level of analysis, i.e. that of "accession", which lays down the procedural and substantive constraints flowing from the past and present Treaty provisions specifying the main contours of the enlargement process, as well as past practice that sheds light on its true nature.

The main purpose of this part is to reveal the complex nature of the accession (enlargement) process, which has become more supranational over the years, (despite its erroneous reduction to being intergovernmental by those who cast only a first glance). Chapter 4 begins by setting the ground for the whole part, by providing an analysis of the past and present forms of the Treaty provisions governing the accession procedure. These provisions are of utmost significance, as they enable us to identify the most salient procedural and substantive constraints on Member States when acting within the scope of the enlargement procedure, as well as enable us to track their evolution.

Chapter 4 deals with procedural constraints on Member States that flow firstly, from the stipulations of Article 49 TEU itself; secondly, established practice; and thirdly, from principles of negotiation that were consistently applied in every subsequent accession wave. Since the Court established long ago that Article 237 EEC (now Article 49 TEU) is "*a precise procedure* encompassed within *well-defined limits* for the admission of new Member States",[485] it is not difficult to foresee that a Council Decision entailing the admission of a new Member State, which has not complied with those precise

485 Emphasis added. *Case 93/78 Mattheus v Doego*, [1978] ECR 2203, para. 7.

procedural requirements, would be susceptible to annulment for "the infringement of an essential procedural requirement".[486] In other words the constraining effect of the procedural aspect of Article 49 TEU flows from the threat of an external sanction, i.e. from the annulment of the above-mentioned Council Decision by the Court of Justice.

A closer analysis of the enlargement procedure and past practice reveals that the procedure laid down in the Treaty is perhaps not as precise as the Court claims it to be. Article 49 TEU is undoubtedly very important, as it establishes the main framework to be followed by the institutions operating within its scope. However, as important as it is, it merely lays down the basic contours of the process, i.e. it provides a bare skeleton. Therefore to provide a fuller and clearer account of how the process works in practice, starting from the precedent set by the first enlargement, an overview of the evolution of past enlargement practice is provided. The role of the Union institutions in this process is highlighted. It should be noted beforehand, that the role of the institutions in this context is not limited to their roles specified under Article 49 TEU, but extends further to their additional roles under the pre-accession strategy designed for the successful realization of the Eastern enlargement. In short, this part will add flesh to the bones provided under Article 49 TEU.

Last but not least, by identifying the main principles that governed past processes of accession and negotiations taking place therein, the flesh and bones of the enlargement process will also acquire their spirit. Identifying these principles and verifying their consistent application over past enlargement waves, will demonstrate the existence of further constraints on Member State action flowing from past enlargement practice.

It should be noted that past practice and principles of negotiation are legal constraints of different kind compared to the procedural constraints flowing from Article 49 TEU. While the latter are formal constitutional constraints written in the Treaties, the former are informal and are to be found in non-binding documents, Commission reports and European Council conclusions. The constraining effect of past practice is a good illustration of "an informal constitutional convention"[487] creating "path dependence",[488] while the con-

486 *Case 138/79 Roquette Fréres*.

487 The 'new institutionalist' literature in political science, and more specifically its 'historical institutionalist branch', serves here as a useful tool, a magnifying glass that provides a clearer picture, and hence, a better understanding of the dynamics of the enlargement process. The 'new institutionalist' approach views institutions "as extending beyond the formal organs of government to include standard operating procedures, so-called soft law, norms and conventions of behaviour". See, S. J. Bulmer, "The Governance of the European Union: A New Institutionalist Approach," *Journal of Public Policy* 13, no. 4 (1993): 355-56. See also, J. G. March and J. P. Olsen, "The New Institutionalism: Organizational Factors in Political Life," *The American Political Science Review* 78, no. 3 (1984): 734-47; and J. G. March and J. P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989).

straining effect of principles is an illustration of their internalization by various institutional actors. Arguably, "path dependence" also takes place as a result of learning and internalization of values, norms, and principles that have led to the establishment of these patterns of action,[489] i.e. past practice and principles have reinforced each other in the process of their development.

An overview of past and present of enlargement policy demonstrates clearly, how Member States despite their frustration with certain of its aspects "all find themselves locked into a system which narrows down the areas for possible change and obliges them to think of incremental revision of existing arrangements".[490] The following overview of past practice and the principles governing past enlargement processes provides a clear illustration of how the "the basics" or "the fundamentals" of enlargement policy have remained unchanged over the years while there has been some fine-tuning to meet the specific challenges posed by every subsequent enlargement wave.

The 'historical institutionalist' approach sheds light on how institutions, in the widest sense of the term (here, read values, norms, principles and conventions/ consistent past practice) shape not only actors' strategies (as explained by 'rational choice institutionalists') but also their goals. "[B]y mediating [actors'] relations of cooperation and conflict, institutions structure political situations and leave their own imprint on political outcomes".[491] In other words, norms, values, principles and past practice in the context of enlargement, govern the relations between the actors involved in the enlargement process (that is Union institutions, Member States, and the candidate State). They shape the process and constrain its actors from taking action that violates them. That is how they affect the outcome of the enlargement process. The overriding significance of these values and principles has been constitu-

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488 Path dependence is a common feature of institutional evolution. In addition to social processes, it "may occur in policy development as well, because policies can constitute crucial systems of rules, incentives and constraints". As is illustrated by the precedent set by the first enlargement, examined below, the initial action of institutions lays down a path that is difficult to change or reverse. As argued by Pierson, "[o]ver time, as social actors make commitments based on existing institutions and policies, the cost of exit from existing arrangements rises". For both citations see, Pierson, "The Path to European Integration: A Historical Institutionalist Analysis," 145-46.

489 Kochenov calls this "customary enlargement law". See, D. Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?," *European Integration online Papers* 9, no. 6 (2005).

490 M. Shackleton, "The Delors II Budget Package," in *The European Community 1992: Annual Review of Activities*, ed. N. Nugent (Oxford: Blackwell Publishers, 1993), 20; cited in Pierson, "The Path to European Integration: A Historical Institutionalist Analysis," 147. See also, Giandomenico, "Path Dependency in EU Enlargement: Macedonia'a Candidate Status from a Historical Institutionalist Perspective."

491 K. Thelen and S. Steinmo, "Historical Institutionalism in Comparative Politics," in *Structurung Politics: Historical Institutionalism in Comparative Analysis*, ed. S. Steinmo, K. Thelen, and F. Longstreth (Cambridge University Press, 1992), 9; cited in Bulmer, "The Governance of the European Union: A New Institutionalist Approach," 356.

tionalized by the inclusion of a reference to the provision listing those values (ex Article 6(1) TEU, now Article 2 TEU) with the Amsterdam Treaty revision.

As to the substantive constraints imposed on Member States by Article 49 TEU, they are dealt with in Chapter 5. The most important substantive constraint laid down in Article 49(2) TEU is the stipulation that admission of a new Member States necessitates only "*adjustments* to the Treaties…which such admission entails".[492] Hence, the focus in Chapter 5 is firstly, on the definition of the concept of "adjustment", and then, on the various forms in which adjustments may appear in Accession Agreements, namely as transitional and/or 'quasi-transitional' measures, as well as in the form of safeguard clauses of different kind. Next, the Chapter examines past examples of changes brought by Accession Treaties, which arguably go beyond being mere "adjustments". The rationale, and if available the "justification" for inclusion of such measures is analysed with a view to establishing how compatible they are with the system established by the Treaties. Last but not least, follows a similar evaluation of the compatibility of the proposed PSC with the letter and spirit of the Treaties.

As it will appear from our examination of the evolution of the accession procedure that follows below, it is possible to identify further substantive constraints flowing from Article 49(1) TEU that have been added relatively recently. However, since those constraints, requiring respect for the values referred to in Article 2 TEU and commitment to promoting them, are imposed on the acceding State in this provision, they will not be dealt with in detail here. However, these substantive constraints will be dealt with in Part III, since these values form part of the constitutional foundations of the Union, which Member States are bound to respect, especially when acting within the scope of EU law and procedures, including Article 49 TEU.

Overall, identifying the complex nature of the accession process is extremely important for the purposes of our analysis. A superficial reading of article 49 TEU leaves one with the impression that the process is intergovernmental since it culminates in "ratification by all contracting States in accordance with their respective constitutional requirements". A follow up assumption based on that impression is that, if the process were to be considered intergovernmental, Member States have unfettered freedom in their conduct within the procedure, including the drafting of the Accession Agreement. However, as mentioned above, and as will be demonstrated below, these assumptions are misconceived. As important as the intergovernmental component in Article 49 TEU might be, it is to be found only at the end of the process, or put differently ratification is the culmination, finalization of the process. While the final component or the conclusion of the procedure is intergovernmental, it will be demonstrated that the previous stages of the procedure have a strong Union

492 Emphasis added.

component, which constrains Member States' action, since they are acting within the scope of EU law that is within the limits of Article 49 TEU.

4 Procedural Constraints

4.1 Introduction

This Chapter begins by analysing the evolution Article 49 TEU has undergone over more than half a century. It is of utmost importance, because it is the one and only provision governing the enlargement of the Union. As such it contains the most important procedural and substantive requirements of the enlargement process, even though it has never fully or accurately reflected how the process worked in practice, hence, the need to examine actual practice. Since the precedent set by the first enlargement determined the path to be trodden in subsequent waves of enlargement, this Chapter casts a closer look at the way the accession procedure worked during the first enlargement. Then, it proceeds to examine the evolution of that practice during the most challenging of all the waves of enlargement so far, which is the enlargement to the Central and East European States. The various roles assumed by the Union institutions in this process are also analysed, since that has clearly strengthened the Union nature of the process.

Lastly, follows an overview of the practice future enlargements are expected to follow based on the Negotiating Framework documents drafted for current candidate sates. That overview reveals that to counterbalance the increasingly important roles assumed by the Union institutions throughout the process, Member States have increased their control over the negotiation process with the introduction of the 'benchmarking' system, which has multiplied their veto opportunities. At the end, by adding flesh to the bones, we will get a fuller picture of the process. Unfortunately, the fuller picture will reveal the complex nature of the process and not necessarily make it easier to reach a sweeping conclusion as to whether the process is intergovernmental or supranational. It will be only after establishing the main principles of negotiation and analysing the limitations imposed by the notion of "adjustment" that the Community/Union nature of the process will become more evident.

4.2 Past and present Treaty provisions governing enlargement

The enlargement process has extended the borders of the Union geographically to an unimaginable extent as compared to the times of its inception. What is now a Union of twenty-eight Member States started as a Union of six. There

is a huge literature on the topic,[493] straddling many disciplines, trying to explain the rationale underlying the process and the reasons for its success. In addition to primary sources of EU law, that literature will be used to reveal the nature and dynamics of the process as well as its evolution over the decades, the focus being on establishing the extent to which Member States are constrained within the context of the enlargement procedure.

493 J.-P. Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom* (Leiden: A. W. Sijthoff 1975). 142; G. Avery and F. Cameron, *The Enlargement of the European Union* (Sheffield Academic Press, 1998). 188-91; *EU Enlargement: A legal approach*, ed. C. Hillion (Oxford; Portland, Or.: Hart, 2004); N. Nugent, *European Union Enlargement* (Palgrave Macmillan, 2004); *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (The Hague: T.M.C. Asser Press, 2007); J. O'Brennan, *The eastern enlargement of the European Union* (New York; London: Routledge, 2006); V. Curzon Price, A. Landau, and R. Whitman, *The enlargement of the European Union: Issues and strategies* (Routledge, 1999); F. Schimmelfennig and U. Sedelmeier, *The politics of European Union enlargement: theoretical approaches* (London; New York: Routledge, 2005); C. Hillion, "EU Enlargement," in *The Evolution of EU Law*, ed. P. Craig and G. De Burca (Oxford: OUP, 2011); Inglis, *Evolving Practice in EU Enlargement*; *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003); M. J. Baun, *A wider Europe: the process and politics of European Union enlargement*, Governance in Europe (Lanham: Rowman & Littlefield Publishers, 2000); H. Motamen-Scobie, *Enlargement of the EU and the Treaty of Nice*, Executive briefings (London; New York: Financial Times/Prentice Hall, 2002); D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008); W. Kaiser and J. Elvert, *European Union enlargement: A comparative history* (London; New York: Routledge, 2004); W. Nicoll and R. Schoenberg, *Europe beyond 2000: the enlargement of the European Union towards the East* (London: Whurr Publishers, 1998); C. Preston, *Enlargement and integration in the European Union* (London; New York: Routledge, 1997); A. Tatham, *Enlargement of the European Union* (The Hague: Kluwer Law International, 1999); J. Redmond, *The 1995 enlargement of the European Union* (Ashgate, 1997); C. Ross, *Perspectives on the enlargement of the European Union* (Leiden; Boston: Brill, 2002); H. Sjursen, *Questioning EU enlargement: Europe in search of identity* (London; New York: Routledge, 2006); C. A. Stephanou, *Adjusting to EU enlargement: recurring issues in a new setting* (Edward Elgar, 2006); M. Sajdik and M. Schwarzinger, *European Union enlargement: Background, developments, facts* (New Brunswick, N.J.: Transaction Publishers, 2008); C. J. Schneider, *Conflict, Negotiation and European Union Enlargement* (Cambridge: Cambridge University Press, 2008); A. Ott and K. Inglis, *Handbook on European Union Enlargement: A Commentary on the Enlargement Process*, ed. Andrea Ott & Kirstyn Inglis (The Hague: T.M.C. Asser Press, 2002); M. Maresceau and E. Lannon, *The EU's Enlargement and Mediterranean Strategies*, ed. M. Maresceau and E. Lannon (Basingstoke: Palgrave, 2001); M. Maresceau, *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*, ed. M. Maresceau (London/New York: Longman, 1997); A. Skuhra, *The Eastern enlargement of the European Union: efforts and obstacles on the way to membership* (Innsbruck: StudienVerlag, 2005); W. Armstrong and J. Anderson, *Geopolitics of European Union Enlargement: The fortress empire* (Florence, KY, USA: Routledge, 2007); P. Nicolaides and S. R. Boean, *A Guide to the Enlargement of the European Union: Determinants, Process, Timing, Negotiations* (Maastricht: European Institute of Public Administration, 1997); A. Moravcsik and M. A. Vachudová, "Preferences, power and equilibrium: the causes and consequences of EU enlargement," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. F. Schimmelfennig and U. Sedelmeier (Routledge, 2005); H. Wallace, "Enlarging the European Union: reflections on the challenge of analysis," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. F. Scimmelfenning and U. Sedelmeier (Routledge, 2005).

Despite the criticism that the Treaty article regulating enlargement is "vague and open"[494] or it is an "imperfect guide to enlargement",[495] it lays down the legal basis on which the whole process rests. Therefore, as imperfect or incomplete the picture provided by that article might be,[496] the analysis of the enlargement process in this part requires a brief overview of its origins and evolution. As mentioned above, the latter analysis will reveal the skeleton of the process. As vague and imperfect the skeleton might be, it should be kept in mind that it plays the important function of shaping as well as holding the whole construct together. The flesh and the spirit of the process can develop only to the extent allowed by the framework provided by the skeleton.

To begin with the first of the Communities, Article 98 of the ECSC was worded as follows:

> 'Any European State may apply to accede to this Treaty. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the high Authority; the Council shall also determine the terms of accession, likewise acting unanimously. Accession shall take effect on the day when the instrument of accession is received by the Government acting as depository of this Treaty.'

What is notable in this provision is that all the control of the accession process is given to the Council, and Member States are not mentioned even once. It also makes no provision for negotiations. According to Puissochet, this makes the 'supranational' character of Article 98 of the ECSC Treaty more highly developed than in the other Community Treaties.[497]

As soon as the other Communities were created, aspiring candidates had to accede to the three Communities at the same time. The issue of accession was complicated by the fact that enlargement in the EEC and the Euratom Treaties was designed quite differently. Member States were given more powers to regulate the process, which gave it an 'intergovernmental' flavour.[498] Articles 237 EEC and Article 205 EAEC read as follows:

> 'Any European State may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote.

494 C. Hillion, "Enlargement of the European Union: A Legal Analysis," in *Accountability and Legitimacy in the European Union*, ed. A. Arnull and D. Wincott (Oxford: OUP, 2002), 402.
495 Avery and Cameron, *The Enlargement of the European Union*: 23.
496 Kochenov, *EU Enlargement and the Failure of Conditionality*: 13-14; O'Brennan, *The eastern enlargement of the European Union*: 56.
497 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 13-14.
498 Hillion, "EU Enlargement," 188-91; Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?."

> The conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules.'

Even if the Treaties prescribed different procedures for acceding to the ECSC, the EEC and Euratom, one procedure was followed for acceding to all three Communities. The practice of the first enlargement set the precedent for the principles and procedure to be followed in future enlargements. The result was that neither of the procedures prescribed in the Treaties was followed strictly.[499] As stipulated by Article 237 EEC, the Member States play an important role in the procedure; however, they have chosen to play that role meeting *qua* Council, as stipulated by Article 98 ECSC. Moreover, the Commission, whose role according to Articles 237 EEC and 205 EAEC seems to be limited to delivering an opinion, has played an increasingly important role in each and every succeeding accession wave.[500] However, eventually the fact that each Member State needs to ratify the end-product, that is the Accession Treaty, in line with its own constitutional rules leaves one with the impression that the procedure is of an inter-state character.

The only novelty introduced by the Single European Act in the accession procedure was the role to be played by the European Parliament. Article 8 of the Single European Act provided that before acting unanimously on the matter, the Council needs to obtain "the assent of the European Parliament which shall act by an absolute majority of its component members". This can be characterized as a development strengthening the legitimacy and Union nature of the process. Ratification by Member States' Parliaments was not enough, the organ representing the European people at Community level also had to give its approval to the process.

Another important development that followed was the introduction of a single enlargement article, Article O of the Treaty on the European Union, which abrogated all the previous articles. Moreover, as far as the wording is concerned, the first important change was the replacement, in the first sentence of the second paragraph of Article O TEU, of the word "amendment" with the

499 Kochenov argues that the enlargement procedure lies somewhere in between the models adopted by the ECSC and the EEC/Euratom Treaties. See Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?."; Hillion is of the opinion that the eventual procedure adopted is "imbued with state centrism", whereby the Member States are the gate keepers. See Hillion, "EU Enlargement," 191.

500 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 8-12. O'Brennan, *The eastern enlargement of the European Union*: 74-76; P. S. Christoffersen, "Organization of the Process and Beginning of the Negotiations," in *The Accession Story: The EU from 15 to 25 Countries*, ed. G. Vassiliou (Oxford: OUP, 2007), 35-36.

word "adjustment".[501] The implications of this change will be discussed in more detail in Chapter 5 below. It suffices to say here that rather than providing a substantive change in that provision, the latter change in wording simply aims to clarify the already limited nature of the existing meaning and scope of the word "amendment" used in that provision, i.e. its limitation to amendments to the Treaty that are only required or necessitated by the candidate State's admission. The second change was the replacement of the word 'Community' with that of the 'Union'.

Article O was renumbered to Article 49 TEU by the Amsterdam Treaty revision, and a reference to Article 6(1) TEU (ex Article F1) was introduced. Only the first sentence of the first paragraph of the article, a substantive requirement for candidate States to respect the principles laid down in Article 6(1) TEU was added.[502] This implies a corresponding obligation/constraint on the Member States to ensure that new comers abide by these principles. The principles mentioned in Article 6(1) TEU were those of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." Even though this reference might look like a novelty, it was not. This was simply the codification of a long existing practice that only functioning democracies could join the club.[503]

It is difficult to judge whether the most recent changes brought by the Lisbon revision, again only in the first paragraph of Article 49 TEU, will translate into any practical changes in the enlargement procedure. Article 49 TEU provides that "Any European State which respects *the values referred to in Article 2 and is committed to promoting them* may apply to become a member of the Union".[504] The principles that needed to be respected in the previous Treaty have been renamed as "values", and it seems that in addition to respecting those values a second condition that has been added is that the applicant state needs to be committed to promoting those values. It is also worth noting that the list of values listed in Article 2 TEU is longer than the principles listed in the *ex* Article 6(1) TEU. It reads as follows:

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501 Cf: Article 237 EEC provided as follows: "The conditions of admission and the *amendments* to this Treaty necessitated thereby shall be the subject of agreement between the Member States and the applicant State." Article O TEU provided: "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." Emphasis added.

502 The first sentence of Article 49 TEU provided that: "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union."

503 European Council of Copenhagen, "Declaration on Democracy", Bull. EC 3/1978, p. 6. Hillion, "The Copenhagen Criteria and their Progeny," 1-22; B. De Witte, "The Impact of Enlargement on the Constitution of the European Union," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003), 229.

504 Emphasis added.

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.'

Other novelties in the current Article 49(1) TEU are that in addition to the European Parliament, the national Parliaments need to be notified of the application for membership, and finally, that "[t]he conditions of eligibility agreed upon by the European Council shall be taken into account." The former is indeed a novelty that requires simply informing i.e. notifying the national Parliaments of the new application and does not go further than that. While the latter addition of the European Council's power to add new conditions to the existing ones is also new as a written element, substantively, it is simply another codification of existing practice.[505]

Based on this overview of past and present Treaty articles governing the enlargement process, it is possible to make a few observations. Firstly, the only condition stipulated for membership in the EEC Treaty was that the applicant country needed to be 'European'.[506] With the Amsterdam and Lisbon Treaty revisions, in addition to being European, the candidate states were required to respect as well as promote the above-mentioned lists of principles and values. The next section shows the latter requirement is codification of existing practice of requiring candidate states' compliance with those principles and values as pre-accession criteria. Moreover, although not stipulated as constraints on Member States in Article 49 TEU (since its focus is on the compliance of the acceding State with these principles and values), the reference to Article 2 TEU is a reminder of the constraining force of these values on Member States as well. Thus, the final part of this thesis demonstrates not only the emergence of these values (as general principles of law), but also their

505 Hillion, "EU Enlargement," 212.

506 The term 'European' remains undefined. According to the Commission, "[i]t combines geographical, historical and cultural elements which all contribute to the European identity. The shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review by each succeeding generation. The Commission believes that it is neither possible nor opportune to establish now the frontiers of the European Union whose contours will be shaped over many years to come". See Commission Communication, "Europe and the Challenge of Enlargement", Bull. EU Supp. 3/92, p. 11. K. Inglis, "EU Enlargement – Membership Conditions Applied to Future and Potential Member States," in *The Constitution for Europe and an Enlarging Union: Unity in Diversity?*, ed. K. Inglis and A. Ott (Groningen: Europa Law Publishing, 2005), 234-35. F. Hoffmeister, "Changing Requirements for Membership," in *Handbook on European Enlargement*, ed. Kirstyn Inglis and Andrea Ott (The Hague: T.M.C. Asser Press, 2002), 91-92. M. Fisne, *Political Conditions for "Being a European State" – The Copenhagen Political Criteria and Turkey* (Afyon: Afyon Kocatepe University, 2003).

development to constitute part of the "very foundations" of the Union that constrain Member States at all times.[507]

Secondly, we are able to identify the institutions involved in the process. While initially the only two institutions engaged in the process were the Council and the High Authority/ Commission, subsequently the European Parliament and the European Council have also been included in the provision on enlargement. As to the roles they play in the actual process of accession, the following part demonstrates how succinct the Treaty is regarding their respective roles. However, it needs to be kept in mind that as succinct as the procedure might be, any deviation from it, for instance failure to obtain the assent of the European Parliament, is capable of triggering the annulment of the Council Decision concluding the process.[508]

Last but not least, if we are to draw a general conclusion as to the nature of the process based on the evolution and current wording of Article 49 TEU, that conclusion would be that the enlargement procedure is of hybrid character, embodying both supranational and inter-governmental components. When we examine the first paragraph of Article 49 TEU, it is all about procedural aspects of the process that is the role played by the EU institutions therein.[509] In the first sentence of the second paragraph of Article 49 TEU, the applicant State and Member States need to agree on the conditions of admission and the adjustments to the Treaties, which such admission entails. It is only in the second and final sentence where all States become 'contracting States' that need to ratify the accession agreement in line with their respective constitutional requirements. This means that throughout the procedure Member States need to act as Member States of the Union, conscious of the fact that they are acting within the scope of EU law, thus respecting its values and general principles.

The fact that the procedure ends with ratification of the accession agreement in line with respective constitutional requirements could be deceptive and leave a misleading impression as to the nature of the whole process. The Community/Union/supranational component of this process is at least as heavy as the inter-governmental one. As is demonstrated in the following Chapter, the fact that the Union institutions are involved in the process in a similar manner to their respective roles in other areas of EU law, clearly confirms the 'supranational'/ Union nature of the process.

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507 A risk of serious breach of values triggers Article 7 TEU, which does not restrict its application to Member States acting within the scope of Union law. In other words, Member States need to respect these values and principles at all times. For details see, note 84 above.

508 See, *Case 138/79 Roquette Fréres*; and *Case C-370/12 Pringle*, judgement of 27 November 2012, n.y.r.

509 The only exception is the reference to the national Parliaments that need to be notified of the membership application. On a closer look, that is not even an exception, because it grants the national Parliaments the passive right to be informed, while it is the Union institutions that need to fulfil that duty.

4.3 Accession procedure in practice

4.3.1 Precedent set by the first enlargement

Article 237 of the EEC Treaty was not very clear as to when the Commission or the Council were to deliver their opinions, nor was it clear as to whether the Commission was to play any role in the negotiations. In the case of the UK's first application in 1961, when the Council requested the Commission's opinion on the matter, the President of the Commission Walter Hallstein replied that the negotiations would deal with many problems of interest to the Community, "the Commission will express itself on these insofar and to the extent of the progress of the negotiations. It is on the basis of their results that the Commission will express its opinion as provided by Article 237 of the Treaty".[510] It has been argued that giving an immediate opinion "might have made the Commission *functus officio* with no further right to take part in the procedure provided by Article 237".[511]

The way practice developed with the UK's second application was as follows: the Commission delivered a first opinion pursuant to Article 237(1), but stated that this opinion was only preliminary. It delivered its second and final opinion after the conclusion of the negotiations.[512] That practice has not changed until today. The Commission first delivers an opinion on an application by a candidate state at the very beginning, and then it gives its final opinion after the end of the negotiations.[513]

In its communiqué of the meeting of Heads of State and Government of the Member States in The Hague on 1-2 December 1969, Member States reaffirmed their agreement on the principle of the enlargement of the Community.[514] At its session on 8-9 June 1970, the Council of the European Communities established the procedure for negotiations with the applicant States[515] that is Denmark, Ireland, Norway and the UK. The first paragraph of their decision stated that the negotiations were to be conducted in accordance with a standard procedure by *the European Communities* [emphasis added]. It followed that in respect of any problems arising from the negotiations for membership the Council was the institution to decide on the common standpoint of the Communities. However, in the adoption of that standpoint the Commis-

510 H. Smit and P. Herzog, "Article 237," in *The Law of the European Community: A Commentary on the EC Treaty* ed. D. Campbell (Vol. 6: Matthew Bender & Co., Inc., 2005), 6-373.
511 Ibid., 373-74.
512 Ibid., 375.
513 For the sequence of institutions' roles and contributions to the sixth enlargement round see, Kochenov, *EU Enlargement and the Failure of Conditionality*: 61.
514 Communiqué of the meeting of Heads of State and Government of the Member States at the Hague, 1-2 December 1969, (1969 Communiqué), para. 13.
515 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 8.

sion was invited to make proposals for the resolution of the problems that arise. The relevant discussions in the Council were to be prepared by the Committee of Permanent Representatives, and the country presiding over the Council was to preside over the meetings for negotiations at all levels. During the negotiations, the common standpoint of the Communities was to be set and defended by the Commission when already agreed upon Community policies were concerned, and by the President-in-office of the Council or by decision of the Council in general. Moreover, the Council stated:

> '… its readiness to call on the Commission to seek, in liaison with the candidate countries, possible solutions to specific problems arising in the course of the negotiations and to report thereon to the Council, which will give the Commission any directives required to pursue the matter further with a view to working out the basis for an agreement to be submitted to the Council. This provision will apply in particular where common policies already agreed are concerned.'

It is remarkable that Member States are not mentioned even once throughout the decision, whereas Article 237 EEC and Article 205 EAEC envisaged that "[t]he conditions of admission and the amendments to this Treaty necessitated thereby shall be the subject of agreement between *the Member States* and the applicant State" [emphasis added]. The Community character of the procedure is demonstrated by the fact that it is the Community institutions carrying out the negotiations; that is the Commission in the area of pre-agreed policies and the Council in general. According to Puissochet, the Community character of the negotiations was already decided by the summit in The Hague where Heads of State and Government agreed to "the opening of the negotiations between *the Community* on the one hand and applicant States on the other."[516] He argued that the desire behind this decision was to demonstrate the singleness of purpose of the Member States. Moreover, by choosing a joint spokesman, the voicing of any divergent opinions among the six was also avoided.[517]

In practice negotiations were conducted at two levels. During the first and informal phase Member States were supposed to agree among themselves on any given issue. This was followed by the official phase in which the President of the Council met with the candidate country conducting the negotiations. Negotiations had quite a rigid character since the President was not able to depart from the pre-established position. Formal monthly meetings took place at ministerial level and weekly meetings at deputy level, that is at the level

516 1969 Communiqué, note 514 above, para. 13 cited in ibid., 9. See also, Smit and Herzog, "Article 237," 6-374.

517 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 9. Smit and Herzog, "Article 237," 6-374.

of permanent representatives of the six Member States.[518] As it will be discussed below, the structure of the meetings and negotiations remained the same in following enlargements, depending on the level of preparedness of the candidate State, it was the frequency of these meetings that changed. The more time a candidate needed for preparation, the less frequent the meetings were.

The first session of the "Conference between the European Communities and the States Applying for Membership" took place on 30 June 1970 in Luxembourg. The title of the conference was meant to indicate the Community nature of the process. The main issues with the UK were tackled between the fall of 1970 and the summer of 1971. What remained were the negotiations with Norway concerning fisheries and its agricultural supports. The Act of Accession was signed on 22 January 1972,[519] and entered into force on 1 January 1973 for the UK, Ireland and Denmark.

An interesting point to be noted is that the Communities were actually prepared for an instance whereby one of the applicants would not eventually accede. Article 2(3) of the 1972 Treaty of Accession provided for the entry into force of the Treaty in such a case for those States that had deposited their instruments of ratification. In the case of such a scenario, it was the Council acting unanimously which needed to "decide immediately upon such resulting adjustments as have become indispensable" to the Act of Accession. According to Puissochet, the reason why that power was given to the Council rather than a conference of representatives of States which had ratified it was a practical one, that is to obviate the need for recourse to another round of parliamentary ratifications or referendums. However, that choice had serious theoretical implications. A Community institution was given the power to amend the Treaties that is primary law, even if that power was circumscribed by the term indispensable "adjustments". Puissochet claims that "[t]he procedure followed underlines the real individuality of the Community and its autonomy *vis-á-vis* the States which had set it up".[520]

In conclusion, an overview of the procedure for negotiations set by the Council on 8-9 June 1970, and later followed in practice, illustrates clearly the Community nature of the process. It was established that it was the European Communities conducting the negotiations, more specifically the Council. The Council was the main player in the process empowered to decide on the common standpoint of the Communities. The Commission had a very active supporting role. Where areas in which Community policies already agreed were concerned, it would set and defend the common standpoint during the negotiations. The Commission was also supposed to seek solutions to the

518 Smit and Herzog, "Article 237," 376.

519 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 10-13.

520 Ibid., 125.

problems that arose during the negotiations together with the candidate states, and make proposals concerning the adoption of a standpoint. In short, the Commission was actively engaged in the process under the guidance of the Council. Its actual role in the process was a far cry from the role assigned to it under Articles 98 ECSC, 237 EEC and 205 EAEC, which was that of delivering an opinion on a membership application. As to the Member States, it is worth repeating that they had no individual roles to play in the process, the only role they played was *qua* Council of the European Communities.[521]

The experience of the first enlargement laid down the ground rules to be adhered to in future enlargements.[522] As illustrated by the review of the changes in the Treaty articles, other institutions, such as the European Parliament, were also given a role to play in the procedure at a later stage. However, the main dynamic of the process, which is the central roles played by the Council and Commission, remained unchanged.

It is worth noting that there is another Union institution, which is not mentioned in Article 49 TEU and therefore not covered in detail in this Chapter, however, whose authority is felt by other Union institutions as the sword of Damocles swaying upon them through every step of the procedure. It is the possible source of "external sanction" if the game were not played in line with the rules stipulated in Article 49 TEU. That is the Court of Justice of the European Union. The jurisdiction of the Court over the enlargement procedure was already acknowledged in the founding treaties of the Communities "without any particular explicit restriction."[523] That remained unchanged and now under the Lisbon Treaty, Article 49 TEU is subject to the Court's jurisdiction as enshrined in Article 19 TEU and Article 275-276 TFEU. Treaties of Accession also explicitly stipulate that "[t]he provisions concerning the rights and obligations of the Member States and the powers and jurisdiction of the institutions of the Union as set out in the Treaties … shall apply in respect of this Treaty [of Accession]."[524]

Last but not least, it is not the intention of this Chapter to trivialize the important role played by the Member States. They are the gatekeepers that trigger the opening and closing the door of the accession procedure, i.e. they

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521 Smit and Herzog, "Article 237," 375-76. That is also clearly illustrated by Article 4 of Protocol 10 of the 2003 Act of Accession, which provides as follows: "In the event of a settlement, the Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community".

522 Kochenov, *EU Enlargement and the Failure of Conditionality*: 62. C. Preston, "Obstacles to EU Enlargement: The Classical Community Method and the Propsects for a Wider Europe," *Journal of Common Market Studies* 33, no. 3 (September 1995): 452. Smit and Herzog, "Article 237," 377-78.

523 Hillion, "EU Enlargement," 213.

524 For an example, see Article 1(3) of the Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, OJ C 241, 29.8.1994.

are at the peak of their influence at the very beginning (by taking the decision that a State qualifies as a "candidate" for EU membership) and the very end (during the ratification of the Act of Accession).[525] However in between, once the procedure of Article 49 TEU is triggered, as illustrated by the first enlargement, the Union institutions come into play and Member States have to exert their influence through the institutional structures of the Union. How that works is analysed in more detail below.[526]

4.3.2 Evolution of the enlargement practice

There were no major changes in the way in which the accession of a new Member State took place until the eastern enlargement. It was the responsibility of each candidate State to prepare itself in the light of the *acquis* applicable at the time of its accession.[527] However, the sheer challenge presented by the prospect of the CEECs joining the Union,[528] prompted the EU institutions to revise the existing practice so as to be more actively involved in preparing the candidate States for their future accession. The enormity of the challenge invited a proportionate amount of attention from academics, who wrote about every possible aspect of what was called "the big bang enlargement".[529]

525 The fact that France vetoed twice the UK membership application is a good illustration to Member States' influence at the very beginning of the process.

526 See the sub-sections under section 4.3.2.

527 Hoffmeister, "Changing Requirements for Membership," 103.

528 O'Brennan, *The eastern enlargement of the European Union*: 172.

529 A. Albi, *EU enlargement and the constitutions of Central and Eastern Europe* (Cambridge: Cambridge University Press, 2005); Armstrong and Anderson, *Geopolitics of European Union Enlargement: The fortress empire*; A. L. Dimitrova, *Driven to change: the European Union's enlargement viewed from the East* (Manchester University Press, 2004); M. A. Landesmann and D. K. Rosati, *Shaping the new Europe: economic policy challenges of European Union enlargement* (Basingstoke, New York Palgrave Macmillan, 2004); P. Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 1 vols., vol. 2, European Council Commentary (Brussels: EuroComment, 2004); Maresceau, *Enlarging the European Union: Relations between the EU and Central and Eastern Europe*; Nicoll and Schoenberg, *Europe beyond 2000: the enlargement of the European Union towards the East*; Sajdik and Schwarzinger, *European Union enlargement: Background, developments, facts*; M. Schmidt and L. Knopp, *Reform in CEE-countries with regard to European enlargement: institution building and public administration reform in the environmental sector*, Environmental protection in the European Union (Berlin: Springer, 2004); S. Senior Nello and K. E. Smith, *The European Union and Central and Eastern Europe: the implications of enlargement in stages* (Ashgate, 1998); Skuhra, *The Eastern enlargement of the European Union: efforts and obstacles on the way to membership*; M. A. Vachudová, *Europe undivided: democracy, leverage, and integration after communism* (Oxford OUP, 2005); A. Verdun and O. Croci, *The European Union in the wake of Eastern enlargement: institutional and policy-making challenges* (Manchester University Press, 2005); A. E. Kellerman, J. W. de Zwaan, and J. Czuczai, *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001); A. Inotai, "The 'Eastern Enlargements' of the European Union," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP,

The event that constituted a milestone not only for the eastern enlargement but for all subsequent enlargements was the June 1993 Copenhagen European Council, where the CEECs were given the prospect of joining the Union. The Presidency conclusions explicitly declared that "[a]ccession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions."[530] The conditions that had to be satisfied for accession, which became known as the Copenhagen criteria, were as follows:

> 'Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.
>
> The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.'[531]

The Copenhagen criteria became the cornerstone of EU conditionality for both the eastern and future enlargements. Accession negotiations could only be opened after the political Copenhagen criteria were fulfilled by a candidate State.[532] In addition to the political and economic reforms that CEECs needed to undergo as preparation for membership that is for the adoption of the community *acquis*, the Copenhagen criteria stipulate that the Union itself also needs to undergo reforms to be able to "absorb" the new Member States and

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2003); K. Engelbrekt, "Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement," *International Politics* 39(March 2002); U. Sedelmeier, "Eastern enlargement: Risk, rationality and role-compliance," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. U. Sedelmeier and F. Schimmelfennig (Florence, KY, USA: Routledge, 2005); F. Schimmelfennig, "The community trap: liberal norms, rhetorical action and the eastern enlargement of the Euroepan Union," in *The Politics of European Union Enlargement: Theoretical Approaches*, ed. F. Schimmelfennig and U. Sedelmeier (Florence, KY, USA: Routledge, 2005); G. Vassiliou, *The Accession Story: The EU from 15 to 25 Countries*, ed. George Vassiliou (Oxford: OUP, 2007); E. Landaburu, "The Need for Enlargement and Differences from Previous Accessions," in *The Accession Story: The EU from 15 to 25 Countries*, ed. G. Vassiliou (Oxford: OUP, 2007). R. Goebel, "Joining the European Union: The Accession Procedure for the Central European and Mediterranean States," *International Law Review* 1, no. 1 (2003-2004). C. Chiva and D. Phinnemore (eds.), *The European Union's 2007 Enlargement* (London and New York: Routledge, 2012).

530 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993, SN 180/1/93 REV 1, p. 13.

531 Ibid.

532 Inglis, "EU Enlargement – Membership Conditions Applied to Future and Potential Member States," 238.

ensure that it still functions effectively. The so-called "absorption capacity" of the Union,[533] a novelty introduced in Copenhagen, became an additional criterion to which enlargement-sceptic Member States could pay lip service to in the future.

It should be noted that the political conditions formulated at Copenhagen are not entirely new.[534] In the mid-1970s when Greece, Portugal and Spain were making a transition from authoritarian rule to democracy, it was important to send a clear signal to these countries that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership in the European Communities".[535] Some trace back the roots of political conditionality to the 1960s when the Political Committee of the Parliament issued a report on the necessary political and institutional conditions to become a Member State of the Communities.[536]

Unlike the political conditions, the economic conditions can be considered relatively new. Since the states aspiring to join the Communities during the Cold War years were capitalist states, the emphasis was placed on the political conditions those states needed to fulfil. The collapse of communism and the need for a total overhaul in the systems of the CEECs made both political and economic conditionality a central feature of enlargement policy.[537]

The heavy emphasis on the Copenhagen criteria, resulted in their partial codification in Article 6(1) TEU as the principles (later becoming "values" under Article 2 TEU after Lisbon) on which the Union is founded and principles that require respect from candidate States. In other words, those principles were upgraded from being unwritten constitutional principles to being formal constitutional principles and hence, formal constraints on Member States. Their increased visibility in the Treaties was bound to increase their constraining

533 M. Emerson, S. Aydin, J. De Clerck-Sachsse, G. Noutcheva, "Just what is this 'absorption capacity' of the European Union?," *CEPS Policy brief* 113 (September 2006). F. Vibert, ""Absorption capacity": the wrong European debate," http://www.opendemocracy.net/content/articles/PDF/3666.pdf. G. Durand and A. Missiroli, "Absorption capacity: old wine in new bottles?," in *European Policy Center Policy Brief* (September 2006). S. Gidisoglu, "Defining and Understanding the Absorption Capacity of the European Union: from absorption to integration capacity," *Insight Turkey* 9, no. 4 (2007); F. Amtenbrink, "On the European Union's institutional capacity to cope with further enlargement," in *Reconciling the Deepening and Widening of the European Union*, ed. S. Blockmans and S. Prechal (T.M.C.Asser Press, 2007), 111-16.

534 Hillion, "The Copenhagen Criteria and their Progeny."; K. E. Smith, "The Evolution and Application of EU Membership Conditionality," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003), 109-10.

535 European Council of Copenhagen, "Declaration on Democracy", Bull. EC 3/1978, p. 6.

536 B. Kliewer and Y. Stivachtis, "Democratizing and Socializing Candidate States: The Case of EU Conditionality," in *The State of European Integration*, ed. Yannis A. Stivachtis (Abingdon, Oxon: Ashgate Publsihing Group, 2008), 146; G. Pridham, *Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe* (New York: Palgrave, 2005). 30.

537 Kliewer and Stivachtis, "Democratizing and Socializing Candidate States: The Case of EU Conditionality," 146.

power. The recurrent appeal to these principles requires corresponding commitment and compliance with them, if the Union's credibility were to be kept in place. This consistency requirement as to the compatibility between what one practices and what one preaches has been called "the civilizing force of hypocrisy",[538] and can be identified as an important political as well as legal constraint in the context of enlargement.

The significance of the Copenhagen European Council for the EU's enlargement cannot be overstated. If there is a distinction to be made in terms of the evolution of the enlargement practice, i.e. distinction between different periods, Copenhagen will definitely be the borderline event. Thus, one can speak about enlargement pre and post Copenhagen. Hillion is also of the opinion that since Copenhagen, enlargement has become a *policy* governed by a set of elaborated substantive rules as opposed to being merely a procedure.[539] That policy was given shape by the following European Councils as well as by the myriad of pre-accession instruments developed by the Commission along the way. The more involved Union institutions were in the process, the less chance Member States got to hijack or abuse the process in line with their national agendas. For a better understanding of how enlargement practice changed with the eastern enlargement, a closer look at the role of the institutions in this particular enlargement wave is warranted.

4.3.2.1 Role of the Commission

There were many factors that made the eastern enlargement a huge challenge. To name a few, the number of candidate States, their political, economic, administrative, judicial structures that had to be reformed in line with Western standards, and the level of integration already achieved by the EU, that is the enormous *acquis communautaire* which they had to adopt. Perhaps it is the scale of the challenge that required a greater role for the institution that was to orchestrate the process that is the Commission. Therefore, it is worth noting that what follows is not an exhaustive description of the Commission's role in the process, but just an overview of its most important functions that will enable us to understand and appreciate that role.

With the incoming membership applications after the Copenhagen Summit, the pressure on the Union to develop a coherent strategy to prepare the CEECs for membership increased. The Commission was given a very important role in the process, as it was the institution that needed to prepare proposals for the so-called pre-accession strategy,[540] which was the route plan for the CEECs

538 J. Elster, "Introduction," in *Deliberative Democracy*, ed. J. Elster (Cambridge University Press, 1998), 12.

539 C. Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," (Swedish Institute for European Policy Studies, 2010), 14.

540 Presidency Conclusions, Corfu European Council, 24-25 June 1994.

in their preparation for accession. The pre-accession strategy[541] was approved by the December 1994 Essen European Council.[542] The political and economic conditionality laid down in Copenhagen was used as the basis of the pre-accession strategy and the instruments it was composed of further refined and clarified that conditionality.[543] According to Inglis, the fact that the Commission was so heavily involved in the formulation and implementation of the instruments of the pre-accession strategy as well as its duty to monitor and evaluate candidates' performance in meeting their respective targets under those instruments is an evidence of its unprecedented role in the eastern enlargement.[544]

One of the most important ideas of the Commission came up from its *Agenda 2000* Report, in which it presented its opinions on the ten CEECs.[545] Unlike previous opinions, *Agenda 2000* provided a mid-term perspective on the candidate's preparedness rather than evaluating their current situation. This concept, which set targets for fulfilling different objectives in different time frames for different candidate states, established the basis of the most important legal instrument guiding the candidate states through their process of preparation for accession: the *Accession Partnership*.[546]

As soon as the Commission would draw an Accession Partnership for a particular candidate State, that State had to adopt a National Plan for the Adoption of the *Acquis* (NPAA) that reflected the principles, objectives and priorities outlined in its Accession Partnership document. It also included the policies and financial instruments to be adopted by the Union to support the candidates' reforms towards accession. However, setting goals was not enough.

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541 European Commission, "The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession", COM(94) 320 final; and European Commission, "Follow up to Commission Communication 'The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession'", COM(94) 361 final.

542 Presidency Conclusions, Essen European Council, 9-10 December 1994.

543 K. Inglis, "The Pre-Accession Strategy and the Accession Partnerships," in *Handbook on European Union Enlargement: A Commentary on the Enlargement Process*, ed. A. Ott and K. Inglis (The Hague: T.M.C. Asser Press, 2002), 104. For more information on the pre-accession strategies and different forms of conditionality applied by the EU, see; Smith, "The Evolution and Application of EU Membership Conditionality." M. Maresceau, "The EU Pre-Accession Strategies: A Political and Legal Analysis," in *The EU's Enlargement and Mediterranean Strategies. A Comparative Analysis* ed. M. Maresceau and E. Lannon (Palgrave, 2001). Kliewer and Stivachtis, "Democratizing and Socializing Candidate States: The Case of EU Conditionality."; L. Tunkrová, "Democratization and EU conditionality: A barking dog that does (not) bite?," in *The Politics of EU Accession: Turkish challenges and Central European experiences*, ed. L. Tunkrová and P. Šaradín (Routledge, 2010); M. Maresceau, "Pre-accession," in *The Enlargement of the European Union*, ed. M. Cremona (Oxford: OUP, 2003).

544 Inglis, "The Pre-Accession Strategy and the Accession Partnerships," 104.

545 European Commission, "Agenda 2000: For a Stronger and Wider Union", Bull. EU Supp. 5-1997.

546 Inglis, "The Pre-Accession Strategy and the Accession Partnerships," 103-11.

Therefore, starting from the end of 1998, the Commission was also asked to prepare yearly reports, which made an overview of the progress made by each applicant State towards accession.[547]

It was obvious that the tasks entrusted to the Commission could no longer be dealt with by the task force (TFNA – Task-force Négociations d'Adhésion) established in 1998. Thus, to represent the political importance as well as the scale of the challenge of enlargement to the east, a Commissioner for Enlargement was appointed and a Directorate General for Enlargement was created to assist him. According to Chrystoffersen, the creation of DG Enlargement reflected "a shift in the focus of the accession process from diplomatic negotiations to a much broader-based preparation process".[548]

To make the negotiations easier and more systematic, the *acquis* was divided into thirty-one chapters, each covering a specific policy area, upon which the negotiations were carried out. The negotiations always started with the analytical examination of the *acquis* by the Commission for each chapter, the so-called "screening" process, which was presented to all candidate States in joint meetings. Subsequently, the Commission held bilateral meetings with each candidate State so as to identify the changes required to conform to the Union's *acquis* in all thirty-one chapters. At the end of the screening process, the Commission presented its findings to the Council in a report, which described the state of affairs and identified problematic areas.[549]

After the screening process was over, both the EU and the candidate states prepared their negotiating positions on each individual chapter. Candidate States explained how they intended to adopt the *acquis*, what changes were needed, and how they planned to implement those changes. On the EU side, it was the Commission that proposed the draft negotiating position for each chapter and country. The only exceptions were the CFSP and JHA. For the latter chapters, it was the Council Presidency that was officially responsible for submitting proposals in "in liaison with the Member States and the Commission."[550] However, in practice according to Chrystoffersen, in the JHA area it was the Commission that did the work, which the individual EU Home and Justice Ministers followed closely.[551]

The Commission played an important role in the process, even though the negotiations formally took place in an IGC: in the case of the fifth enlargement called "Conference for accession to the European Union" between the fifteen Member States and the specific candidate country.[552] It was not only

547 Presidency Conclusions, Luxembourg European Council, 12-13 December 1997, para. 29.
548 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 37.
549 Ibid., 44-45.
550 Ibid., 45.
551 Ibid.
552 L. Maurer, "Negotiations in Progress," in *Handbook on European Union Enlargement: A Commentary on the Enlargement Process*, ed. Andrea Ott and Kirstyn Inglis (The Hague: T.M.C. Asser Press, 2002), 117-18.

the institution monitoring the progress of the candidates, but also the one developing and fine-tuning the myriad of strategies and instruments that sought to manage the process. It acted as the main interlocutor with the candidate States.[553] Hence, Chrystoffersen concludes that the Commission's de facto role in the enlargement process "is more typical of the 'Community method': the Commission proposes, the Council decides, and the Commission implements, controls and evaluates".[554] That is again a far cry from the role envisaged for the Commission under Article 49 TEU.

4.3.2.2 Role of the Council

Defining the role of the Council in the enlargement process is a bigger challenge than defining the Commission's role, since we talk about the role of multiple entities under the rubric "the Council". We talk about the European Council,[555] the Presidency of the EU, the Council of Ministers, Coreper (Committee of Permanent Representatives), the expert working groups reporting to Coreper. In the case of the eastern enlargement, these different parts of the machinery combined to form the complex and multifaceted Council, which had responsibility over a wide range of policy domains. According to O'Brennan, this differentiated sharing of responsibility within the Council machinery contributed to the fragmentation of enlargement policy, undermining the coherence of the EU position and alienating the candidate states.[556]

To mention a few of the reasons for fragmentation within the Council; firstly, officials working in the Council were Member State representatives with relatively clearly defined and fixed national objectives which made it difficult for the Council to develop its distinct 'enlargement perspective'.[557] Secondly, the Council would meet in one of its many configurations, composed of ministers in a given sectorial area such as finance, the environment or agriculture, which at the end would result in not only national but also sectorial cleavages.[558] Finally, cooperation and coordination was needed among the sectorial Councils, the General Affairs Council, and Coreper as well as between all these and the Presidency. All that fragmentation, according

553 O'Brennan, *The eastern enlargement of the European Union*: 56.

554 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 36.

555 At the time of the eastern enlargement the European Council was not officially a fully-fledged institution under the Treaties, but an inter-governmental forum. Therefore, it will be dealt with as part of the Council machinery when describing its role in the eastern enlargement.

556 O'Brennan, *The eastern enlargement of the European Union*: 58-59.

557 M. Conrad, "Persuasion, Communicative Action and Socialization after EU Enlargement," in *Second ECPR Pan-European Conference* (Bologna24-26 June 2004), 20; cited in O'Brennan, *The eastern enlargement of the European Union*: 59.

558 U. Sedelmeier, "Sectoral Dynamics of EU Enlargement: Advocacy, Access and Alliances in a Composite Polity," *Journal of European Public Policy* 9, no. 4 (2002): 631.

to O'Brennan, frequently undermined the Council's ability to carve out a consistent enlargement policy.[559] Arguably, all these drawbacks experienced by the Council might have contributed to the strengthened role of the Commission in the enlargement process.

As to the role of the Council machinery in the negotiation process itself, every piece of work would start at the lowest level, and if not resolved, would be transferred to a higher level until it reached the highest level of decision-making. A draft common position would initially be examined by the Council's Enlargement Working Group, which would be composed of diplomats experienced in EU affairs. If there were difficulties in reaching an agreement on the definition of the common position, the issue would be referred to Coreper, a senior committee composed of EU ambassadors of Member States and the Director General for Enlargement representing the Commission in this particular case. If it were still not possible to resolve the issue, it would be referred to the General Affairs Council, composed of Foreign Ministers of Member States and a member of the Commission. In exceptional cases, such as a number of financial issues that needed to be agreed on at the end of the negotiations of the fifth enlargement, the matter had to be raised to the level of the European Council.[560]

Negotiations, which took place under the title "Conference for the Accession to the European Union", usually, began at (deputy) ambassador level. The President of Coreper, who was assisted by the Director General Enlargement, led the Union delegation. Negotiations also took place at ministerial level with the EU being represented by the General Affairs Council and the Enlargement Commissioner. A candidate State was represented by its chief negotiator, who was a minister appointed to conduct the negotiations. Any results reached in the negotiations at deputy level had to be approved at the ministerial level. Usually each presidency held one meeting at deputy and one at ministerial level. The negotiations, i.e. the conference could also be held at the level of heads of state and government.[561]

According to Chrystoffersen, little real negotiation took place in the enlargement conferences. They were purely formal. Their main function was to register the progress of the negotiations. Most of the real negotiations took place behind the scenes, in meetings between the chief negotiator of the country and the Commission and/or the Presidency.[562] This suggests a limited role for Member States representatives during the conference.

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559 O'Brennan, *The eastern enlargement of the European Union*: 60.

560 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 41-42.

561 Ibid.; Maurer, "Negotiations in Progress," 117-18. Schneider, *Conflict, Negotiation and European Union Enlargement*: 18-19.

562 See also, Christoffersen, "Organization of the Process and Beginning of the Negotiations," 42-43; G. Avery, "The Enlargement Negotiations," in *The future of Europe: integration and enlargement*, ed. F. Cameron (London: Routledge, 2004), 40.

The roles of the European Council and especially that of the Presidency of the Council of Ministers also deserve special attention. To begin with the role of the latter, it is one of the key institutional actors in the negotiating process. It was expected to take a leadership role, and act as a mediator when there were institutional or policy disputes. Activist Presidencies, such as the Swedish and Danish presidencies, made a big difference in the acceleration and conclusion of the accession process. Presidencies' role in the process is crucial since it is the Presidency that decides not only on the format of the negotiation sessions, but also on their number and frequency. They are able to structure and shape the negotiating agenda. Especially when the Commission and a Presidency enjoyed a good working relationship, they were able to resolve problems since it would become more difficult for the Member States to oppose proposed solutions backed by both institutions.[563] According to Ludlow, as far as the EU is concerned, the Commission and the Presidency were the main actors in the enlargement story to the East.[564]

As to the role of the European Council, it provided the general political direction to the enlargement process.[565] Important decisions, such as the opening of accession negotiations with a group of countries, or additional criteria that had to be fulfilled by the candidates, would be specified in these summits.[566] Though there were few summits that provided momentum to the enlargement process, O'Brennan argues that the structural dynamics of intergovernmental bargaining was often inclined to produce non-decisions. Where European Council meetings did produce EU agreement, "that was more often than not because of the informal day-to-day supranational process which increasingly characterized EU enlargement practice and provided the problem-solving capacity in advance of intergovernmental gatherings".[567]

To recap, the Council's role in the process is complex and multifaceted. Due to various forms of fragmentation mentioned above, it was not able to act consistently throughout the process. Its role was still very important, since it was the Council machinery through which Member States tried to maintain their control over the process. This was important because the Commission succeeded in establishing authority in key parts of the EU enlargement framework from early on. Thus, the Council machinery enabled Member States to

563 O'Brennan, *The eastern enlargement of the European Union*: 62-65.

564 Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 2: 64.

565 See Article 15(1) TEU.

566 The December 1999 Helsinki European Council for instance, invited Bulgaria, Romania, Latvia, Lithuania and Slovakia to begin accession negotiations in February 2000. It was emphasised that negotiating states had to comply not only with the Copenhagen criteria but also with the principle of peaceful settlement of disputes in accordance with the UN Charter. See Presidency Conclusions, Helsinki European Council, 10-11 December 1999, paras. 10 and 4 for the respective examples.

567 O'Brennan, *The eastern enlargement of the European Union*: 72.

scrutinize the Commission's activities and ensure their interests were protected throughout the process.[568]

The purpose of describing the role of each institution in the accession process was to demonstrate its complex nature and the structures within which Member States and Union institutions had to operate. All of these limit Member States' room for manoeuvre. Overall, the accession process of the CEECs was far from being purely intergovernmental, and Member States were far from having full control over it. They had to use existing structures, i.e. various parts of the Council machinery, to be able to control the process. As in other policy areas, there were and there still are inter-institutional turf battles whereby each institution tries to maximize its power and influence over the process. As a response to the increase in the Commission's power over the process, as argued in section 4.3.3 below, Member States have devised new ways to increase their control over the process.

4.3.2.3 Role of the European Parliament

Upon a plain reading of Article 49 TEU, the role of the European Parliament seems to be limited to saying "yes" or "no" at the end of the accession process. However, scholars argue that with the eastern enlargement the EP became a player in its own right in all the stages of the process within the Union and within the candidate countries themselves. It managed to translate its formal power of assent into various forms of informal influence over the process.[569]

The Parliament was pro-enlargement from the early stages of the process. It was in favour of an inclusive strategy and insisted on the equality of treatment of all the candidate states. Its Foreign Affairs Committee was largely responsible for supervising and coordinating studies and debates on enlargement. Embedding democratic norms, human rights and fundamental freedoms in the candidate states were the main themes of these studies and debates. The EP also contributed to the early socialization of the members of the national parliaments of the candidate states through their meetings in Joint Parliamentary Committees.[570] As negotiations progressed towards tackling more challenging issues specialist committees were formed within the Parliament to tackle sector-specific enlargement issues. These specialist committees

568 Ibid.

569 Ibid., 95; Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 2: 64. See also, The European Parliament, "The European Parliament in the Enlargment Process: An Overview", June 2002.

570 O'Brennan, *The eastern enlargement of the European Union*: 99-104; Ludlow, *The Making of the New Europe: The European Councils in Brussels and Copenhagen*, 2: 64-65.

were involved in monitoring the negotiations in their areas of expertise, and when needed conducted fact-finding missions in the candidate countries.[571]

Overall, the European Parliament played an important monitoring role in the pre-accession process. In addition to holding annual debates on enlargement on the basis of reports prepared by its Foreign Affairs Committee and its specialist committees in the process of negotiations of the Eastern enlargement, it also adopted resolutions on the Commission's regular progress reports for each candidate country.[572] These resolutions were quite influential and stirred fruitful debates within the Union as well as within the candidate countries.

Though a minor player compared to the Commission and the Council, Parliament's pro-enlargement stance undoubtedly gave an extra momentum to the process and contributed to its legitimacy. Parliament's role is another illustration of the Union nature of the enlargement process, as Parliament usually has no say in purely intergovernmental settings. In other words, the role of the EP in the enlargement process brings it closer to other areas of Union law, which are shaped and implemented by the Community/Union method, that is the interaction between the Commission, Council and the European Parliament.

An overview of the roles of various institutions in the process was important to illustrate how active and involved they were in the process, way beyond what had been envisaged in Article 49 TEU. That role now extends to cover the pre-accession process. The main reason behind this extension was the fact that the Union institutions had to be involved in "Member State building"[573] or "Member State creation". Economic, administrative and judicial structures compatible with the EU's DNA, that is liberal democracy based on the rule of law and on market economy principles, had to be created before admitting the new comers. The transformation of the CEECs needed the support and guidance of Union institutions, without which it might have lasted way longer, and could have lost its momentum along the way. It needs to be emphasised that this was indeed an evolution of the process and not only an exception, as the majority of the candidate countries and potential candidates are countries in need of a similar transformation process. Except for

571 See, "The European Parliament in the Enlargement Process – An Overview", March 2003. Available online at: http://www.europarl.europa.eu/enlargement_new/positionep/pdf/ep_role_en.pdf

572 Ibid.

573 The term was first used by G. Knaus and M. Cox, "The "Helsinki Moment" in Southeastern Europe," *Journal of Democracy* 14(2005): 39-53. See also, S. Blockmans, "EU enlargement as a peacebuilding tool," in *The European Union and Peace Building: Policy and Legal Aspects*, ed. S. Blockmans, J. Wouters, and T. Ruys (The Hague: TMC Asser Press, 2010), 77-78.

Iceland, there are no states like Austria, Finland or Sweden left outside the EU anymore.[574]

Poul Skytte Chrystoffersen, who was the Danish ambassador to the EU from 1995 to 2003, and in this capacity was the President of Coreper and the EU Chief negotiator, explained how formal enlargement conferences were and how little real negotiation they entailed. He notes their main function was to register the progress of the negotiations, which took place elsewhere, in meetings between the chief negotiator of the country and the Commission and/or the Presidency.[575] This demonstrates how constrained Member States' representatives were during the Conferences. They had limited room of manoeuvre, especially when the Commission and Presidency worked well together and came with common proposals.[576]

To sum up, the eastern enlargement showed how the active involvement of Union institutions added an extra momentum to the enlargement process. The institutions worked hard to make things move. The fact that so much energy and effort was invested in the preparation of the candidates for full membership, made it difficult for individual Member States to halt the process or sabotage it. Both Member States and Union institutions jointly prepared the ground for the unification of Europe. Once the process got underway, blocking such a historical event was no longer plausible. Member States were constrained (or 'entrapped' as Schimmelfennig calls it) both by their own rhetoric,[577] as well as by the momentum created by the scale of institutional involvement in the process.

4.3.3 Practice governing future enlargements

Even though there has been some fine-tuning, the accession process of the existing candidate states has been by and large working along the same lines with that of the CEECs. The Commission prepared Accession Partnership documents in which it outlined the short and medium-term priorities upon which the candidates prepared their National Programmes for the Adoption

574 The author assumes that in the current political climate, and after negative referenda on the issue of EU membership in both Switzerland and Norway, it is not very likely for either of these countries to revive its membership aspirations in the near future. Moreover, it should be noted that the Swiss also refused to join the EEA Agreement in December 1992, following which the current association regime of bilateral agreements was established. For more details, see the literature cited in footnote 199 above.

575 See also, Christoffersen, "Organization of the Process and Beginning of the Negotiations," 42-43; Avery, "The Enlargement Negotiations," 40.

576 O'Brennan, *The eastern enlargement of the European Union*: 62-65.

577 Schimmelfennig, "The community trap: liberal norms, rhetorical action and the eastern enlargement of the Euroepan Union."

of the *Acquis*.[578] These documents are updated by the Commission on a regular basis.[579]

The Negotiating Frameworks for Turkey, Montenegro and Serbia also contain a section on the "negotiating procedures" which briefly explain how the negotiations are to proceed. The first step is breaking down the *acquis* into chapters covering specific policy areas, to be followed by "screening". After the screening phase, building on the Commission's regular reports and in particular on the information obtained by the Commission during screening, the Council, acting by unanimity on a proposal by the Commission, lays down "benchmarks" for the provisional closure and opening of every chapter. This system of benchmarks is what differentiates the current accession process from all the previous ones. It is an evaluation and assessment system that makes use of pre-determined performance indicators. These indicators, i.e. the benchmarks, can be updated as needed. The fact that unanimity in the Council is required for identifying relevant benchmarks, (as proposed by the Commission), as well as for the opening and closing of individual chapters makes the process much more political and difficult than before, as it gives Member States plenty of opportunity to block decision-making at any stage they wish to do so. This has arguably weakened the "Union nature" of the enlargement process. Unlike initial practice, Member States' increased control over the process has given them the opportunity to hold up the negotiations also for reasons that are not necessarily related to compliance with accession criteria, thereby politicizing the process and making it unpredictable.[580]

Provisionally closed chapters might be opened at any stage and the definitive ending of the negotiations takes place only at the very end, after everything has been agreed upon. According to the Commission, there is such interdependence between different chapters of the *acquis* that the principle that governs the negotiations is that "nothing is agreed until everything is agreed".[581] This is one of the relatively novel principles, which tells us that no chapter is closed until all chapters are closed.

To be able to fully grasp the nature of the enlargement process we also need to know about the well-established principles governing the negotiations. These principles had to be respected by all actors involved in the process so far. As such they can be considered as constraints on all actors including the Member States. Having established some of the constraints flowing from the

578 For examples, see Turkish National Programme for the Adoption of the Acquis, available online at: http://ec.europa.eu/enlargement/pdf/turkey/npaa_full_en.pdf ; National Programme for the Adoption of the Acquis of the Republic of Macedonia, available online at: http://www.mfa.gov.mk/Upload%5CContentManagement%5CFiles%5CMFA-National%20programme%20for%20adoption%20of%20the%20acquis.pdf

579 For examples, see note 224 above.

580 Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," 21.

581 "Closure of Negotiations and Accession Treaty", available online at: http://ec.europa.eu/enlargement/the-policy/process-of-enlargement/closure-and-accession_en.htm

procedure laid down in Article 49 TEU and actual enlargement practice, that is the bones and the flesh of our construct, it is time to identify the main principles that have shaped the negotiation process thereby shedding light on its spirit.

4.4 Definition and consolidation of negotiation principles

As with the actual practice of enlargement, the main principles of negotiation established during the first enlargement have formed the very basis on top of which some new principles have been added, however by and large, the latter have been derived from the former. The focus in this part is on identifying the main principles, which are by now entrenched in enlargement practice. Principles that could be considered part of "customary EU law",[582] because there has been a consistent actual practice over time as a result of a belief that they are legally obligatory.[583] Thus, the list provided here is shorter than the lists of enlargement principles identified by scholars writing in this field,[584] since what is of interest for our purposes is identifying only the principles that have been entrenched and internalized as a result of consistent and repeated past practice. As part of "customary EU law", these principles constrain all the actors involved in the enlargement procedure, including the Member States.

To show that these principles have been repeatedly and consistently applied in each and every accession process out of a belief that such legal obligation existed, i.e. to prove they have been internalized, it is appropriate to examine the process in a chronological order. The fact that those principles were respected is evidence of state practice, while statements of the Commission, the Council, leaders of candidate states or Member States emphasizing the importance of those principles or the requirement they be respected are evidence of *opinio juris*, i.e. the belief that that following those principles is legally obligatory.[585] The emphasis in this part will be on the latter, while a more in-depth analysis of the evidence of actual state practice, as manifested by the Acts of Accessions follows in Chapter 4.

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582 Kochenov, "EU Enlargement Law: History and Recent Developments: Treaty-Custom Concubinage?."

583 M. N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003). 68-80.

584 D. Booss and J. Forman, "Enlargement: Legal and Procedural Issues," *Common Market Law Review* 32, no. 1 (1995): 100-03. K. Maniokas, "Methodology of Enlargement: A Critical Appraisal," *Lithuanian Foreign Policy Review* 1, no. 5 (2000); Preston, "Obstacles to EU Enlargement: The Classical Community Method and the Propsects for a Wider Europe," 452-56. Kochenov, *EU Enlargement and the Failure of Conditionality*: 38-45.

585 For more information on what constitutes 'opinio juris' see, Shaw, *International Law*: 80-84. H. Thirlway, "The Sources of International Law," in *International Law*, ed. M. D. Evans (Oxford: OUP, 2010), 102-04.

4.4.1 The first enlargement as the source of all principles

Once the main principles of negotiation were established, the main issues to be discussed became also apparent. The founding Member States agreed that there were two main principles that would govern the accession process. The first principle had already been laid down in the Hague summit. It required that "the applicant States accept the Treaties and their political finality, the decisions taken since the entry into force of the Treaties and the options made in the sphere of development…".[586] In today's jargon, the applicant States needed to adopt the entire body of *acquis communautaire*.

The second principle, which is a corollary to the first one, was established by the Council at its session on 6th of March 1970 and provided as follows: "The rule … is that the solution of any problems of adjustment which arise must be sought in the establishment of transitional measures and *not in changes of existing rules*."[587] In the first session of the "Conference between the European Communities and the States applying for membership of these Communities" on 30 June 1970, the President-in-office of the Council at the time, Mr. Harmel, Foreign Minister of Belgium, emphasized these two principles. Regarding the second principle, he reaffirmed that any transitional measures that prove to be necessary need to be of limited duration, and that as a general rule they must incorporate precise timetables.[588]

According to Puissochet, these two principles demonstrated the intention of the founding Member States to apply the principle of continuity of the Community. The legal and political personality of the Community as well as existing economic arrangements were not to be distorted by accession in a way that would constitute novation in the legal sense of the term. Also legally, the Treaty articles on enlargement provided for "adjustments" and not amendment to the Treaties.[589]

These principles were in no way new. The Commission had outlined them long before the negotiations started. Back in the early 1960s, it made it clear that membership required the full acceptance of the principles and content of the Treaty of Rome. The entry of the new members was not to jeopardize

586 1969 Communiqué, note 514 above, para. 13.

587 Emphasis added. Cited in Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 6.

588 Ibid., 10.

589 Puissochet must have reached that conclusion based on the original language versions of the Treaty. Similarly, AG Lenz argued that "[s]ince accession treaties are, after all, agreements admitting additional States to a group of members of an existing community, it may be argued that such treaties should only contain the necessary technical adjustments of existing Community law without substantially changing the character of the Community." Emphasis added. See, Opinion of AG Lenz delivered on 1 December 1987 in *Joined Cases 31 and 35/86 LAISA and CPC España v Council of the European Communities*, [1988] ECR 2285, part B -I- (a) of the Opinion.

the aims of the Community, and consequently the Treaty was not to be subjected to any changes other than those required by the actual enlargement of the Community to new Member States.[590] Setting the limits within which future negotiations were to proceed was important in order to ensure that the interests of the Community were respected. Thus, already back in 1962 it was underlined that "the Community could never agree to schemes that might, by means of protocols or otherwise, introduce exceptions to the Treaty's rules which would be permanent or on so large a scale as to make the application of these rules an exception in itself."[591]

4.4.2 Enlargement to the South: Main principles maintained

To begin with the southern enlargement, the Commission acknowledged from the very outset that the integration of Greece, Portugal and Spain would be more problematic due to their lower level of development.[592] It was obvious to the Commission that the transitional period for these states should be longer than the transitional period adopted in the previous enlargement. However, there had to be a fixed deadline so as not to lose the incentive for reform. So the Commission concluded that the transitional period should be between five and ten years.[593]

The Commission also saw derogations or safeguard clauses of limited duration as a possible response to problems that arise in the transitional period. However it also emphasized that "[s]ubject to any strictly limited exceptions or derogations specified in the accession treaty, the end of the transitional period would represent the ultimate deadline for entry into force of all Community rules and application of all measures associated with enlargement."[594] In other words, at the end of the transitional period, the acceding States needed to have adopted the *acquis commnautaire* in full. This general principle guiding the negotiations was stated explicitly by the Commission, in addition to the principle that the terms of negotiation should be clear and that Portugal and

590 EEC-Commission, The first stage of the Common Market: Report on the Execution of the Treaty (January 1958 – January 1962), July 1962, pp. 95-96.

591 Ibid., p. 98.

592 For multi-disciplinary studies on the challanges of the 'enlargement to the South' see, J. B. Donges et al., *The Second Enlargement of the European Community: Adjustment Requirements and Challenges for Policy Reform*, Kieler Studien: Institut für Weltwirtschaft an der Universität Kiel (Tübingen: J. C. B. Mohr (Paul Siebeck) Tübingen, 1982). D. Seers and C. Vaitsos, *The Second Enlargement of the EEC: The Integration of Unequal Partners*, Studies in the Integration of Western Europe (New York: St. Martin's Press, 1982). L. Tsoukalis, *The European Community and its Mediterranean Enlargement* (London: George Allen & Unwin, 1981).

593 European Commission, Communication, "Enlargement of the Community – Transitional period and institutional implications", Supp. 2/78, pp. 6-7.

594 Ibid., p. 8.

Spain should accede simultaneously.[595] Put differently, the main principles underlying the negotiations of the first enlargement did not change during the second wave of enlargement.

4.4.3 Enlargement to the North: Main principles confirmed

An interesting point concerning the negotiations preceding the northern enlargement was the fact that the Commission was preparing and carrying out the negotiations based on the future *acquis* of what was to become the European Union after the entry into force of the Maastricht Treaty.[596] The speech delivered by the Finnish President Koivisto in Bruges on 28 October 1992 reveals the spirit of the process, and is another illustration of the confirmation, or entrenchment if you will, of the principle established in the Hague Communiqué: that "the applicant States accept the Treaties and their political finality".[597] He provided as follows:

> 'The European Community is playing a growing role in determining the course of developments on our continent. We would like to play a part in this process. We have studied the obligations of EC membership with care. In applying for membership, we accept the *acquis communautaire,* the Maastricht Treaty and the *finalité politique* of the European Union. We are ready to accept the obligations conferred by membership and to help to meet them as agreed.'[598]

This does not mean that there were no difficulties at all. The northern states also had their concerns, which they raised during the negotiations such as their neutrality, their high environmental standards, taxation, their alcohol monopolies etc. Norway was particularly concerned with the rules in the area of energy and fisheries, which were considered as areas of vital national importance.[599] However, the President-in-Office of the Council of Ministers made it clear at the ministerial meeting opening the Conferences on the accession of Austria, Sweden and Finland to the European Union that:

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595 European Commission, Communication, "Problems of Enlargement – Taking stock and proposals", Supp. 8/82.

596 European Commission, "The Challenge of Enlargement. Commission opinion on Finland's application for membership", Supp. 6/92, p. 6; and European Commission, "The Challenge of Enlargement. Commission opinion on Sweden's application for membership", Supp. 5/92, p. 5.

597 1969 Communiqué, note 514 above.

598 European Commission, "The Challenge of Enlargement. Commission opinion on Finland's application for membership", Supp. 6/92, p. 8.

599 For more detailed analysis see, T. Pedersen, *European Union and the EFTA countries: enlargement and integration* (London; New York: Pinter Publishers, 1994). F. Granell, "The European Union's Enlargement Negotiations with Austria, Finland, Norway and Sweden," *Journal of Common Market Studies* 33, no. 1 (March 1995).

> 'The acceptance of the rights and obligations by a new member may give rise to *technical adjustments*, and *exceptionally* to temporary *(not permanent)* derogations and transitional arrangements to be defined during the accession negotiations, *but can in no way involve amendments to Community rules*.'[600]

This was another way of formulating the main principles established during the first enlargement. It is possible to recognize this formulation in a bit more elaborated form in the following two sub-titles.

4.4.4 Enlargement to the East: Negotiation principles entrenched

Without doubt, the most challenging enlargement was the enlargement to the east. As was discussed above, the Union and its institutions were much more involved in shaping and preparing the applicant States for future membership. However, as far as the main principles of negotiation are concerned, from the very outset the Commission identified the same principles discussed above as the basis on which the negotiations were to be conducted. The Commission in its *Agenda 2000* document[601] confirmed that as in the past, the basis of negotiations would be the *acquis* as it existed at the time of accession. It also added that transitional periods of definite and reasonable duration might be considered in duly justified cases, however, the objective should be the application of the *acquis* on accession by the new Member States. In particular, the measures concerning the extension of the single market should be applied immediately. Moreover, "[t]he Union should not envisage any kind of second-class membership or opt-outs."[602]

The general position of the Union presented to the CEECs at the outset of the negotiations was almost identical with its position in previous enlargements. It states that the acceptance of the CEECs of the *acquis*:

> 'may give rise to technical adjustments, and exceptionally to transitional measures. Such transitional measures should be limited in time and scope, and accompanied by a plan with clearly defined stages for the application of the *acquis*. They must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant distortions of competition. In this connection,

600 Emphasis added. European Commission, "The Challenge of Enlargement. Commission opinion on Norway's application for membership", Supp. 2/93, pp. 5-6.

601 European Commission, "Agenda 2000: For a Stronger and Wider Union", Bull. EU Supp. 5-1997.

602 Ibid., p. 51-52.

account must be taken of the interests of the Union, the applicant country and the other applicant states.'[603]

The last sentence is novel and interesting. If it is taken to refer to the whole paragraph, its meaning is easier to interpret in the light of well-established principles. What is probably meant is that a balancing act of the interests of the Union, the interests of an applicant state and interests of all other states is required when deciding whether any exceptional transitional measure is granted to a particular applicant state. Given the number of the applicants, this statement is meaningful, since any 'concession' given to one is very likely to be claimed by the others.[604] However, if the last sentence is understood to be qualifying the sentence it precedes, that it allows for such measures that "involve amendments to the rules or policies of the Union" or "lead to significant distortions of competition", if those decisions are a result of a balancing act of the interests of all, we reach a conclusion that is entirely incompatible with already established rules. With hindsight, there is no evidence to support the latter interpretation. This is just bad drafting that was corrected in subsequent documents.[605]

In the *Enlargement Strategy Paper*,[606] the Commission also provided guidelines as to what types of transitional measures were "acceptable", "negotiable" or "unacceptable". The transitional measures that were identified as "acceptable" were those, which pose no significant problems and are of a technical nature. Those measures were limited in time and scope and were considered not to have a significant impact on competition or the functioning of the internal market. The measures in the "negotiable" category were those with a more significant impact on competition or the internal market, or in terms of time and scope. The Commission might recommend the acceptance of transitional measures in this category under certain conditions and within a certain time horizon. In addition to the effects on competition and the single market, requests for transitional measures in this category were also to be evaluated in terms of their effects on the economy, health, safety and the environment, consumers, citizens, other common policies and the Union budget. The Commission further explains that classifying certain requests as "negotiable" does not mean that they will be accepted, in whole or in part, but that it means that a solution to those requests might be found under certain

603 European Commission, "Enlargement Strategy Paper – Report on progress towards accession by each of the candidate countries, 2000" (Enlargement Strategy Paper 2000). Available online at: http://www.esiweb.org/enlargement/wp-content/uploads/2009/02/ec-2000-strategy-paper.pdf , p. 26.

604 Avery, "The Enlargement Negotiations," 39.

605 See section 4.4.5. or Negotiating Framework for Turkey, point 12; Negotiating Framework for Montenegro, point 13; and Negotiating Framework for Serbia, point 33.

606 Enlargement Strategy Paper 2000, cited in note 603 above.

conditions. Finally, according to the Commission, requests for transitional measures that pose fundamental problems will not be accepted.[607]

Even though the principles established by the Commission in the conduct of the negotiations with the CEECs were the same as in previous enlargements, the result was a bit different. The use of temporary derogations, safeguard clauses and transitional arrangements was far from being exceptional. According to Ott, the extent of these derogations in the 2003 and 2005 Accession Treaties is without a precedent. She claims that half of the *acquis* chapters include derogations for the new Member States in areas such as: free movement of goods, free movement of persons, freedom to provide services, free movement of capital, company law, competition policy, agriculture, fisheries, transport policy, energy, telecommunications, environment etc.[608]

The whole pre-accession strategy was built around reducing the differences between the candidates and the existing Member States and building the administrative and legal capacity of candidates so that they are able to take on the obligations of membership when the time of accession comes. Yet, this was an ambitious objective despite all the legal and financial instruments employed to make the candidates ready for membership. What's more, the structure of the Union was getting more and more complex, and there were areas in which candidates could only join at a later stage, after becoming Member States and after fulfilling the specific conditions necessary to join these policy areas. That was the case for the EMU and the Schengen area. The new Member States had to accept the EMU and the Schengen *acquis* from the date of accession, yet they were not considered to be qualified to become full members of these areas yet.[609] They would be able to join in the future once they fulfilled the relevant criteria applicable to these areas.

In addition to the wider use of transitional arrangements, another novelty in the latest accession treaties was the inclusion of extra safeguard clauses. In addition to the general economic safeguard clause that was also employed in previous accession treaties,[610] two specific safeguard clauses on the internal

607 Ibid., p. 27.

608 A. Ott, "EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration," in *Fifty Years of European Integration – Foundation and Perspectives*, ed. A. Ott and E. Vos (The Hague: T.M.C. Asser Institute, 2009), 117.

609 From their accession date until their eventual entry into the eurozone, the new Member States are considered as "Member States with a derogation" in the sense of Article 122 EC (now Article 140 TFEU). They will need to fulfil the Maastricht convergence criteria to be able to adopt the euro and join the eurozone. Similarly, they will be able to join the Schengen area only after it has been verified that all the requirements of the Schengen acquis have been met in full. See C. Hillion, "The European Union is dead. Long live the European Union… A commentary on the Treaty of Accession 2003," *European Law Review* 29(2004): 593-96.

610 Article 37 of the 2003 Act of Accession. There were similar clauses in the Act of Accession for Denmark, Ireland and the United Kingdom (Article 135), and in the Act of Accession for Austria, Finland, and Sweden (Article 152).

market and on Justice and Home Affairs were included.[611] This is a clear indication of the mistrust of the old Member States concerning the new Member States' ability to take on the obligations flowing from the *acquis*. This mistrust went as far as the inclusion of a mechanism to monitor Bulgaria and Romania's performance in their post-accession phase, the so-called "Co-operation and Verification Mechanism".[612]

In short, even if the principles identified by the Commission before the negotiations started with the CEECs were the same as the principles that applied to the states that joined in previous enlargement waves, it turned out that these principles were applied more liberally than before. It will not be an exaggeration to say that transitional measures were the norm rather than the exception in many policy areas. However, transitional measures are just instruments that enable the extension of the *acquis* to the newcomers in a more flexible way. What needs to be underlined is the fact that the idea behind all the new creative mechanisms applied in the enlargement to the east was to enable the effective participation of the new Member States in the policies of the EU in the future where that was not possible at the time of accession. What is important is that the EU *acquis* was to apply to all the new Member States when the relevant transitional periods expire and that this was done without any opt-outs or amendments to the existing EU rules. In other words, despite all the difficulties, the gist of the main principles of negotiation was respected also during the most challenging enlargements of all, which is a clear illustration of how deeply entrenched those principles are.

4.4.5 Future Enlargements: Respect or deviation from entrenched principles?

The countries that are currently in the process of negotiating for accession are Turkey, Montenegro and Serbia. The principles governing these negotiations as well as their substance and procedure have been laid down in the "Negotiating Framework" laid down for each individual applicant.[613] The Negotiating Framework for Turkey was adopted on the 3 October 2005, that of Monte-

611 Article 38 of the 2003 Act of Accession is the internal market safeguard clause and Article 39 of the 2003 Act of Accession is the Justice and Home Affairs safeguard clause.

612 K. Inglis, "Accession Treaties: Differentiation versus Conditionality," in *Fifty Years of European Integration – Foundation and Perspectives*, ed. A. Ott and E. Vos (2009), 154.

613 Negotiating Framework for Turkey, available online at: http://ec.europa.eu/enlargement/pdf/st20002_05_tr_framedoc_en.pdf.
Negotiating Framework for Iceland, available online at: http://ec.europa.eu/enlargement/pdf/iceland/st1222810_en.pdf.
Negotiating Framework for Montenegro, available online at: http://glb.bos.rs/progovori-o-pregovorima/uploaded/Montenegro-negotiating-framework.pdf.
Negotiating Framework for Serbia, available online at: http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT.

negro on 29 March 2012, and that of Serbia on 21 January 2014. Apart from one major difference, which is mentioned below, these documents are quite similar both in terms of structure and content.[614]

The obligation to adopt and implement the *acquis* is the very first point mentioned in both documents under the title "Substance of the negotiations". The following paragraphs constitute a good summary of the main principles, which have constituted the basis of negotiations during previous as well as on-going enlargement processes. They have been cited in almost identical terms in the Negotiating Frameworks of Turkey, Montenegro and Serbia. They read as follows:

> 'Accession implies the acceptance of the rights and obligations attached to the Union system and its institutional framework, known as the "*acquis*" of the Union. Turkey will have to apply this as it stands at the time of accession. Furthermore, in addition to legislative alignment, accession implies timely and effective implementation of the *acquis*. The *acquis* is constantly evolving and includes …[615]
> …
>
> Turkey's acceptance of the rights and obligations arising from the *acquis* may necessitate specific adaptations to the *acquis* and may, exceptionally, give rise to transitional measures which must be defined during the accession negotiations.
>
> Where necessary, specific adaptations to the *acquis* will be agreed on the basis of the principles, criteria and parameters inherent in that *acquis* as applied by the Member States when adopting that *acquis*, and taking into consideration the specificities of Turkey.
>
> The Union may agree to requests from Turkey for *transitional measures* provided they are *limited in time and scope*, and accompanied by a plan with clearly defined stages for application of the *acquis*. For areas linked to the extension of the internal market, regulatory measures should be implemented quickly and *transition periods should be short and few*; where considerable adaptations are necessary requiring substantial effort including large financial outlays, appropriate transitional arrangements can be envisaged as part of an ongoing, detailed and budgeted plan for alignment. In any case, *transitional arrangements must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant*

614 The Negotiating Frameworks for Montenegro and Serbia have an additional Annex on "Procedure for and Organisation of the Negotiations". What is more important and worth noting however, is the emphasis laid down on the importance of reforms under chapters "Judiciary and fundamental rights" and "Justice, freedom and security". It is advised to tackle these chapters early in the negotiations so as to provide the candidates with enough time for the proper implementation of reforms. See, Negotiating Framework for Montenegro, points 21-23; and Negotiating Framework for Serbia, points 42-44.

615 See Negotiating Framework for Turkey, point 10; and Negotiating Framework for Montenegro, point 11; Negotiating Framework for Serbia, point 31.

> *distortions of competition*. In this connection, account must be taken of the interests of the Union and of Turkey.'[616]

In addition to few other differences,[617] the main difference between Turkey's Negotiating Framework and those of Montenegro and Serbia is that the second bullet point of paragraph 23 of the European Council conclusions of 16/17 December 2004 has been copy-pasted into the former document, while there is only a reference to that point in the latter. The following paragraph of the Negotiating Framework for Turkey reads as follows:

> '*Long transitional periods, derogations, specific arrangements or permanent safeguard clauses*, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as *freedom of movement of persons, structural policies or agriculture*. Furthermore, the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a *maximum role of individual Member States*. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.'[618]

In the Negotiating Framework of Montenegro and Serbia, what we find replacing this paragraph is the following sentence: "Transitional measures and specific arrangements, in particular safeguard clauses, may also be agreed in the interest of the Union, in line with the second bullet point of paragraph 23 of the European Council conclusions of 16/17 December 2004."[619] This leaves some room for speculation as to the meaning and significance of that paragraph. On the one hand, one could argue that it has been explicitly included in Turkey's Negotiating Framework because of the expectation that the accession of that country will involve greater difficulties and challenges. On the other hand, that paragraph was taken from the European Council conclusions and in principle it is supposed to refer to the accession of all countries which were mentioned there, that is Bulgaria, Romania, Croatia and Turkey, and even if not mentioned in the conclusions, by virtue of the reference included in its Negotiating Framework it applies to Montenegro and Serbia as well. Thus, as far as substance is concerned, the four Negotiating Frameworks are actually not much different from one another.

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616 Emphasis added. Negotiating Framework for Turkey, point 12; and Negotiating Framework for Montenegro, point 13; Negotiating Framework for Serbia, point 33.

617 These requirements are geared to the special expectations regarding each candidate state. For instance under point 6 of Turkey's Negotiating Framework, its continued support for efforts to achieve a comprehensive settlement of the Cyprus problem is required; whereas in the case of Serbia, improvement of relations with Kosovo is mentioned again and again.

618 Emphasis added. Negotiating Framework for Turkey, point 12, paragraph 4.

619 Negotiating Framework for Montenegro, point 13 (last sentence); Negotiating Framework for Serbia, point 33 (last sentence).

Yet, it is difficult to understand the reasoning behind the inclusion of that paragraph and the reference to it in the Negotiating Frameworks, since a brief glance at it and the paragraph preceding it is enough to reveal the stark incompatibility between them. The Negotiating Frameworks lay down firstly, the long established traditional position that transitional measures might be included if "they are limited in time and scope". Moreover, it is noted that if they are linked to the extension of the internal market "transition periods should be short and few". It is emphasized that "transitional arrangements must not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant distortions of competition." Then, the Negotiating Framework contradicts itself and in the next paragraph declares that "[l]ong transitional periods, derogations, specific arrangements or permanent safeguard clauses … may be considered." The areas in which these measures are to be included, areas such as freedom of movement of persons, structural policies or agriculture, are areas which will have impact on the functioning of the internal market, the importance of which was emphasized a few lines before. Moreover, allowing a maximum role for individual Member States in the eventual establishment of free movement of persons, means that the new Member State will not be equal to other Member States even after their eventual accession. This will mean shift in power to the old Member States, the continuation of inter-governmental bargaining after accession and possibly the falling prey of the new Member State to the vagaries of the existing Member States. In short, it is very difficult, if not impossible, to reconcile the messages of the newly introduced paragraph with the established practice and principles of the past accessions. Inglis is also of the opinion that "[p]ermanent flexibility or safeguard mechanisms, such as suggested for Turkey, would go against the grain of any previous rationale underlying transitional flexibility mechanisms in accession treaty practice."[620]

Another important point is that the candidate States need to terminate all existing bilateral agreements between them and the Communities, and all international agreements which are not compatible with their obligations of membership, which is not something new. In addition, the Negotiating Frameworks provide that "[a]ny provisions of the [Association Agreement/ Stabilisation and Association Agreement] which depart from the *acquis* cannot be considered as precedents in the accession negotiations."[621] What this means in practice is that the *acquis* as it exists at the time of accession forms the basis of accession negotiations, i.e. if there was an area where one of the candidate States enjoyed a special regime, it will not be allowed to maintain it. The candidate needs to adopt the *acquis* as it stands at the time of accession in its entirety. While this requirement is not likely to pose any problems for

620 Inglis, "Accession Treaties: Differentiation versus Conditionality," 148.

621 Negotiating Framework for Turkey, point 11; Negotiating Framework for Montenegro, point 13; and Negotiating Framework for Serbia, point 33.

the period when a new Member States is fully integrated, it might pose problems for the transitional period. It is not very likely that a candidate state enjoys a more favourable regime with the EC/EU than the one between the Member States themselves in a given area. However, it is likely that it would enjoy a more favourable regime under previous agreements than the one that will regulate a given area in the transitional period. Thus, to ensure that the new transitional regime is not less favourable than the previous regime that applied under an association agreement, standstill clauses have been included in various fields of Accession Treaties. In other words, past practice demonstrates that previous agreements served as precedent where those agreements would be the basis on which more rights would be added and not subtracted.[622]

4.5 Conclusion

To sum up, after providing an account of the evolution of the procedure governing enlargement, now laid down in the Treaties as Article 49 TEU, this Chapter demonstrated how the wording of that provision never provided an accurate description of the process in practice. The procedural requirements of the Treaty provision, such as the opinion provided by the Commission and consent of the EP, are of paramount importance and were described as the skeleton of the process. However, arguably it is past practice that provides a clearer picture by adding flesh to the skeleton of enlargement procedure.

The analysis of past enlargements revealed that the precedent of the first enlargement set the basics of the procedure, both in terms of institutional interaction as well as establishing the main principles governing the negotiation process. Subsequent enlargements followed those basics with some fine-tuning, which did not challenge the basics. The most pronounced change to enlargement practice was experienced with the enlargement to the CEECs. The Chapter demonstrated the increased involvement of Union institutions in the process. The examination of the role of institutions as well as their interaction through-

622 Such a standstill clause was at issue in case C-546/07 *Commission v. Germany* [2010] ECR I-439. It read as follows "The effect of the application of this paragraph shall not result in conditions for the temporary movement of workers in the context of the transnational provision of services between Germany or Austria and Poland which are more restrictive than those prevailing on the date of signature of the Treaty of Accession." See, Annex XII to Act of Accession entitled 'List referred to in Article 24 of the Act of Accession: Poland'. Chapter 2 of that annex, entitled 'Freedom of movement for persons', paragraph 13. See, Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, OJ L 236/33, 23.9.2003.

out the process showed how Member States were left with less room for manoeuvre and influence, highlighting the supranational/Union aspect of the process.

Lastly, to complete the enlargement procedure with its spirit, the main principles of negotiation established during the first enlargement and consistently applied ever since, were put under the spotlight. The first principle requires the full adoption of the *acquis communautaire* as it stands at the time of accession, while the second principle requires the solution of any problems via the establishment of transitional measures and not via change of existing rules. The clear rationale underlying these principles is the preservation and continuation of the existing legal order. The newcomers are expected to make the necessary changes that will enable their integration into the existing system without changing its defining characteristics.[623] When that was too big a challenge for the candidates to achieve by themselves, as in the eastern enlargement, the Union institutions were actively involved in the process to assist them in achieving that important objective. As was demonstrated above, the rules of the game, i.e. the main principles of negotiation, were clearly voiced by the Community/ Union institutions and were accepted and respected by candidates and Member States alike in every enlargement wave. As such these principles constitute part of 'customary EU law' or 'customary enlargement law' as illustrated by past practice coupled with a belief in the existence of a legal obligation to respect and abide by those principles. In other words, these principles set constraints on Member States for future accession processes.

The only sign that puts a question mark on that conclusion, and the reason to conduct this research, is the statements in paragraph 4 of point 12 of the Negotiating Framework of Turkey. The latter is very confusing and difficult to interpret, as it stands in stark contrast to the reiteration and elaboration of the main negotiating principles in the immediately preceding paragraphs. It is quite possible that this paragraph was a result of a compromise and was included in the Negotiating Framework simply to appease certain Member States in return for opening the accession negotiations with Turkey. Whatever the political rationale for including that paragraph, its repercussions for both Turkey's accession and Union law are significant enough to justify the conduct of this study. At a time when Member States become more assertive and willing to control (or even hijack) the enlargement process, identifying the main procedures, rules and principles that constrain them is more important than ever.

With the overview of the principles of negotiation used in past enlargements the analysis, which tried to shed light on the functioning of the accession process, as enshrined in Article 49 TEU, has been completed. It was argued

623 The mirror image of that expectation (as well as an obligation) would be the legal constraint or preclusion of Member States from imposing on new comers anything that could disrupt the functioning of the system or its underlying principles.

that Article 49 TEU drew the main contours of the enlargement process, but did non manage to accurately reflect what happened in practice. We established that in practice the Union institutions' roles, especially that of the Commission, was more important and varied than past and present articles on enlargement suggest, especially during and after the eastern enlargement. Moreover, even though past and present articles stipulated that "[t]he conditions of admission…shall be subject of an agreement between the Member States and the applicant State", Member States have habitually acted via the Community/ Union institutions such as the Council and/or its Presidency. Even though with the introduction of the "benchmarking system" they seem to have gained more control over the process,[624] they still exercise that power acting via the Council machinery and not *qua* Member States, which means they need operate under different institutional constraints. This adds a Community/Union flavour to the process.

Having reviewed past and present Treaty provisions on enlargement, actual practice and its evolution, as well as the main principles of negotiation that shaped the process we have obtained a relatively clear picture of the nature and functioning of the process. However, as clear as that picture might be, it will not be complete without examining the final products of the processes that were described so far, namely past Accession Treaties. There are still important terms employed in Article 49 TEU and Accession Treaties that require further elaboration and clarification. For instance, what does the term "adjustments to the Treaties" mean? Can Member States go beyond "adjustments" in Accession Treaties? What are adaptations? What is the function of other instruments employed in Accession Treaties such as temporary derogations, permanent derogations and safeguard clauses?

The formulation of paragraph 4 of point 12 of the Negotiation Framework for Turkey is quite broad and vague. It is difficult to envisage what exactly those "specific arrangements or permanent safeguard clauses" will be like since they are unprecedented. Why would one need to "allow for a maximum role of individual Member States" in "the decision-taking process regarding the eventual establishment of freedom of movement of persons" in the existence of a permanent safeguard clause? Could it be that the "specific arrangements" in the area of freedom of movement of persons might *de facto* turn into a permanent derogation as in the case of the fisheries regime established by the first Act of Accession? The vague and ambiguous formulation of paragraph 4 of point 12 of the Negotiating framework opens it wide to speculation. Thus,

624 "Benchmarks" are conditions that need to be fulfilled by applicant countries in a given field (chapter) so as to ensure their eventual alignment with Union acquis. While they were designed with a view to assisting the applicants in their preparation process for accession, the fact that they are established unanimously by the Council on a recommendation by the Commission, gives any Member State plenty of opportunity to block the process, and push through demands related to its own national agenda. See, Hillion, "The Creeping Nationalisation of the EU Enlargement Policy," 21.

not knowing the precise nature of the regime envisaged in the area of free movement of persons, the special mechanisms and terms used in past Accession Agreements are analysed with the expectation that past practice will provide clues as to the future boundaries which Member States will need to respect while exercising their Accession Treaty making powers.

5 Substantive Constraints

5.1 INTRODUCTION

After having reviewed the procedural constraints on Member States that result from the wording of Article 49 TEU as well as past practice, the focus of this Chapter is on the substantive constraints that similarly flow from the wording of Article 49 TEU, and its concomitant reflection in past practice. An overview of past practice, in this case as evidenced by past Accession Agreements, is provided with the aim to establish the existence of substantive constraints on Member States as primary law makers in the context of an accession of a new Member State.

This Chapter begins by discussing the change in the formulation of the concept in the English language version, which establishes the most important substantive constraint embedded in the wording of Article 49 TEU, from "amendment" to "adjustment". Given the absence of such a change, as well as the distinction between the concepts of "adjustments" and "adaptations" in other language versions of the latter provision, the relationship between the terms "adjustment" and "adaptation" is examined, hoping that the interpretation of the latter concept by the Court of Justice will shed light on the interpretation of the former. What follows afterwards is an examination of the most widely employed measures that provide for the "adjustment" or "adaptation" (used in their broadest colloquial sense) of applicant States, as they enable the gradual extension of the *acquis* to those States: that is transitional measures, quasi-transitional measures, past and present forms of safeguard clauses. Last but not least, follows a chronological overview of past measures, which arguably could qualify as going beyond being mere 'adjustments' or 'adaptations'. It will be demonstrated how difficult labelling or categorizing these measures is so as to reveal the room of manoeuvre Member States had during past negotiation processes.

Since the aim of this thesis is to identify the constraints on Member States in drafting Accession Treaties, before going into identifying the existence of substantive constraints, it is worth briefly examining what such Treaties typically look like and what they contain. That overview provides a good summary of the fundamentals of the process. The fact that the overall structure of Acts of Accession has remained largely unchanged over the decades is another indication of consistent practice in this area.

To begin with the main document that is the Accession Treaty to which the Act of Accession and other Annexes are attached, it is a document consisting of three articles followed by the respective signatures of heads of state or government empowered to sign the document. Article 1(1) of an Accession Treaty proclaims that hereby the state concerned becomes a member to the EEC/EC/EU. Article 1(2) points out that the conditions of admission and adjustments to the Treaties necessitated by this accession are to be found in the Act annexed to this Treaty, which forms an integral part of the latter. Article 1(3) adds that powers and jurisdictions of EC/EU institutions apply in respect to this Treaty as well. This article is of utmost importance, because firstly, it describes what is happening, that is a State is acceding to the Union (Article 1(1)); secondly, it points to what this entails or how this is happening, by agreement as to the conditions of admission and by making the corresponding adjustments to the Treaties (Article 1(2)); and last but not least, it establishes the jurisdiction of the Court of Justice with respect to Accession Treaties (Article 1 (3)). In other words, the Court is to ensure (Article 1(3)) that what happens, i.e. accession (Article 1(1)), happens in line with the requirements of Article 1(2), without going beyond the constraints set thereby.

Put very briefly, Article 2 of an Accession Treaty stipulates that it needs to be ratified with the respective constitutional requirements of the contracting parties. It establishes a date when the Treaty enters into force. However, in case not all acceding states submit their instruments of ratification in due time, the Council is to decide immediately on such resulting adjustments as have become indispensable. The latter provision is another proof of the Union/supranational nature of the process as well as the technical nature of adjustments necessitated by a candidate State's accession. Finally, Article 3 lists all the languages, adding the languages of the acceding states to the list of existing official languages, in which the Accession Treaty is to be equally authentic.

On the whole, firstly, the Accession Treaty succinctly describes the essentials of the process: what happens, how it happens, and impliedly, what (sanction) could follow if the process were not to follow the requirements listed in Article 1(2). Secondly, it reveals that the substantive issues, i.e. changes to the Treaties and secondary law, are dealt with in the Act of Accession and the Annexes attached to the Treaty of Accession. Lastly, it provides for the procedure concluding the process with the entry into force of the Accession Treaty, and just in case stipulates for an alternative procedure to enable the completion of the process if an acceding State were to fail to comply with the requirements of the former procedure, i.e. it fails to ratify the Treaty.

As to the content of the Act of Accession, part one lays down the "Principles" governing the Act. Part two is titled "Adjustments to the Treaties" and contains "Institutional Provisions" (Title I) and "Other Adjustments" (Title II). It is followed by part three on "Adaptations to Acts Adopted by the Institu-

tions".[625] Part four contains the "Transitional Measures" of the Act.[626] Last but not least, comes part five on the "Provisions Related to the Implementation of this Act." It should be noted that part three, on the adaptations to secondary EU law, the most voluminous part of the document, merely makes a reference to the relevant Annexes of the Act where those adaptations are to be found.

As mentioned above, in establishing the substantive constraints on Member States in drafting Accession Treaties, the starting point is the terms used in various versions of Article 49 TEU, the most important one being the term "adjustments to the Treaties". It is quite a challenge to accurately define the scope of the latter term, since distinguishing between adjustments, adaptations and other substantive changes is quite difficult and open to dispute.[627] Inferences are drawn as to the meaning and scope of the term from its past use in Acts of Accession (see preceding paragraph), as well as from the Court's case law clarifying the term "adaptations".

5.2 THE NOTION OF "ADJUSTMENTS" TO THE TREATIES

To begin by repeating the wording of Article 237 EEC and Article 205 EAEC, it provided as follows:

> 'Any *European* State may apply to become a member of the Community. It shall address its application to the Council which, after obtaining the opinion of the Commission, shall act by means of a unanimous vote.
>
> The conditions of admission and *the amendments to this Treaty necessitated thereby* shall be the subject of agreement between the Member States and the applicant State. Such agreement shall be submitted to all the contracting States for ratification in accordance with their respective constitutional rules. [Emphasis added]'

Each paragraph imposes a substantive requirement: the first paragraph requires that the applicant state be European, while the second paragraph requires the conditions of admission and the amendments to the Treaties necessitated by the applicant State's accession to be agreed upon by all the contracting States. Implicit in the second paragraph is the condition that the changes to the Treaty necessitated by the accession of the applicant State are limited to amendments/

625 Under the 2003 and 2005 Acts of Accession, part three was renamed as "Permanent Provisions". However, its content did not change. The titles of that part were as follows: "Adaptations to acts adopted by the institutions (amendments to secondary law)" (Title I) and "Other Provisions" (Title II). See respectively, OJ L 236, 23.9.2003, and OJ L 157, 21.6.2005.

626 Under the 2003 and 2005 Acts of Accession, part four was renamed as "Temporary Provisions". Again there was no change content-wise: its Title I contained "Transitional Measures" and Title II contained "Other Provisions".

627 Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," 9.

changes necessitated by that accession. In other words, there needs to be a direct causal link between the accession of the applicant State and the ensuing changes to the Treaties.

These two provisions, together with Article 98 ECSC, were replaced by a single provision in the Treaty of Maastricht, which reformulated the first sentence of the second paragraph cited above, as follows: "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".[628] The implications of that change are discussed in more detail below. For now suffice to say that examination of other language versions reveals that there was no change in the substantive scope of the constraint imposed by the term "adjustment" as opposed to "amendment". The aim was simply to clarify the constraint imposed by that provision by using a more accurate term, which had already been the case in other language versions.

Another important substantive requirement added by the Treaty of Amsterdam was that only European States, which respected the principles set out in Article 6(1) TEU, could apply to become members of the Union. Hence, respect for the principles on which the Union was founded and which were common to the Member States became another substantive requirement and as such another constraint on the applicant as well as Member States. To name those principles, they were "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law".

These principles were renamed as "values" in Article 2 TEU with Lisbon Treaty amendment and the list was further extended. Article 2 TEU now reads as follows:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

With the Lisbon Treaty revision, it was no longer enough for the applicant State to respect these values, it also had to illustrate that it was committed to promoting them. Arguably, as a result of the experience gained from the Eastern enlargement, it was important to emphasize that it was not enough that the laws of a State were in line with these principles and Union *acquis* on paper, their implementation and incorporation into daily practice was also deemed equally important.

The mirror image of this substantive constraint on the applicant State to comply with the foundational values of the Union is to be found in the pro-

628 Article O of the Treaty on the European Union.

vision cited above (Article 2 TEU). It applies to Member States at all times, i.e. not only when they act within the scope of EU law, as under Article 49 TEU, but also when they act outside it. Hence, "a clear risk of a serious breach by a Member State of the values referred to in Article 2"[629] triggers the application of Article 7 TEU. The threat of an external sanction under Article 7 TEU, which can be taken by the Council by qualified majority, can go as far as suspending "certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".[630] As important as the latter substantive constraint is on Member States, it is dealt with in more detail in the last part of the thesis, which identifies legal constraints flowing from the constitutional foundations of the Union. As will be argued and illustrated in Part III, the values listed in Article 2 TEU (principles listed in ex Article 6(1) TEU) constitute an integral part of the Union's constitutional foundations, whereas this Chapter focuses exclusively on the substantive constraints on Member States flowing from (the wording of) Article 49 TEU and particularly from the term "adjustment to the Treaties".

5.2.1 Meaning and scope of the term "adjustment"

To shed light on the true nature and scope of the term "adjustment" used in Article 49 TEU, which replaced the word "amendment" used in the first English version of the EEC Treaty, it is worth examining and comparing the original language versions of the EEC Treaty, as English became an official language only after the accession of the UK and Ireland in 1973. Hence, following the method laid down by the Court for the interpretation of a particular term or provision of EU law, such an interpretation entails first of all "a comparison of the different language versions", which are all equally authentic.[631] Secondly, even when different language versions are in agreement, the Court warns that EU law uses a terminology peculiar to it, which does not necessarily correspond to the meaning it has acquired in national law. Last but not least, the Court provides instructions explaining the fundamentals of its most widely used "teleological" method of interpretation, which requires "every provision of [EU] law [to] be placed in its context and interpreted in the light of the provisions of [EU] law as a whole, regard being had to the objectives thereof and to its evolution at the date on which the provision in question is to be applied".[632]

629 Article 7(1) TEU.
630 Article 7(3) TEU.
631 *Case 283/81 CILFIT*, [1982] ECR 3415, para. 18.
632 Ibid., para. 20.

For an accurate understanding of the substantive constraint imposed by the wording of Article 237 EEC, the scope of the term "adjustment"/ "amendment" used in the original Dutch, French, and German versions, alphabetically, will be analyzed in comparison to the term providing for the procedure for amending the Treaty in the preceding Article 236 EEC. It will be demonstrated that in all the three language versions consistently, a concept with a more restrictive scope compared to that used in Article 236 EEC has been employed, which implies that Member States have less freedom/ discretion, i.e. they are more constrained when acting as primary law makers under Article 237 EEC as compared to Article 236 EEC.

To begin by comparing the terms used in the Dutch version of the EEC Treaty, Article 236(1) employs the terms "herziening van dit Verdrag" (amendment/revision of this Treaty), and "wijzigingen" (changes) in Article 236(3), while Article 237(2) uses the more restrictive term "aanpassingen" (adaptations, adjustments). Similarly, the terms used in the French version of Article 236(1) and (3) are broader (respectively; "la révision du présent Traité" (revision/ amendment of the present Treaty) and "[l]es amendments" (amendments/ changes)) compared to the term "les adaptations" (adaptations/adjustments) used in Article 237(2) EEC. The German version of the EEC Treaty follows the same logic: Article 236(1) and (3) uses respectively the terms "Änderung dieses Vertrags" (change/ amendment of this Treaty) and "[d]iese Änderungen" (these changes/amendments), while Article 237(2) uses the term "Anpassungen" (adjustments/adaptations). The following Treaty revisions have not changed that logic, and the terms used in the current Articles 48 and 49 TEU in the Dutch, French and German language versions, still reflect the more restrictive scope of the term "adjustment" used in Article 49(2) TEU.

The use of different terms in Articles 236 and 237 EEC does not come as a surprise. Those terms make perfect sense when considered in their context and interpreted in the light of EU law as whole. To begin with the amendment procedure laid down in Article 236 EEC (now Article 48 TEU), it has a much broader purpose, which is to encompass and accommodate changes/ amendments the nature of which, it is difficult to predict in advance. This is clearly illustrated by the EC's evolution into EU by the Treaty of Maastricht. Hence, Member States had (and still have) more room for manoeuvre under Article 236 (an now 48 TEU), i.e. they are less constrained. While the purpose of Article 237 EEC is much more clear and circumscribed, it is to be used in the context of accession of a new Member State to make the changes strictly necessary for the latter State's incorporation into the Union's structures and policies. Hence, Member States are more constrained when acting as primary law makers under Article 237 EEC (now Article 49 TEU).

In other words, the change in the English wording of Article 49 TEU by the Treaty of Maastricht from "amendments" to "adjustments", made it more clear and precise. It simply brought it in line with the other language versions of the Treaty rather than making any substantive change to the scope of the

term used in that provision. The English version of Articles 236 and 237 EEC,[633] as far as it used the same term "amendment" in both provisions, was an "aberration" rather than the rule: an aberration, which was duly corrected.

In conclusion, the analysis of different language versions of Article 237 EEC (now Article 49 TEU) clearly reveals that the scope of the term "adjustment" is narrower than that of the term "amendment". While the umbrella term encompassing both is "Treaty change", when interpreted in the their context, the former Treaty change takes place under Article 49 TEU procedure and provides only for the changes necessitated by the accession of new Member States, such as the changing distribution of seats in the institutions as well as other changes enabling the full participation of the new Member States in policies and areas of Union action. The change envisioned by Article 236 TEU has always been much broader so as to accommodate the need for any type of change that might be needed in the long road to complete European integration. Despite the existing differentiation between the "ordinary revision procedure" and "simplified revision procedure" under Article 48 TEU, the terms "revision" and "amendment" used in the framework of the latter provision still have a broader scope.

Even though the scope of the term "amendment" is broader than that of "adjustment", as discussed in the introduction of this thesis, it should be remembered that many constitutional courts are of the opinion that the concept of "amendment" is not as broad as to encompass any change, but only changes that respect the "basic structure", the coherence, the spirit or the "very foundations" of the Constitution, which they aim to amend.[634] As important as it is to establish that the concept "adjustment" has a narrower substantive scope than the concept of "amendment", which is also restrictively interpreted in some jurisdictions, it does not provide a clear definition of the kind of changes falling within the scope of the concept "adjustment". The following part aims to further clarify the definition of the latter concept.

633 Article 236 of the EEC Treaty read as follows: "[1.] The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty. [2.] If the Council, after consulting the Assembly [European Parliament] and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty. [3.] The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements."

634 See the relevant literature cited in the introductory Chapter.

5.2.2 "*Adjustments* to the Treaties" v. "*Adaptations* to Acts Adopted by the Institutions"

So what does it mean exactly to make adjustments to the Treaties? How do we know if the changes made go beyond mere adjustments as provided in Article 49(2) TEU? One would think that adjustments are small technical changes, i.e. adaptations that extend the existing *acquis* to the new Member State and enable its participation in the Union's institutional structures and policies. Unfortunately, the Treaties themselves are silent about the precise definition and scope of the term "adjustment". So are English commentaries on the EU Treaties. However, there is case law of the Court that could be of some help. Although the case law is not strictly speaking on the definition of the term "adjustment" in Article 49(2) TEU, it is on the definition of the term "adaptation" that is contained in the provisions of various Accession Agreements. Based upon an overview of the titles and contents of various Acts of Accession, it is possible to make the observation that adjustments are the technical changes made to the Treaties extending them to the newcomers, while adaptations are the technical changes made to secondary EU law in order to extend it to the acceding States.

Since there is no such distinction between the terms "adjustment" and "adaptation", in many other language versions, such as Dutch, French and German, it could be argued that what the Court has established about the term "adaptation" could also be used to explain the term "adjustment". It is noteworthy that in the just mentioned language versions, only one term is employed to cover both terms. In Dutch, it is the term "aanpassing", in French, "adaptation", and in German "Anpassung". In other words, in these language versions it seems more natural or intuitive to take the guidance of the Court on adaptations and apply it cautiously to adjustments.

As described above, in every Accession Treaty there has been a part containing provisions on the adaptation of secondary EU law. To look more closely at one of those provisions to illustrate the point, Article 57(1) of the 2003 Act of Accession states as follows:

> 'Where acts of the institutions prior to accession require adaptation by reason of accession, and the necessary adaptations have not been provided for in this Act or its Annexes, those adaptations shall be made in accordance with the procedure laid down by paragraph 2. Those adaptations shall enter into force as from accession.'

Both adjustments and adaptations aim to make the necessary changes for accession, as mentioned above; the former is used in the context of changes to the Treaties and the latter in the context of secondary law. Both types of technical changes are necessary to be able to bring the acceding State within the Union structures and to ensure the applicability of the Union *acquis* in that State. Few points could be made about the added value of including a pro-

vision such as Article 57 in an Accession Treaty. First, comes the vast challenge of screening the entire *acquis* and making the necessary changes. It is not out of question that the adaptation of certain secondary measures might have simply been forgotten and therefore not included in an Accession Treaty. The second and probably main reason is the fact that the EU is a moving target; many legal acts are adopted every day. This means that the period between the signature of an Accession Treaty and its actual entry into force might become problematic if the interests of an acceding State have not been taken into account.[635] To be able to promptly resolve any problems that arise in the interim period, provisions such as Article 57 have been included in Accession Treaties.[636]

It should be noted that provisions of the kind of Article 57 provide for changes to "acts of the institutions", not for the provisions of the Treaties. Even though the aim of both types of changes (i.e. "adjustments" and "adaptations") is to enable the actual accession of the applicant State into the Union, they involve changes to instruments in the different ranks of the constitutional hierarchical order. Hence, the higher a norm is in the constitutional hierarchy, the more restrictive will be the rules providing for the conditions of its change. In other words, since the Treaties are higher in the hierarchy of constitutional norms, it is to be expected that "adjustments" will be more difficult, and not easier, to make in comparison to "adaptations" to secondary law.

In three relatively recent cases, the Court provided some clarification regarding the meaning of the term "adaptation".[637] According to the Court, the "adaptations" to which some provisions of Accession Agreements refer "… correspond, in principle, to amendments necessary to ensure the full applicability of acts of the institutions to the new Member States and which are intended, with that in view, to supplement those acts in the long term".[638] The Court explains further that measures which can be adopted on the basis of provisions such as Article 57 of the 2003 Act of Accession "… are limited, in principle, to adaptations intended to render earlier Community measures applicable in the new Member States *to the exclusion of all other amendments*…, and, particularly, to the exclusion of temporary derogations".[639]

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635 See Cases *Case C-413/04 Parliament v Council*, [2006] ECR I-11221; and *Case C-414/04 Parliament v Council*, [2006] ECR I-11279.

636 See also Article 23 of the 2003 Act of Accession providing for a procedure to make adaptations to acts related to the Common Agricultural Policy. See also *Case C-273/04 Poland v Council*, [2007] ECR I-8925.

637 *Case C-413/04 Parliament v Council*; *Case C-414/04 Parliament v Council*; *Case C-273/04 Poland v Council*.

638 *Case C-413/04 Parliament v Council*, para. 32.

639 Emphasis added. Ibid., para. 37. See by way of analogy, in respect of the corresponding provision in the 1994 Act of Accession (Article 169), *Case C-259/95 Parliament v Council*, [1997] ECR I-5303, paras. 14 and 19.

The Court's interpretation of the term "adaptation" in Article 23 of the 2003 Act of Accession, which provides for a specific procedure for adaptations to be made in the field of the Common Agricultural Policy, is also informative. The Court provides that "… the concept of 'adaptation' must be restricted to measures which cannot in any way affect the scope of one of the provisions of the Act of Accession relating to the CAP nor substantially alter its content, but which solely represent *adjustments designed to ensure consistency* between the Act and new provisions adopted by the Community institutions between the signature of the Act of Accession and actual accession."[640] By analogy it can be argued that adjustments need to be restricted to changes which cannot in any way affect the scope of one of the provisions of the Treaties nor substantially alter their content.[641]

Although the Commission seems to be in favour of a broader definition of the term "adjustment" used in Article 49(2) TEU, it draws a limit as to how far adjustments to the Treaties can go. Starting from the premise that enlargement will necessitate far-reaching change, the Commission thinks that "[f]rom the legal angle there is no reason why the concept of adjustment of the Treaties of Rome (Articles 237 of the EEC Treaty and 205 of the Euratom Treaty) should not be interpreted more broadly than in the past, as long as there is *a definite causal link* between the adjustments to the Treaties and the enlargement of the Community and as long as it is borne in mind that *any change in the fundamental principles of the Treaties can be made only by the special procedure laid down for that purpose*."[642]

In other words, according to the Commission, we can test whether an adjustment falls within the legal boundary drawn by Article 49 TEU, by checking whether two cumulative conditions are fulfilled. Firstly, the adjustments to the Treaties should be necessitated by virtue of enlargement. Secondly, the adjustments should be in law and in fact mere adaptations or amendments enabling the accession of the applicant State, i.e. they should not bring about any change in the fundamental principles of the Treaties and the way the Union operates.[643] Any amendment going beyond the above definition neces-

640 Emphasis added. *Case C-273/04 Poland v Council*, para. 48.

641 In similar vein, Becker argues that enlargements "need to leave the fundamental principles of the Community unharmed. This means all principles which define the identity of the Community". According to Becker, among these are the institutional structure, principles mentioned in *ex* Article 6 TEU (now renamed as 'values' in Article 2 TEU), fundamental rights, the principle of integration as well as principles expressed in the policies; the basic freedoms of the internal market being the most important part of the latter. See, Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," 9.

642 Emphasis added. Bull. EC Supp. 2/78, "The transitional period and the institutional implications of enlargement", COM (78) 190, English version dated 24 April 1978, p. 9.

643 Smit and Herzog, "Article 237," 6-370. The fact that it was for the Council, upon Norway's failure to ratify the Treaty of Accession in 1972, to "decide immediately upon such resulting adjustments as have become indispensable" to the Act of Accession illustrates the technical nature of these adjustments, i.e. the fact that they are 'mere adaptations'. Anything more

sitates a Treaty modification on the basis of Article 48 TEU, since "the procedure for admitting new Member States is designed to maintain the identity of the admitting institution."[644]

If we take the Court's pronouncements on "adaptations" and apply it by analogy to "adjustments", it can be argued again that adjustments need to be restricted to changes which cannot in any way affect the scope of one of the provisions of the Treaties nor substantially alter their content.[645] Thus, they are merely amendments necessary to ensure the full applicability of the Treaties to the new Member States. They are limited in principle to adjustments intended to render the Treaties applicable in the new Member States to the exclusion of all other amendments,[646] which would need to be carried out on the basis of Article 48 TEU.

5.2.3 "Adjustments" in previous Accession Treaties

It is possible to get a clearer idea of what "adjustments" mean by having a brief overview of what the term entailed in past Acts of Accession. As mentioned above, under part two titled "Adjustments to the Treaties" of the various Acts of Accession, one finds the "Institutional Provisions" and "Other Adjustments" to the Treaties. Hence, the first and most important type of adjustments to the Treaties are the institutional provisions, which are about the new redistribution of votes in the European Parliament, and the Council, and the appointments of their nationals to the Commission, the Court of Justice and various committees, i.e. adjustments that have to be made in every accession. The title on "Other Adjustments" seems to be more interesting as it illustrates what kind of other changes, other than the institutional ones, could be and had to be made to the Treaties.

To begin with the 1972 Act of Accession, the few articles under the title "Other Adjustments" are concerned with their territorial field of application. Article 24(1) added the UK to the list of Member States specified in the first sentence of Article 131 of the EEC Treaty. Article 24(2) added the list of countries and territories with which the UK had a special relationship to the list in Annex IV to the EEC Treaty, that is the list of the countries and territories with a special relationship to a Member State and which benefitted from special association arrangements at the time. Articles 25, 26 and 27 made changes to the articles determining the territorial field of application of the three founding

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political would have required renegotiation among all the parties involved. See, Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 125.

644 Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," 8-9.

645 *Case C-273/04 Poland v Council*, para. 48.

646 *Case C-413/04 Parliament v Council*, paras. 32 and 37.

Treaties.[647] The final article in this title, that is Article 28, defined the arrangements applicable to the territory of Gibraltar.[648]

Subsequent Acts of Accession follow a similar pattern; they add the name of the new Member State to the list in Article 227(1) of the EEC Treaty (now Article 52 TEU) thereby extending the territorial application of the relevant version of the Treaty to the new Member State, and specify the legal regime that is to apply to the countries and territories with a special relationship to that new Member State. Of course, the latter applies only to states in possession of such territories. In the Spanish and Portuguese Act of Accession, the Treaties and acts of the institutions applicable to the Canary Islands, Ceuta and Melilla, are made subject to the derogations referred to in the following paragraphs of Article 25 and other provisions of the Act of Accession.[649] Similarly, in the 1994 Act of Accession, under the title "Other Adjustments", it is stipulated that "[t]his Treaty shall not apply to the Åland islands." However, as in other cases of special relationship, the Member State to which the country or territory

647 Article 25 determines the territorial field of application of the ECSC Treaty after accession. The Treaty was not applicable to the Faroe Islands, unless Denmark submitted a declaration to the French government; similarly, it was not applicable to the Sovereign Base Areas of the UK in Cyprus; and it was partially applicable to the Channel Islands and the Isle of Man. Article 26 determines the territorial field of application of the EEC Treaty after accession. By Article 26 (2) which is to supplement Article 227(3) of the EEC Treaty, it was reminded that the overseas countries and territories in Annex IV of the EEC Treaty enjoy special arrangements of association. It was also clarified that countries and territories that were not added to the list, were excluded from the general field of application of the Treaty, even if constitutionally they were considered part of the Member States. (The only countries with that status that were not included in the list at the time were Rhodesia, and the territory of Hong Kong.) As far as the status of the Channel Islands and the Isle of Man is concerned, according to Puissochet, the treatment granted to them appeared to be like "a general regime of exclusion, except in respect to the Community rules concerning the exchange of products and the application of the agricultural policy, insofar as it affects the movement of products." See, Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 186. Finally, Article 27 defined the territorial field of application of the Euratom Treaty.

648 The regime established regarding Gibraltar is confusing. Article 28 excludes Gibraltar from the field of application of the common agricultural policy. However, according to Puissochet, due to the curious wording of the article, it seems to leave the Treaties applicable, while at the same time excluding the application of the acts of the institutions. Overall, he concludes that the Community rules will apply only to a minor extent in Gibraltar. See, ibid., 187-89. See further the case concerning the voting rights for European Parliament elections in Gibraltar, *ECtHR, Matthews v the UK*, Appl. No. 24833/94.

649 Regarding the application of EU law to the Canary Islands, Ceuta and Melilla, a special regime is established again. While Article 25(2) of the Act refers to Protocol No. 2 which establishes the conditions under which the EEC and ECSC Treaties concerning free movement of goods, and acts of the institutions concerning customs legislation and commercial policy are concerned, Article 25(3) excludes those territories from scope of application of the common agricultural policy and common fisheries policy.

is connected may by means of a declaration make the *acquis* applicable to that territory.[650]

The only other novel provision in the 2003 Act of Accession stipulated that the following sentence should be added to Article 57(1) of the EC Treaty: "In respect of restrictions [in the area of free movement of capital to and from third countries] existing under national law in Estonia and Hungary, the relevant date shall be 31 December 1999."[651] Article 13 of the 2005 Act of Accession also adds Bulgaria to that sentence. Article 12 of Croatia's Act adds Croatia, and specifies the relevant date as 31 December 2002. The final article under the title "Other Adjustments" of the 2005 Act of Accession stipulates the addition of a phrase to Article IV-448(1) of the Constitution, which makes the Bulgarian and Romanian versions of the Accession Treaty also authentic.[652]

Overall, it is possible to conclude that other than the institutional adjustments made to the Treaties by the Acts of Accession, the main issue dealt with under this title has been the special relationship between some Member States and their former colonies or territories for which they are responsible. The only other provision that was different made an adjustment to Article 57(1) EC to allow Estonia, Hungary and Bulgaria to keep the restrictions they had on 31 December 1999 in the area of free movement of capital to and from third countries.

In short, this overview of past provisions of various Acts of Accession demonstrates that the most important changes under the title "Adjustments to the Treaties" are to be found under the title "Institutional Provisions". Issues regulated under the title "Other Adjustments" are very limited. The latter is another indication of the substantively limited scope of the term "adjustments" used in Article 49(2) TEU. It requires both a restrictive interpretation of the term, as well as a tight causal link between the changes to the Treaties and the accession of the new Member State.

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650 If the Government of Finland makes such a declaration, the rules applicable to the Åland islands will be those specified in Protocol No 2 to the 1994 Act of Accession.

651 Article 56 EC prohibited all restrictions on the movement of capital and payments between the Member States, and between Member States and third countries. Article 57(1) EC provided that "[t]he provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets."

652 Although its main components and structure are the same, it is interesting to note that what has so far been called an Act, for instance an "Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded", in the case of Bulgaria and Romania is called "Protocol Concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union".

5.2.4 Other measures facilitating the full integration of new Member States

The measures discussed in this section are not strictly speaking "adjustments" within the meaning of Article 49(2) TEU; however, they can be considered as instruments of adjustment/ adaptation in a much broader sense, as they all share the same underlying rationale, which is the eventual full extension of the *acquis communautaire* to the new Member States. While adjustments and adaptations ensure the immediate extension of the Treaties and secondary law to the new Member State after its accession, the aim of the measures in this section is to provide the new and old Member States with some flexibility for a pre-determined period of time to deal with difficulties and unforeseen situations that might arise after the accession of the new Member State. In other words, the measures dealt with in this section postpone the full implementation of parts of the *acquis* under specified circumstances for a pre-determined period after joining the EU.

The most important instruments dealt with in this section are transitional measures, quasi-transitional measures, and safeguard clauses. While transitional measures are negotiated prior to a country's accession in line with the difficulties it expects to experience in certain sectors and provides it with extra time to prepare and adapt those sectors in view of the time the Union rules in that sector will apply fully, safeguard clauses are put in place also for a specified period, however as instruments aimed to enable the protection of the interests of either the new or old Member States regarding unforeseen problems in a given area. What differentiates the quasi-transitional measures from these two instruments is that they are in place for an unspecified and unforeseeable amount of time after a new Member State's accession. Quasi-transitional measures in a given area, which suspend the full application of the *acquis* in that area, apply as long as the new Member State fails to fulfil the conditions necessary to fully join that area. Unlike transitional measures and safeguard clauses, they do not automatically and fully extend the *acquis* to the new Member State after the expiry of a pre-determined period, but do so only conditionally, upon the fulfilment of pre-determined criteria by the new Member State.

An overview of types of measures used in past Acts of Accession might prove useful since Turkey's Negotiating Framework is not very precise as to either the nature of the measures to be employed or as to the respective fields in which they are to be employed. It simply mentions the possibility of including "[l]ong transitional periods, derogations, specific arrangements or permanent safeguard clauses … in areas such as freedom of movement of persons, structural policies or agriculture".[653] It is worth looking at different types of measures used in past Acts of Accession, as that overview will help us

653 Negotiating Framework for Turkey, point 12, para. 4.

establish their nature, functions and purpose. That in turn will provide us with clues as to what was possible and what not in the past. In other words, the latter overview will shed light on the constraints on Member States in drafting Acts of Accession. Moreover, the Court's comparative analysis of these measures in past cases will enlighten us further as to the nature of these measures as well as the substantive constraints flowing from the terms "adjustments" and "adaptations".

The following overview begins by an analysis of the most widely used measures in past Acts of Accession that is transitional measures. It is followed by a more novel variant of those measures, i.e. what here are called "quasi-transitional measures". Lastly, follows an overview of the past and present of safeguard clauses with a view to establishing the repertoire of existing clauses so as to establish the existence or the possibility of including a safeguard clause of a permanent nature in a future Act of Accession.

5.2.4.1 Transitional measures

Once the applicant States accepted the principle that they had to adopt the *acquis communautaire* in full, the remaining task was the negotiation of the more difficult areas the implementation of which would not be possible immediately upon accession. As Avery succinctly puts it, "…the scope of the negotiations is limited to the possibility of delays in applying the rules during 'transitional periods'".[654] In the majority of areas that Member States are able to adopt and implement the *acquis* upon accession, there is no need for negotiations. Only the necessary technical adjustments or adaptations need to be carried out. Conversely, lengthy negotiations take place in areas where applicant States think they need more time to implement the relevant *acquis*. Thus, the form and method as well as the time-line of the transitional measures was one of the main topics that had to be negotiated and agreed upon by the applicants and the existing Member States.

The case law of the Court on the nature of transitional measures and the way they need to be interpreted is quite illuminating. In Case C-413/04 *European Parliament v Council*, which was mentioned above to explain the meaning of the term "adaptations",[655] what was at issue were temporary derogations in favour of Estonia regarding the application of Directive 2003/54/EC providing for common rules for the internal market in electricity. The Council adopted the contested directive (Directive 2004/85/EC) on 28 June 2004 on the basis of Article 57 of the 2003 Act of Accession (AA). The problem was firstly, that Article 57 AA allowed only for "adaptations" to be made to acts of the institutions.[656] It was Article 55 AA that provided for the possibility

654 Avery, "The Enlargement Negotiations," 40.
655 See section 5.2.2 above.
656 For the wording of Article 57 of the 2003 Act of Accession, see section 5.2.2.

of adopting temporary derogations, but then only before 1 May 2004, and only regarding acts of the institutions that were adopted between 1 November 2002 and the date of the signature of the Treaty of Accession, that is 16 April 2003. Secondly, the European Parliament had no role to play under Article 57 AA. The EP challenged the legal basis of the directive and the Court of Justice had to rule on whether the "transitional measures" in the contested directive could be considered "adaptations" under Article 57 AA.

AG Geelhoed in his Opinion explains eloquently the terminological difference between "temporary derogations" used in Article 55 AA and "adaptations" used in Article 57 AA. His interpretation of these terms was also taken up by the Court. The AG agreed with the arguments of the European Parliament and the Commission, and suggested that the main difference between the terms was as follows: "whereas 'derogations' are aimed at temporarily rendering an element of the *acquis communautaire* inapplicable in a Member State in order to grant it the sufficient time to take the necessary steps to permit it to comply fully with its Community obligations, 'adaptations' are aimed at the opposite effect of making the *acquis* applicable on accession."[657] In other words, the temporary derogations delay the application of a given Community measure in a new Member State, while adaptations enable the immediate application of that measure upon accession.[658]

Based on the above observations and on the Court's ruling in a previous case concerning a parallel provision in the 1994 Act of Accession,[659] the AG suggested that:

> 'the concept of *'adaptations'* which at first sight appears to be more general in scope, *cannot*, in the context of Article 57 AA, *be construed as encompassing substantive amendments to Community acts or measures permitting derogations to these acts*. It therefore *only covers inescapable adaptations* to a Community measure which are *incited by technical necessity rather than political opportunity*.'[660]

According to the AG, the difference in meaning between the two concepts can also be derived from the functions of Articles 55 AA and 57 AA, as well as from the difference in procedure prescribed for the adoption of measures under those provisions. The decision underlying the grant of temporary derogations is of a political nature according to the AG, since temporary derogations are granted at the request of an applicant State and since they amount to an authorization of non-compliance with certain Community law obligations for a limited period. Therefore, Article 55 AA provides, at the request of the acceding State, for decision-making with unanimity. Whereas the adaptation

657 Opinion of AG Geelhoed, delivered on 1 June 2006, in *Case C-413/04 Parliament v Council*, para. 55.
658 Ibid.
659 *Case C-259/95 Parliament v Council*.
660 Emphasis added. Opinion of AG Geelhoed in *Case C-413/04 Parliament v Council*, para. 57.

of Community acts in order to make them fully applicable in the new Member State upon accession is a direct result of the principle that a new Member State needs to adopt and implement the *acquis* in full and immediately upon accession. The AG argues that there is nothing political about such adaptations, hence they can be adopted by the Council acting by qualified majority voting on a proposal of the Commission or by the Commission on its own in respect of acts adopted by it.[661]

The Court also reached the conclusion that "temporary derogations from the application of the provisions of a Community act, whose sole object and purpose is to delay the effective application of the Community act concerned as regards a new Member State, cannot, in principle, be described as 'adaptations', within the meaning of Article 57 of the 2003 Act of Accession."[662] The adoption of those temporary derogations involved a political assessment according to the Court. As such those derogations could not be adopted validly on the basis of Article 57 AA.[663]

Another case that provides guidance as to how temporary derogations are to be interpreted is an infringement action brought by the Commission against the UK.[664] The issue underlying the case was the national law in the UK, which had the effect of restricting imports of potatoes even after the expiration of the transitional period laid down in Article 9 of the Act of Accession. While the Commission was relying on Article 9AA, the UK was relying on Article 60(2) AA for its claim on entitlement to maintain the existing restrictions. To look at the wording of these provisions, Article 9 AA laid down the general rule and it provided that:

> '1. In order to facilitate the adjustment of the new Member States to the rules in force within the Communities, the application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.
> 2. Subject to the dates, time limits and special provisions provided for in this Act, the application of the transitional measures shall terminate at the end of 1977.'

Article 60(2) AA, which was an application of the general rule laid down in Article 9 AA provided as follows:

> 'In respect of products not covered, on the date of accession, by a common organisation of the market, the provisions of Title I concerning the progressive abolition of charges having equivalent effect to customs duties and of quantitative restrictions and measures having equivalent effect shall not apply to those charges,

661 Ibid., paras. 57-58.
662 *Case C-413/04 European Parliament v Council*, para. 38.
663 Ibid., paras. 60-61.
664 *Case 231/78 Commission v UK.*

restrictions and measures if they form part of a national market organisation on the date of accession.
This provision shall apply only to the extent necessary to ensure the maintenance of the national organisation until the common organisation of the market for these products is implemented.'

Since potatoes were not covered by any common organization of the market at the time, the UK argued that Article 60(2) AA constituted a special provision within the meaning of Article 9(2) AA, which meant that it could maintain its rules for the national organization for that sector. The Commission agreed that Article 60(2) AA constituted derogation from the main rule in Article 42 AA,[665] however it disagreed that it constituted a "special provision" within the meaning of Article 9(2) AA.

The Court acknowledged that if considered in isolation, the wording of Article 60(2) AA might appear to support the interpretation of the UK government. However, it ruled that that interpretation could not be upheld in the light of the general system of the Act of Accession and of its relationship with the provisions of the EEC Treaty. According to the Court, such an interpretation would "lead to *unacceptable consequences* as regards the *equality of the Member States in relation to certain rules essential for the proper functioning of the common market*."[666]

Following its teleological approach to interpretation, the Court looked at Article 2 AA,[667] and established that the integration of the new Member States into the Community is the fundamental objective of the Act of Accession. Article 9(1) AA laid down that it is only "in order to facilitate the adjustment of the new Member States to the rules in force within the Communities" that "the application of the original Treaties and acts adopted by institutions shall, as a transitional measure, be subject to the derogations provided for in this Act."[668] Thus, the provisions of the Acts of Accession needed to be interpreted with due regard "to the foundations and the system of the Community, as established by the Treaty".[669] According to the Court, the provisions on quantitative restrictions and measures having equivalent effect in the Act of

665 Article 42 AA reads as follows: "Quantitative restrictions on imports and exports shall, from the date of accession, be abolished between the Community as originally constituted and the new Member States and between the new Member States themselves. Measures having equivalent effect to such restrictions shall be abolished by 1 January 1975 at the latest."

666 Emphasis added. *Case 231/78 Commission v UK*, para. 9.

667 Article 2 AA is the embodiment of the main principle of negotiation in the 1972 Act of Accession. It reads as follows: "From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act."

668 *Case 231/78 Commission v UK*, para. 11.

669 Ibid., para. 12.

Accession could not be interpreted in isolation from the related provisions in the EEC Treaty. After examining the relevant provisions in the Treaty, Articles 3(A) and Articles 30 et seq., the Court concluded that the importance of the prohibition of quantitative restrictions and all measures having equivalent effect "for the achievement of freedom of trade between Member States precludes any broad interpretation of the reservations or derogations in that connexion provided for in the Act of Accession."[670]

The Court ruled that Article 60(2) AA constituted derogation from the rule laid down in Article 42 AA, however, it could not be regarded as a special provision within the meaning of Article 9(2) AA. The reservation made in Article 9(2) AA could not be given a broad interpretation. It needed to be interpreted as relating only to special provisions, which were clearly defined and delimited in time, and not to provisions such as Article 60(2) AA, which referred to an uncertain event in the future.[671]

According to the Court, its conclusion is also confirmed by a consideration of the consequences that would flow from the alternative interpretation advocated by the UK. Accordingly, "[i]n *a matter as essential for the proper functioning of the common market* as the elimination of quantitative restrictions, *the Act of Accession cannot be interpreted as having established for an indefinite period in favour of the new Member States a legal position different from that laid down by the Treaty for the original Member States*."[672] If Article 60(2) AA were to be regarded as a "special" provision, it would have the effect of establishing a persisting inequality between the original and the new Member States, the latter being able to prevent or restrict the importation of certain agricultural products coming from the Community, while the old Member States would be obliged under the Treaty to refrain from making such restrictions. In conclusion, even if "it was justified for the original Member States *provisionally to accept such inequalities*, it would be *contrary to the principle of equality of the Member States before Community law* to accept that such inequalities could continue *indefinitely*."[673]

The Court's judgment rules out very clearly any permanent safeguard clause or a permanent derogation from an area that is essential to the proper functioning of the internal market. Free movement of goods and free movement of persons[674] are without doubt such areas.[675] Such clauses would have

670 Ibid., para. 13.
671 Ibid., para. 16.
672 Emphasis added. Ibid., para. 17.
673 Emphasis added. Ibid.
674 See, point 12, para. 4 of the Negotiating Framework for Turkey, and the second bullet point of para. 23 of the European Council conclusions of 16-17 December 2004.
675 Becker argues clearly "transitional measures may not result in a permanent non-application of law in areas which define the Community's identity". In his view, rules concerning the four basic freedoms are among the rules that define that identity. Becker, "EU-Enlargements and Limits to Amendments of the E.C. Treaty," 12.

the effect of establishing "for an indefinite period in favour of the new Member States a legal position different from that laid down by the Treaty for the original Member States", i.e. they are going to embed permanent inequality into the Union system. As such they would clearly be in breach of the principle of equality of the Member States before EU law.

The importance of the principle of equality of Member States cannot be overemphasized. It is confirmed by its recent constitutionalisation in Article 4(2) TEU. Moreover, it has been argued in the past that the principle of equal participation in the integration process as well as the principle of uniform applicability of the provisions of the Treaty flow from the general principle of rule of law and not from the prohibition on discrimination in Article 18 TFEU.[676] From the role the principle of rule of law plays in the enlargement process, Becker deduces that the new Member States have to have the same rights and duties as the old Member States. Yet, this does not mean that the principle of non-discrimination excludes any differentiation; it rather restricts exceptions by imposing the requirement of a reasonable justification. Similarly, for exceptions from the principle of uniformity of EU law in the context of transitional measures objective reasons are required as justifications. As Becker puts it, "deviations from the unity of law and the rule of non-discrimination are to be tolerated if they serve, in the end, the purpose of a per se admissible accession and aim at simplifying the mutual adaptation and securing unity and equality in the whole Community area".[677]

5.2.4.2 Quasi-transitional measures

A major novelty of the fifth and sixth enlargement waves was the plan to gradually integrate the new Member States into the Eurozone and Schengen area, as they were considered unfit to join at their time of accession. It should be noted that not all old Member States are part of these two policy areas, since some Member States have negotiated opt-outs.[678] Opting-out was however, not an option for the new comers. They have formally committed them-

676 Ibid., 11.

677 Ibid.

678 The system of opt-outs is complicated. While Denmark has a full opt-out of Schengen (see the Lisbon Treaty, Protocol No. 22 on the Position of Denmark, OJ C 83/299, 30.03.2010), the UK and Ireland have an opt-out with a possibility of opting-in in some or all of the provisions of the Schengen acquis (see Article 4 of Protocol No. 19, OJ C 83/291, 30.03.2010). The UK and Denmark have opted-out of participating in the third stage of EMU. See, Protocols No 15 and 16 to the Lisbon Treaty, OJ C 83/284, 30.03.2010. Sweden is considered as a Member State with a derogation within the meaning of Article 139 TFEU. For more information see, D. O'Keeffe and C. Turner, "The Status of Member States not Participating in the Euro," *Cambridge Yearbook of European Legal Studies* 4(2001): 293-314. A. G. Toth, "The Legal Effects of the Protocols Relating to the United Kingdom, Ireland and Denmark," in *The European Unon after Amsterdam: A Legal Analysis*, ed. T. Heukels, N. Blokker, and M. Brus (The Hague: Kluwer Law International, 1998), 227-52.

selves to adopting and implementing the *acquis* in these two areas, which they will be included into gradually, as they fulfil the necessary conditions.[679]

Before looking briefly into the measures foreseen in these two policy areas, it is worth thinking about the nature of this regime whereby the partial or total non-participation of the new Member States in EMU and Schengen is envisaged. Could these measures be considered under the title "transitional measures" above? Interestingly, there are reasons to both include and exclude these measures from the previous title. On the one hand, in its broadest sense, the regime envisaged for the new comers in these areas is transitional, since they are under the obligation to join these two areas. They will be able to join as soon as they fulfil the requisite criteria applicable to each area. As mentioned above, they were not allowed to opt-out like some of the old Member States. On the other hand, the legal regimes or arrangements created for EMU and Schengen are very different from the "transitional measures" in that the latter is supposed to be "limited in time and scope, and accompanied by a plan with clearly defined stages for application of the *acquis*".[680] As soon as the set period expires, the relevant *acquis* becomes fully applicable to the new Member State, whereas there is no set deadline for the new Member States to join the EMU and Schengen. While the application of the *acquis* as far as transitional measures are concerned is *automatic* upon the expiration of the pre-determined period, the application of the EMU or Schengen *acquis* is *conditional.* The new Member States will be able to join these areas only if they are able to meet the necessary entry criteria. One wonders whether the inability of some new Member States to meet some of the criteria might eventually turn out into a *de facto* opt-out.

Some of the new Member States have already joined the Eurozone or/and Schengen.[681] However, it is still worth briefly examining the "transitional" regimes in force in these two areas, so as to see how far the new measures go in terms of providing for differentiation. Hence, what follows is a very brief description of the procedures envisaged in both areas.

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679 For more detailed analysis on how the process of gradual integration into these areas is to work see, Hillion, "The European Union is dead. Long live the European Union… A commentary on the Treaty of Accession 2003," 593-96; K. Inglis, "The Union's fifth Accession Treaty: New means to make enlargement possible," *Common Market Law Review* 41(2004): 947-50; Inglis, *Evolving Practice in EU Enlargement*: 177-82.

680 Enlargement Strategy Paper 2000, cited in note 603 above, p. 26. See also the Negotiating Frameworks for Turkey, Montenegro and Serbia.

681 The new Member States that already joined the Eurozone are Slovenia, Cyprus, Malta, Slovakia and Estonia. See, S. Van den Bogaert and V. Borger, "Twenty Years After Maastricht: The Coming of Age of the EMU?," in *The Treaty on European Union 1993-2013: Reflections from Maastricht*, ed. M. de Visser and A. P. van der Mei (Intersentia, 2013), 451. The new Member States that are not yet fully-fledged members of the Schengen area are Bulgaria, Cyprus, Romania and Croatia. See, "Schengen Area", available online at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

5.2.4.2.1 Economic and Monetary Union

While new Member States are obliged to be part of EMU from their date of accession,[682] from that date until their entry into the Eurozone they are considered as "Member States with a derogation" within the meaning of Article 139 TFEU. They need to fulfil the Maastricht convergence criteria before they are able to adopt the single currency.[683] At least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank prepare "Convergence Reports" examining whether the new Member States fulfil the criteria.[684] These reports form the basis of the Council's decision on whether a new Member State may join the Eurozone. If the Council considers those conditions are fulfilled, acting on a proposal from the Commission, and after consulting the European Parliament, it can bring an end to the derogation enjoyed by a new comer.[685]

5.2.4.2.2 Schengen

As with the Eurozone, there is no specified target date for the full incorporation of the new Member States into the Schengen area. The Schengen Protocol as well as the secondary Schengen measures listed in the Annex I to the 2003 Act of Accession are binding on and applicable in the new Member States as of their date of accession.[686] All the other Schengen rules not mentioned above (in the previous sentence) are binding but not applicable in the new Member States. They become applicable only after the Council verifies "in accordance with the applicable Schengen evaluation procedures" that all conditions are met.[687] Then, the Council needs to issue a decision to that effect after consulting the European Parliament.[688]

In short, the idea is that all the new Member States are supposed to sooner or later join the Eurozone and Schengen. Yet, the recent economic crisis and the repercussions of the "rescue plans" that had to be prepared for some old Member States lead one to think that the existing Eurozone members will be very cautious about letting in new comers, which will mean less pressure on the newcomers to join and more time for adequate preparation.

It will not be wrong to say that the quasi-transitional measures were born out of necessity. Some areas of integration, such as the Eurozone and Schengen, are increasingly complex and very important and sensitive for Member States. It is no surprise that new Member States are allowed to join only gradually, as they fulfil the necessary requirements. That is how those areas developed

682 See Article 4 of the 2003 Treaty of Accession. See also, ibid.
683 The Maastricht convergence criteria are listed in Article 140(1) TFEU.
684 See Article 140(1) TFEU.
685 See Article 140(2) TFEU.
686 See Article 3(1) of the 2003 Acts of Accession, and Article 4(1) of the 2005 Act of Accession.
687 See Article 3(2) of the 2003 Acts of Accession, and Article 4(2) of the 2005 Act of Accession.
688 For the precise procedure, see Article 3(3) of the 2003 Acts of Accession, and Article 4(3) of the 2005 Act of Accession.

over the years. With the exception of the States opting-out, old Member States joined those areas at different times as they fulfilled the requisite conditions. For instance, Greece was able to join the Eurozone as of 1 January 2001, after the Council decided it fulfilled the necessary criteria.[689] Given the fact that some old Member States had difficulty fulfilling the necessary requirements for joining in these complex and sensitive areas of integration, it would have been unfair (as well as unrealistic) to expect the new Member States' immediate fulfilment of the criteria upon accession.

The logical step was to let them prepare while they are inside the Union with the full help and assistance of the Union institutions. Making them wait outside until they fulfil all the criteria would be counterproductive, as the process would lose its momentum and even their eventual integration might be endangered. Overall, the logic behind the quasi-transitional measures is not that different from that of transitional measures, as it aims to facilitate the full integration of the new Member States in these complex and important areas at a point in the future. The danger is that the inability (and/or unwillingness) of a new Member State to fulfil the necessary criteria to join the Eurozone or Schengen might turn out into a *de facto* opt-out; however, that danger applies equally to old as well as new Member States which are not part of the Eurozone (i.e. Sweden).[690]

Having examined the new type of measures applicable to new Member States concerning their participation into Eurozone and Schengen, it is important to emphasize that these measures have been devised as "transitional" measures. There is an obligation on the new Member States to participate in these areas some time in the future, i.e. in principle as soon as they are able to fulfil the requisite criteria. Accordingly, they are monitored for compliance with the latter criteria on a regular basis. However, despite the obligation and pressure to join those areas, given the *de facto* possibility of remaining out, the "transitional" nature of these regimes could be questioned, hence their qualification as "quasi-transitional".

How come Member States were able to introduce these new types of measures? Even though these two regimes carry theoretically the possibility of being problematic, in case a Member State is not unable but rather unwilling to join one of these areas, in practice, the incremental and conditional application of these two regimes to the new Member States is not problematic, as

689 Council Decision 2000/427/EC, OJ L 167/19, 7.7.2000. That was two years after the introduction of the euro as the Union's currency on 1 January 1999. See, Van den Bogaert and Borger, "Twenty Years After Maastricht: The Coming of Age of the EMU?," 451; O'Keeffe and Turner, "The Status of Member States not Participating in the Euro," 299.

690 Officially, Sweden is also considered to be a Member State 'with a derogation' and is required to adopt the euro. It is not yet part of the Eurozone, as it has not made the requisite changes to its central bank legislation and does not meet some of the convergence criteria. For further details on the adoption of the euro, see: http://ec.europa.eu/economy_finance/euro/adoption/who_can_join/index_en.htm

it applied (and still applies) on the same terms and criteria to the old Member States (except that opting-out is ruled out for the new Member States). As described above, old Member States also joined these areas in groups, gradually, as they fulfilled the requisite conditions in each area. In other words, the quasi-transitional measures respect the principle of equality of Member States.

Another reason that makes the application of these regimes possible is the fact that the rules applicable in those regimes concern the latest and most developed stage of economic integration: Economic and Monetary Union. As illustrated by the States opting-out, though not entirely unproblematic, it is economically possible not to take part in the Eurozone and/or Schengen while still being a part of the European Union. While the initial steps of integration were taken collectively by all Member States, such as establishing the Customs Union, realizing the common market by ensuring the free circulation of all factors of production, the final stage of integration, that of establishing an economic and monetary union, proved more problematic than the former stages.[691] European integration witnessed an exponential increase in problems experienced in every subsequent stage of integration. To complicate matters further, when establishing the economic and monetary union was at stake, the Union was no longer a homogenous economic block consisting of few western developed economies. Hence, a practical and gradual approach was taken regarding this last stage of integration, whereby only States that were ready to join these policies were allowed to do so. That approach did not change regarding the new Member States.

5.2.4.3 Safeguard clauses

Next, follows the examination of the safeguard clauses, especially those included in the last two Acts of Accession. Safeguard clauses have always been part of Accession Treaties. Yet, their actual use has not been that frequent, which has sometimes led to confusion as to the nature and effect of these clauses.[692] Fortunately, there are a few cases shedding some light on the application of safeguard clauses from earlier Acts of Accession. After examining those clauses, we will proceed to the examination of the new safeguard clauses employed in the last two Acts of Accession. This overview will help us understand the nature, purpose and past uses of those clauses based on which conclusions will be drawn as to whether Member States would be precluded (or constrained) from introducing a PSC on free movement of persons in Turkey's future Accession Agreement.

691 For the description of various stages of economic integration, see B. Balassa, *The Theory of Economic Integration* (Routledge Revivals, 2013). 2; Foster, *Foster on EU LAW*: 14.

692 The use of the term in the Negotiating Framework for Turkey, point 12, para. 4, has also been confusing. See the end of this section for the discussion on that point.

To begin our examination with the first Act of Accession, which set the precedent, the general safeguard clause in that Act was contained in Article 135. The wording of Article 135 AA was based on Article 226 of the EEC Treaty,[693] however, the provisions of that article in relation to a safeguard clause ceased applying among the original Member States as of 31 December 1969, that is the end of the transitional period. According to Puissochet, the effect of Article 135 AA was to 'revive' the safeguard clause contained in Article 226, though by limiting its effect only to relations among the new Member States, and between the new and original Member States.[694] To look at the procedure that Article 135 AA provided for the adoption of protective measures, it read as follows:

> '1. If, before 31 December 1977, difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area, a new Member State may apply for authorisation to take protective measures in order to rectify the situation and adjust the sector concerned to the economy of the Common Market.
>
> 2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.
>
> 3. The measures authorised under paragraph 2 may involve derogations from the rules of the EEC Treaty and of this Act to such an extent and for such periods as are strictly necessary in order to attain the objective referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the Common Market.
>
> 4. In the same circumstances and according to the same procedure, any original Member State may apply for authorisation to take protective measures in regard to one or more new Member States.'

Safeguard clauses included in subsequent Acts of Accession followed largely the wording and structure of Article 135 AA. There were some developments though, such as the specification that "in the event of serious economic difficulties, the Commission shall act within five working days",[695] or even "within 24 hours of receiving such request" in certain sectors specified in the Acts

693 See note 120 above.

694 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 326-27.

695 See Article 130(2) of the 1979 Act of Accession, OJ L 291/47, 19.11.1979; Article 379(2) of the 1985 Act of Accession, OJ L 302/135, 15.11.1985; Article 152(2) of the 1994 Act of Accession, OJ C 241, 29.08.1994.

of Accession.[696] However, as illustrated by examples that will be briefly mentioned, just like with the 'infringement proceedings' the Commission has wide discretion in deciding whether the conditions justifying the adoption of a protective measure are present.[697]

As one can expect, the Commission has been sued in the past for both granting and for refusing to grant authorizations for the adoption of protective measures under the safeguard clauses. To begin with a case concerning an instance whereby the Commission had authorized France to impose a quota on imports of cotton yarn from Greece, based on Article 130 of the 1979 Act of Accession, seven Greek undertakings brought an action pursuant to what is now Article 263 TFEU for a declaration that the decision providing the authorization was void.[698] They argued that they were the main undertakings in Greece that produce and export cotton yarn to France. Moreover, they were distinguished form other exporters of cotton yarn of Greek origin into France by virtue of a series of contracts of sales they had entered into with French customers which were to be performed during the period of application of the decision. They were not able to carry out those contracts because of the quota system applied by the French authorities. Thus, they argued that the Commission was both in a position to, and also under an obligation to, identify the traders who would have been individually concerned by its decision. By failing to do that, they argued that the Commission failed to comply with the conditions of application of Article 130.[699]

To be able to come to a conclusion concerning the arguments of the applicants, the Court needed to interpret Article 130 AA. The wording of Article 130(1) and (3) which the Court recites in the judgment is the same as that of Article 135(1) and (3) of the 1972 Act of Accession mentioned above. According to the Court, the requirement of Article 130 AA might be explained by the fact that "a provision permitting *the authorization of protective measures* with regard to a Member State *which derogates, even temporarily* and in respect of certain products only, from the rules relating to the free movement of goods must, *like any provision of that nature*, *be interpreted strictly*."[700] Moreover, according to the Court, in order to determine whether the measure concerned met the conditions laid down in Article 130(3), the Commission had to also take into account "the situation in the Member State with regard to which the protective measure is requested",[701] that is the situation in Greece. In other words, the

696 In the 1994 Act of Accession the sectors specified are agriculture and fisheries (Article 379(2)), while in the 1979 Act of Accession it is only the agricultural sector that is mentioned (Article 130 (2)).

697 *Case 11/82 SA Piraiki-Patraiki and others v Commission*, para. 40.

698 Ibid., para. 1. See Commission Decision No 81/988/EEC of 30 October 1981, OJ L 362/33, 17.12.1981.

699 Ibid., paras. 12, and 15-16.

700 Emphasis added. Ibid., para. 26.

701 Ibid., para. 28.

Commission had to inquire into the negative effects of its decisions on the economy of Greece as well as on the undertakings concerned. In that vein, the Commission had to consider, as far as possible, the contracts which the undertakings had already entered into and whose execution would be wholly or partially prevented by the decision authorizing the protective measure.[702] At the end, the Court ruled that the Commission had not complied with Article 130(3) as far as it had failed to take into account the contracts entered into in good faith before the adoption of the protective measures. Thus, the contested decision was declared partially void.

On another occasion, associations of French new potato producers brought an action for damages against the Commission under Article 340(2) TFEU (ex Article 215(2) of the EEC Treaty) arguing that they had suffered as a result of the fact that the Commission refrained from taking the necessary measures to stop the import of Greek new potatoes on the German, UK and French markets.[703] Even though the applicants claimed that the conditions needed for the application of Article 130(2) AA for the adoption of protective measures existed on three national markets, it was only France and the UK that requested authorization for the adoption of protective measures. Interestingly, the French application was not based on serious disturbances arising from the importation of Greek potatoes into France, but rather on the sale of Greek potatoes into the UK market, which allegedly kept French potatoes out of the UK market thereby burdening the French market with the potatoes that had not been exported.

Then, it was up to the Court to check whether the Commission's assessment was based on findings of fact that were correct. The Commission contended that potatoes from Greece were not likely to disturb the UK market seriously either by reason of their quantity or their price level. Its main argument was that the true reasons for the fall in potato prices in the UK market were the existence of very large stocks of ware potatoes and the simultaneous availability of supplies from various other countries. The Commission also presented the figures, which supported its arguments. The Court ruled that, in the light of these figures the Commission was justified in concluding that the foreseeable fall in potato prices would not be due to the Greek potatoes and that "by refusing to authorize the application of a protective measure it did not exceed

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702 Ibid.

703 See *Case 114/83 Société d'Initiatives et de Coopération Agricole and Société Interprofessionnelle des producteurs et Expéditeurs de Fruits, Légumes, Bulbes et Fleurs d'Ille-et-Vilaine v Commission*, [1984] ECR 2589; and *Case 289/83 Groupement des Associations Agricoles pour l'Organisation de la Production et de la Commercialisation des Pommes de Terre et Légumes de la Région Malouine (GAARM) and others v Commission*, [1984] ECR 4295.

the limits of the margin of discretion accorded to it for the assessment of economic data."[704]

Both cases are useful examples, which delineate the margin of discretion that the Commission has in authorizing Member States' adoption of protective measures on the basis of safeguard clauses in Accession Agreements. The Commission's job is in no way easy, as illustrated by the case *Piraiki-Patraiki*, its margin of discretion is determined by the correctness of its analysis of the economic situation and the consequences that flow from the adoption or non-adoption of protective measures on the markets of the states requesting a protective measure as well as the market of the state against which the protective measure is requested for.[705] Incorrect analysis, or a hasty analysis based on insufficient data on the part of the Commission might result in the Court ruling that the Commission has exceeded its margin of discretion.

The last two waves of enlargement brought a novelty in respect of the safeguard clauses as well. In addition to the traditional economic safeguard clause present in all Accession Treaties, the 2003 and 2005 Acts of Accession also contain new safeguard clauses covering specifically the internal market and Justice and Home Affairs. Moreover, again for the first time ever, the 2005 Act of Accession contained a clause granting the Union the power to postpone the membership of two countries who had already signed their Accession Agreements.

5.2.4.3.1 "New" safeguard clauses

The first two new safeguard clauses were introduced into the 2003 and 2005 Accession Treaties with the objective to maintain the momentum of reform in the new Member States with the *acquis* on the internal market and JHA. They can be viewed as the spillover of pre-accession conditionality into the post-accession phase. The main reason for this spillover according to many scholars was the old Member States' doubt as to the new Member States' ability in fulfilling their obligations in the areas of the internal market and JHA.[706] The

704 *Case 114/83 Société d'Initiatives et de Coopération Agricole and Société Interprofessionnelle des producteurs et Expéditeurs de Fruits, Légumes, Bulbes et Fleurs d'Ille-et-Vilaine v Commission*, para. 20.

705 For other examples in which the Commission refused the grant of an authorization to take protective measures see, Commission Decision 96/319/EC of 20 November 1995 refusing Belgium's application for protective measures with regard to pharmaceutical products coming from Spain, OJ L 122/21, 22.05.1996; Commission Decision 96/320/EC of 20 December 1995 refusing Germany's application for protective measures with regard to pharmaceutical products coming from Spain, OJ L 122/22, 22.05.1996; and Commission Decision 96/324/EC of 20 December 1995 refusing the United Kingdom's application for protective measures with regard to pharmaceutical products coming from Spain, OJ L 122/26, 22.05.1996.

706 Hillion, "The European Union is dead. Long live the European Union… A commentary on the Treaty of Accession 2003," 607. Inglis, "The Union's fifth Accession Treaty: New means to make enlargement possible," 954. A. Lazowski, "And then they were twenty-

aim of the safeguard clauses is considered to be not only "the maintenance of the achieved level of European integration",[707] i.e. to ensure the integrity of the *acquis*, but also to protect the new Member States against unilateral national measures that could be directed at them.[708]

Both safeguard clauses could be invoked during a three-year period. However, safeguard measures can be maintained beyond this period if relevant commitments by the new comers have not been fulfilled. To understand the nature and effect of these clauses a closer look at them is required

a) Internal Market safeguard clause

Article 38(1) of the 2003 Act of Accession authorizes the Commission to take appropriate measures,[709] either on its own initiative or upon a request of a Member State, where "a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach…". The formulation of this provision has been subject to criticism since it refers broadly to the commitments undertaken in the negotiations rather than the specific commitments laid down in the Act of Accession itself.[710] Moreover, the form and nature of the measures to be taken is entirely at the discretion of the Commission. Yet, failure to implement a commitment is not sufficient to trigger the clause. The failure needs to be the cause of "a serious breach of the functioning of the internal market" or there needs to be "an imminent risk of such breach", and even then, the fact that "the Commission may…take appropriate measures" suggests that the Commission has discretion in adopting the measure, as is the case with its adoption of protective measures under the general economic safeguard clause.

The Commission needs to take measures which are proportional and "which disturb least the functioning of the internal market". These measures should be kept as long as they are "strictly necessary". Safeguard measures should not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. The Commission may adapt the measures as it sees appropriate in response to progress made by the concerned Member State. Last but not least, the Commission needs to inform the Council

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seven... A legal appraisal of the sixth Accession Treaty," *Common Market Law Review* 44 (2007): 410-19.

707 M. Spernbauer, "Benchmarking, safeguard clauses and verification mechanisms – What's in a name? Recent developments in pre- and post- accession conditionality and compliance with EU law," *Croatian Yearbook of European Law and Policy* 3 (2007): 286.

708 Inglis, *Evolving Practice in EU Enlargement*: 191.

709 Its equivalent in the 2005 Acts of Accession is Article 37.

710 Hillion, "The European Union is dead. Long live the European Union… A commentary on the Treaty of Accession 2003," 603.

before revoking the safeguard measures, and to take "duly into account any observations of the Council in this respect".[711]

The only case when the internal market safeguard clause was ever invoked was in the case of the Bulgarian aviation sector,[712] where it was established that there was an imminent risk that Bulgaria's failure to implement its commitments to comply with the Community rules regulating this sector[713] would cause a serious breach of the internal market for air transport. Once the Bulgarian authority for civil aviation (CAA) took the corrective measures to remedy the safety shortcomings identified by previous visits of the European Aviation Safety Agency (EASA), the Commission repealed the safeguard measure.[714]

b) Justice and Home Affairs safeguard clause

According to Hillion, it was the absence of temporary derogations concerning the Area of Freedom, Security and Justice, except the quasi-transitional arrangements in relation to the Schengen *acquis* mentioned above, that led the current Member States and the Commission to devise a *sui generis* safeguard clause to address the potential serious breaches in the functioning of the area.[715] This special clause, which is enshrined in Article 39 of the 2003 Act of Accession and Article 38 of the 2005 Act of Accession, is a bit more elaborate than the safeguard clause on the internal market, however; overall it can also be criticized for being quite broad and vague.

What triggers the clause could be "serious shortcomings or any imminent risks of such shortcomings in the transposition, state of implementation, or the application of the framework decisions or *any other relevant commitments*, instruments of cooperation and decisions relating to mutual recognition in the area of criminal law under Title VI of the EU Treaty and Directives and Regulations relating to mutual recognition in civil matters under Title IV of the EC Treaty in a new Member State".[716] The Commission is again the insti-

711 Article 38(2) of the 2003 Act of Accession.

712 See Commission Regulation (EC) No 1962/2006 of 21 December 2006 in application of Article 37 of the Act of Accession of Bulgaria to the European Union, OJ L 408/8, 30.12.2006.

713 Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ L 240/1, 24.8.1992; Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240/8, 24.8.1992; Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, OJ L 240/15, 24.8.1992; Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, OJ L 240/1, 7.9.2002; Regulation as last amended by Commission Regulation (EC) No 1701/2003, OJ L 243/5, 27.9.2003.

714 Commission Regulation 875/2008 of 8 September 2008 repealing Regulation (EC) No 1962/2006, OJ L 240/3, 9.9.2008.

715 Hillion, "The European Union is dead. Long live the European Union… A commentary on the Treaty of Accession 2003," 605.

716 Emphasis added. Article 39(1) of the 2003 Act of Accession.

tution to take "appropriate measures" either on its own initiative or upon a "motivated request" of a Member State. However, under this clause it needs to "specify the conditions and modalities under which these measures are put into effect" and it needs to consult the Member States before adopting the appropriate measures.

The appropriate measures "may take the form of temporary suspension of the application of relevant provisions and decisions in the relations between a new Member State and any other Member State or Member States".[717] Just like with the internal market safeguard clause, the measures are to be maintained as long as they are "strictly necessary" and need to be lifted when the shortcomings are remedied. Similarly, the Commission might adapt the measures in response to progress in rectifying the shortcomings, and finally, can revoke the measures after having informed and duly having taken account of the Council's observations in this respect.

Even though the Accession Treaty provides for a one-stage procedure, in the case of Bulgaria and Romania the Commission developed a scrutiny mechanism, the so-called "Cooperation and Verification Mechanism",[718] that adds a preliminary phase to the application of the JHA safeguard clause.[719] Yet, if it proves necessary the immediate application of the safeguard clause is also not precluded.[720] The rationale behind this mechanism was again bolstering post-accession conditionality by creating specific benchmarks with a view to remedy the most important shortcomings identified by the Commission.[721] Thus, the mechanism was to apply only regarding the commitments concerning the areas to which these benchmarks were to apply. Bulgaria and Romania had to report to the Commission by 31st of March each year, starting by 31st of March 2007 for the first time, on the progress they make in addressing the benchmarks listed in the Annexes of their respective Decisions.[722] The Commission could amend the Decisions and adjust the benchmarks if need be. The Decisions were to be repealed upon the satisfactory fulfilment of all the benchmarks.[723]

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717 Article 39(2) of the 2003 Act of Accession.

718 Commission Decision 2006/928/EC, of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and fight against corruption, OJ L 354/56, 14.12.2006; Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and fight against corruption and organized crime, OJ L 354/58, 14.12.2006.

719 Lazowski, "And then they were twenty-seven... A legal appraisal of the sixth Accession Treaty," 418.

720 See point 8 of the preambles of both Decisions.

721 See the Annexes to both Decisions for the benchmarks identified with regard to Bulgaria and Romania.

722 Articles 1 of Decisions 2006/928/EC and 2006/929/EC.

723 See point 9 of the preambles of both Decisions.

This mechanism was a new creation, something that has never been used before in previous enlargements. However, it was not the only novelty in the 2005 Act of Accession. When it became clear that Bulgaria and Romania would not be able to fulfil the obligations set forth in their pre-accession strategies, the compromise found to not leave those two countries too far behind and to keep the momentum of enlargement going was the insertion of an unprecedented safeguard clause allowing the postponement of the membership of both countries by twelve months (Article 39).[724] What follows is a brief account of what that clause provides for.

c) Membership postponement (safeguard) clause

The conditions for delaying the membership of Bulgaria and Romania are laid down in Article 39(1) which provides that the Council could use the safeguard clause if there is clear evidence that "there is serious risk of either of those States being *manifestly unprepared* to meet the requirements of membership by the date of accession of 1 January 2007 *in a number of important areas*" [emphasis added]. The decision is to be taken unanimously by the Council. However, regarding the specific commitments undertaken by Romania in the Annex IX points I and II, the Council may take the postponement decision acting by qualified majority on the basis of a Commission recommendation "if serious shortcomings have been observed" (Article 39(2)&(3)).

It should be underlined that this clause is of a different kind,[725] and the most important difference distinguishing this clause from other safeguard clauses is the central role played by the Commission in the latter safeguard clauses, while it is the Council that takes the postponement decision on the basis of a Commission recommendation under Article 39. The postponement clause is a curious instrument that differentiates Bulgaria and Romania from the other CEECs. It was not used, but the reason for not using it was probably not the lack of serious shortcomings but rather the fact that a year was regarded as an insufficient length of time to remedy those shortcomings. The idea being that working with Romania and Bulgaria when they are inside might prove to be more effective than trying to push for reforms when they are outside the Union.[726]

d) Pre-accession closer monitoring (safeguard) clause

As the membership postponement safeguard clause proved to be an ineffective instrument, it was not included in Croatia's Act of Accession. However, it was

724 See, Lazowski, "And then they were twenty-seven... A legal appraisal of the sixth Accession Treaty," 412-13.

725 Lazowski describes the membership postponement safeguard clause as "a political tool with a legal touch", while he describes the internal market and JHA safeguard clauses as "legal tools with a political touch". See, ibid., 415-19.

726 Editorial Comment, "The Sixth Enlargement," *Common Market Law Review* 43 (2006): 1499.

replaced by another unique clause: Article 36 of Croatia's Act of Accession. It was included to emphasize the need for further work and preparations on the part of Croatia until its actual date of accession, namely 1 July 2013. The clause was included as reminder that Croatia had to complete the implementation of its commitments taken during the accession negotiations. After the finalization of the accession negotiations, Member States gave the Commission the mandate to closely monitor Croatia's progress in all the areas covered by the negotiations. Article 36(2) of empowered the Council, on a proposal from the Commission, to "take appropriate measures if issues of concern are identified during the monitoring process" by qualified majority.

While this clause applied prior to the entry into force of Croatia's Accession Treaty, there are other clauses in place that can be triggered during the three years following accession. Those are the general economic safeguard clause (Article 37), the internal market safeguard clause (Article 38), and the Justice and Home Affairs safeguard clause (Article 39), which were discussed above.

Overall, the last waves of accession witnessed an increase in the number, variety and nature of safeguard clauses employed in the newcomers' Acts of Accession. As varied as they were, they were all clauses that applied for a temporary and specified period of time, i.e. none of them was permanent. With the exception of the membership postponement clause, the safeguard clauses were intended as instruments of last resort to ensure compliance with the relevant areas of the *acquis*.[727] Most of them, the two exceptions being the membership postponement clause and pre-accession closer monitoring clause, were ex-ante tools aiming to prevent serious breaches of EU law by the new Member States in their first three years after accession. They were at the disposal of the Commission in addition to the infringement proceedings under Article 258 TFEU. Obviously, it was the reactive, cumbersome and lengthy nature of the latter procedure that created the need for the safeguard clauses. However, as effective as they can be, the criticism goes that the very existence of the safeguard clauses in respect to the incoming states only is *prima facie* discriminatory. It underlies not only the mistrust of the old Member States in the newcomers, but also the inability of the Union's institutions in preparing those countries for accession.[728]

Another important point worth noting is the increased role of the Council regarding the new safeguard clauses, which makes them even more controversial with respect to the principle of equality of Member States. The membership postponement clause as well as the pre-accession closer monitoring clause are unique, as the safeguard measure or the postponement decision is taken by the Council before the Act of Accession enters into force; thus, arguably they apply before the acceding States become full and equal Member States. What is more controversial is the role that the Council plays in the "internal

727 See Comprehensive Monitoring Report of 5 November 2003, COM(2003) 676, p. 18.
728 Inglis, *Evolving Practice in EU Enlargement*: 191.

market" and "Justice and Home Affairs" safeguard clauses. In the traditional safeguard clause, the Commission was the only and main player. Under the new safeguard clauses, before taking any decision to revoke such clauses, the Commission was supposed to not only inform the Council but also duly take account of the Council's views in this regard. This probably does not amount to an obligation to follow the Council's view, however in practice, it would be quite difficult for the Commission to ignore the Council's view if they were to disagree. This is another illustration of Member States' attempts to increase their power and control of all stages of the enlargement process, controversially spilling over to the post-enlargement phase.

5.2.4.3.2 The proposed PSCs in the Negotiating Framework for Turkey

While the existence of temporary safeguard clauses, even if discriminatory, could be explained by the practical need to give new Member States a period of adaptation to the functioning of the Union and its internal market, as well as allaying the fears of old Member States that any unexpected disruption could be dealt with promptly and efficiently, the insertion of PSCs would go against the grain of the very logic and principles of integration that have applied so far. As was demonstrated in this part, the accession of new Member States with different economic, political and cultural histories was an enormous challenge, which necessitated new instruments and policies to make their integration possible. While some strategies and instruments were new, the purpose and principles underlying the process were the same, that is, to fully integrate the newcomers into the existing policies and structures. To support their preparation so that they are able to take on and apply in full the *acquis communautaire*. If that goal was unrealistic in the short run, mechanisms were put in place, such as the cooperation and verification mechanism for instance, so that this goal is achieved in the long run.

It is true that some of the safeguard clauses created inequality between the Member States, but the reason that inequality and discrimination were condoned was because they were temporary, and because they prepared the ground for full equality in the medium to long run. Moreover, it should not be forgotten that recourse to safeguard clauses was also possible for the old Member States during the transitional period, i.e. in the process of establishing the internal market under Article 226 EEC. However, again that was a measure of temporary nature, whereas inserting a PSC would mean engraving discrimination on a permanent basis in the Treaty regarding not only that Member State, but also its citizens, who will be Union citizens upon that State's accession. That will contravene both past practice, case law and the current Treaties. Perhaps there was a reason for never including a PSC in any past Accession Treaty before.

The Court's reasoning in interpreting some temporary derogation clauses is illuminating and should be remembered once again. The Court ruled that "it was justified for the original Member States *provisionally to accept such*

inequalities, it would be *contrary to the principle of equality of the Member States before Community law* to accept that such inequalities could continue *indefinitely*."[729] According to the Court the provisions of the Act of Accession needed to be interpreted with due regard "to the foundations and the system of the Community, as established by the Treaty".[730] While the "foundations" of the Community/ Union will be explored in the next Chapter, for the time being suffice to refer to Article 4(2) TEU which clearly stipulates that "[t]he Union shall respect the equality of Member States before the Treaties". Obviously, the availability of a PSC with regard to a single Member State will blatantly violate that principle.

If we look again at the Negotiating Framework for Turkey, we see that it is quite confusing because it mentions a few different instruments that could be employed in the future Turkish Act of Accession in a few areas without specifying which instrument would be appropriate for which area. As a reminder of what exactly the Negotiating Framework envisaged regarding the adoption of measures on free movement of persons, it read as follows:

> 'Long transitional periods, derogations, specific arrangements or *permanent safeguard clauses*, i.e. *clauses which are permanently available as a basis for safeguard measures*, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as *freedom of movement of persons*, structural policies or agriculture. Furthermore, the decision-taking process regarding *the eventual establishment of freedom of movement of persons* should allow for a *maximum role of individual Member States*. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.'[731]

What can be inferred from this paragraph is that "eventually" the freedom of movement of persons will be established, however, by allowing "for a maximum role of individual Member States". Does this imply that there will be a derogation clause on free movement of persons that some Member States will be able to choose to apply until they see fit? Or that there will be free movement of persons but with a safeguard clause that can be invoked by Member States whenever they like? "The eventual establishment of freedom of movement of persons" seems to suggest the former rather than the latter, but obviously that might have been formulated ambiguously on purpose, so that the Union and its Member States have the leeway to decide what is appropriate when the time for decision-making comes. For the purposes of this study, it is a fruitful exercise to check the legality of both types of measure, that is an unprecedented PSC, as well as a derogation clause, which can be

729 Emphasis added. *Case 231/78 Commission v UK*, para. 11.
730 Ibid., para. 12.
731 Emphasis added. Negotiating Framework for Turkey, point 12, para. 4.

changed on a future date by Member States, as Article 103 of the 1972 Act of Accession concerning the fisheries regime examined below.[732]

Having examined the nature of transitional measures, "quasi-transitional" measures, and safeguard clauses, it was demonstrated that the aim of all these instruments was the eventual and successful integration of the new Member States into the Union institutions and policies as full and equal Member States. The fact that the shared aim was pursued relying on different methods does not reduce the significance of this finding. What follows in the next section is what was supposed to be ruled out,[733] but was still exceptionally included in some of the Acts of Accession, that is changes that arguably go beyond being mere "adjustments" to the Treaties.

5.3 Changes to the Treaties going beyond mere "adjustments"

Even though the main principle of negotiation in every accession wave was to adopt the *acquis communautaire* or the so-called "Community patrimony" in full, there were occasionally some minor exceptions to this rule. However, it will be argued that these exceptions were in no way of a scope or nature to challenge the rule itself. The purpose of this part of the research is to lay out these exceptions, as exhaustively as possible, in order to see in which areas they existed and how far they could go; the underlying idea being that past practice might also provide insight as to the limits of future practice and constraints existing in this area.

It is very difficult to try to fit the different measures employed in Accession Treaties into different categories. The difficulty lies in the fact that whenever we create a category based on a particular criterion, a measure in that category will sometimes also bear the characteristics of measures under other categories. It would be much easier if we could just name the measures under this category as "permanent derogations clauses", as opposed to "transitional derogation clauses"; however, as will be demonstrated, for instance in the case of the arrangements agreed in the area of fisheries, the derogations were not supposed to be necessarily permanent. They were to apply for ten years and then it would be up to the Council to decide on the follow-up to those arrangements.[734] Moreover, while other "permanent derogation clauses" applied only to the acceding Member State(s), the arrangement in the area of fisheries

732 The fisheries regime is analysed below in section 5.3.1.

733 European Commission, Communication, "Enlargement of the Community – Transitional period and institutional implications", Supp. 2/78, pp. 6-8; European Commission, "The Challenge of Enlargement. Commission opinion on Norway's application for membership", Supp. 2/93, pp. 5-6; Enlargement Strategy Paper 2000, cited note 603 above, p. 26.

734 They were not temporary either, since temporary derogations were introduced for a limited time upon the expiration of which the *acquis* in that area would become automatically applicable to the Member State concerned.

changed the existing regime regarding all the Member States, old and new alike. Hence, the more general subtitle "Changes to the Treaties going beyond mere 'adjustments'".

As is elaborated below, the legal regime created by the first Act of Accession in the area of fisheries carries some characteristics that differentiate it from other changes going beyond mere 'adjustments' in subsequent Acts of Accession. Therefore, a closer look at that regime is warranted. For the sake of convenience and exhaustiveness, it is followed by a chronological examination of the exceptional instances where changes in past Accession Treaties could be argued to have gone beyond being mere 'adjustments'.

5.3.1 Arrangement on fishing rights under the 1972 Act of Accession

The reason why the provisions on fishing rights constitute a separate category under this title is because fishing rights were the only area in which problems raised by accession were tried to be solved by transitional measures that modified the system in force. It was "the only instance in which a temporary retrograde change in relation to the status of the law before accession became possible."[735] There are many issues that can be questioned related to this statement though, starting from the point of the status of the law in this area before accession to the 'temporary' and 'retrograde' nature of the change provided for in the 1972 Act of Accession.

If one were to have a look at the system in force before the application of the fish rich UK, Ireland, Denmark and Norway in the area of fisheries, one would be surprised to see that the area was not regulated. It was only the day before the official negotiations of accession with the four applicant countries began that the old Member States managed to agree on the *acquis* in this area:[736] the so-called 1970 'structural regulation' and 'market regulation'.[737] The most important, and also most problematic, provision of Regulation 2141/70 (the 1970 structural regulation) required Member States to open their maritime waters to the access and use of all fishing vessels registered in

735 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 276.

736 The acquis on fisheries was agreed on 30 June 1970. See, R. J. Long and P. A. Curran, *Enforcing the Common Fisheries Policy* (Oxford: Fishing News Books, 2000). 8; R. R. Churchill and D. Owen, *The EC Common Fisheries Policy* (OUP, 2010). 5.

737 See respectively, Council Regulation No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry, OJ Eng. Spec. Ed. 1970 (III) 703; and Council Regulation No 2142/70 of 20 October 1970 on the common organisation of the market in fishery products, OJ Eng. Spec. Ed. 1970 (III) 707.

Community territory and flying the flag of a Member State (Article 2).[738] However, that provision was intended to apply only as of 1 November 1975 in the case of certain fishing grounds lying within three nautical miles of the coast and which were to be designated by the Council (Article 4).[739]

The applicant states, especially Norway and the UK, expressed their concerns with regard to the structural regulation, underlining the fact that it had been adopted after the date on which they had in principle accepted the *acquis communautaire*. According to them, the Regulation was detrimental to the interests of their local populations depending on coastal fishing. At the end of tough negotiations, they came up with the compromise laid down in Articles 100 to 103 in the 1972 Act of Accession.[740]

Article 100 established the main rules applicable with regard to fishing as of their date of Accession, i.e. 1 January 1973. It provided the possibility of derogation from the principle of non-discrimination established in Article 2 of Regulation No 2141/70 for a period of ten years. This derogation was not limited only to the new Member State, but was extended to all Member States. The waters in which Member States could restrict fishing were those "situated within a limit of six nautical miles, calculated from the base lines of the coastal Member State" (Article 100(1) AA). The six-mile limit could be extended to 12 miles for the areas listed in Article 101 AA. These areas covered very important sectors of the coastline of the new Member States and France. The coastal states could reserve the right to fish in these areas to "vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area" (Article 100(1) AA). However, the derogation allowed in Article 100 AA is subject to one restriction. If a Member State can claim "special fishing rights" in the waters of another Member State, it can continue to exercise those rights (Article 100(2) AA). Those "special rights" could have been established either by treaty or by established practice.

Article 102 AA empowered the Council, acting on a proposal by the Commission, to "determine the conditions for fishing with a view to ensure the protection of the fishing grounds and conservation of the biological resources of the sea" from the sixth year after accession at the latest. Last but not least, Article 103 AA provided that the Commission was to prepare a report on the

738 To be more precise Article 2(1) of Regulation No. 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry, OJ Eng. Spec. Ed. 1970 (III) 703, provided as follows: "Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.
Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory."

739 Puissochet, *The Enlargement of the European Communities – A Commentary on the Treaty and the Acts Concerning the Accesssion of Denmark, Ireland, and the United Kingdom*: 276.

740 Ibid., 274-83.

economic and social development of the coastal areas of the Member States and the state of fish stocks. Based on that report, and acting on a proposal from the Commission, the Council was to "examine the provisions which could follow the derogations in force until 31 December 1982." According to Puissochet, with these provisions the definition of the measures applicable in this area is deferred to a future date, while leaving some flexibility as to whether the new measures will be the extension of existing derogations or not, or whether they will be temporary or permanent.[741]

At its meeting on 21 December 1982, the Council was not able to adopt the measures mentioned in Article 103 AA. Yet, it managed to adopt a number of regulations establishing a new Community fisheries regime at its meeting on 25 January 1983. Article 6(1) of Regulation No. 170/83 establishing a Community system for the conservation and management of fishery resources,[742] provided as follows: "As from 1 January 1983 and until 31 December 1992, Member States shall be authorized to retain the arrangements defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles laid down in that article."

What happened with the new arrangement in Regulation No. 170/83 was that the regime that seemed to be derogating from the main rule established in Regulation No. 2141/70 was not only kept in place for another ten years, but the geographical area that it covered was increased from six to twelve nautical miles. This new arrangement was then extended few times,[743] and will remain in force until 31 December 2022.[744] This means that the existing arrangement cannot be viewed as derogation anymore or the extension of derogation, but rather as constituting the main rule since it has been in force for more than forty years.

Regulation No 2141/70 was put in force hastily without consulting the candidate states with which accession negotiations had already begun. Moreover, the rule of equal access to maritime waters of other Member States laid down in Article 2 of that Regulation was to apply subject to derogation for the next five years. That derogation laid down in Article 4, stipulated that it would apply to certain fishing areas situated within three nautical miles

741 Ibid., 281-82. See also, Churchill and Owen, *The EC Common Fisheries Policy*: 5-6; Long and Curran, *Enforcing the Common Fisheries Policy*: 8-12.

742 OJ L 24/1, 27.01.1983.

743 The arrangement established by Regulation No 170/83 was extended for another ten years by Regulation No 3760/92 establishing a Community system for fisheries and aquaculture, OJ L 389/1, 31.12.1992; then for another ten years by Regulation No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358/59, 31.12.2002, para. 14 of the preamble; and lastly, by Regulation No 1380/2013 of 11 December 2013 on the Common Fisheries Policy, OJ L 354/22, 28.12.2013.

744 See, Article 5 of Regulation No 1380/2013 on the Common Fisheries Policy, OJ L 354/32, 28.12.2013.

calculated from the base lines of the Member States which were to be specified by the Council. The 1972 accession took place before that five-year period expired. In other words, the regime established by the Regulation applied only for two years and then only subject to derogation. What happened with the 1972 Accession was that the derogation was extended to six nautical miles, and with hindsight this became the main rule, which was subject to the restriction of "special fishing rights", as well as to the exceptions listed in Article 101 AA. A decade later (in 1983), the main rule was extended to twelve nautical miles and remained at twelve miles ever since. Yet, although it is not very likely to change in practice, perhaps theoretically there is the possibility that the regime in force might change as of December 2022.

In conclusion, fisheries was an area under the Common Agricultural Policy at the time of the first accession (Article 3(d)). Under the combined provisions of Article 38(3) and Annex II to the EEC Treaty, fishery products were subject to the provisions of Articles 39 to 46 concerning agriculture.[745] However, fisheries was not yet an area with well-established rules and practices. Thus, it is possible to argue both ways. Firstly, that the rules established by Regulation No 2141/70 which were changed by the 1972 Act of Accession, do not go beyond mere adjustments, since Regulation No 2141/70 was never applied without derogation and was adopted only after the start of the negotiations with the UK, Denmark, Ireland and Norway knowing that those rules will need to be changed taking the interests of the newcomers into account when the time for accession comes. Accordingly the arrangement on fisheries was needed to be able to extend the *acquis* to a situation that did not exist in the Union of six. Articles 100 to 103 of the 1972 Act of Accession lay down a regime for fisheries, which was more adapted to the sea-faring nature of the then new Member States than the existing regime put in place by continental states.[746]

Secondly, the argument to the contrary would be that it goes beyond a mere adjustment since it creates a new regime with new rules that applies to all Member States. Moreover, in addition to the more implicit competence derived from Article 39, which specified objectives such as the rational development of production and guarantee of regular supplies, objectives laid down for CAP but which could be extended to fisheries as well, Article 102 of the Act of Accession created a more explicit competence for the adoption of rules "to determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea".

No matter which view one subscribes to, it is not difficult to see that the arrangement on fisheries is eventually one with integrationist effects. Old Member States wanted further integration in this area and the regulation they had promulgated served as a good basis for the accession negotiations. With some changes to the regime already applicable that enabled them to take into

745 *Joined Cases 3, 4 and 6/76, Kramer and Others*, paras. 21-25.
746 See, Booss and Forman, "Enlargement: Legal and Procedural Issues," 102, footnote 19.

account the interests of the newcomers as well, they found a middle ground and set the main rules of the fisheries policy. With some further minor 'adjustments', such as increasing the restriction on fishing in their waters from 6 to 12 nautical miles, the policy established in 1972 has survived and developed until today.

5.3.2 Other measures in past Acts of Accession going beyond "adjustments"

To continue with another arrangement in the 1972 Act of Accession, which seemed to go further than being a mere adjustmens, that is the case of butter imported from New Zealand. As far as agricultural products are concerned, most of the issues were resolved by transitional measures,[747] whereas a special transitional arrangement similar to that applying to fisheries was adopted in the case of butter coming from New Zealand. Article 5(1) and (2) of Protocol No 18 to the 1972 Act of Accession provided that in 1975 the Council would examine the situation, taking into account *inter alia*:

> 'progress towards an effective world agreement on milk products … [and] the extent of New Zealand's progress towards diversification of its economy and exports, it being understood that the Community will strive to pursue a commercial policy which does not run counter to this progress. Appropriate measures to ensure the maintenance, after December 31, 1977, of exceptional arrangements in respect of butter from New Zealand, including the details of such arrangements, shall be determined by the Council, acting unanimously on a proposal from the Commission, in the light of that review.'

When we come to the 1979 Act of Accession, the most important change, to be more accurate an 'addition', to the existing rules was the inclusion of cotton into the Common Agricultural Policy.[748] As with other agricultural products, a system of support for the production of cotton was to be introduced, so that producers earn a fair income and the market in cotton is stabilized.[749] Another interesting point regarding Greece was the joint declaration annexed to the Final Act concerning the status of Mount Athos. It read as follows:

> 'Recognizing that the special status granted to Mount Athos, as guaranteed by Article 105 of the Hellenic Constitution, is justified exclusively on grounds of a spiritual and religious nature, the Community will ensure that this status is taken into account in the application and subsequent preparation of provisions of Com-

747 See, G. Olmi, "Agriculture and Fisheries in the Treaty of Brussels of January 22, 1972," *Common Market Law Review* 9, no. 3 (1972): 309-11.

748 See, Protocol No. 4 to the 1979 Act of Accession, OJ L 291, 19.11.1979.

749 B. Schloh, "The Accession of Greece to the European Communities," *Georgia Journal of International and Comparative Law* 10 (1980): 4061.

> munity law, in particular in relation to custom franchise privileges, tax exemptions and the right if establishment.'[750]

The arrangement on cotton is new but not something out of line with existing practice under CAP. On the contrary, the rules applied in CAP are extended to a product that was not covered by the policy simply because it was not produced by the old Member States. Thus, it can be argued that this addition to CAP does not go beyond being an "adjustment". As to the declaration regarding Mount Athos, it is merely *a declaration*, which aims to ensure that the religious significance of Mount Athos is taken into account in the application of EU law. Put differently, if need be, the ground for a future derogation is laid down. However, that derogation is not a permanent one, but one that would fit within the system of the Treaty. Derogations on the freedoms are allowed on various grounds, public policy, public morality... within the system of the Treaty, provided they are proporionate. The spiritual and religious nature of a place could be assimilated to one of these grounds.

The 1994 Act of Accession also contains interesting arrangemenments and novel additions to the existing *acquis*. To begin describing them in the order they appear in the Act of Accession, the first novelty is Article 142 on Nordic agriculture. That article stipulates as follows:

> '1. The Commission shall authorize Norway, Finland and Sweden to grant long-term national aids with a view to ensuring that agricultural activity is maintained in specific regions. These regions should cover the agricultural areas situated to the north of the 62nd Parallel and some adjacent areas south of that parallel affected by comparable climatic conditions rendering agricultural activity particularly difficult.'

Article 142 specifies further the objectives of the aid and the considerations that the Commission needs to take into account while determining the regions referred to in paragraph 1. This article again was necessitated by a novel situation. Prior to the accession of Finland and Sweden there was no Member State whose mainland was subject to such harsh climatic conditions. Thus, for the equitable application of CAP to all the Member States, the special circumstances of the newcomers had to be taken into account. In other words, this arrangement should also be seen as an attempt to extend the *acquis* to the newcomers rather than a derogation or deviation from it.

The same goes for Protocol No. 3 of the 1994 Act of Accession on the Sami people, which for the first time dealt with an indigenous population living on the mainland territory of Member States.[751] Norway, Sweden and Finland

750 Final Act, OJ L 291/186, 19.11.1979.

751 For arrangements on lands or territories with which Member States have a special relationship, see section 5.2.3 of this chapter.

had certain obligations and commitments with regard to Sami people flowing from both national and international law. Thus, there was the need to accommodate those obligations and commitments within the EU legal order as well. In the preamble of the Protocol, it was acknowledged that traditional Sami culture and livelihood was dependent on primary economic activities such as reindeer husbandry, following which Article 1 of the Protocol provided that "[n]otwithstanding the provisions of the EC Treaty, exclusive rights to reindeer husbandry within traditional Sami areas may be granted to the Sami people." Article 2 of the Protocol provided the legal basis for the extension of this Protocol so as to "take account of any further development of exclusive Sami rights linked to their traditional means of livelihood".

The third novelty introduced by the 1994 Act of Accession is contained in Protocol No. 6, which created an additional objective to the existing five referred to in Article 1 of Council Regulation (EEC) No 2052/88, as amended by Council Regulation (EEC) No 2081/93.[752] The new objective, that is Objective 6, under Article 1 of the Protocol aims "to promote the development and structural adjustment of regions with an extremely low population density". The regions covered by Objective 6 are listed in Annex 1 to the Protocol, and Annex 2 sets out the breakdown of resources by year and Member State. It would probably be more accurate to qualify this new arrangement as a measure going beyond mere technical adjustment, however, far from being a permanent derogation clause. Since again the aim is extending the *acquis* to a new situation arising in new Member States rather than derogating from certain areas of the *acquis*. Furthermore, the arrangement is far from being permanent, as in the fisheries regime, Article 5 of the Protocol refers to a future date when the existing rules will be re-examined. It reads as follows:

> 'The provisions of this Protocol, including the eligibility of the regions listed in Annex 1 for assistance from the Structural Funds, shall be re-examined in 1999 simultaneously with the framework Regulation (EEC) No 2081/93 on structural instruments and policies and in accordance with the procedures laid down in that Regulation.'

The last clause in the 1994 Act of Accession to be examined is in Annex XV, under point X Miscellaneous and concerns the prohibition of marketing of tobacco products for oral use, the so-called "snus", in Sweden and Norway. The marketing of tobacco for oral use was prohibited by Article 8a of Directive

752 Council Regulation (EEC) No 2081/93 of 20 July 1993 amending Regulation (EEC) No 2052/88 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 193/5, 31.7.1993.

92/41/EEC,[753] which defined "tobacco for oral use" in its Article 2(4) as "all products for oral use, except those to be smoked or chewed, made wholly or partly of tobacco, in powder or particulate form or in any combination of these forms – particularly those presented in sachet portions or porous sachets – or in a form resembling a food product". The most widely used and marketed types of "snus" in Sweden and Norway are either in a powder form (loose snus) or in teabag-like sachets (portion snus), i.e. in forms described by Article 2(4) and prohibited by Article 8a. The derogation provides that "[t]he prohibition in Article 8a … shall not apply in Sweden and Norway, with the exception of the prohibition to place this product on the market in a form resembling a food product". Moreover, Sweden and Norway need to take all the necessary measures to ensure that "snus" is not placed on the market in other Member States, which will also be monitored by the Commission.

This is indeed a permanent derogation from secondary EU law that applies to Sweden. It goes beyond being a "mere adjustment", however, given the fact that it concerns the marketing of a particular form of a product and then only on the territory of one Member State, arguably, it is not a derogation that is liable to have a serious effect on the functioning of the internal market or on competition. The purpose of this derogation seems to be to provide some flexibility as to the use of this product, whose effects on human health are contentious, where there is habitual use of the product, i.e. Sweden and Norway. Yet, the general prohibition is kept in place so as to prevent the habit from spreading and thereby protect public health. This is another example to the difficulties and tensions that can arise in the endeavour to extend the *acquis* to new Member States with different geography, climate, cultures etc.

One of the most conspicuous derogations in the 2003 Act of Accession is the Maltese derogation, providing for a permanent restriction to the purchase of secondary reidences by non-residents of Malta. It is similar to the Danish deorgation obtained by Protocol No. 1 to the Maastricht Treaty.[754] The details

753 Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products, OJ L 158/30, 11.06.1991.

754 Protocol No. 1 to the Maastricht Treaty provided as follows: "Notwithstanding the Provisions of this Treaty, Denmark may maintain the existing legislation on the acquisition of second homes". Hence, complaints on the ground that "only established residents are entitled to acquire property in Denmark" have been dismissed. See European Parliament, Committee on Petitions, 3 July 2006, Petition 866/2000 by Mr Rolf Dieter Rahn (German) concerning equal treatment of Union citizens in Denmark, PE 311.501/REV II. It is argued that the introduction of Protocol No. 1 was a response to two judgments delivered in in 1989: *Cowan* and *Commission v Greece*. In the latter case, the Court established that as far as Greece had maintained legislation restricting the acquisition of immovable property by nationals of other Member States, it had failed to fulfil its obligations under Articles 48, 52, and 59 of the EEC Treaty [now Articles 45, 49, 56 TFEU]. See, *Case C-305/87 Commission v Greece*, [1989] ECR 1461, paras. 28-29; and *Case 186/87 Cowan*. G. Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (Routledge, 2013).

of the derogation are to be found in Protocol 6 to the Act of Accession. It reads as follows:

> 'Bearing in mind the very limited number of residences in Malta and the very limited land available for construction purposes, which can only cover the basic needs created by the demographic development of the present residents, Malta may *on a non-discriminatory basis* maintain in force the rules on the acquisition and holding of immovable property for secondary residence purposes by nationals of the Member States who have not legally resided in Malta for at least five years laid down in the Immovable Property (Acquisition by Non-Residents) Act (Chapter 246).'

Malta shall apply *authorisation procedures* for the acquisition of immovable property for secondary residence purposes in Malta, which shall be *based on published, objective, stable and transparent criteria*. *These criteria shall be applied in a non-discriminatory manner and shall not differentiate between nationals of Malta and of other Member States*. Malta shall ensure that in no instance shall a national of a Member State be treated in a more restrictive way than a national of a third country.

In the event that the value of one such property bought by a national of a Member State exceeds the thresholds provided for in Malta's legislation, namely 30000 Maltese lira for apartments and 50000 Maltese lira for any type of property other than apartments and property of historical importance, authorisation shall be granted. Malta may revise the thresholds established by such legislation to reflect changes in prices in the property market in Malta.[755]

If the authorization procedures as well as the criteria mentioned apply equally to everone who is not a resident of Malta, including Maltese nationals, this would make the Immovable Propert Act indirectly discriminatory, as more Maltese nationals are likely to be resident in Malta. However, indirect discrimination can be justified. In the case of Malta, the justification is the small size of the island, and the limited number of residences and land available for construction. It is difficult to envisage how the same result (making housing available for residents of Malta) could be achieved by less restrictive means. Moreover, given the tiny size of the island this derogation is not of such scope or nature as to (negatively) affect the functioning of the internal market.

In addition, although technically speaking not a permanent derogation, in Protocol 7 to the 2003 Act of Accession Malta has also tried to guarantee

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79; D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces," *Common Market Law Review* 30, no. 1 (1993): 46-47.

755 Emphasis added. Protocol No 6 on the acquisition of secondary residences in Malta, OJ L 236/947, 23.09.2003.

that it would not be obliged to legalise abortion.[756] According to Inglis, this Protocol can be seen as a pre-emptive response to the legislative Resolution of the European Parliament of July 2002,[757] which was interpreted by Maltese clergy as a call to legalise abortion.[758]

The last novel situation worth mentioning was introduced by Protocol No 10 to the 2003 Act of Accession. It deals with the special situation of Cyprus, as the country acceded to the Union without settling the problem between its Greek and Turkish communities. The arrangement found at EU level was to suspend the application of the *acquis* to the areas of the island over which the Cypriot government does not exercise effective control,[759] namely the northern Turkish part. The suspension can be withdrawn by "[t]he Council, acting unanimously on the basis of a proposal from the Commission".[760] According to Article 2(1) of Protocol 10, following the same procedure, the Council is to decide on the terms under which the provisions of EU law apply between the areas that the Cypriot government exercises control (the southern part) and those that it does not (the northern part).[761] Since it is argued that "the suspension of the *acquis* is not a derogation from the *acquis*",[762] this thesis does not deal with the regime established in Cyprus in any depth. However, it is worth noting that even if the regime created is not *de jure* one of a permanent derogation, the development of the *de facto* situation in the long run is difficult to foresee.[763]

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756 The Protocol reads as follows: "Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion."

757 European Parliament legislative resolution on the proposal for a European Parliament and Council regulation on aid for policies and actions on reproductive and sexual health and rights in developing countries, (COM(2002) 120 – C5-0114/2002 – 2002/0052(COD)). Regulation (EC) 1567/2003 of the European Parliament and of the Council on aid policies and actions for reproductive and sexual health and rights in developing countries, OJ L 224/1, 6.9.2003.

758 Inglis, *Evolving Practice in EU Enlargement*: 52.

759 See Article 1(1) of Protocol No 10 on Cyprus, OJ L 236/955, 23.9.2003.

760 See ibid., Article 1(2). Similarly, in the event of a settlement it is the Council deciding by unanimity on a proposal by the Commission "on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community". See ibid., Article 4.

761 Council Regulation 866/2004 on a regime under Article 2 of Protocol No 10 of the 2003 Act of Accession, OJ L 161/128, 30.4.2004; as amended by Regulation 1283/2005, OJ L 203/8, 4.8.2005; Regulation 587/2008, OJ L 163/1, 24.6.2008; and Regulation 685/2013, OJ L 196/1, 19.7.2013.

762 Inglis, *Evolving Practice in EU Enlargement*: 183.

763 On the possibility to accommodate a bi-zonal and bi-communal federation within the Union legal order, see M. Cremona and N. Skoutaris, "Speaking of the de … rogations: accommodating a solution of the Cyprus issue within the Union legal order," *Journal of Balkan and Near Eastern Studies* 11, no. 4 (2009): 381-95.

As illustrated by this overview, changes in past Accession Treaties going beyond mere "adjustments" were rather exceptional and limited in scope. As concluded, in most instances those changes were mere "adjustments" but of a different kind. They were adjustments necessitated by inclusion of a novel situation or condition that did not exist in the Union before. It is possible to argue that some of them could still be considered as "adjustments" in the sense used in Article 49(2) TEU, as there is a causal link between the "adjustment" and the process of accession, as required by the latter provision. The solutions found aimed at extending the application of existing policies to those products, situations or conditions; thus had integrationist objectives and effects. For instance, the application of CAP was extended so as to include a new product "cotton"; a new objective (Objective 6) was added to existing objectives in Regulation No 2052/88 so as to finance the development of regions with extremely low population density; indigenous peoples were accommodated so as to respect their right to enjoy their unique lifestyles.

At the end, arguably there are only two exceptional cases, in which changes seem to have gone beyond being mere "adjustments": those are the derogation granted to the purchase of secondary residences in Malta and the derogation on the prohibition of marketing of "snus". Malta is very small and its secondary housing market quite attractive, which means that without any protection and with increasing housing prices, its population could be deprived of the opportunity to obtain housing in the long run. Since the Maltese rules do not discriminate on the basis of nationality but residence, they are only indirectly discriminatory and thus could arguably be justified, as they seem to be proportionate to achieve their aim. As to the derogation on "snus", it should be noted that it concerns derogating from a single provision of secondary EU law, i.e. Article 8a of Directive 92/41/EEC. In other words, the scope of that derogation is very limited. It aims to accommodate Sweden's cultural consumption habits of tobacco, which is not shared by populations of other Memberm States, while at the same time preventing those habits from spreading to other parts of Europe.

Most important of all, none of these arrangements significantly affects the proper functioning of the internal market, competition or one of the Union's well-established policies. All of them were introducing at the request of the acceding States, none was imposed unilaterally on them. For the most part these arrangements were created out of the necessity to accommodate the particularities of each new comer usually with the aim to extend the *acquis* to these novel conditions and situations.[764] In the exceptional instances where the aim was not the extension of the *acquis*, there was a reasonable justification to derogate from the *acquis* so as to respect the particular needs or conditions

764 See, Booss and Forman, "Enlargement: Legal and Procedural Issues," 102, footnote 19.

of a country. As such these derogations do not seriously call into question the equality of Member States.

As far as the wording of the Negotiating Framework for Turkey is concerned, it should be noted that a (temporary) derogation clause pointing to a future date to establish "[t]he eventual establishment of freedom of movement of persons" carries the danger of becoming a permanent derogation clause. As illustrated by the fisheries regime, which was supposed to be derogating from the main rule for ten years, the derogating regime became the main rule rather than vice versa. The difference being of course that there was no well-established regime in the area of fisheries when the regime in the 1972 Act of Accession was devised and that the latter regime applied equally to all Member States without differentiating between the old and new Member States. Obviously, such a clause in the area of free movement of persons will have a substantial impact both on the functioning of the internal market and on competition, and it will discriminate directly on the basis of nationality in respect of some of the fundamental freedoms with regard to the nationals of one Member State only. No matter in what form, i.e. a permanent derogation or a PSC, such a clause will fly in the face of important rules and principles governing the enlargement process as well as on rules and principles underlying the constitutional foundations of the Union, which is examined in the next and final part.

5.4 CONCLUSION

This part contained an analysis of past and present versions of the Treaty provision laying down the basis of both procedural and substantive constraints in the framework of a candidate State's accession process to the Union. The various versions of this provision, now Article 49 TEU, have always constituted the backbone of the enlargement procedure and have defined its general limits. While the primary aim of this part was to identify the main legal (both procedural and substantive) constraints flowing from the latter provision, its secondary aim was to demonstrate that the latter limits never provided a full picture of what happened in practice. Hence, for a better understanding of the full range of legal constraints that play a role in the process, the evolution of past practice as well entrenched principles that have always underlain the process have been identified and analysed.

Few examples of the limited view provided by Article 49 TEU, are as follows: firstly, since the very beginning, that is the first accession process, the Commission has played a role that went far beyond delivering an opinion as indicated in in ex Article 237 EEC. Secondly, Member States have never acted as such in the process but always via the Council machinery. Thirdly, with the enlargement to the East and subsequent Treaty revisions, institutions of the Union got even more involved in the process, to the extent that some

commentators would argue that the Commission's *de facto* role in the enlargement process came to resemble "the 'Community method': the Commission proposes, the Council decides, and the Commission implements, controls and evaluates".[765]

Throughout Chapter 4, it has been argued that the Community/ Union nature of the enlargement process has always been prominent. The fact that recently Member States are trying to increase their control over the process via the introduction of various mechanisms does not challenge this argument. On the contrary, that development could be conceived of as an attempt to tip the balance between the supranational and intergovernmental components of the procedure back to where it was before the fifth enlargement. With the increased role of the Commission, backing of the Parliament and the support of the Presidencies, Member States felt the process gained its own life, which was almost out of their control. With the "benchmarking" system they have more control over the process. However, the fact that they still need to act via the Council machinery remains unchanged. Moreover, the fact that the main function of enlargement conferences is seen as registering the progress of negotiations, which apparently take place between the chief negotiator of the country and the Commission and/or the Presidency,[766] demonstrates the limited roles of Member States in the process.

In addition to the procedure provided in the Treaties and the enlargement practice that developed over the years, the third component that defined the nature of the process were the principles governing the negotiation process. The first principle required the full adoption of the *acquis communautaire* and the second one required the solution of all problems by transitional measures of limited duration and not by changing the existing rules. The objective of these principles was to ensure the continuity of the Community/ Union. The examination of past Acts of Accession as well as of various measures employed therein clearly illustrated that these principles were consistently applied in each and every accession. The *acquis communautaire* was extended to all newly acceding states in its entirety. When that was not possible immediately or under traditional transitional measures, new measures were designed such as the 'quasi-transitional' measures. Measures going beyond mere "adjustments" were very exceptional and limited in scope, to the extent that we can ignore their existence. This consistent application of the principles of negotiation made the process foreseeable, credible and legitimate for the candidate states.

As elaborated above, the PSC or permanent derogation clauses mentioned in the Negotiating Framework for Turkey are unprecedented in the light of both old and new mechanisms used in all the Acts of Accession. What differentiates them most from the instruments employed so far is their underlying

765 Christoffersen, "Organization of the Process and Beginning of the Negotiations," 36.
766 See also, ibid., 42-43; Avery, "The Enlargement Negotiations," 40.

rationale, which is to withhold the full extension of the *acquis communautaire* to the acceding State, and/or suspending parts of the *acquis*, which are fundamental for the functioning of the internal market. Inclusion of such clauses would mean amending some of the rules and policies of the Union, which Member States are allowed to do on the basis of Article 48 TEU, but not on the basis of Article 49 TEU. The limits to the changes Member States are allowed to make under Article 49 TEU, as demonstrated in this Chapter, are delineated by the notions of "adjustments" and "adaptations".

In other words, Article 49 TEU has delimited the changes to be made under its scope more clearly and more restrictively compared to Article 48 TEU, i.e. it places firmer legal constraints on Member States as primary law makers under Article 49 as compared to Article 48 TEU. The following part of this thesis aims to establish that there are cases and Opinions delivered by the Court of Justice, which imply the existence of a constitutional core, or constitutional foundations of the Union, which could be argued to limit some of the changes that affect that core even under Article 48 TEU.

As to the constraining effect of past practice and negotiation principles, as demonstrated in Chapter 4, they flow from their consistent application and their internalization by the Union institutions as well as Member States. The chronological overview of past accession waves has demonstrated that the main contours of the process as well as the main principles underlying it are firmly entrenched by now. That entrenchment can be deduced not only from Member States' compliance with these principles and norms, i.e. by their internalization, but also by their constitutionalisation, in other words, their official incorporation into the Treaties. The partial incorporation of the Copenhagen criteria as ex Article 6(1) TEU and now Article 2 TEU is a good illustration of the latter point.

It should be noted that once incorporated into the Treaties, the constraining force of these principles is further reinforced. The external threat of sanction by the Court of Justice is added to the constraining force of internalization. As argued above, the external threat of sanction by the Court of Justice is always present in the framework of Article 49 TEU. Member States have to comply with the procedural steps indicated in Article 49 TEU as well as pay attention to the causal link between the "adjustments" they introduce and the accession of the candidate State. Problems regarding procedure or substance, if taken to the Court, might trigger a review of the Council Decision concluding the accession negotiations, which could lead to its annulment.[767]

767 The relatively recent *Pringle* ruling has revealed that Member States cannot escape judicial review when acting as primary law makers (though the review focuses mainly on checking procedural requirements). See, *Case C-370/12 Pringle*. For a more elaborate discussion of the possibility to challenge the PSC in front of the Court of Justice, see Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," 279-82.

As to the main substantive constraint imposed by Article 49 TEU, Chapter 5 identified the term "adjustment" and elaborated on its scope by analysing other language versions of the term as well as examining changes included under past Acts of Accession under that title " Adjustments to the Treaties". It was demonstrated that the Dutch, French and German versions of the Treaties all employed terms of more limited scope to refer to the changes necessitated by accession under Article 49 TEU ('aanpassingen', 'les adaptations', and 'Anpassungen') than the changes carried out under Article 48 TEU ('herziening', 'la révision' and 'Änderung'). Moreover, it was argued that the fact that other language versions do not distinguish between changes to the Treaties ('adjustments') and changes to secondary law ('adaptations'), but use a single term for both types of changes ('aanpassingen', 'les adaptations', and 'Anpassungen'), suggests that the Court case law interpreting 'adaptations' could be used shed light on the term 'adjustment' as well. The conclusion reached was that "adjustments" could be defined as the technical changes to the Treaties necessitated directly by accession and the corresponding need to ensure the full applicability of the Treaties to the acceding State to the exclusion of other types of changes, which can be carried out under Article 48 TEU.

Since the Negotiating Franework is vague as to the precise type of measure that would be employed regarding free movement of persons, Chapter 5 examines other types of measures used in past Accession Agreements, which like 'adjustments' aim to facilitate the full integration of the new Member States into the Union. Different types of measures are classified as 'transitional measures', 'quasi-transitional measures' and 'safeguard clauses'. It is argued that a PSC on free movement of persons would be different from all the previously employed safeguard clauses, because it would be permanent, it would single out one Member State and its nationals, and instead of aiming to extend fully the application of the free movement provisions, it would provide for their inapplication or suspension.

Lastly, Chapter 5 examined all new arrangements introduced by past Acts of Accession so as to establish those that could be considered to be going beyond the substantive constraint of 'adjustment' embedded in Article 49 TEU. The examination revealed that there were many instances in which there was need for new arrangements, however, the underlying rationale of almost all of these was not derogating from the existing Treaty rules, but rather making the necessary arrangements to incorporate them into the existing system of rules. As to the two exceptions (restrictions on the purchase of secondary rersidence by non-rresidents in Malta and the marketing of 'snus' in Sweden), which were of a different nature, i.e. derogating from the existing rules, it was established that they were of a very limited scope and not likely to effect the functioning of the internal market in any siginificant way.

To recapitulate, this part established that enlargement takes place based on a procedure enshrined in the Treaty on the European Union over which

the Court has jurisdiction. As in other areas of EU law, under Article 49 TEU Member States are subject to the general principles of law flowing from the Treaties and case law of the Court. If Member States pledge to abide by those principles and Treaties in intergovernmental agreements that they sign outside the Treaty framework,[768] those rules and principles should *a fortiori* apply in the context of Article 49 TEU.

The following part demonstrates the existence of constitutional constraints and their application to all acts and procedures that fall within the scope of Union law. It shows the central role of fundamental rights and free movement of persons and how their importance was further elevated by the introduction of Union citizenship and the CFR. It is argued that all those developments place strong constraints on Member States and are capable of precluding them from introducing a directly discriminatory clause on the free movement rights of nationals of a single Member State.

768 See Article 2 of (Draft) International Agreement on a Reinforced Union. Available online: http://www.europeanvoice.com/GED/00020000/28000/28035.pdf.

PART III

Legal Constraints Flowing from the Constitutional Foundations of the Union

INTRODUCTION

Having examined the legal constraints flowing from EU-Turkey Association Law and EU enlargement law in the first two parts of this thesis, this final part proceeds to examine the legal constraints on Member States when drafting an Accession Agreement flowing from the constitutional foundations of the Union legal order. The case law of the Court established that there are rules in primary law that are more difficult to derogate from,[769] implying those rules are more important than others. This suggests that those rules, which according to the Court constitute the "very foundations" of the legal order,[770] could act as constraint on the primary law making function of Member States.

In addition to the case law of the Court, it is possible to identify those foundations by examining the original Treaties, subsequent Treaty amendments, as well as academic literature on the issue. To enable a full understanding of Treaty provisions and recent case law, a brief account of the historical evolution of certain aspects of the system is required. In other words, a mere snapshot of recent case law and the current version of the Treaties might not be enough to tell the full story on how the legal order gradually gained a life (and a nucleus or core) of its own, managing to get out of the full grip of its Masters, namely the Member States of the Union.

It should be emphasized from the very start that the purpose of this part is not to identify those "very foundations" in their entirety, but simply to identify parts of those foundations, which would be breached by the proposed PSC on free movement of persons in Turkey's Negotiating Framework. Identifying those relevant parts would enable us to argue that they could act as constraint on Member States when drafting Turkey's Accession Agreement. Hence, while Chapter 6 elaborates on the idea of constitutional foundations of the Union that comprise a hard core that could even limit Member States' power to revise the Treaties, which is extrapolated from the Court's Opinions[771] and judgments,[772] Chapter 7 focuses on the compatibility of

769 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

770 *Opinion 1/91 EEA*, para. 46; *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

771 *Opinion 1/91 EEA*; *Opinion 1/92 EEA*; *Opinion 1/09 of the Court of Justice*. See Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 31-32.

the PSC with a central element of those very foundations of the Union constitutional order, namely the principle of non-discrimination on the basis of nationality, or in broader terms the principle of equality.

In short, Chapter 6 identifies the contours of the constitutional foundations of the Union as recognized by the Court and later acknowledged by the Member States. The substance of those "very foundations", as far as they relate to the PSC on free movement of persons, is arguably comprised of: the fundamental freedoms, Union citizenship and fundamental rights. Lastly, the Chapter discusses the possible application of those areas as constitutional constraints on Member States when drafting an Accession Agreement.

Chapter 7 focuses on the compatibility of the proposed PSC with, arguably the most important principle forming part of those "very foundations", which it would breach, i.e. the principle of equality. To demonstrate how this principle underpins and defines the edifice of the Union legal order, firstly, its traditional role in the development of the internal market is briefly reviewed. Secondly, it is demonstrated that equality is an inalienable part of the concept of Union citizenship. Moreover, it is an integral part of the CFR as well as an important general principle of EU law. As central as the equality of Member State nationals is for the functioning of the EU legal order, another indispensable aspect of the principle that is analysed in Chapter 7 is the equality of Member States, which has been constitutionalized recently in Article 4(2) TEU. It is argued that a constitutional principle as central to the Union legal order as the principle of equality would preclude Member States from including a PSC on free movement of persons that would blatantly breach it.

772 See *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*; Kokott and Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?."

6 Constitutional Foundations of the Union as a Constraint on Primary Law Making

6.1 INTRODUCTION

To demonstrate the existence of constitutional constraints in the Union legal order, Chapter 6 begins by examining the areas identified as the foundations of the Community in the original Treaties. Subsequently, it provides a detailed analysis the first EEA Opinion, which inspired the literature on the existence of a "core *acquis*",[773] an "untouchable hard core",[774] or a "fundamental patrimony",[775] which constitutes an "irreducible minimum"[776] and thereby constrains Member States as primary law makers. While the first EEA Opinion laid down the basis of the thesis on the existence of implied material limits to changing the Treaties, it has not remained an exception. Few recent pronouncements and opinions of the Court have further confirmed the existence of those "very foundations". Their implications for the inclusion of a PSC on free movement of persons in a future Accession Agreement are spelled out in this section.

Once the judicial acknowledgment of the existence of the "very foundations" of the Union is laid down, the next section tries to shed light on the substance of those "very foundations". Opinions and cases of the Court that are examined in the above-mentioned section so as to establish the existence of the "very foundations" of the legal order, are re-examined with a view to establishing their substance. It is argued that the first component that constitutes part of those very foundations is the four freedoms; free movement of persons in particular. The second component is the concept of Union citizenship, which the Court proclaimed as "destined to be *the fundamental status* of nationals of the Member States".[777] It is argued that the concept has entrenched the significance of the right to free movement of persons to such an extent that now it constitutes a consolidated constitutional right. It has

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773 S. Weatherill, "Safeguarding the Acquis Communautaire," in *The European Union after Amsterdam: A Legal Analysis*, ed. T. Heukels, N. Blokker, and M. Brus (The Hague: Kluwer Law International, 1998), 167.

774 C. C. Gialdino, "Some Reflections on the Acquis Communautaire," *Common Market Law Review* 32, no. 5 (1995): 1119.

775 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 38.

776 Weatherill, "Safeguarding the Acquis Communautaire," 168.

777 Emphasis added. *Case C-184/99 Grzelczyk*, para. 31.

moved up in the hierarchy of norms and become stronger. For our purposes, this translates into more constraining power on Member States.

The third component identified as part of the very foundations of the Union in this study is fundamental rights. Fundamental rights were initially introduced by the Court into the Union legal order as general principles of law. Recent case law confirms that some of those principles belong to the "very foundations" of the Union legal order.[778] Arguably, these principles today go beyond constituting "implicit" constraints or implicit material limits on Member States as primary law makers, as they have not only been entrenched by the case law of the Court over the years, but they have also been accorded a prominent place in the Treaties for more than two decades. Now, they are enshrined in Article 2 TEU, which follows the very first provision announcing the establishment of the European Union (Article 1 TEU), and explicitly proclaims and enumerates the values on which the Union is founded. A brief overview of the process of entrenchment of those principles and their rise in the constitutional hierarchy of norms will shed light not only on the development trajectory of those principles but also on the constitutionalisation or "autonomization" of the EU legal order *vis-à-vis* its founders, i.e. the Member States of the Union. It will demonstrate that they constitute another source of constraint on introducing a PSC on free movement of persons in a future Accession Treaty.

6.2 Existence of constitutional constraints: Judicial acknowledgment of the "very foundations" of the Union

While it is the Court's first EEA Opinion that introduced the concept "very foundations" of the Union, it is worth pointing out that the EEC Treaty also allowed us to identify what it considered to constitute the "Foundations of the Community". Part II of the EEC Treaty carried that title,[779] highlighting the importance of the four freedoms in the construction of the common market. Even though the EEC Treaty laid down quite clearly what the foundations of the integration project were, it was Article 8a (later 14 EC) introduced by the Single European Act[780] that described best the relationship between the com-

778 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*.

779 Part II titled "Foundations of the Union" contained four Titles. Title I dealt with the establishment of "Free Movement of Goods" with chapters on "The Customs Union" and the "Elimination of Quantitative Restriction between Member States". Title II was on "Agriculture" and Title III on the "Free Movement of Persons, Services and Capital". Chapter I of Title III was on "Workers", Chapter 2 on the "Right of Establishment", Chapter 3 on "Services", and Chapter 4 on "Capital". Lastly, followed "Transport" under Title IV, another common policy essential for the establishment and proper functioning of the common market.

780 OJ L 169/1, 29.06.1987.

mon market[781] and the four freedoms. It provided that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty." Obviously, the internal market was not confined to the four freedoms, yet they constituted the essence, the very core of the project.

As important as the freedoms were, in the early years of the EEC, it was not possible to deduce by looking at Treaty provisions alone the existence of an area or principles of Community law of such paramount importance that they could act as implicit material constraint on Treaty change. The idea emerged only after the Court's first EEA Opinion, which found the proposed judicial supervision system envisaged under the EEA Agreement to be incompatible with "the very foundations of the Community". Hence, Member States had no choice but to make the necessary revisions to bring the EEA Agreement in line with EU law.

For a clearer understanding of the Court's Opinion, it is worth briefly outlining the main characteristics of the EEA Agreement beforehand. The purpose of the agreement was to create a European Economic Area covering the territories of the Member States and those of the EFTA countries. Its Article 1 provided that its aim was "to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and respect for the same rules, with a view to creating a homogeneous European Economic Area". The legal regime that were to apply in relations between the EEA States would cover the free movement of goods, persons, services, capital, and competition. The rules applicable in those areas would be those laid down in corresponding provisions of the EEC

781 The common market was to be also called the single market or the internal market from that time on. For our purposes there is no need to distinguish between these concepts. However, it is worth noting that the term "internal market" is seen to be less extensive than the term "common market". See L. W. Gormley, "The internal market: history and evolution," in *Regulating the Internal Market*, ed. N. Nic Shuibhne (Cheltenham, UK; Northampton, MA, USA: Edward Elgar, 2006), 14. Gormley notes that this distinction has not always been understood by the Court. See, for example; *Case C-376/98 Germany v Parliament and Council*, [2000] ECR I-8419; for comments see, L. W. Gormley, "Competition and free movement: Is the internal market the same as a common market?," *European Business Law Review* 13, no. 6 (2002): 517-22; P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, ed. Laurence W. Gormley, 3 ed. (London: Kluwer Law International, 1998); According to Barnard, since the realization of the single market is dependent on policy action in ever-wider range of fields, including competition and social policy, "it is likely that the terms common, single, and internal market are largely synonymous". C. Barnard, *Substantive Law of the EU: The Four Freedoms*, 3 ed. (Oxford: OUP, 2010). 12; K. Mortelmans, "The Common Market, the Internal Market and the Single Market, What's in a Market?," *Common Market Law Review* 35(1998): 107. D. Hanf, "Legal Concept and Meaning of the Internal Market," in *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses*, ed. J. Pelkmans, D. Hanf, and M. Chang (Brussels: P.I.E Peter Lang, 2008), 78-81.

and ECSC Treaties as well as secondary legislation. Moreover, the Contracting Parties were to extend to the EEA future Community law in those fields.[782]

The aim of homogeneity was to be ensured through the use of provisions identically worded with corresponding provisions in Community law and through the establishment of an EEA Court, to which a Court of First Instance would be attached. The EEA Court would have jurisdiction to settle disputes between the Contracting Parties. Article 6 of the agreement provided that its provisions and corresponding provisions of Community secondary law were to be interpreted in conformity with the case law of the ECJ which were given *prior* to the date of the signature of the agreement. Moreover, under Article 104(1) of the agreement all the Courts, EEA and EC/EU Courts were to pay due account to the principles laid down in decisions delivered by the other courts so as to ensure as uniform as possible an interpretation of the EEA agreement.[783]

6.2.1 Opinions 1/91 and 1/92

In its first EEA Opinion, the Court of Justice identified several aspects of the EEA Agreement that would create problems in terms of its compatibility with the Union legal order. To mention the most important ones, firstly, it would not be possible to achieve homogeneity of the rules of law throughout the EEA because the aims and contexts of the agreements were different, which meant that even identical provisions could be interpreted differently. The fact that Article 6 of the EEA Agreement provided a duty of conform interpretation only with the case law of the Court delivered prior to the signature of the agreement was also problematic. As the case law evolved over time, the possibility of divergent interpretation would emerge.[784] Moreover, the interpretation of the expression "Contracting Parties" by the EEA Court also raised issues,[785]

782 *Opinion 1/91 EEA*, paras. 3-4; See annotation by H. G. Schermers, "Opinion 1/91 of the Court of Justice, 14 December 199; Opinion 1/92 of the Court of Justice, 10 April 1992," *Common Market Law Review* (1992): 991-99; B. Brandtner, "The 'Drama' of the EEA: Comments on Opinions 1/91 and 1/92," *European Journal of International Law* 3(1992): 300-19.

783 *Opinion 1/91 EEA*, paras. 5-9.

784 Ibid., paras. 13-29.

785 The problem with the interpretation of the expression of "Contracting Parties" was that as far as the Community and its Member States were concerned it could mean various things depending on the issue and respective competences of the Community and Member States. It could mean the Community and Member States; the Community; or Member States. In other words, interpreting the term "Contracting Parties" would require the EEA Court to rule on the respective competences of the Community and Member States. This was likely to negatively affect the allocation of responsibilities defined in the Treaties as well as the autonomy of the Community legal order, which was to be ensured by the Court of Justice. See, ibid., paras. 30-35.

as well as the effect of the case law of the EEA Court on the interpretation of Community law.

To examine the latter problem in more detail, the provisions of the EEA Agreement as well as measures adopted by its institutions would become an integral part of the Community legal order once it entered into force. The decisions of the EEA Court would be binding on the Community institutions, including the Court of Justice. According to the Court, an international agreement providing for such a system of courts is in principle compatible with Community law.[786] "However, the agreement at issue takes over *an essential part of the rules* – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, *fundamental provisions of the Community legal order*."[787] The problem with Article 6 of the agreement was mentioned above. In addition, the agreement's objective to ensure homogeneity of the law throughout the EEA would not only determine the interpretation of the rules of the EEA Agreement, but would also affect the interpretation of the corresponding rules of Community law. Thus, the Court concluded: "in so far as it *conditions the future interpretation of the Community rules on free movement* and competition [,] the machinery of courts provided for in the agreement *conflicts* with Article 164 of the EEC Treaty [now Article 19(1) TEU] and, more generally *with the very foundations of the Community*".[788]

As to the question whether an amendment of Article 238 [now Article 217 TFEU] would permit the establishment of such a judicial system, the Court unequivocally replied that "Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with *the very foundations of the Community*".[789] Consequently, an amendment of that article could not cure the incompatibility with Community law of the judicial system envisaged by the EEA Agreement.

The judicial system envisaged by the EEA Agreement threatened the autonomy of the legal order. Under Article 19(1) TEU (ex Article 164 of the EEC Treaty) it has always been the Court of Justice that is to "ensure that in the interpretation and application of the Treaties the law is observed". Thus, conditioning the future interpretation of the Treaties by the Court to the interpretation provided by another court in the context of another agreement was incompatible with Article 19(1) TEU and endangered the autonomy of the Union legal order. What increased the gravity of the incompatibility was the fact that the area that would be affected or conditioned by the interpretation of the EEA Court, that is the rules on free movement, constituted an "essential" or "fundamental" part of the legal order, arguably part of its core or part of

786 Ibid., paras. 37-40.
787 Emphasis added. Ibid., para. 41.
788 Emphasis added. Ibid., para. 46.
789 Emphasis added. Ibid., para. 71.

its "very foundations".[790] Incompatibility of such gravity according to the Court could not be cured by a simple amendment of the provision providing a legal basis for the conclusion of association agreements with third countries and international organizations.

The Court's first Opinion resulted in the following changes: firstly, the idea of creating an EEA Court was dropped. An EFTA court was to be set up in its place with the competence to rule on the acts of the Surveillance Authority as well as disputes between EFTA states. In other words, there would be no common judicial organ but two separate courts: the EFTA court for EFTA countries, and the Court of Justice for the EEC. Secondly, a new Article 111 was introduced to ensure that only the Court of Justice would be empowered to interpret the provisions of the EEA Agreement that were identical in substance to provisions existing under Community law. However, since EFTA countries were far from being willing to subject themselves to future rulings of the Court of Justice, a new mechanism was introduced via Article 105, whereby it would be a political organ, the Joint Committee that would introduce the Court's new judgments into the EFTA legal order, keeping in mind the aim to preserve the homogenous interpretation of the EEA Agreement. Similarly, in cases of conflict between the rulings of the two courts, it was again the Joint Committee that would be responsible to solve the conflict (Article 111). Moreover, an "Agreed Minute" specified that the decisions of the Joint Committee would not affect the rulings of the Court of Justice in any way.[791]

The revised version of the EEA Agreement was sent to the Court once again, to check whether the new renegotiated provisions were compatible with the EEC Treaty. The Court's second Opinion was positive, however not unconditional. The Court's interpretation of the new provisions clearly underlined the paramount importance of one single principle, i.e. that of the autonomy of the Community legal order. When asked to evaluate the mechanism introduced under Article 105, the Court unequivocally declared that " [i]f that article were to be interpreted as empowering the Joint Committee to disregard the binding nature of decisions of the Court of Justice within the Community legal order, the vesting of such a power in the Joint Committee would adversely affect the autonomy of the Community legal order, respect for which must be assured by the Court pursuant to Article 164 of the EEC Treaty".[792] According to the Court, the "Agreed Minute" stipulating that decisions of the Joint Committee were not to affect the case law of the Court was an essential safeguard, which was indispensable for preserving the autonomy of the Community legal order.[793]

790 Ibid., paras. 41 and 46.
791 See, *Opinion 1/92 EEA*; Schermers, "Opinion 1/91 of the Court of Justice, 14 December 199; Opinion 1/92 of the Court of Justice, 10 April 1992," 999-1000.
792 *Opinion 1/92 EEA*, para. 22.
793 Ibid., 23-24.

As to the newly introduced Article 111(3), which provided the possibility to request the Court's interpretation of provisions of the EEA Agreement containing identical rules to the EEC Treaty, the Court ruled that "an international agreement concluded by the Community may confer new powers on the Court, *provided that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty*".[794] The Court found that the function concerned was not changed in the context of Article 111, since the wording of the provision empowering the Court to "give a ruling" ("*se prononcer*" in French) was clear on the point that the Court's interpretation would be binding on both the Contracting Parties and the Joint Committee. The fact that it was the Joint Committee that had to settle the dispute at the end did not change that fact.[795] In short, if the revised version of the EEA Agreement were to be interpreted in line with the Opinion of the Court, taking due account of pitfalls that could endanger the autonomy of the Community legal order, it could be considered as compatible with the EEC Treaty.

6.2.2 Opinion 1/09

A recent example confirming that some essential characteristics of the system are untouchable or worthy of protection is the Court's Opinion on the establishment of a unified patent litigation system (called European and Community Patents Court) situated outside the institutional and judicial framework of the EU.[796] As in its EEA Opinions, the Court found that such a system "would alter *the essential character of the powers* which the Treaties confer on the institutions of the European Union and on the Member States and which are *indispensable to the preservation of the very nature of European Union law*."[797] The system of courts established by the proposed agreement would have an exclusive jurisdiction to hear actions brought in the field of Community patent and would have to interpret and apply EU law in that field, which would deprive national courts of their power to interpret and apply EU law as well as from referring preliminary rulings to the Court of Justice. Moreover, to increase the gravity of the problem, if the Patents Court were to breach EU law, there

794 Emphasis added. Ibid., para. 32.

795 Ibid., paras. 33-35.

796 For a more detailed discussion of the Opinion, see C. Baudenbacher, "The EFTA Court remains the only Non-EU-Member States Court – Observations on Opinion 1/09," *European Law Reporter*, no. 7-8 (2011): 236-42; M. C. A. Kant, "A Specialized Patent Court for Europe?," *Nederlands Internationaal Privaatrecht*, no. 2 (2012): 193-201; H. M. H. Speyart, "Is er nu eindelijk een Unieoctrooi-pardon: "Europees octrooi met einheidswerking"," *Nederlands Tijdschrift voor Europees Recht*, no. 4 (2013): 135-44; F. Dehousse, "The Unified Court on Patents: The New Oxymoron of European Law," in *Egmont Papers 60* (Brussels: Academia Press, October 2013).

797 Emphasis added. *Opinion 1/09 of the Court of Justice*, para. 89.

would be no remedy against that breach. The Patents Court could not be subject to infringement proceedings or sued for financial liability. All these shortcomings led the Court to establish that draft agreement on a unified patent litigations system would be incompatible with the Treaties.[798]

What was central in this Opinion as well as those on the EEA Agreement is the principle of the autonomy of the legal order. The system of courts envisaged under both international agreements would interfere with the Court's monopoly over interpreting EU law. Yet, the second system would also damage the system of cooperation established between the national courts and the Court of Justice. It would change the fundamental qualities of the system, its essential dynamics, its "very nature" or "very foundations", which are inextricably linked and which rely on the cooperation between the national courts and the Court of Justice. Accordingly, both agreements were found to be incompatible with the Treaties.

6.2.3 *Kadi I*

To begin with providing a brief factual background to the *Kadi* case, which also contained important statements regarding the "very foundations" of Union law, it concerned Mr. Kadi, whose name appeared in Resolutions issued by the Sanctions Committee of the UN Security Council. He was listed as one of the persons associated with Usama bin Laden and Al-Qaeda. The Resolutions provided for the freezing of assets of organizations and people mentioned in their lists. In order to implement the Security Council Resolutions, Member States of the Union adopted few Common Positions, which were further implemented by Council Regulations providing for the freezing of assets of each entity or individual identified in the above-mentioned lists.[799]

As one of the individuals affected by the provisions of these Regulations, Mr. Kadi applied to the General Court for the annulment of those Regulations

798 Ibid., paras. 88-89.

799 Mr. Kadi's name was "added to the list in Annex I to Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1), by Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25). He was subsequently listed in Annex I to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9)." See, *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II*, judgment of 18 July 2013, n.y.r., para. 17.

as far as they concerned him for infringing his fundamental rights.[800] While Mr. Kadi's application in front of the General Court was not successful,[801] his appeal to the Court of Justice was. The Court set aside the judgment of the General Court, and annulled Regulation No 881/2002 in so far as it concerned Mr. Kadi.

What is important for our purposes here is the fact that the Court reiterated the existence of "the very foundations of the Community legal order" that may not be challenged under any circumstances.[802] While most of the commentaries written on the case focus on the relationship it spells out between the international and Union legal orders, for our purposes its significance is twofold: firstly, the Court acknowledged the existence of the "very foundations" of the Union in a ruling it delivered in a Grand Chamber formation, and secondly, it revealed some clues as to what constitutes part of those "very foundations". The latter aspect of the judgment is dealt with in section 6.3.3.1 below.

To provide a full citation of the Court statement regarding the untouchable core of Union law, it ruled that primary law provisions, here Article 307 EC and 297 EC, could not be interpreted as authorizing "any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as *a foundation of the Union*".[803] The Court also categorically stated that Article 307 EC "may in no circumstances permit any challenge to *the principles that form part of the very foundations of the Community legal order*…"[804] As to the content and principles which form part of those "very foundations", they are discussed in the following section examining the "Substance of constitutional constraints".

6.2.4 Implications

The most important pronouncement of the Court in its first EEA Opinion for our purposes is to be found in the last two paragraphs (paragraphs 71-72), in which the Court declared not only that Article 238 of the EEC Treaty [now 217 TFEU] did not provide any legal basis for setting up a system of courts that would violate Article 164 of the EEC Treaty [now Article 19(1) TFEU] and

800 To be more specific, "[o]n 18 December 2001 Mr Kadi brought before the General Court an action seeking the annulment, initially, of Regulations No 467/2001 and No 2062/2001, then of Regulation No 881/2002, in so far as those regulations concerned him. The grounds for annulment were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review." See, ibid., para. 18.

801 See *T-315/01 Kadi v Council and Commission*, [2005] ECR II-3649.

802 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

803 Emphasis added. Ibid., para. 303.

804 Emphasis added. Ibid., para. 304.

the very foundations of the Community, but further added that even revising Article 238 would not cure the incompatibility in question. This conclusion was interpreted to imply the priority or hierarchical superiority of Article 164 EEC over Article 238 EEC, and more generally, the priority of provisions constituting "the very foundations of the Community" over those that did not.[805]

The three Opinions of the Court highlighted the paramount importance of the principle of the autonomy of the Community legal order, which could be maintained only and only if Article 164 EEC was fully respected.[806] The Opinions confirm Pescatore's findings in his seminal essay of 1981, which identified some parts of the *acquis* as "*acquis* fondamental",[807] that is a "fundamental patrimony",[808] "a "fundamental" *acquis* of constitutional rank"[809] or "core *acquis*".[810] According to Pescatore, the fundamental *acquis* was an *acquis* of a superior rank ("de rang supérieur"[811]), which contained the most crucial elements of the Community legal order, that is "essential elements, requirements effecting the very foundations of the Community, and rules which guarantee the unity, identity and existence of the whole European project".[812] This *acquis*, he argued, constituted "an untouchable hard core, that is an absolute substantial restriction implicitly imposed on any substantial revision".[813]

After the EEA Opinions, other scholars followed in agreement that there had to be aspects of the legal order, which were so central to its nature that if removed, the legal order would be deprived of its essential characteristics. Hence, those aspects had to be protected at all cost. Weatherill called the latter the "core *acquis*"[814] or "irreducible minimum of Community law";[815] Delcourt called it "a basic *acquis*, constituting what one might call the "genetic inheritance" of the European Union"[816] or "supra-constitutional *acquis*";[817]

805 C. Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," *Common Market Law Review* 38, no. 4 (2001): 843.
806 Article 164 EEC provided as follows: "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed."
807 P. Pescatore, "Aspects judiciaries de l'acquis communautaire," *Revue Trimestrielle de Droit Européen* (1981): 620.
808 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 38.
809 Weatherill, "Safeguarding the Acquis Communautaire," 167.
810 Gialdino, "Some Reflections on the Acquis Communautaire," 1109.
811 Pescatore, "Aspects judiciaries de l'acquis communautaire," 620.
812 "des choses essentielles, des exigences qui touchent aux fondements même de la Communauté, des règles dont la méconnaissance mettrait en cause l'unité, l'identité et jusqu'à l'existence même de l'entreprise européennee", ibid.; cited in Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," 841.
813 Gialdino, "Some Reflections on the Acquis Communautaire," 1109.
814 Weatherill, "Safeguarding the Acquis Communautaire," 167.
815 Ibid., 168.
816 Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," 835.
817 Ibid., 844.

Cruz Vilaça and Piçarra qualified it as a ""hard core" of the Treaty" or the "foundations of the Community", which in relation to the power of revision posses a "supra-constitutional value";[818] for Gialdino "those are the principles and values whose immutability constitutes the safeguard of the legality of the order itself."[819]

The most important implication of the existence of such an unamendable core or fundamental *acquis* for our purposes is its function as a constraint on Member States as primary law makers. If Member States are constrained by that core or by the principles constituting part of that core within the Treaty revision procedure, in which they arguably posses the widest room for manoeuvre, they will be all the more constrained within Article 49 TEU procedure, which as illustrated in the previous part, empowers Member States to make only the necessary "adjustments" linked directly to the accession of a new Member State.

While many scholars[820] agreed that in its EEA Opinions the Court construed the existence of "unamendable principles in the Community legal order"[821] or "legal principles which even Treaty amendment cannot violate",[822] it was more difficult to agree on which principles exactly these were except for the principles, which could be derived from Article 164 EEC, such as the principle of the rule of law, and the principle of the autonomy of the legal order. Similarly, Vilaça and Piçarra acknowledge that the main difficulties in identifying the material content of the implied limits to Treaty revision suggested by the Court relate "to the absence of objective legal criteria capable of defining such limits with certainty".[823] However, as difficult as it might be to identify those limits precisely, by making use of clues contained in the Treaties and above all in the case law of the Court, it is argued that it is possible to approxiamtely draw those limits as far as they could have implications for the inclusion of a PSC on free movement of persons in a future Accession Agreement.

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818 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 31-32.

819 Gialdino, "Some Reflections on the Acquis Communautaire," 1112-13.

820 T. C. Hartley, "The European Court and the EEA," *International and Comparative Law Quarterly* 41, no. 4 (1992): 846-48; R. Bernhardt, "The Sources of Community Law: the 'constitution' of the Community," in *Thirty years of community law* (Brussels-Luxembourg: 1981), 71.

821 Gialdino, "Some Reflections on the Acquis Communautaire," 1109.

822 J. H. H. Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration," *Journal of Common Market Studies* 31, no. 4 (1993): 418, footnote 2.

823 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 49.

6.3 Substance of constitutional constraints

The Treaties have never explicitly indicated the existence of hierarchy among their provisions; had they done so, we would be talking about "explicit" and not "implicit" limits to Treaty change. It is possible to talk about "implicit" limits to Treaty change or implicit hierarchy among the provisions of a Treaty or a constitution, when firstly, it is possible to infer that hierarchy from the wording, function and place in the Treaty of some provisions compared to others. Obviously, provisions that are placed at the very beginning of a Treaty or a constitution under the title "Principles" or "Foundations of the Community" will have priority or more weight compared to provisions that are placed under the title "Transitional Provisions" placed towards the end of a Treaty or a constitution. Logically, provisions that enshrine ends will also have priority over those laying down means to achieve them, as the latter might be changed or discarded in a subsequent revision if deemed inadequate or inappropriate to achieve the desired ends. Hence while some provisions constitute part of the "*acquis* fondamental" in a legal order, it would be possible to qualify other provisions, as Pescatore did, as constituting "un droit plus périphérique de caractère contingent et transitoire".[824]

From the perspective of creating constraints, it makes a lot of a difference, if it is merely legal scholars or a constitutional court (or the supreme court of the land (or legal order)) that reads such a distinction into a constitution. While the former might effect the latter in the long run, until that takes place, as interesting or insightful as it might be, the academic discussion does not bind anyone. However, once a constitutional court gives a particular interpretation of a certain provision or a concept, the latter becomes binding on all actors operating within that legal system.[825] Hence, the power of authoritative interpretation vested in constitutional courts is of paramount importance.

As was briefly discussed in the introduction of this thesis, many constitutional courts have developed doctrines to protect what they consider to be the "core", the "essence" or "spirit" of their legal orders, based on the objectives, structure as well as the underlying rationale of the constitutional orders they had been created to uphold. They identify elements they believe imbue the construct with particular values, purpose and meaning and thereby hold it together. In their pursuit to safeguard the "core", or the "spirit" of their legal orders, each constitutional court has created its own terminology. While the Indian Constitutional Court is after protecting the "basic structure" of the Indian Constitution, the German Constitutional Court protects the "coherence"

824 P. Pescatore, "Commentaire de l'article 164 CEE," in *Commentaire article par article du traité instituant la CEE*, ed. V. Constantinesco, et al. (Paris: Economica, 1992), 960; cited in Delcourt, "The Acquis Communautaire: Has the Concept had its Day?," 843.

825 Fallon calls the latter phenomenon "mediated constitutional constraint". See, Fallon, "Constitutional Constraints," 1036.

and "inner unity" of the Basic Law, while the Court of Justice protects the "very foundations" of the Treaties as well as certain characteristics "which are indispensable to the preservation of the very nature of European Union law".[826]

When it comes to identifying those "very foundations", three clusters of provisions are of interest to us, as they are capable of precluding Member States from including a PSC on free movement of persons, which will violate all those provisions. It should be noted that the concepts of "fundamental *acquis*" and the "very foundations" of the Union are not used interchangeably here, as the scope of the former concept seems to be broader. The former concept also encompasses the latter. Or put differently, the "very foundations" of the Union as defined by the Court could be seen as the hard core or nucleus of the "fundamental *acquis*". It constitutes the top layer in the hierarchy of principles and norms, such as the principle of the autonomy of the Union legal order.

The three clusters of provisions identified as belonging to the "very foundations" of the Union, or at least to the "fundamental *acquis*" are: the fundamental freedoms, particularly those that concern free movement of persons; Union citizenship, which constitutionalised the right to free movement; and last but not least, fundamental rights. The leading authority in identifying those clusters of provisions as constituting the substance of constitutional constraints that are expected to play a role in precluding the inclusion of a PSC on free movement of persons is the case law of the Court interpreting those provisions, since in the Union legal order, it is the Court of Justice that is vested with the power to provide an authoritative interpretation of Treaty and secondary law.[827] In addition to the Court's case law, this section will make use of the interpretation methods used by the Court, such as looking at the wording, context, purpose of a provision, as well as relevant academic literature so as to support and strengthen the evidence provided by the case law and Opinions of the Court.

826 *Opinion 1/09 of the Court of Justice*, para. 89. See Jacobsohn, "An unconstitutional constitution? A comparative perspective."; Kommers, "German Constitutionalism: A Prolegomenon."; Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany."; Albert, "Nonconstitutional Amendments."

827 See Articles 19(1) TEU and 267 TFEU.

6.3.1 Fundamental freedoms

Many consider the internal market as "the core of the EU's constitutional order".[828] A brief look at the EEC Treaty confirms this view, as the four freedoms were listed under the title "Foundations of the Community", and almost all of the objectives listed under Article 3 were related to the establishment of the common market and the four freedoms. What follows in this section is a brief overview aiming to illustrate how important the freedoms have been for the construction of the integration project, which for a long time has had the establishment of a common market at its core. Illustrating how significant the freedoms have been, and above all the free movement of persons, will enable us to argue that they belong to the "very foundations" of the Union, or are at least part of the "fundamental *acquis*", thereby precluding Member States from interfering with their functioning as they please.

For the purpose of illustrating their importance for the *acquis*, their place in the Treaties and the provisions regulating their functioning are analysed first. Next, follows a brief mention of secondary law promulgated to increase their effectiveness. Thirdly, comes the case law of the Court that has blown life into the freedoms by interpreting them in ever-broader terms, while keeping under strict control the instances of derogation. Lastly, follows academic commentary that confirms how crucial the freedoms have been in particular for the construction of the internal market and in general for European integration.

6.3.1.1 Fundamental freedoms in the Treaties

To achieve the objective of establishing a common market, the Treaty of Rome contained provisions to ensure the free movement of factors of production. In the current Treaty it is Articles 34-37 TFEU that prohibit quantitative restrictions on the free movement of goods. Articles 45-48 TFEU provide for the free movement of workers, Articles 49-55 TFEU for freedom of establishment, Articles 56-62 TFEU for free movement of services, and Articles 63-66 TFEU for free movement of capital. These Treaty provisions provide the skeleton for the functioning of the four freedoms, which are based on the principle of

828 D. Howarth and T. Sadeh, "The ever incomplete single market: differentiation and the evolving frontier of integration," *Journal of European Public Policy* 17, no. 7 (October 2010): 923. See also, G. De Búrca, "Differentiation Within the "Core"? The Case of the Internal Market," in *Constitutional Change in the EU: From Uniformity to Flexibility?*, ed. G. de Búrca and J. Scott (Oxford and Portland, Oregon: Hart Publishing, 2000), 133-71. N. Bernard, "Flexibility in the European Single Market," in *The Law of the Single European Market: Unpacking the Premises*, ed. C. Barnard and J. Scott (Oxford and Portland, Oregon: Hart Publishing, 2002), 101.

negative integration that is removing obstacles and barriers to trade,[829] whereas the flesh was added by passing directives and regulations, which provide for harmonization and creating a level-playing field.[830]

The importance of the freedoms has only increased in time, especially that of free movement of persons after the introduction of Union citizenship into the Treaties. Since the purpose of this study is to establish whether Member States would be constrained from including a PSC on free movement of persons, obviously, what is of primary concern to us is the development and place of free movement rules for natural persons.[831] The reason why they are examined together under the title "fundamental freedoms" with free movement of goods and capital is the simple fact that in the pre-1993 period the Treaties, case law of the Court, as well as scholarly work would often lump and study those freedoms together. Hence, when reading case law, and literature on the freedoms, it should be kept in mind that what is central to this study is the free movement of persons.

The principle of non-discrimination on the ground of nationality, which is analysed in more detail in Chapter 7 of this study, is what underpins the four freedoms at a minimum.[832] This means that a migrant or a product has to enjoy the same treatment as nationals or local products in a comparable situation. In the early line of case law on the freedoms, Community law would not interfere with national rules that were not directly or indirectly discriminatory. However, since the early 1990s the Court has moved beyond that discrimination model, fighting both discriminatory and non-discriminatory "obstacles" or "restrictions" to free movement.[833]

The fact that the fundamental freedoms have been strengthened by the Court's interpretation as well as by legislation laying down the rules facilitating the exercise of these freedoms should not lead one to think they are absolute. They are not and they have never been. The Treaty itself provides for grounds

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829 This approach can be illustrated by the Court's ruling in *Gaston Schul*, according to which the aim of the four freedoms is to eliminate "all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market". See *Case C 15/81 Gaston Schul*, [1982] ECR 1409, para. 33.

830 Barnard, *Substantive Law of the EU: The Four Freedoms*: 10-11.

831 While free movement of workers is straightforward, freedom of establishment and freedom to provide services are relevant as far as they relate to the free movement of natural persons. The free movement rules for the "self-sufficient", which were introduced via secondary law in the 1990s, are also covered in this sub-section.

832 See the Opinion of AG Mayras in *Case 33/74 Van Binsbergen*, [1974] ECR 1299.

833 For an example see, *Case C-49/89 Corsica Ferries*, [1989] ECR I-4441, para. 8. It reads as follows: "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Community provisions and any restriction, even minor, of that freedom is prohibited".; Barnard, *Substantive Law of the EU: The Four Freedoms*: 223-24; A. P. Van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, 2003). 77.

under which derogating from the freedoms is justified.[834] As far as free movement of persons is concerned, Article 45(3) TFEU allows Member States to derogate from the free movement of workers on the grounds of public policy, public security and public health. The same grounds of derogation from the freedom of establishment and free movement of services are provided in Articles 52 and 62 TFEU respectively. Moreover, Article 45(4) TFEU excludes the application of the free movement of workers "to employment in the public sector". Similarly, Article 51(1) TFEU excludes the application of the freedom of establishment and freedom to provide services "to activities, which in that State are connected, even occasionally, with the exercise of official authority". The Court ensures that that all derogations from the freedoms are interpreted restrictively.[835]

6.3.1.2 Development of free movement of persons in secondary law

While the Treaty provisions mentioned above sketched the skeleton of the general derogations provided in the Treaty on free movement of persons, Directive 64/221/EEC[836] fleshed out those provisions. With the guidance of the Directive it would be more difficult for Member States to abuse or extend the scope of the derogation grounds provided in the Treaty. For instance, Article 2(2) of the Directive prohibited Member States from invoking the Treaty derogations to service economic ends. Article 3 specified that any measure taken on the grounds of public policy or public security were to be based exclusively on the personal conduct of the individual concerned. Moreover, previous convictions were not supposed to constitute in themselves grounds for taking such measures. Today Directive 64/221 has been replaced and the case law interpreting its provisions has been codified in Directive 2004/38/EC,[837] which is analysed more closely together with the concept of "Union citizenship".[838]

While derogations from the freedoms were interpreted restrictively, the free movement provisions were empowered by the case law of the Court,[839] so as to enable them catch more obstacles and barriers to free movement. Directives and regulations promulgated to that effect also helped to reach that

834 Articles 36, 45(3) and (4), 51 and 52 TFEU.

835 *Case 66/85 Lawrie-Blum*, [1986] ECR 2121, paras. 26-28; *Case 2/74 Reyners*, [1974] ECR 631, paras. 51-55.

836 Directive 64/221/EEC, note 450 above.

837 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158/77, 30.04.2004.

838 See sub-section 6.3.2.2.

839 See sub-section 6.3.1.2.1.

objective. As far as the development of free movement of persons is concerned, it is noteworthy that in the 1990's the Community adopted three directives conferring a general right of movement and residence on the retired, students, and those who are financially self-sufficient. This right was however subject to the requirement of having sufficient finances and medical insurance.[840]

These three directives signalled the beginning of the erosion of the link between economic activity and free movement. They instigated a shift in perception of migrants from economic agents or factors of production to individuals with rights. This shift was consolidated further and moved to a whole new level with the introduction of Union citizenship for all nationals of Member State by the Treaty of Maastricht. With the interpretation of the Court, Union citizens acquired a more general, freestanding right of free movement within the EU. Even though, as will be examined in more detail below in the part on EU citizenship, that right is still to be exercised in accordance with the limitations and conditions laid down in the Treaties and secondary legislation.

6.3.1.2.1 Case law on the freedoms

The Court interpreted the free movement provisions broadly. It extended the scope of Articles 34, 45 and 49 TFEU to cover indistinctly applicable measures to free movement. To counterbalance the extension of scope of the free movement provisions, it created additional grounds of derogation to the freedoms, the so-called mandatory requirements or imperative requirements in the general interest.[841] To provide a concrete example, in *Säger*, the Court ruled that Article 49 EC required "not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of *any restriction*, even if it applies without distinction to national providers of services and to those of other Member States, when it is *liable to prohibit or otherwise impede* the activities of the provider of services established in another Member State where he lawfully provides similar ser-

840 See Council Directive 90/364/EEC on the right of residence for persons of sufficient means, OJ L 180/29, 13.07.1990; Council Directive 90/365/EEC on the rights of residence for employees and self-employed persons who have ceased their occupational activity, OJ L 180/28, 13.07.1990; and Council Directive 90/366/EEC on the rights of residence for students, OJ L 180/30, 13.07.1990, repealed and replaced by Council Directive 93/96/EEC, OJ L 317/59, 18.12.1993.

841 S. O'Leary, "Free Movement of Persons and Services," in *Evolution of EU Law*, ed. P. Craig and G. De Búrca (Oxford: OUP, 2011), 508.

vices".[842] Such "restrictions" could however, be justified by imperative reasons relating to the public interest.[843]

In *Gebhard*, the Court provided one single test to be applied to national measures that were "liable to hinder or make less attractive the exercise of the fundamental freedoms".[844] Such measures had to fulfil four conditions to be allowed by the Court: "they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it".[845] In addition to the principle of proportionality,[846] derogations were to be read subject to the general principles of law, fundamental human rights[847] in particular. Overall, the conclusion to be drawn from the Court's case law is that the freedoms are to be interpreted broadly,[848] while derogations are to be interpreted restrictively.[849]

As to specific cases in which the Court underlined the centrality of the freedoms for the legal order, it is worth mentioning that in its early case law the Court referred to the freedoms as "fundamental objectives" of the Community.[850] Back in 1989 it stated that "the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are *fundamental Community provisions* and any restriction, even minor, of that freedom is prohibited".[851] In its later case law the Court qualified the four freedoms as "*fundamental freedoms*" both collectively and individually. To cite the most well-known cases, in *Kraus* and *Gebhard* the Court referred collectively to the four freedoms as fundamental freedoms,[852] whereas in *Heinonen* and *Schmidberger* it referred individually to the free movement of goods as a "fundamental

842 Emphasis added. *Case C-76/90 Säger*, [1991] ECR I-4221, para. 12; Subsequently, this test was also applied to free movement of workers, e.g. *Case C-464/02 Commission v Denmark*, [2005] ECR I-7929, para. 45; freedom of establishment, e.g. *Case C-55/94 Gebhard*, [1995] ECR I-4165, para. 37; and free movement of capital, e.g. *Case C-367/98 Commission v Portugal*, [2002] ECR I-4731, paras. 44-45.

843 *Case C-76/90 Säger*, para. 15.

844 *Case C-55/94 Gebhard*, para. 37.

845 Ibid.

846 *Case C-3/88 Commission v Italy* [1989] ECR I-4035, para. 15; *Case C-108/96 Mac Quen*, [2001] ECR I-837, para. 31; *Case C-100/01 Olazabal*, [2002] ECR I-10981, para. 43.

847 *Case C-260/89 ERT*, [1991] ECR I-2925, para. 43.

848 *Case 152/82 Forcheri*, [1983] ECR 2323, para. 11.

849 *Case 36/75 Rutili*, [1975] ECR 1219, para. 27; *Case 30/77 Bouchereau*, [1977] ECR 1999, para. 33; *Case C-114/97 Commission v Spain*, [1998] ECR I-6717, para. 34; *Case C-348/96 Donatella Calfa*, para. 23; *Case C-503/03 Commission v Spain*, [2006] ECR I-1097, para. 45.

850 *Case 36/74 Walrave and Koch*, [1974] ECR 1405, para. 18.

851 Emphasis added. *Case C-49/89 Corsica Ferries*, para. 8.

852 *Case C-19/92 Kraus*, [1993] ECR I-1663, para. 32; and *Case C-55/94 Gebhard*, para. 37; see also *Case C-390/99 Canal Satélite Digital v Spain*, [2002] ECR I-607, para. 28.

freedom",[853] and in *Bosman* and *Angonese* it referred to free movement of workers as a "fundamental freedom".[854] The Court ruled that free movement of goods constitutes "*one of the foundations* of the Community".[855] It even referred to the free movement of workers as a "*fundamental right*" long before the introduction of the concept of European Citizenship.[856] The cases named here are not exceptions but the rule that has been repeated in most of the cases concerning the four freedoms.

The importance of the free movement rules can also be deduced from the Court's first *EEA Opinion*. While the most sacrosanct principle worthy of protection identified in the Opinion was the autonomy of the legal order, which was to be ensured by safeguarding the exclusive jurisdiction of the Court over the Treaties, the Opinion also highlighted that the proposed system of courts was inconceivable because the EEA Agreement took over "*an essential part of the rules* – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, *fundamental provisions of the Community legal order.*"[857] Moreover, the agreement's objective to ensure homogeneity of the law throughout the EEA would inevitably affect the interpretation of the corresponding rules of Community law. Hence, concluded the Court: "in so far as it *conditions the future interpretation of the Community rules on free movement* and competition [,] the machinery of courts provided for in the agreement *conflicts* with Article 164 of the EEC Treaty [now Article 19(1) TEU] and, more generally *with the very foundations of the Community*".[858] In short, the Court could not allow free movement rules, which constitute an essential and fundamental part of Community rules, to be affected by the new legal regime created under the proposed EEA Agreement.

6.3.1.3 Academic opinion

As to the academic literature emphasizing the importance of the four freedoms in the context of European integration, it abounds with references underlining their central role. The fact that "the four fundamental freedoms provided in

853 *Cases C-394/97 Sami Heinonen*, [1999] ECR I-3599, para. 38; and *Case C-112/00 Schmidberger*, [2003] ECR I-5659, paras. 62 and 74.

854 *Case C-415/93 Bosman*, [1995] ECR I-4291, para. 7; and *Case C-281/98 Angonese*, [2000] ECR I-4139, para. 35.

855 Emphasis added. *Case C-194/94 CIA Security v Signalson* [1996] ECR I-2201, para. 40; and *Case C-443/98 Unilever Italia v Central Food*, [2000] ECR I-7535, para. 40.

856 *Case 152/82 Forcheri*, para. 11; *Case 222/86 Heylens*, [1987] ECR 4097, para. 14; and the Opinion of AG Lenz in *Case C-415/93 Bosman*, para. 174; the Court also referred once to free movement of goods as 'a fundamental right'. See *Case C-228/98 Dounias*, [2000] ECR I-577, para. 64.

857 Emphasis added. *Opinion 1/91 EEA*, para. 41.

858 Emphasis added. Ibid., para. 46.

the EC Treaty constitute *the very essence of the Internal Market"*[859] is not disputed, i.e. the two are seen as inextricably linked. Curzon describes their role as follows:

> 'The establishment of a *common market* … is *one of the cornerstones* of the European Union (herein EU) and is *based upon the protection of four fundamental economic freedoms*, i.e. the free movement of goods, persons, capital and the free provision of services. Such free movement provisions have played a pivotal role in the evolution of the EU and appear to have assumed what some consider to be of a *constitutional value* in the EU legal order.'[860]

The four freedoms have been described as the "foundation stones of the internal market",[861] and have been placed at the core of both the Community legal system as well as that of the Union.[862] They are seen as a prerequisite for the establishment of the common market.[863] What underpins those freedoms at a minimum is the principle of non-discrimination on the ground of nationality,[864] which is analysed in detail in the last Chapter of this thesis. Kingreen argues that the freedoms "were gradually transformed from general principles of non-discrimination into rights of freedom".[865] According to Lane they are "constitutional rights; they may be constitutional rights *plus ultra*".[866] Gekrath defines them as "economic constitutional rights" and as "the principle elements of the economic Constitution of the Community".[867]

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859 Emphasis added. V. Skouris, "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance," *European Business Law Review* 17, no. 2 (2006): 225.

860 Emphasis added. S. J. Curzon, "Internal Market Derogations in Light of the Newly Binding Character of the EU Charter of Fundamental Rights," in *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. Giacomo di Federico (Springer, 2011), 145.

861 Gormley, "Competition and free movement: Is the internal market the same as a common market?," 520. Similarly, Schmidt and de Búrca describe them as the "core of the internal market", and as the "kernel of the EC's common market". See respectively, S. K. Schmidt, "The Internal Market Seen from a Political Science Perspective," in *The EU Internal Market in Comparative Perspective: Economic, Political and Legal Analyses* ed. J. Pelkmans, D. Hanf, and M. Chang (Brussels: P.I.E Peter Lang, 2008), 101; De Búrca, "Differentiation Within the "Core"? The Case of the Internal Market," 136.

862 See respectively, P. Oliver, "Competition and Free Movement: Their Place in the Treaty," in *European Union Law for the Twebty-First Century*, ed. Takis Tridimas and Paolisa Nebbia (Oxford and Portland Oregon: Hart Publishing, 2004), 175; G. Garrett, "The politics of legal integration in the European Union," *International Organization* 49(1995): 178.

863 T. Kingreen, "Fundamental Freedoms," in *Principles of European Constitutional Law*, ed. A. Von Bogdandy and J. Bast (Hart Publishing and Verlag CH Beck, 2010), 531.

864 See the Opinion of AG Mayras in *Case 33/74 Van Binsbergen*.

865 Kingreen, "Fundamental Freedoms," 523.

866 R. Lane, "The internal market and the individual," in *Regulating the Internal Market*, ed. N. Nic Shuibhne (Edward Elgar, 2006), 258.

867 J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Etudes Européennes, 1997). 315, cited in; Oliver, "Competition and Free Movement: Their Place in the Treaty," 166.

No matter what exactly they are called, all discussions and studies point to their pivotal role in the Union legal order. As Oliver puts it "the Court has not wavered in its determination to keep the four freedoms … at the core of the Community legal system".[868] Not only are the four freedoms at the core, the free movement of persons, which is the freedom central to our research, has been elevated somewhat higher than the other freedoms by virtue of the introduction of the concept of Union citizenship.

Scholars argue that with the introduction of Union citizenship and the Court's subsequent case law interpreting it, movement related to an economic activity was "relegated to constituting merely the 'specific expression' of a more general and overarching right of free movement enshrined in Article 21 TFEU".[869] Since Union citizenship seems to have subsumed the economic aspects of free movement of persons, and since the four freedoms have already been studied thoroughly in the literature, this section will not deal in more detail with the specifics of these freedoms, but will focus on the general free movement right developed under the concept of Union citizenship. The following section aims to demonstrate that following the introduction of Union citizenship, the free movement right has arguably developed to an extent that it would amount to a constitutional constraint on Member States, precluding their arbitrary interference with the principles underlying it.

6.3.2 Union citizenship: The fundamental status

Another addition that is by now part of the fundamental *acquis* of the Union, and has contributed to the approximation of the Union legal order to that of States, is that of Union citizenship introduced by the Treaty on European Union in 1993. Even though at the time of its introduction many were sceptical about the more tangible and intangible[870] benefits the new status could deliver,[871]

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868 Oliver, "Competition and Free Movement: Their Place in the Treaty," 175.

869 J. Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," in *The First Decade of EU Migration and Asylum Law*, ed. E. Guild and P. Minderhoud (Leiden; Boston: Martinus Nijhoff Publishers, 2012), 44-45; Tomkin refers to *Case C-212/06 Government of the French Community and Walloon Government*, [2008] ECR I-1683, para. 59. For a similar argument, see F. Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," *European Law Journal* 17, no. 1 (2011): 30.

870 Obviously, the most intangible benefit expected to flow from the introduction of the concept was in the form of increased legitimacy for the integration project, by making the Union's benefits more visible to people, and by creating a genuine connection between the Union and "the peoples of Europe", thereby hoping to change the public perception of the EU as elite-driven and distant from people. However, subsequent developments, such the introduction of the Lisbon Treaty, have arguably resulted in citizens' further alienation from Europe. See, S. Van den Bogaert, "The Treaty of Lisbon: The European Union's Own

today many agree that the gap between what the status promised and what it seemed to provide initially, has been partially filled in by the judgments of the Court of Justice.[872]

With the introduction of Union citizenship the umbilical cord between the free movement of persons and the need to perform an economic activity was cut,[873] and nourished by the judgments of the Court, the new born concept ('citizenship') developed quickly to become an independent source of rights for all the nationals of Member States within the Union legal order. After the entry into force of the Lisbon Treaty, the Union has also acquired its Bill of Rights,[874] namely the Charter of Fundamental Rights that clearly sets all the bundles of rights to be enjoyed by citizens as well as some TCN residents in the territory of the Member States of the Union.

This section provides a brief legal analysis of the status of Union citizenship. The focus of this section is on the substance of the status of EU citizenship as it stands, addressing the following questions: what are the core or inalienable rights that all Union citizens enjoy and what are the implications of those rights for the PSC on free movement of persons? The aim of this section is to establish whether it is possible to reconcile a PSC on free movement of persons with the status of Union citizenship.

The analysis begins with a brief overview of the rights envisaged for Union citizens in the Treaties and secondary law. While the provisions in the Treaties are the starting point and source of inspiration for the Court, the real propelling force behind the growth and development of the concept has been the case law of the Court of Justice. Hence, the following sections examine the seminal cases that shaped the concept, and briefly discuss case law that seems to have

Judgment of Solomon?," *Maastricht Journal of European and Comparative Law* 15, no. 1 (2008): 19.

871 Scholars would often point out to the gap between the symbolism and grandeur of the concept and what it actually delivered. See, F. G. Jacobs, "Citizenship of the European Union – A Legal Analysis," *European Law Journal* 13, no. 5 (2007): 592. R. Bellamy and A. Warleigh, "Introduction: The Puzzle of European Citizenship," in *Citizenship and Governance in the European Union*, ed. R. Bellamy and A. Warleigh (London and New York: Continuum, 2001), 3.

872 See, S. O'Leary, "Putting Flesh on the Bones of European Citizenship," *European Law Review* 24(1999): 68-79; Jacobs, "Citizenship of the European Union – A Legal Analysis," 592. X. Groussot, "'Principled Citizenship' and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds," in *General Principles of EC Law in a Process of Development*, ed. U. Bernitz, et al. (Wolters Kluwer, 2008), 315; W. T. Eijsbouts, "Onze Primaire Hoedanigheid," (Europa Instituut, Universiteit Leiden, 2011), 7-10.

873 That link between free movement and performing an economic activity was already weekend by the introduction of the three directives conferring a general right of movement and residence on the retired, students, and those who are financially self-sufficient. See, Directives cited in note 840 above.

874 See, E. Guild, "The evolution of the concept of union citizenship after the Lisbon Treaty," in *Integration for Third-Country Nationals in the European Union: The Equality Challenge*, ed. S. Morano-Foadi and M. Malena (Edward Elgar, 2012), 3-15.

taken Union citizenship beyond what was initially envisaged in the Treaties. The purpose behind this overview of case law is to reveal the core components of Union citizenship, so as to establish the basic rights to be enjoyed by all Union citizens. What is crucial for our purposes is to find out whether a PSC on free movement of persons is going to affect those core components.

6.3.2.1 Union citizenship as defined in the Treaties

There are two main provisions in the Treaty that are interesting and that will help us establish the crux of EU citizenship. These are Articles 20 and 21 TFEU (*ex* Articles 17 and 18 EC). The first one, Article 20(1) TFEU solemnly proclaims that:

> 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'[875]

Article 20(2) TFEU lists the rights Union citizens are to enjoy: the right to move and reside within the territory of the Member States; rights of political participation, that is to vote and stand as candidate in elections to the EP, and in the municipal elections in their Member State of residence;[876] the right to petition the EP, and apply to the Ombudsman;[877] the right to enjoy diplomatic and consular protection in the territory of a third country in which their Member States is not represented.[878] These rights are further elaborated in the following articles (Articles 22-24 TFEU). Except for the right to diplomatic and consular protection in the territory of a third state, there is not anything new introduced by the concept of Union citizenship. It should also be noted that not all of the rights just mentioned are exclusive to the Union citizens. Some rights, such as voting in the municipal elections, petitioning the EP or applying to the Ombudsman are also enjoyed by TCNs who are legally resident on the territory of the Union.

The second important provision for our analysis, Article 21(1) TFEU, provides that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect". The fact that the main right granted to Union citizens was subject to

875 It should be noted that the Lisbon Treaty has changed the wording of this provision. Pre-Lisbon citizenship was "complementary" and not "additional" to national citizenship. For a commentary on the possible implications of this change, see J. Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," in *The Evolution of EU Law*, ed. P. Craig and G. De Búrca (Oxford: OUP, 2011), 598-600.

876 See also Article 22 TFEU.

877 See also Article 24 TFEU.

878 See also Article 23 TFEU.

the limitations and conditions that already existed in secondary law, in practice meant that actually nothing new was granted. That was one of the main criticisms and a source of disappointment with the concept at the time of its introduction. However, as will be demonstrated below, the Court managed to give meaning to the concept by linking it inextricably with the general non-discrimination provision (Article 18 TFEU), which precedes the citizenship provisions under the same title.

6.3.2.2 Citizenship Directive

The Citizenship Directive erodes entirely the remaining link between free movement and economic activity for Union citizens and their families, who wish to move and reside on the territory of another Member State for up to three months, by introducing an unconditional right to free movement under its Article 6.[879] For residence exceeding three months the conditions of possessing sufficient resources and medical insurance remain in place.[880] However, the Court reinterpreted those conditions in light of Union citizenship and ruled that those conditions are to apply subject to the principle of proportionality.[881]

The Directive entered into force thirteen years after the introduction of Union citizenship. Hence, to a large extent it is a codification of the Court's citizenship case law until that point. It repealed and replaced nine directives and amended Regulation 1612/68.[882] Another important novelty of the Directive was the right of permanent residence and corresponding strengthened rights granted to those Union citizens who had resided for a continuous period of five years in a host Member state.[883] By now, the details of the Directive are well established and well known. Since many of the decisions of the Court codified in the Directive are briefly analysed below, there is no need to discuss the Directive in more detail here. It is worth noting that this codification implies the confirmation, or approval of the Court's case law by the institutions of the Union as well as by its Member States.

879 Article 6(1) of the Directive reads as follows: "Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months *without any conditions or formalities other than the requirement to hold a valid identity card or passport*." Emphasis added.

880 See Article 7 of the Citizenship Directive.

881 *Case C-413/99 Baumbast*, [2002] ECR I-07091, paras. 90-91.

882 It repealed the following Directives: 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

883 See Chapter IV, Articles 16 to 21 of the Citizenship Directive.

6.3.2.3 Union citizenship in the case law of the Court

The most important components of Union citizenship that the case law of the Court brings forward are undoubtedly: free movement and equal treatment. Coincidentally, those are the most important aspects of citizenship that would be breached by the introduction of the proposed PSC. By suspending the free movement rights of Turkish nationals, such a clause would be discriminating on the basis of nationality, since no other Accession Agreement ever contained such a clause. Thus, if we were able to demonstrate that free movement and non-discrimination are at the very core of citizenship, i.e. they are the constitutive or defining characteristics of the status of Union citizenship, it would be possible to establish the incompatibility of the proposed PSC with the status of Union citizenship. Moreover, the analysis of the citizenship case law aims to argue and demonstrate that the status by now belongs to the "very foundations" of the Union,[884] and as such amounts to an important constitutional constraint on Member States whenever they act within the scope of EU law.

To demonstrate how the concept of Union citizenship could amount to a constraint on Member States as primary law makers, a brief reminder of the case law on the economic free movement provisions would be helpful. For individuals to successfully rely on the free movement provisions before the introduction of Union citizenship, they had to fall both under the personal and material scope of the Treaty and/or secondary legislation.[885] In order to fall under the personal scope of one of the freedoms in the Treaty, individuals had to be nationals of a Member State and fulfil two conditions. Firstly, they had to demonstrate that they performed a genuine and effective economic activity: that they provided (or received) a service for remuneration in an employed or self employed capacity. Secondly, they had to demonstrate that their situation contained a cross-border element. To be able to fall under the material scope of the freedoms, individuals had to rely on the rights granted by those provisions, such as the right to non-discrimination on the ground of nationality, the right to accept offers of employment, the rights to move within the territory of the host Member State etc.[886]

6.3.2.3.1 Union citizenship taking shape: First 'ground breaking' cases

The novelty brought by the first citizenship case, that of Maria Martinez Sala, was that even though she did not perform any economic activity, she was brought into the personal scope of the Treaty by virtue of the citizenship

884 The Court has never expressed itself in those terms, however, it will be demonstrated that the overall development of the citizenship case law implicitly conveys that message.

885 The personal scope (*ratione personae*) of a Treaty provision or a piece of legislation defines those to which it applies, whereas its material scope (*ratione materiae*) defines the rights that it grants.

886 E. Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects," *Common Market Law Review* 45(2008): 14-15.

provisions. The Court ruled that "[a]s a national of a Member State lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship".[887] It went on to rule that a citizen of the Union, such as Ms Sala, "lawfully resident in the territory of the host Member State, can rely on [Article 18 TFEU] in all situations which fall within the scope *ratione materiae* of [Union] law".

The second seminal judgment on the rights of Union citizens was that of *Grzelczyk*,[888] in which the Court declared its future projections of the status of citizenship as follows: "*Union citizenship* is destined to be *the fundamental status* of nationals of the Member States, enabling those who find themselves in the same situation to *enjoy the same treatment in law* irrespective of their nationality, subject to such exceptions as are expressly provided for".[889] Whereas citizenship in *Martinez Sala* was used to bring her within the personal scope of the Treaty, in this case "the right to move and reside freely, as conferred by [Article 21 TFEU]" was used to bring the case under the material scope of the Treaty.[890] In short, once a national of a Member State moves to another Member State, he or she falls within the personal and material scope of the Treaty, which enables him or her to rely on the principle of non-discrimination laid down in Article 18 TFEU.

In *Baumbast*, the Court confirmed that Article 21 TFEU was directly effective and created an independent right to free movement and residence for all Union citizens.[891] The Court acknowledged that the right was subject to limitations and conditions contained in the Treaty and secondary law (to be financially self-sufficient and to have a comprehensive health insurance), however, according to the Court those limitations and conditions had to be interpreted with regard to general principles of law, in particular with regard to the principle of proportionality.[892]

The only condition that Mr Baumbast did not fulfil was to have comprehensive sickness insurance. His insurance did not cover emergency treatment in the UK. According to the Court, it would be disproportionate to deny Mr Baumbast the right of residence conferred on him by Article 20(1) TFEU just on that ground. The implications of this ruling were huge. What this meant in practice was that national authorities were under an obligation to take into account the personal circumstances of every Union citizen relying on Article 20(1) TFEU. According to Spaventa, this "personalized" assessment of proportionality "brings about a qualitative change in the expansion of judicial

887 *Case C-85/96 Martinez Sala*, [1998] ECRI-2691, para. 61.
888 *Case C-184/99 Grzelczyk*.
889 Emphasis added. Ibid., para. 31.
890 Ibid., para. 33.
891 *Case C-413/99 Baumbast*, para. 84.
892 Ibid., paras. 85-90.

review of national rules".[893] She argues that such "indirect review" of Union law limits the discretion of the legislature since all their actions or requirements will need to be assessed on the basis of their proportionality.[894] Hailbronner's criticism goes further, since he argues that the citizenship provisions and the principle of proportionality are used to rewrite the rules laid down in secondary Union law.[895]

Baumbast was definitely "[a] further step in the advancement of citizens' rights"[896] instigated by the Court's willingness to interpret relevant secondary law in light of the Treaty's citizenship provisions. Other cases followed where this time the Court "softened" the "sufficient resources" requirements laid down in the citizenship directive. According to the Court, recourse to social benefits should not result automatically in losing residence rights.[897] Moreover, those Union citizens who could demonstrate a sufficient degree of integration in the host Member State would have access to social benefits that are available to the nationals of that state.[898]

6.3.2.3.2 Further developments: Beyond discrimination, beyond material scope, beyond internal situations?

Firstly, it is argued that the citizenship provisions in the Treaty go beyond prohibiting discrimination on the grounds of nationality to prohibit non-discriminatory restrictions as well under certain circumstances, in a way following the Court's approach on the four freedoms.[899] It follows that any measure that is liable to deter,[900] dissuade,[901] or discourage[902] a Union citizen from exercising his free movement right, or places him at a disad-

893 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects," 40.

894 Ibid., 41.

895 K. Hailbronner, "Union Citizenship and Access to Social Benefits," *Common Market Law Review* 42(2005): 1251.

896 Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 43.

897 First established in *Case C-184/99 Grzelczyk*, para. 43; afterwards, repeated in *Case C-456/02 Trojani*, [2004] ECR I-7573, para. 45. This statement of the Court was codified in Article 14(3) of Directive 2004/38/EC.

898 *Case C-209/03 Bidar*, [2005] ECR I-2119, para. 59; *Case C-158/07 Förster*, [2008] ECR I-8507, para. 49.

899 Jacobs, "Citizenship of the European Union – A Legal Analysis," 596-97; Groussot, "'Principled Citizenship' and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds," 335; Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 35; Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," 25.

900 *Case C-224/98 D'Hoop*, [2002] ECR I-6191, para. 31.

901 *Case C-192/05 Tas-Hagen and Tas*, [2006] ECR I-10451, para. 32.

902 *Joined Cases C-11/06 and C-12/06 Morgan and Bucher*, [2007] ECR I-9161, paras. 30-31.

vantage for exercising those rights,[903] is prohibited unless justified based on objective considerations independent of the nationality of the persons concerned which are proportionate to the legitimate aim of the measure concerned.[904]

Secondly, in *Tas-Hagen and Tas* the Court clearly used the language of "restrictions" and ruled on access to a benefit, which at first sight fell outside the material scope of the Treaty. The case concerned Dutch legislation on the award of benefits to civilian war victims, which required the person concerned to be resident in the Netherlands at the time when the application for the benefit was submitted. Mr. Tas and Mrs. Hagen-Tas were Dutch nationals who resided in Spain at the time of their application. Their applications were rejected upon which they appealed. As to the analysis of the Court of Justice, applicants clearly fell within the personal scope of the Treaty as Union citizens. The benefit they were trying to obtain clearly fell within the competence of Member States. However, according to the Court, that competence had to be exercised in line with Union law, "in particular with the Treaty provisions giving every citizen of the Union the right to move and reside freely within the territory of the Member States".[905] Then, the Court repeated that Article 20 TFEU was not intended to extend the material scope of the Treaty to internal situations.[906] However, the situation of the applicants in this case was clearly covered by the right to free movement and residence granted to every Union citizen by Article 21(1) TFEU. Since the exercise of their right had an impact on their right to receive a benefit under national law, their situation could not be considered as purely internal.

According to the Court, "the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State *can be deterred* from availing himself of them by *obstacles* raised to his residence in the host Member State by legislation of his State of origin penalising the fact that he has used them".[907] The Court went on to establish that national legislation that placed at a disadvantage nationals that had "exercised their freedom to move and reside in another Member State is *a restriction* on the freedoms conferred by Article [21(1) TFEU]".[908] The Court admitted that such a restriction could be justified by objective considerations of public interest, however it also had to satisfy the principle of proportionality. The Court found that a residence criterion was not an appropriate or satisfactory indicator for achieving the aim of the legislation, which was to ensure

903 *Case C-224/98 D'Hoop*, para. 34; *Case C-224/02 Pusa*, [2004] ECR I-6421, para. 20.
904 *Case C-224/98 D'Hoop*, para. 36; *Case C-224/02 Pusa*, para. 20; *Case C-406/04 De Cuyper*, [2006] ECR I-6947, para. 40; *Case C-192/05 Tas-Hagen and Tas*, para. 33.
905 *Case C-192/05 Tas-Hagen and Tas*, para. 22.
906 Ibid., 23.
907 Emphasis added. Ibid., para. 30. The Court referred to *Case C-224/02 Pusa*, para. 19.
908 Emphasis added. *Case C-192/05 Tas-Hagen and Tas*, para. 31.

the connection of applicants to the Member State granting the benefit. In short, Article 21(1) TFEU precluded the contested Dutch law.

Spaventa suggests that this line of case law can be seen from two perspectives. Firstly, it can be argued that what was at stake in these cases was discrimination against movers. Both those who had moved or those who had returned after having exercised their right to free movement were at a disadvantage compared to those who had not moved. Secondly, as proposed by other scholars mentioned above, the right to move contained in Article 21(1) TFEU could be seen as of broader application encompassing also non-discriminatory obstacles to free movement.[909]

Similarly, in *Schempp*,[910] the Court examined whether the national legislation in question in the case "obstructed" applicant's right to move and reside in another Member State independently of any discrimination.[911] According to AG Kokott, "[s]uch a harmonised approach, which aligns the interpretation of the right to freedom of movement or residence to the other fundamental freedoms, corresponds to the "fundamental status" of Union citizenship established by the Court and the new EU citizenship Directive."[912]

Thirdly, as far as the effect of Union citizenship on "purely internal situations" (one of the most criticized concepts of EU law[913]) is concerned, the rule remains in place. In other words, the freedoms or the citizenship provisions do not cover entirely internal situations that have no Union link (cross-border element). However, the case law on citizenship has made some inroad in that field as well, inciting comments as to the "arbitrariness to attaching so much importance to crossing a national border".[914] As is often questioned, what is indeed an 'internal situation' within an internal market which aims to eliminate national frontiers and barriers to free movement?[915]

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909 Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects," 25.

910 *Case C-403/03 Schempp*, [2005] ECR I-6421, paras. 42-47.

911 J. Kokott, "EU citizenship – citoyens sans frontières?," (Durham Euroepan Law Institute – European Law Lecture, 2005), 9.

912 Ibid.

913 N. Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?," *Common Market Law Review* 39(2002); A. Tryfonidou, "Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe," *Legal Issues of Economic Integration* 35, no. 1 (2008); C. Dautricourt and S. Thomas, "Reverse discrimination and free movement of persons under Community law: all for Ulysses, nothing for Penelope?," *European Law Review* 34, no. 3 (2009).

914 Opinion of AG Sharpston in *Case C-212/06 Government of the French Community and Walloon Government*, para. 141.

915 Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," 596; Groussot, "'Principled Citizenship' and the Process of European Constitutionalization – From a Pie in the Sky to a Sky with Diamonds," 338.

For the purposes of this thesis, it is sufficient to emphasize the importance of *Zambrano*,[916] as it is the most important case that illustrates the erosion of the outer boundaries of the concept of internal situations. The Zambrano children were born in Belgium, to parents of Columbian nationality who sought asylum, but did not succeed. Their applications to regularize their stay and obtain unemployment benefits did not succeed either. Mr. Zambrano challenged those refusals arguing that as a parent of minor children of Belgian nationality, he was entitled to reside and work in Belgium on the basis of the Union citizenship provisions. The problem was that the Zambrano children had never moved outside their state of nationality (Belgium), which normally meant that there was nothing to bring them within the scope of EU law. However, the Court disagreed, establishing that "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of *the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*."[917] According to the Court, refusing to grant Zambranos a right to residence and a work permit would have such an effect, since it would lead to a situation where the Zambrano children, who are citizens of the Union, would have to leave the territory of the Union together with their parents.

As important as *Zambrano* is, perhaps it would be more correct to classify it as an exception to the rule of internal situations, as the cases following it (*Dereci* and *McCarthy*[918]) demonstrated the "purely internal situations" still matter. Hence, *Zambrano* can be interpreted to exemplify an internal situation, which is considered to have a link with EU law due to its drastic consequences. Such a situation has the effect of depriving Union citizens of the genuine enjoyment of the substance of their citizenship rights,[919] as in the case of Zambrano children, who would have to leave the territory of the Union. When the genuine enjoyment of the substance of citizenship rights is threatened, "the veil of internal situations may legitimately be pierced".[920]

916 *Case C-34/09 Zambrano*, [2011] ECR I-1177. For a detailed analysis, see V. Borger, "Ruiz Zambrano: Hoe Europees Burgerschap zijn Schaduw in de Tijd Vooruit Werpt," in *Vrij Verkeer van personen in 60 arresten: De zegeningen van het Europees burgerschap*, ed. G. Essers, A. P. van der Mei, and F. van Overmeiren (Den Haag: Kluwer, 2012).

917 *Case C-34/09 Zambrano*, para. 42.

918 *Case C-256/11 Dereci*, judgment of 15 November 2011, n.y.r; *Case C-434/09 McCarthy*, [2011] ECR I-3375. For an in-depth discussion, see A. Tryfonidou, "Redefining the Outer Boundaries of EU Law: The Zambrano, McCarthy and Dereci trilogy," *European Public Law* 18, no. 3 (2012): 493-526; J. T. Nowak, "Case C-34/09, Gerardo Ruiz Zambrano v. Office National de L'Emploi (ONEM) & Case C-434/09, Shirley McCarthy v. Secretary of State for the Home Department," *Columbia Journal of European Law* 17(2010-2011): 673; A. P. Van der Mei, S. Van den Bogaert, and G. R. De Groot, "De arresten Ruiz Zambrano en McCarthy," *Nederlands Tijdschrift voor Europees Recht* 6(August 2011): 188-99.

919 *Case C-34/09 Zambrano*, para. 42.

920 N. Nic Shuibhne, "(Some of) The Kids Are All Right," *Common Market Law Review* 49(2012): 365.

Zambrano is a step in the right direction, since it enables the Court to deal with an extremely problematic example of reverse discrimination,[921] by using and sharpening further one of the most precious weapons in its arsenal of provisions of EU law, that of Union citizenship. In the light of *Zambrano* it could be concluded that anything that would deprive Union citizens of "the genuine enjoyment of the substance of their citizenship rights" would constitute a constraint on Member States. The following section tries to establish the contents of that substance.

6.3.2.3.3 Core of Union citizenship

What these cases reveal as to the substance or the core of Union citizenship is that first and foremost Union citizenship is about movement and residence on the territory of the Member States. That conclusion is confirmed by Advocate Generals and scholars alike. AG Sharpston calls the right to movement and residence the "core" right of Union citizenship,[922] while AG Colomer calls it the "central right of citizenship".[923] Nic Shuibhne calls them the "the undoubted "core" rights of citizenship".[924]

Yet, that is not the only right attached to citizenship. As the case law clearly demonstrated, the right to free movement and residence come with the bonus of the right to equal treatment. Once a Union citizen exercises his right to free movement and residence, by virtue of his citizenship status he is automatically entitled to equal treatment in the host Member State. According to Wollenschläger, the right to move and reside in the host Member State, the far-reaching claim to national treatment,[925] as well as the prohibitions on restriction to freedom of movement constitute the "core guarantees" of Union citizenship.[926]

Scholars argue that with the introduction of Union citizenship and the Court's subsequent case law interpreting it, movement related to an economic activity was "relegated to constituting merely the 'specific expression' of a more general and overarching right of free movement enshrined in Article

921 P. van Elsuwege, "Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law," *Legal Issues of Economic Integration* 38, no. 3 (2011): 276.

922 See the AG's Opinion in *Case C-34/09 Zambrano*, para. 80.

923 See the AG's Opinion in *Joined Cases C-11/06 and C-12/06 Morgan and Bucher*, para. 67.

924 Nic Shuibhne, "(Some of) The Kids Are All Right," 365; Kochenov also calls the rght to free movement "a core element of European citizenship", see D. Kochenov, "European Integration and the Gift of the Second Class Citizenship," *Murdoch University Electronic Journal of Law* 13, no. 1 (2006): 212.

925 The equality aspect of citizenship is analysed further in the following chapter.

926 Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," 30.

21 TFEU".[927] According to Tomkin, this is a paradigm shift. Member State nationals are no longer granted rights as economic means serving economic ends, but by virtue of their status as Union citizens.[928]

As to the implication of these developments for the inclusion of a PSC on free movement persons, it is evident that such a clause would go against the grain of the status of Union citizenship. It will undermine the work of the Court in this field, as it will create second-class citizens on a permanent basis. Citizens whose right to free movement and residence within the territory of Member States can possibly be suspended at the whim of individual Member State governments. In addition to violating the substance of the Union citizenship concept, such a clause will also be discriminatory. It will discriminate directly on the basis of nationality, providing the possibility to single out and suspend the free movement rights of nationals belonging to one Member State only. It will be quite a challenge to legitimize such a clause when the Court's case law already moved beyond non-discrimination on the basis of nationality to tackle all kinds of restriction affecting free movement. If Member States are to respect the existing Treaties and their provisions as interpreted by the Court, the Union citizenship provisions at their current stage of development will preclude Member States from including such a controversial clause into the Turkish Accession Agreement.

6.3.3 Fundamental rights

The third cluster of cases demonstrating that some provisions of EU law belong to the "very foundations" of the Union or implying they are hierarchically superior to other provisions of the Treaties, are those dealing with fundamental rights.[929] This section begins by examining the most recent and important cases of the Court revealing the place of fundamental rights in the current hierarchy of norms. This demonstration begins with the case, in which the Court was most explicit and compelling in its statements regarding the importance and status of fundamental rights, i.e. the first *Kadi* judgment.[930] It is

927 Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 44-45; Tomkin refers to *Case C-212/06 Government of the French Community and Walloon Government*, para. 59; For a similar argument, see Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration," 30.

928 Tomkin, "Citizenship in Motion: The Development of the Freedom of Movement for Citizens in the Case-law of the Court of Justice of the European Union," 45.

929 See *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 303; *Case C-229/05 P PKK and KNK v Council*, [2007] ECR I-439; and *Case C-432/04 Cresson*, [2006] ECR I-6387.

930 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*.

followed by two other cases, *Cresson* and *PKK*,[931] in which the Court's examination of the compatibility of primary law provisions with relevant provisions of the ECHR, implicitly confirmed that provisions protecting fundamental rights are hierarchically superior to other provisions of the Treaties, i.e. to provisions which are not considered to be part of the "very foundations" of the Union.

After providing a snapshot of the most important cases revealing the status of fundamental rights in today's legal order, a more historical approach is taken in order to illustrate and explain the emergence and the rise of fundamental rights to their current position. Next, the inclusion of fundamental rights in the Treaties and their rise from being mentioned in the preamble to the SEA to constituting Article 2 TEU after Lisbon is put under the spotlight. Lastly, it is argued that the case law of the Court, starting from the first cases, in which it declared protection of fundamental rights constituted general principles of Community law, to drafting of the Charter, which eventually became part of primary law after Lisbon, contributed to the constitionlisation, i.e. autonomisation of the EU legal order over the decades. Today Member States respect fundamental rights and freedoms not only because they have deeply internalized them, but also because their violations are backed up by sanctions provided by the Court of Justice.

6.3.3.1 Snapshot of recent case law

To begin with the *Kadi* case,[932] the gist of the Court's ruling is in the statement that "the obligations imposed by an international agreement cannot have the effect of prejudicing *the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights*, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty".[933] The Court held that the General Court had to review the lawfulness of the contested Regulations in light of fundamental rights, even if they had been adopted in order to implement Security Council resolutions. Since it failed to do so, its reasoning was vitiated by an error of law.[934] Moreover, the fact that the Council had failed to communicate to Mr. Kadi the evidence relied on against him to justify the inclusion of his name in the contested Regulations, deprived him of the right to defend himself, as well as from the right to effective judicial review.[935] On the same grounds, the Court found that his right to property was also infringed.[936]

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931 *Case C-432/04 Cresson*; *Case C-229/05 P PKK and KNK v Council*.
932 For the factual background of the case, see section 6.2.3 above.
933 *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II*, para. 22.
934 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, paras. 326-27.
935 Ibid., paras. 345-49.
936 Ibid., paras. 369-71.

As to the Court's statements regarding the position of fundamental rights in the EU legal order, which is the most important aspect of the judgment for the purposes of this thesis, they were clear and unequivocal. Referring to two primary law provisions, Articles 307 and 297 EC, the Court ruled that they could not be interpreted as authorizing "any derogation from the principles of liberty, democracy, and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as *a foundation of the Union*".[937] The Court also categorically stated that Article 307 EC "may in no circumstances permit any challenge to *the principles that form part of the very foundations of the Community legal order*, one of which is the protection of fundamental rights".[938]

The Court's statements in *Kadi* place fundamental rights at the top of the hierarchy of norms in the Union legal order. Just like the principle of the autonomy of the legal order, which was protected by the Court in its first *EEA Opinion*, fundamental rights have been declared sacrosanct by the Court, by virtue of their "form[ing] part of the very foundations of the Community legal order".[939] Fundamental rights in general, and the principles enshrined in Article 6(1) TEU (now renamed as values under Article 2 TEU) in particular, are hierarchically superior principles that constitute part of the core, of the "very foundations" of the legal order. As such they constrain Member States whenever they act within the scope of EU law, including when they perform their functions as primary law makers in the context of drafting an Accession Agreement.

In *Cresson*, the second example, the Commission brought action against former Commissioner Mrs. Cresson on the basis of the third subparagraph of Article 213(2) EC [now Article 245(2) TFEU] for breaching her obligations as a Commissioner. She was accused of "conduct amounting to favouritism or, at least, and gross negligence".[940] In her defence, she raised procedural issues concerning the way her case was handled and argued that her rights of defence had not been not respected. More specifically, she complained of a lack of legal remedy, in case the Court decided to impose a penalty on her, since there would be no possibility to appeal that decision. To check whether that would indeed breach her right to effective judicial protection, the Court tested Article 213(2) EC against Article 2(1) of Protocol No. 7 of the ECHR.[941]

937 Emphasis added. Ibid., para. 303.
938 Emphasis added. Ibid., para. 304.
939 Ibid.
940 *Case C-432/04 Cresson*, para. 1. For details, see R. Mastroianni and A. Arena, "Case C-432/04, Commission of the European Communities v. Édith Cresson, Judgment of the Court (Full Court) of 11 July 2006, [2006] ECR I-6387.," *Common Market Law Review* 45(2008): 1207-32.
941 Article 2(1) of Protocol No 7 to the ECHR provides that "everyone convicted of a criminal offence by a court or tribunal has the right to have his conviction or sentence reviewed by a higher court or tribunal. Even if it be accepted that that provision applies to proceedings based on Article 213(2) EC, it is sufficient to point out that Article 2(2) of that Protocol states that that right may be subject to exceptions in cases, inter alia, where the

The Court found that Article 213(2) EC complied with the rules established under the Convention. The fact that the Court found it necessary to check whether a provision of the Treaties was fundamental rights-compliant clearly implies the hierarchical superiority of fundamental rights. Moreover, these cases illustrate that the Court needs fundamental rights not only to legitimize various provisions of secondary law, but also of primary law.

The third and last example, which confirms and illustrates the 'precedence' of fundamental rights over provisions of primary law, is the *PKK* case.[942] The facts of the *PKK* case are similar to *Kadi*. The PKK's funds and financial assets were frozen since it was added as a terrorist organization to the list envisaged in Article 2(3) of Regulation No 2580/2001, which was adopted to implement UN Security Council Resolution (Res. 1373 (2001)).[943] The PKK brought an action for annulment and damages to the General Court, but its action was declared inadmissible, upon which it appealed to the Court of Justice. The relevant part of the Court's judgment for our purposes is the part where KNK, an umbrella organization to which the PKK was related, argued that the admissibility requirement under Article 230(4) EC [now Article 263(4) TFEU], the requirement to be "directly and individually concerned", was so restrictive that it conflicted with the ECHR, and more specifically with Article 13 of the Convention which provides for the right to an effective remedy. Instead of dismissing that argument, the Court went on to check whether that was indeed the case.

After repeating the importance of fundamental rights in the EU legal order, the Court examined the issue of admissibility under Article 34 of the Convention. The Court established that to be considered a victim, the case law of the Strasbourg court and Article 13 ECHR require an applicant to have been affected by a violation that had already taken place. Moreover, the case law of the Strasbourg court had already established that "persons who claim to be linked to an entity included in the list annexed to Common Position 2001/931, but who are not included in the list themselves, do not have the status of victims of a violation of the ECHR within the meaning of Article 34 thereof and that, consequently, their applications are inadmissible".[944] The KNK was linked to the PKK, but it was not included in the disputed list, which meant that it

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person concerned was tried in the first instance by the highest court or tribunal." Hence, the fact that Mrs. Cresson would not be able to appeal the Court's decision did not violate her right to effective judicial protection. See, ibid., paras. 112-113.

942 *Case C-229/05 P PKK and KNK v Council*.

943 The PPK sought the annulment of Council Decision 2002/460/EC of 17 June 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/334/EC, OJ L 160/26, 18.6.2002.

944 *Case C-229/05 P PKK and KNK v Council*, para. 80. The Court refers to the following Strasbourg case: *ECtHR, Segi and Gestoras Pro-Amnistia and Others v 15 States of the Euroepan Union*, Appl. Nos. 6422/02 and 9916/02.

would not be able to establish the status of a victim under Article 34 ECHR. Thus, it would not be able to bring an action before the Court of Human Rights, which illustrated that Article 230(4) EC (now Article 263(4) TFEU) was in line with the ECHR.[945]

As briefly described below, even though fundamental rights initially had no place either in the Treaties or the case law of the Court, once they were introduced into the legal order as general principles of EU law, their rise was steady and consistent over the decades. The few cases analysed above, as well as the central place of fundamental rights in the Treaties,[946] clearly illustrate how deeply entrenched they are today into the Union legal order. By now they have reached the pinnacle of norms and values in the Union legal order and constitute part of the core or of the "very foundations" of the legal order. The vast array of case law on fundamental rights as well as the never diminishing judicial and academic interest on this topic in the last half a century, have contributed to the deep internalization of protection of fundamental rights firstly in the national and then also in the Union legal orders.[947] However, the most decisive factor in the internalization of fundamental rights in various legal orders was undoubtedly, the mechanisms of external sanctions built-in within various legal orders in the aftermath of the Second World War.

At national level, it was the national constitutional courts that guaranteed the protection of fundamental rights. To provide the most prominent example, in the case of Germany it was the Bundesverfassungsgericht that ensured compliance regarding the protection of fundamental rights enumerated in the Grundgesetz. At international, or more precisely regional level, it was the European Court of Human Rights that ensured that its Contracting Parties abide by the rights enumerated in the Convention, for the protection of which it was established. Given the rise and centrality of the protection of fundamental rights of the individual at all levels and almost all jurisdictions in the last century, it was unthinkable, at least in Europe, that there would be a legal order, or a level of governance (however one names it), that would not take account of those rights.

While the Union legal order started taking account of fundamental rights as early as the 1970s, they soon became so central to it that compliance with them became a pre-condition for the validity and lawfulness of any Union act. In other words, acts disrespecting a fundamental right could be sanctioned by annulment (nullity) by the Courts of the Union. The Court's pronouncement in *Kadi II* is quite clear, it provided that "the Courts of the European Union

945 *Case C-229/05 P PKK and KNK v Council*, paras. 80-83.

946 See the introduction, as well as section 6.3.3.3 following below.

947 It should be noted that all Member States of the Union are also parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

must ensure the review, in principle the full review, of the lawfulness of *all* European acts in the light of fundamental rights".[948]

What can be inferred from the Court's pronouncement in *Kadi II* is that fundamental rights are capable of constraining Member States in their roles as primary as well as secondary law makers. While their constraining role regarding the latter is clear and uncontested, it is their constraining role when Member States act as primary law makers that is more controversial. However, the analysis of the *Pringle* case following below,[949] illustrates clearly the constraining force of general principles on Member States when they act as primary law makers too. The constraining force flows from the threat of a sanction (here in the form of a declaration of incompatibility) since there is the possibility to refer a Council Decision approving the conclusion of an Accession Agreement or the adoption of a Treaty revision to the Court before its ratification for a check of its legality and/or compliance with the requirements of the procedure under which the contested Decision was adopted.[950]

While the four freedoms were indigenous to the legal order, fundamental rights were not. They were incorporated later into the Union legal order; however, they climbed up the stairs in the hierarchy of norms in Union law. Today, just like the four freedoms, they form part of the "very foundations" of the Union. What follows is a brief overview of the emergence and development of fundamental rights in the EU legal order, and a discussion of their constraining, legitimizing as well as constitutionalizing functions in EU law. This overview sheds light on their central place in the EU legal and demonstrates that those principles are capable of constraining Member States even when they act as primary law makers.

6.3.3.2 Inception and rise of fundamental rights

The silence of the founding Treaties on fundamental rights and their subsequent incorporation into the case law of the Court as general principles of law in response to the challenge of the German and Italian constitutional courts is well known. Thus, the discussion on this process is brief, as comprehensive studies on the topic already exist,[951] and since what is relevant here is their

948 Emphasis added. *Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Kadi II*, para. 23.

949 *Case C-370/12 Pringle*.

950 R. Plender, "The European Court's Pre-emptive Jurisdiction: Opinions under Article 300(6) EC," in *Judicial Review in European Union Law*, ed. D. O'Keeffe (Kluwer Law International, 2000), 203-20.

951 See Tridimas, *The General Principles of EU Law*; X. Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006); J. A. Usher, *General Principles of EC Law*, European Law Series (London and New York: Longman, 1998); A. Arnull, *The General Principles of EEC Law and the Individual* (St. Martin's Press, 1990). For an alternative account see, G. De Búrca, "The Road Not Taken: The European Union as a Global Human Rights Actor," *The American Journal of International Law* 105(2011): 649-93.

current status and possible function as constraint on Member States when drafting an Accession Agreement.

As to the Court's approach in its endeavour to extrapolate general principles of EU law, it had to "weigh up and evaluate the particular problem and search for the best and most appropriate solution".[952] The common constitutional traditions of the Member States as well as international human rights agreements would be the main sources of inspiration. What is "best and most appropriate" would depend on the objectives of the Community. Thus, the standard of protection would change from one case to another,[953] igniting criticism and academic debate on the issue.[954]

Starting with *Stauder*,[955] and later rulings on more and more cases involving issues of fundamental rights,[956] the Court established a comprehensive "unwritten" catalogue of rights, which was eventually adopted as the Charter of Fundamental Rights. From the first case until the adoption of the Charter (and even afterwards), the Court was criticised for various reasons. At the beginning, it was criticised for the fact that the its initial motivation was not the protection of fundamental rights *per se*, but the protection of the supremacy of Community law as well as the autonomy of the legal order.[957] After *Internationale Handelsgesellschaft* and *Nold*,[958] it was criticised for protecting fundamental rights only to the extent this was necessitated by the goal

952 Opinion of AG Slynn in *Case 155/79 AM&S*, [1982] ECR 1575, 1649.

953 According to Groussot, the Court's approach is neither minimalist nor maximalist, but "evaluative". For details see, Groussot, *General Principles of Community Law*: 48-50. See also, M. Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?* (Åbo: Åbo Akademi University Press, 2007). 67-70.

954 For an example, see L. Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union," *Common Market Law Review* 35(1998).

955 Stauder was the first case in which the Court recognized that fundamental human rights were enshrined in the general principles of Community law and were protected by the Court. See, *Case 29/69 Stauder*, [1969] ECR 419, para. 7.

956 For a comprehensive survey of the rights protected and recognized as general principles of EU law see, K. Lenaerts et al., *European Union Law* (London: Sweet & Maxwell; Thomson Reuters, 2011). 845-48.

957 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 65.

958 In *Internationale Handelsgesellschaft*, the Court identified "the constitutional traditions common to the Member States" as the source of inspiration for such rights, and ruled that those rights had to be "ensured within the framework of the structure and objectives of the Community". See, *Case 11/70 Internationale Handelsgesellschaft*, [1970] ECR 1125, para. 4. In *Nold*, it identified international treaties for the protection of human rights as an additional source of inspiration. However, according to the Court, fundamental rights were not "unfettered prerogatives". They had to be viewed in the light of the social function of that right and the activities it protected, i.e. they were "subject always to limitations laid down in accordance with the public interest". Hence, those rights could be subject to certain limits justified by the overall objectives of the Community, as long as the substance of those rights was left intact. See, *Case 4/73 Nold*, [1974] ECR 491, para. 14.

of economic integration.[959] Others argued that the Court's use of fundamental rights was 'instrumental', the underlying motive being the extension of its jurisdiction to matters reserved to Member States.[960] The main critique regarding the state of affairs before the adoption of the Charter was that the case law developed by the Court lacked legal certainty and predictability.[961] Despite all the criticisms and discussions the prominence of fundamental rights in the EU legal order increased slowly but surely.[962]

6.3.3.3 Constitutionalisation of fundamental rights by inclusion in primary law

Late judge Mancini claimed that the *acquis* of fundamental rights developed by the Court was "one of the greatest contributions that the court has made to democratic legitimacy in the Community".[963] Similarly, Member States declared that "[p]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy".[964] In other words, the judges' contribution was acknowledged and matched by the Member States: first, by recognizing and enshrining the protection of fundamental rights in the Treaties, and secondly, by crystallizing the case law of the Court in the Charter of Fundamental Rights.[965] What follows is a brief overview of the inclusion and rise of fundamental rights in the Treaties, i.e. from appearing in the preamble to becoming Article 6 TEU and rising up to constitute Article 2 TEU with the Lisbon Treaty revision.

Fundamental rights were first mentioned in the preamble to the Single European Act.[966] It was only with the Treaty on European Union adopted

959 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 2-3.

960 J. Coppel and A. O'Neill, "The European Court of Justice: taking rights seriously?," *Legal Studies* 12, no. 2 (1992): 227. For another critical account of the fundamental rights jurisprudence of the Court, see P. R. Beaumont, "Human Rights: Some Recent Developments and Their Impact on Convergence and Divergence of Law in Europe," in *Convergence and divergence in European Public Law*, ed. Paul R. Beaumont, Carole Lyons, and Neil Walker (Oxford: Hart Publishing, 2002).

961 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 3.

962 P. (ed.) Alston, *The EU and Human Rights* (OUP, 1999); R. Lawson, "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg," in *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, ed. R. Lawson and M. De Blois (Martinus Nijhoff Publishers, 1994).

963 G. F. Mancini, *Democracy and Constitutionalism in the EU* (Oxford and Portalnd, Oregon: Hart Publishing, 2000). 45.

964 See Presidency Conlcusions to the Cologne European Council, 3-4 June 1999, Annex IV.

965 The Charter was first proclaimed as a non-binding instrument in December 2000, OJ C 364/1, 18.12.2000. By virtue of the reference to the Charter that was included in Article 6(1) TEU with the Lisbon Treaty revision, it has a primary law status, OJ C 306/1, 17.12.2007.

966 The Single European Act made the following reference in its preamble: "the findamental rights recognized in the constitutions and laws of the Member States, in the Convention for Protection of Human Rights and Fundamental Freedoms and the Social Charter, notably freedom, equality and social justice".

in Maastricht that they found their place in the main text of the Treaties as Article F(2). The latter article stipulated that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from constitutional traditions common to the Member States, as general principles of Community law".[967] As important as this development was, Von Bogdandy argues that the latter article, which is now Article 6(3) TFEU, was formulated entirely from a limiting perspective. It commits "the Union to general principles of law which have no constitutive function but only a restrictive one".[968]

Von Bogdandy's argument does not diminish the importance of Article 6(3) TFEU. It rather serves to highlight a subsequent development that took the protection of fundamental rights to a new level. That development was the inclusion of Article 6(1) TEU by the Amsterdam Treaty revision. Article 6(1) TEU provided that "[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". According to Von Bogdandy, this provision laid down the normative core content on which the EU is established, and as such, the argument goes, the constitutional content of Article 6(1) TEU by far surpasses the constitutional dimension of Article 6(2) TEU (ex Article F(2)). He concludes that "[n]ow not only restrictive, but also a constitutive European constitutionalism has found its recognition in positive law".[969] As discussed above, the Court's statements on protection of fundamental rights, democracy and the rule of law in the *Kadi* ruling, support this view.[970]

With the Lisbon Treaty revision, the Member States renamed the "principles" on which the Union is founded as "values", and extended further the list. The significance and effect of the renaming remain to be seen. Article 2 TEU now reads as follows:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

967 Article F(2), became Article 6(2) TEU with the Amsterdam Treaty revision, and it is now Article 6(3) TEU after the Lisbon Treaty revision.

968 A. von Bogdandy, "Founding Principles," in *Principles of European Constitutional Law*, ed. A. von Bogdandy and J. Bast (Oxford, München: Hart Publishing, Verlag C.H. Beck, 2011), 22.

969 Ibid.

970 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, paras. 303-04.

Undoubtedly, one of the most significant developments was the Charter's assuming primary law status with the entry into force of the Lisbon Treaty on 1 December 2009.[971] Its text was not reproduced in the Treaties, but Article 6(1) TEU stipulates that the Charter "shall have the same legal value as the Treaties". This was not an easy decision for the Member States, which were wary of conferring greater powers to the Union via the Charter. The US experience illustrated how a Bill of Rights of very limited scope could have centralizing effects engendered by the creative interpretation of a Supreme Court.[972] Thus, Member States wanted to prevent that from happening by making absolutely clear that the Charter would have a limited personal and material scope.[973] Hence, the Charter was addressed to "the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States *only when they are implementing Union law*".[974]

Another important development illustrating the importance given to fundamental rights was the inclusion of Articles 7 TEU and 309 EC (now Article 354 TFEU) with the Amsterdam Treaty. The aim was to provide a legal basis for the Union to react against a Member State that would seriously and persistently breach the principles (now values) recognized in Article 6(1) TEU (now Article 2 TEU). The drawback of this provision was that it provided a *post hoc* tool, i.e. it could not be used preventively. The Nice Treaty amendment corrected this drawback by also adding a mechanism enabling preventive action in the event of "a clear risk of a serious breach" (Article 7(1) TEU). When the European Council determines the existence of such a risk under Article 7(2) TEU, the Council under Article 7(3) TEU "may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council".

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971 OJ C 306/1, 17.12.2007.

972 It is interesting to note the US experience in this respect. Similarly, the framers of the US constitution were afraid that a Bill of Rights would widen federal legislative powers. It was introduced only later in 1791, to appease those opposing the Constitution on the ground that it did not contain a Bill of Rights. So when adopted, it had a limited scope ratione personae. It would only apply to the federal government and would not in any way affect the legislative powers of the states. However, over the years, the Supreme Court extended the application of almost all the rights contained in the Bill of Rights to the states as well, thereby limiting their legislative competence. This extension was based on the theory of incorporation, according to which the Fourteenth Amendment, which was addressed to the states, "incorporates" the Bill of Rights. For more details see, A. Knook, "The Court, the Charter, and the Vertical Division of Powers in the European Union," *Common Market Law Review* 42(2005): 374-79. T. M. Fine, *An Introduction to the Anglo-American Legal System* (Navarra: Thomson-Aranzadi, 2007). 28-36.

973 Knook, "The Court, the Charter, and the Vertical Division of Powers in the European Union," 373-74.

974 Emphasis added. Article 51(1) CFR. See also, *Case C-617/10 Åkerberg Fransson*, judgment of 26 February 2013, n.y.r.

Article 7 TEU is mainly a political tool. Yet, its mere existence is quite significant as it very clearly illustrates the underlying values of the Union, the breach of which might trigger sanctions. It is not only the possibility of sanctions that demonstrates the importance and constraining force of fundamental rights, but also the fact that in terms of scope Article 7 TEU is all encompassing, i.e. all Member State action falls within its scope. The fact that it is a provision that makes no distinction as to whether Member States act within or outside the scope of EU law, illustrates how central fundamental rights are to the EU legal order.

6.3.3.4 Role of fundamental rights in the constitutionalisation of the legal order

While the previous section covered how fundamental rights slowly but surely obtained primary law status, and how they rose to become Article 2 TEU, it should be emphasized that fundamental rights played a constitutionalizing role also as unwritten general principles of EU law. This sub-section firstly, looks briefly into how fundamental rights, as general principles, were used by the Court to increase the autonomy of the Union legal order. Secondly, it examines the significance of adopting a binding Charter of Fundamental Rights that has primary law status.

6.3.3.4.1 As general principles of Union law

"General principles" is a broad category that is a moving target as it evolves by every case delivered by the Court. Some of the functions and legal effects of the term are more controversial than others.[975] To begin by mentioning briefly the most important functions of those principles in the Union legal order: they serve to fill gaps, as aid to interpretation and as grounds for review.[976] The fact that every scholar creates different sub-categories of general principles of EU law is an indication of the relative character of the

975 Editorial Comments, "Horizontal Direct Effect – A Law of Diminishing Coherence," *Common Market Law Review* 43, no. 1 (2006); A. Masson and C. Micheau, "The Werner Mangold Case: An Example of Legal Militancy," *European Public Law* 13, no. 4 (2007); P. Cabral and R. Neves, "General Principles of EU Law and Horizontal Direct Effect," *European Public Law* 17, no. 3 (2011).

976 Tridimas, *The General Principles of EU Law*: 29-35; See, S. Peers, "The 'Opt-out' that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights," *Human Rights Law Review* 12, no. 2 (2012); V. Belling, "Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights," *European Law Journal* 18, no. 2 (2012); D. Anderson and C. C. Murphy, "The Charter of Fundamental Rights," in *EU Law After Lisbon*, ed. A. Biondi, P. Eeckhout, and S. Ripley (Oxford: OUP, 2012), 166-69. A. Dashwood et al., *Wyatt and Dashwood's European Union Law* (Oxford and Portland, Oregon: Hart Publishing, 2011). 321.

term.[977] As rightly noted by Tridimas, those classifications usually raise more questions than they answer.[978] While it is useful to keep in mind the breadth of the term as well as the existence of different sub-categories of general principles, our focus here is on the sub-category of fundamental rights as defined in Article 6(3) TFEU.[979]

As far as they encapsulate fundamental rights, general principles also have a legitimising function, as they reflect the norms and values on which the legal order is built.[980] Their legitimising function goes hand in hand with their function as constraint. Tridimas elaborates on how in the aftermath of the Second World War distrust of executive power led to the search of constitutional principles to constrain administrative discretion in Germany. The development of general principles of EU law can be seen as a parallel development. More specifically, it was "an effort to assert the legitimacy and supremacy of Community law over conflicting national traditions",[981] by subjecting the

977 Every author uses a different classification of general principles of EU law. Some general principles find themselves under more than one category, while others are not categorized as "general principles" at all by some scholars. To begin with Tridimas, he identifies two main types of general principles: "(a) Principles which derive from the rule of law. In this category belong, for example, the protection of fundamental rights, equality, proportionality, legal certainty, the protection of legitimate expectations, and the rights of defence. … (b) Systemic principles which underlie the constitutional structure of the Community and define the Community legal edifice. These refer to the relationship between the Community and Member States, and include primacy, attribution of competences, subsidiarity, and the duty of cooperation provided for in Article 10 EC." Tridimas, *The General Principles of EU Law*: 4. Schermers and Waelbroeck identify three types of general principles of law: (a) Compelling (or constitutional) legal principles; (b) Regulatory principles common to the laws of the Member States; (c) General principles native to the Community legal order. For the definition and distinction of each group see, H. G. Schermers and D. F. Waelbroeck, *Judicial Protection in the European Union*, 6th ed. (The Hague: Kluwer Law Internation, 2001). 28-30. Groussot divides general principles of law into three groups: administrative principles (e.g. proportionality, non-discrimination and legitimate expectations), the procedural principles (e.g. rights of defense), and fundamental rights (e.g. right to property). He also traces back the origins of those principles to the national jurisdictions from which they were derived. See, Groussot, *General Principles of Community Law*: 4 and 17-43.

978 Tridimas, *The General Principles of EU Law*: 3.

979 Article 6(3) TEU reads as follows: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

980 Lindfelt, *Fundamental Rights in the European Union – Towards Higher Law of the Land?*: 12.

981 Tridimas, *The General Principles of EU Law*: 24. Similarly, Von Bogdandy claims that "the phenomenon of one-sided public power" is at the centre of every constitutional order. This one-sidedness clashes with "the central tenet of modern Europe", that is with individual freedom, turning this clash into the central problem of modern constitutional law. Both national as well as EU constitutional law are preoccupied with "the constitution, organization and limitation of this problematic one-sidedness". He argues that most, if not all constitutional principles are concerned with this problem. See, Bogdandy, "Founding Principles," 24.

exercise of public power to substantive and procedural limitations,[982] without getting into conflict with national constitutional courts.

As mentioned before, the founding Treaties are framework treaties i.e. *traités cadres*. They did not and still do not contain "a complete set of rules and principles which is necessary to redeem the promise of reining in the exercise of political power by the 'rule of law'".[983] It was the Court of Justice that developed those principles based on its mandate to "ensure that in the interpretation and application of this Treaty *the law* is observed".[984] According to AG Mázak, by formulating general principles of EU law, the Court has "added flesh to the bones of Community law, which otherwise … would have remained a mere skeleton of rules, not quite constituting a proper legal 'order'".[985] For others, general principles constitute the 'spirit' of the Treaties, or of any constitution, by imbuing it with meaning going beyond the black letter of its provisions.[986] The Supreme Court of Canada has expressed this view eloquently in the following paragraph:

> 'The constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution…Those principles must inform our overall appreciation of the constitutional rights and obligations.'[987]

Similarly, Tridimas is of the opinion that general principles are an expression of the constitutional standards underlying the EU legal order; hence recourse to them constitutes an integral part of the methodology employed by the Court of Justice. Since general principles embody constitutional values, they are capable of influencing the interpretation of written rules even in the absence of gaps.[988] As illustrated above, the most significant of those principles have been codified by the Member States in the Treaties. In the pre-Lisbon Treaty on the European Union they were called the *principles* on which the Union

982 M. Herdegen, "General Principles of EU Law – the Methodological Challenge," in *General Principles of EC Law in a Process of Development*, ed. U. Bernitz, J. Nergelius, and C. Cardner (Great Britain: Kluwer Law International, 2008), 3.

983 Ibid., 344.

984 Emphasis added. Now Article 19(1) TEU.

985 Opinion of AG Mázak in *Case C-411/05 Félix Palacios de la Villa*, [2007] ECR I-08531, para. 85.

986 Von Bogdandy argues that Article F in the Maastricht Treaty, as well as Article 6(2) TEU in the Amsterdam version were formulated from a limiting perspective. Therefore, they had only a 'restrictive' function, as opposed to the 'constitutive' function of Article 6(1) TEU (now Article 2 TEU). Bogdandy, "Founding Principles," 15.

987 Reference re Secession of Quebec, [1998] 2 SCR 217 (Can) to question 1, cited in ibid.

988 Tridimas, *The General Principles of EU Law*: 19.

is founded, while under current Article 2 TEU they are the *values* on which the Union is founded. No matter what their official designation is, scholars, and the Court of Justice,[989] agree on the fact that they constitute "the top tier of the hierarchy of norms of EU law".[990] They express the normative core content on which the EU is built, and are seen as the recognition in positive law of "a constitutive European constitutionalism".[991]

To sum up, general principles have contributed to the constitutionalisation of the legal order in many senses of the term. First of all, as just mentioned above, some of those principles have become constitutional by virtue of being codified in the Treaties, i.e. "the constitutional charter" of the Union. Secondly, they have contributed to the constitutionalisation of the legal order by incorporating the protection of fundamental rights,[992] by establishing the rule of law, and overall by laying down substantial and procedural constraints on the exercise of law making power in the EU. Thirdly, they have contributed to the process whereby the Treaties have asserted their normative independence *vis-à-vis* the Member States, and have evolved into "the founding charter of a supranational system of government."[993] As to how the latter happened, Von Bogdandy explains the role of principles in formulating an autonomous legal discourse, which strengthens the autonomy of courts *vis-à-vis* politics and allows for an internal development of the law that circumvents Article 48 EU.[994]

6.3.3.4.2 As part of the Charter of Fundamental Rights

Lastly, the codification of fundamental rights in the Charter has led many to view it as "the centrepiece of the current EU constitutionalization process".[995] With its clear constitutional overtones, the Charter, as the EU's 'Bill of Rights',[996] contributes further to this shift away from the international legal order where the Member States are the 'Masters of the Treaties', towards "a

989 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

990 Tridimas, *The General Principles of EU Law*: 16. C. Eckes, "Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order," *European Law Journal* 18, no. 2 (2012): 241.

991 Bogdandy, "Founding Principles," 22.

992 Von Bogdandy argues that individual rights were essential for the constitutionalisation of the Union, however he acknowledges that those rights were rarely qualified as fundamental rights. He claims that "integration has followed the functionalist, not the constitutionalist path". ibid., 45.

993 This definition of 'constitutionalisation' has been provided by Tridimas, *The General Principles of EU Law*: 5.

994 Bogdandy, "Founding Principles," 18.

995 P. Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question," *Common Market Law Review* 39(2002): 945.

996 G. De Búrca and J. B. Aschenbrenner, "The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights," *Columbia Journal of European Law* 9(2002-2003): 372.

genuinely autonomous legal order" with "a self-sustaining constitution".[997] It reinforces the democratic legitimacy of the legal order,[998] by providing for a constitutionalized system of protection of fundamental rights as well as by constraining the scope of action of Union institutions and Member States.

6.4 Application of constitutional constraints

The entrenchment and inviolability of certain fundamental rights is the hallmark of modern constitutionalism as far as it means "nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process".[999] The latter understanding of constitutionalism is criticised regarding its legitimacy, or "the 'undemocratic nature' of judge-made higher law".[1000] It is accused of positing democracy versus rights.[1001] However, as far as one talks about the Treaty amendment process, which is "characterized by a singular lack of transparency and real 'democratic' choice, then it is suggested that the guarantee of judicial control by a Court concerned to protect the rights of individuals and their fundamental freedoms may be essential to fulfil the characterization of the EC Treaty as 'a constitutional

997 Ibid., 364.

998 Ibid., 368; O. Zetterquist, "The Charter of Fundamental Rights and the European Res Publica," in *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. G. Di Federico (Springer, 2011), 8.

999 Bellamy, "The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy," 436. Similarly, Dworkin points out that constitutionalism is increasingly understood as "a system that established legal rights that the dominant legislature does not have the power to override or compromise". See, Dworkin, "Constitutionalism and democracy," 2.

1000 Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces," 65.

1001 According to Dworkin the conflict between democracy and rights "is illusory, because it is based on an inaccurate understanding of what democracy is". He clarifies that democracy does not merely mean majority rule, i.e. "mere majoritarianism does not constitute democracy unless further conditions are met". Even though there is no agreement as to exactly what those conditions are "some kind of constitutional structure that a majority cannot change is certainly a prerequisite to democracy". For example, argues Dworkin, there must be rules to ensure that a majority cannot disenfranchise a minority, or abolish future elections. See, Dworkin, "Constitutionalism and democracy," 2; building on Dworkin's arguments, Schauer adds that "[j]ust as we might expect anyone – including judges, lawyers, members of Congress, the President, and ordinary citizens – to be systematically deficient at the task of acting against self-interest, so, too, might we expect majorities to have the same systematic deficiencies. … [Hence], the same arguments for being reluctant to let police officers, presidents, attorneys general, and lawyers police themselves would also apply to the policing of majorities and the policing of the people, for this is a large part of what rights against majorities do". See, F. Schauer, "Judicial Supremacy and the Modest Constitution," *California Law Review* 92(2004): 1064; on the conflict between democracy and rights see also, Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment," 252-53.

charter based on the rule of law'."[1002] As mentioned in the introduction, it was mainly the historical experience of the Second World War, which demonstrated that democracy is a necessary but not sufficient guarantee for the protection of individual rights and freedoms. That was for instance, the rationale behind entrenching those rights in an "eternity clause" in the German Constitution.[1003]

In the same vein, Vilaça and Piçarra argue that the idea that Member States are free to revise the Treaties as they want, "disregards the obvious fact that the Treat[ies] not only create[s] rights and obligations on the part of the Member States but also create[s] fundamental rights on the part of their nationals, such as those relating to free movement of persons".[1004] Hence, goes the argument, the Treaties "[are] not and could not be at the entire disposal of the Member States anymore than the fundamental rights embodied in their respective constitutions as States based on the rule of law could ever be".[1005]

As illustrated by the incorporation of general principles of law based on the common constitutional traditions of Member States, as well as ECHR to which all Member States are parties, the Union legal order is not insulated from that of its Member States. The interaction between the two has been studied widely, and is considered "entirely normal and healthy".[1006] In this respect, it is perhaps inevitable that the Court takes up the limits to revision drawn by national constitutions and constitutional courts as an example in this respect.[1007] After decades of interaction, harmonization and approximation between legal orders, it is argued that "a substantial part of the consti-

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1002 Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces," 65.

1003 See, Goerlich, "Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany," 397-412; Herzog, "The Hierarchy of Constitutional Norms and Its Functions in the Protection of Basic Rights," 90-93. More recently, the Czech Constitutional Court performed review around a non-amendable Article 9(2) of the Czech Constitution, which was included to protect the constitution against changes to essential requirements of a democratic state governed by the rule of law. For more details, see I. Šlosarèík, "Czech Republic 2009-2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections," *European Public Law* 3(2013): 435.

1004 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 50.

1005 Ibid., 50-51.

1006 Ibid., 56.

1007 The Court's approach in *Kadi*, also reminded many scholars of the approach taken up by the national constitutional courts, especially that of the Bundesverfassungsgericht in early 1970s, when it declared that "so long as" there were no mechanisms for the protection of fundamental rights at Union level, it would not hesitate to review the judgments of the Court of Justice. (The case triggering the so-called " Solange" approach or cases was Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 11 25.) For the similarity between the approaches of national constitutional courts of 1970s and that of the Court of Justice in *Kadi*, see A. von Bogdandy et al., "Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States," *Common Market Law Review* 49(2012): 489-520.

tutional core of the [Union] ultimately coincides with the fundamental principles shared, to a greater or lesser degree, by the various national constitutional orders, and that therefore, to that extent, the material limits to be preserved in the [Union] legal order derive, quite simply, from the transposition to the [Union] level of those which, identical or similar in nature, are laid down by the national constitutions".[1008]

6.4.1 Are the "very foundations" impossible to amend?

As illustrated by history, no regime, no legal order is cast in stone. Rarely are States able to prevent revolutions, which is a clear illustration of the fact that their constitutions are not capable of preventing their own violation, they "can only deny any semblance of legality to such violation".[1009] The Union legal order is not much different from those of States in this respect as well.

Weatherill agrees that the Union legal order has "inalienable elements in its "very foundations"",[1010] as suggested by the Court in its Opinion 1/91. He adds that "[t]here is and should be *an irreducible minimum* to [Union] law – as seen from within".[1011] However, as a matter of public international law, he argues that it is difficult to envisage how Member States could be prevented from amending the Treaties as they wish, provided they all agree on the desired changes. He warns that if those changes are of a fundamental nature, this might mean the existing legal order has been brought to an end. Member States are capable of doing that "acting 'from outside'".[1012] A similar warning comes from Ehlermann, who argues that constraining the freedom of amending the Treaties by setting unwritten material limits might induce Member States to rely on conventional public international law so as to bypass those limits by arriving at a consensus outside Union law,[1013] as illustrated by the fiscal compact.

In other words, what is argued here is not that the substantive limits to amendment set by the Court will protect the legal order and its essential characteristics forever, but simply that the essential characteristics of the legal order or its "very foundations" are a *sine qua non* (essential pre-requisite) for the continuation of the legal order *as it is*. The fact that the nature of the legal

1008 Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: 56-57.
1009 Ibid., 52.
1010 Weatherill, "Safeguarding the Acquis Communautaire," 168.
1011 Emphasis added. Ibid.
1012 Ibid.
1013 C.-D. Ehlermann, "Mitgliedschaft in der Europäischen Gemeinschaft – Rechtsprobleme der Erweiterung, der Mitgliedschaft und der der Verkleinerung," *Europarecht* 19(1984): 123; cited in Vilaça and Piçarra, *Are there material limits to the revision of the Treaties on the European Union?*: footnote 51.

order can be changed or be brought to an end by the Member States is not disputed. It is worth noting that changing the essential characteristic of the legal order will mean the end of the Union legal order, as we know it, and the birth of a new, different legal order. In short, the latter will no longer be the legal order of *Van Gend en Loos*.[1014] It will be of a legal order of a different character that rests on new foundations. Hence, the argument put forward here is that there are constraints on Member States as primary law makers assuming that they want to maintain the essence of the *existing* legal order.

6.4.2 Are the "very foundations" able to constrain Member States as primary law makers?

To repeat the gist of the argument, Member States are constrained by the essential characteristics of the Union legal order, its constitutional foundations, or as put by the Court, by its "very foundations", as long as they want to maintain it and continue to act within its framework. As described in the introduction, there are two types of constraints: internal (normative) and external constraints. They can function independently as well as jointly by reinforcing each other. The section above demonstrated how the protection of fundamental rights spilled over from the national constitutional traditions into the case law of the Court of Justice, by the initial push of few national constitutional courts. After that, slowly but surely their protection was deeply ingrained in the Union legal order, firstly, as general principles of EU law, and then enshrined in the Treaties initially as principles (*ex* Article 6 TEU) and now as values (Article 2 TEU) on which the legal order is established. Their inclusion into the Treaties, as well as the case law of the Court is another illustration of firstly, how deeply entrenched or internalized those principles are; and secondly, of how both types of constraints reinforced each other over time.

After having examined the process of internalization of fundamental rights in the Union legal order, it is also worth looking more closely at the source of external constraints, that is the threat of sanctions flowing from the Court of Justice when Member States do not comply with some of the principles constituting part of the "very foundations", especially in their role as primary law makers. In this respect, the recent *Pringle* case points towards the possibility of judicial review, as well as the obligation on Member States to act in line with general principles whenever they act in the scope of Union law, irrespective of whether they act as primary or secondary law makers.

The *Pringle* judgment illustrates that primary law making procedures are amenable to judicial review. The case arose after the adoption of European Council Decision 2011/199/EU, which concerned the amendment of Article

1014 *Case 26/62 Van Gend en Loos.*

136 TFEU by insertion of a new paragraph 3.[1015] The amendment was to be carried out on the basis of Article 48(6) TEU, the newly introduced "simplified revision procedure". Mr. Pringle claimed that the amendment of Article 136 TFEU by Decision 2011/199 was unlawful. Hence, the first question referred to the Court concerned the validity of Decision 2011/199 in so far as it amended Article 136 TFEU on the basis of Article 48(6) TFEU.

In addition to the Council and the Commission, ten Member States intervened in the case arguing that the Court's jurisdiction to examine the first question was limited, if not excluded. They argued that the Court had no power to assess the validity of Treaty provisions under Article 267 TFEU. The Court's response was that it was the validity of Decision 2011/199, an act of a EU institution that was at stake and not that of Article 136 TFEU. Since the European Council was one of the Union's institutions under Article 13(1) TEU, the Court ruled that it had jurisdiction to examine the validity of the contested decision under Article 267(1)(b) TFEU.[1016]

As to its analysis of the matter, the Court began by admitting that the examination of the validity of primary law does not fall within its jurisdiction under Article 267(1)(a) TFEU. However, it added that after the introduction of the simplified revision procedure, it was up to the Court to ensure that Member States comply with the conditions laid down by the simplified procedure. For that purpose, the Court had to check, first, whether the procedural rules laid down in Article 48(6) TEU were met;[1017] second, whether the amendments concern only Part Three of the TFEU as required by the first subparagraph of Article 48(6) TEU; and lastly, whether there is no increase in the competences of the Union as required by the third subparagraph of Article 48(6) TEU.

According to the Court, compliance with the conditions provided for in Article 48(6) TEU had to be monitored in order to establish whether the simplified revision procedure was applicable. As the institution responsible to ensure that in the interpretation and application of the Treaties the law is observed under Article 19(1) TEU, it fell to the Court to examine the validity of the contested decision. In other words, the Court had jurisdiction to examine

1015 OJ L 91/1, 6.4.2011. The following paragraph was to be added to Article 136 TFEU: "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

1016 *Case C-370/12 Pringle*, paras. 30-31.

1017 The Court did not list the procedural requirements of Article 48(6) TEU, probably because they were all met in this case. One of those requirements is provided in the second sentence of subparagraph 2 of Article 48(6) TEU and reads as follows: "The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area".

the validity of Decision 2011/199 in the light of the conditions of Article 48(6) TEU.[1018]

At the end of a comprehensive review, the Court found that there was nothing capable of affecting the validity of the contested decision. However, it should be noted that in addition to checking whether the procedural conditions of Article 48(6) TEU were met, the Court also had to go into the substance of the matter. It was not enough to establish formally that Article 136 TEU is a provision in the Part Three of TFEU. The Court also had to check whether the proposed amendment affected provisions in Part One of the Treaty, that is whether the amendment would encroach on the competences of the Union in the areas of monetary policy and coordination of Member States' economic policies.[1019] After establishing that the proposed revision concerned only provisions of Part Three of TFEU, the Court went on to check the content, that is the substance of the proposed amendment, which was laid down in Article 1 of the contested decision, to ensure that the amendment would not entail the conferral of new competences on the Union.[1020]

It should be noted that the Court's approval was not the end of the simplified revision procedure. In order to attain primary law status, Decision 2011/199 had to be approved by the Member States in accordance with their constitutional requirements as stipulated by the last sentence of subparagraph two of Article 48(6) TEU. That is actually how every procedure entailing amendment, or changes to the Treaties ends, be it the ordinary revision procedure (Article 48(4) TEU) or the enlargement procedure (Article 49(2) TEU). The fact that those procedures have intergovernmental components, however, does not exclude them from the Court's jurisdiction, as suggested by *Pringle*.

The second question referred to the Court is also of relevance for the arguments put forward in this thesis, more specifically, for establishing that general principles of EU law are also capable of constraining Member States when acting as primary law makers under Article 49 TEU. The second question concerned the interpretation of various Treaty provisions,[1021] as well as of the general principle of effective judicial protection.[1022] The referring court wanted to establish "whether those articles and principles preclude a Member State whose currency is the euro from concluding and ratifying an agreement

1018 *Case C-370/12 Pringle*, para. 35.
1019 Ibid., paras. 45-70.
1020 Ibid., paras. 71-76.
1021 Articles 4(3), and 13 TEU; and Articles 2(3), 3(1)(c) & (2), 119 to 123, and 125 to 127 TFEU.
1022 The second question also concerned the interpretation of Article 2 and 3 TEU, as well as the prinicple of legal certainty. However, the Court found the second question inadmissible as far as it concerned those two provisions and the prinipcle of legal certainty, on the ground that the order of reference failed to explain the relevance of those provisions and that prinicple to the outcome of the dispute.

such as the ESM Treaty".[1023] In other words, could those articles and general principles act as constraint on Member States in ratifying the ESM Treaty?

After analysing every provision individually, the Court ruled that none of those provisions precluded a Member State whose currency is the euro from concluding the ESM Treaty. As to the application and interpretation of the general principle of effective judicial protection, the applicant argued that the establishment of the ESM outside the Treaty framework would remove it from the scope of the Charter, which would breach the guarantee to effective judicial protection laid down in Article 47 CFR.

The Court responded by pointing out that Article 51(1) CFR is addressed to the Member States only when they are implementing EU law. According to Article 51(2) CFR, the Charter does not extend the field of application of Union law, establish new powers and tasks or modify those defined in the Treaties. Thus, the Court interprets EU law within the limits of powers conferred on it. The Court went on to explain that, "the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where … *the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism*."[1024] Thus, the Court concluded that the general principle of effective judicial protection did not preclude either the conclusion or the ratification of the ESM Treaty.

The explanation provided by the Court is pretty clear. The general principle of effective judicial protection and Article 47 CFR, which the Court seems to use interchangeably, will not apply to a Treaty (the ESM), which will be born entirely outside the structures of the Treaties. The Treaties do not confer any competence on the Union to establish the ESM; whereas, they contain a procedure to admit new Member States under the conditions stipulated by Article 49 TEU as well as to amend the Treaties under the conditions stipulated by Article 48 TEU. Thus, general principles do apply and constrain Member States when they are acting within procedures embedded in the Treaties.

The Court of Justice has jurisdiction to review whether the conditions laid down in those provisions are met, and whether the proposed amendments comply with general principles of EU law. It should be noted that the most straightforward way for the Court to review the validity of a European Council decision would be before its entry into force, that is before the act it adopts is ratified by all Member States. Even though the same decision could be challenged after ratification, the latter process would be trickier in terms of its consequences.[1025]

1023 *Case C-370/12 Pringle*, para. 77.

1024 Emphasis added. Ibid., para. 180.

1025 Hillion notes that the Court could interpret and check the application of the provisions of a future Turkish Accession Treaty via the preliminary ruling procedure (Article 267 TFEU). He argues that the more radical option would be the use of the plea of illegality

Pringle seems to be in line with AG Lenz' Opinion in *LAISA* where he argued that "the possibility cannot be excluded that the Member States themselves might enact primary law contrary to the Treaty which would then necessarily be subject to review by the Court, not only by means of an interpretation of the kind constantly undertaken by the Court in proceedings under Article 177 of the EEC Treaty (4) [now Article 267 TFEU] but also in a direct action, be it eventually essentially on the basis of Article 164 of the EEC Treaty [now Article 263 TFEU]".[1026] It should be noted that previously, the European Council was not one of the institutions listed in the Treaties consequently its acts were not within the jurisdiction of the Court of Justice. Whereas after Lisbon, the validity of its acts can be challenged, both via Article 267 TFEU as in *Pringle*, as well as via Article 263 TFEU.[1027]

As Von Bogdandy underlines, it is the Member States that compose the European Council and Council and as such they are "in the centre of the public authority constitutionalised by the Treaties, *while being strictly subjected to primary law*".[1028] In other words, Member States act as Member States of the Union whenever they act within the scope of EU law, i.e. whenever they act within the procedures, structures of the Union or whenever their actions affect areas or competences in which their actions have been pre-empted by the Treaties or secondary EU law. Thus, whenever they act within the scope of EU law,[1029] they are bound by the Treaties, the Charter, as well as by general principles of law, which together constitute primary law.

In conclusion, if a Member State or an institution of the Union applies to obtain the Court's Opinion on the compatibility of the PSC with Union law included in Turkey's Accession Agreement after the Council's approval of the agreement,[1030] or challenge its validity under Article 263 or 267 TFEU, just

(Article 277 TFEU) whereby a Turkish national asks the Court to hold inapplicable a safeguard measure claiming that the basis on which it is adopted (that is the PSC in the Accession Treaty) is itself invalid for not being compatible with fundamental principles of Union law. For a more detailed discussion, see Hillion, "Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?," 281-82.

1026 See, Opinion of AG Lenz delivered on 1 December 1987 in Joined Cases 31 and 35/86 LAISA and CPC España v Council of the European Communities [1988] ECR 2285, part B -I- (a) of the Opinion.

1027 Article 263(1) TFEU provides as follows: "The Court of Justice of the European Union shall review the legality of legislative acts … of the European Council intended to produce legal effects vis-à-vis third parties."

1028 Emphasis added. Bogdandy, "Founding Principles," 35.

1029 In the explanations to the Charter, OJ C 303/32, 14.12.2007, the cases referred to explain the statement "Member States when they act in the scope of Union law" are the following: *Case 5/88 Wachauf*, [1989] ECR 2609; *Case C-260/89 ERT*; *Case C-309/96 Annibaldi*, [1997] ECR I-7493. While the first case seems to exemplify the most straightforward situation, that is Member States acting as agents of the Union in implementing EU law, the Court has interpreted it recently in boarder terms, that is not only when Member States are directly implementing an EU Directive for instance, but also when a national law, which was not put in place to implement a Union obligation, is connected to or has an effect

like it did in *Pringle*, the Court would be able to review the legality of the Council Decision approving the Agreement. The Court could review the contested Council Decision on procedural grounds as it already stated that Article 49 TEU is "*a precise procedure encompassed within well-defined limits for the admission of new Member States*",[1031] which can be interpreted to mean that it is up to the Court to rule on whether the procedural requirements of Article 49 TEU have been met. Moreover, like in *Pringle*, the Court could carry a limited substantive review to check whether there's anything in the Accession Agreement that goes beyond being a mere "adjustment" that aims to integrate the new Member State into the structures of the Union.

The Court should not be expected to uphold an Accession Agreement that contains elements which are incompatible with the "the very foundations" of the EU legal order as defined in Article 2 TEU. The fact that this could be the case is demonstrated more clearly in the following Chapter, by providing a specific example of how the PSC would violate one of the founding principles of the Union legal order, that is the principle of non-discrimination on the basis of nationality.

6.5 Conclusion

This Chapter discussed the existence of the "very foundations" of the Union as an untouchable core, which acts as a constraint on Member States even when they act as primary law makers. The Court's *EEA Opinions*, *Opinion 1/09* and its pronouncements in *Kadi I* confirm the existence of fundamental principles that constitute "the very foundations of the [Union]" that have to be respected at all times. It was noted that a concept similar to that used by the Court, but not identical, the concept of "fundamental *acquis*" was coined first by Pescatore to indicate the existence of an *acquis* of superior rank, before the Court's *EEA*

to an issue regulated by EU law. See, *Case C-617/10 Åkerberg Fransson*, paras. 19-26. The ERT case exemplifies situations in which Member States derogate from Union law and the Court reminds them that they need to comply with fundamental rights even in cases of derogation. The obligation to comply with fundamental rights even in "derogation cases" was recently confirmed in *Case C-390/12 Pfleger*, judgment of 30 April 2014, n.y.r., paras 35-36. As to the Annibaldi case, it refers to a situation that is covered entirely by national law and has no link to EU law. The latter situations has been recently confirmed in *Case C-483/12 Pelckmans Turnhout NV*, judgment of 8 May 2014, n.y.r., paras 18-23. For a more detailed discussion of these three situations, see K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights," *European Constitutional Law Review* 8, no. 3 (2012): 376-87.

1030 The legal basis for obtaining the Court's Opinion is Article 218(11) TFEU [ex Article 300(6) EC]. For more information on the procedure, see Plender, "The European Court's Pre-emptive Jurisdiction: Opinions under Article 300(6) EC," 203-20.

1031 Emphasis added. *Joined Cases 31 and 35/86 LAISA and CPC España v Council of the European Communities*, para. 7.

Opinion. The implication of the existence of such a core of Union law for the inclusion of a PSC on free movement of persons is clear, as principles belonging to that core would arguably be able to constrain Member States from including such a clause if it were to violate any of those principles.

While the existence of "the very foundations" is not disputed very much, what is controversial is identifying the content of the notion defined by the Court. To be able to determine the content of the notion, firstly the original Treaties, case law and Opinions of the Court were examined for clues. In addition to the principles of the rule of law (now embedded in Article 19(1) TEU, ex Article 164 EEC), the autonomy of the legal order (*EEA Opinions* and *Opinion 1/09*) and protection of fundamental rights (*Kadi I*), it was argued that the fundamental freedoms and the core of Union citizenship also constitute part of those "very foundations".

The analysis on the substance of constitutional constraints begins with the four freedoms. They are identified as part of the "very foundations" due to several factors. Firstly, their central place in the original EEC Treaty, under the title "Foundations of the Community", as well as their vital role in the establishment of the internal market, which has been traditionally seen as the essence of the integration project. Secondly, The Court's case law and academic writing also confirm how crucial they have been and still are to the project of European integration. The analysis in this part focused on the development of the free movement of persons, since that is one of the areas in which the introduction of a PSC is considered. As they developed over time, the Court acknowledged that it considered the freedoms as part of the foundations of the [Union], and even as "fundamental rights". Similarly academics defined them as "economic constitutional rights".

The development that removed the adjective "economic" and turned free movement into almost (as it is still subject to some limitations) a fully-fledged constitutional right was the introduction of Union citizenship. While the concept is arguably the latest addition to the "very foundations" of the Union legal order, in our demonstration of the substance of constitutional constraints, it follows immediately the freedoms, mainly because it provides a clear illustration of the relationship between what is "destined to be the fundamental status of nationals of Member States" and the right to free movement of persons. While Union citizenship as provided in the Treaties initially was seen as a disappointment or an empty promise, the overview of the Court's case law illustrated how the Court managed to make something out of it, i.e. as put by O'Leary, how it fleshed out the bare bones of the citizenship concept.

As demonstrated above, the Court's case law on Union citizenship cut the existing connection between the right to free movement and its economic objective, i.e. the pursuit of an economic activity. Now the right to free movement, and the corollary right of equal treatment, which is analysed in more detail in the following Chapter, are directly linked to the status of Union citizenship. Free movement and equal treatment constitute the very core of

the citizenship status. Since a PSC on free movement of persons is bound to breach both aspects of the latter status, as (it will suspend the free movement rights of Union citizens of only Turkish nationality) it would be breaching the essence or the entire core of the citizenship concept. Hence, it is argued that Member States would be precluded from including such a clause that is liable to violate Union citizenship, "the" status of nationals of Member States, which is arguably part of the "very foundations" of the Union.

The third and final substantive constitutional constraint identified in this Chapter, which the Court already identified explicitly as one of "the principles that form part of the very foundations of the Union"[1032] is the protection of fundamental rights. Unlike the fundamental freedoms, fundamental rights were initially not even mentioned in the Treaties. Hence, the inception and rise of fundamental rights in the hierarchy of norms within the Union was briefly reviewed by examining the Court's case law in this area. The Court was the engine propelling the upward movement of those rights. Reaching the pinnacle in the hierarchy of norms in the Union legal order would however, not have been possible if it had not been for the approval of the Member States. That approval was manifested by the inclusion of protection of fundamental rights in the Treaties, and by giving them a more prominent place in each subsequent Treaty revision. The latter development, combined with the case law of the Court, created a virtuous circle that led to stronger protection and genuine internalization of fundamental rights at both Member State and Union levels.

Next, it was argued that fundamental rights played an important role in the constitutionalisation of the Union legal order in at least two senses of the word. Firstly, the development of fundamental rights and their inclusion in a binding Charter brought the Union legal order closer to those of nation states. Secondly, they contributed to the autonomisation of the Union legal order *vis-à-vis* the Member States, by helping the Court develop an autonomous legal discourse. Hence, the Court of Justice was identified as the main authority in the Union legal order competent to ensure respect for the substantive constitutional constraints and the "very foundations" of the legal order. It was noted however, that as constitutionalized as a legal order could be, that would not mean it could not be brought to an end. Just like revolutions terminate national legal orders, theoretically Member States are also, in principle, able to bring the Union legal order to an end. Hence, the argument forming the basis of this thesis was fine-tuned to claim that the "very foundations" of the Union constitute an untouchable core assuming that Member States want to maintain the fundamental structure of the existing legal order in place. Changing the fundamentals of the legal order would mean the end of the existing one and the creation of a new legal order.

1032 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 304.

While the entrenchment and internalization of fundamental rights illustrated their constraining power as normative or internal constraints, the recent *Pringle* judgment illustrated clearly how they could also be used as external constraints matched with the threat of sanction in the hands of the Court of Justice. In other words, *Pringle* was an example of the application of constitutional constraints. It showed that any Council Decision adopting a Treaty of Accession, before its ratification and transformation into primary law, could be challenged to check if it respects, firstly, the conditions stipulated by the procedure on the basis of which it was adopted, and secondly, principles that constitute part of the "very foundations" of the Union.

As for our test case, in the framework of Article 49 TEU, the Council Decision approving an Accession Agreement could be reviewed firstly, on procedural grounds, and secondly, on substantive grounds, so as to check whether what Article 49 TEU provides for has been respected. Regarding the former, the Court already established that Article 237 EEC (now Article 49 TEU) is "*a precise procedure* encompassed within *well-defined limits* for the admission of new Member States".[1033] The Court could check if those limits had been respected. Regarding the latter, the Court could check whether the "very foundations" of the Union were respected, and if there were anything in the Accession Treaty that went beyond being a mere adjustment carried out to facilitate the accession of the new Member State. Obviously, a PSC on free movement of persons that breaches few elements that constitute part of the "very foundations" of the Union will not be able to pass the test set by the Court. Hence, the next step (Chapter 7) is to establish that the proposed PSC would breach one of the fundamental principles of the Union legal order, which belongs to those "very foundations", namely the principle of non-discrimination on the basis of nationality or the principle of equality.

1033 Emphasis added. *Case 93/78 Mattheus v Doego*, para. 7.

7 The Principle of Equality as Part of the Constitutional Foundations of the Union: A Case Study

7.1 INTRODUCTION

This Chapter is going to demonstrate that equality is one of the most important values on which the Union is founded, and as such capable of constraining Member States and Union institutions alike, whenever they act within the scope of Union law. In other words, it is part of the constitutional foundations of the Union, or part of its "very foundations", which Member States need to respect at all times, including when they act as primary law makers under Article 49 TEU. The reason why the case study in this Chapter is based on the principle of equality rather than other principles, such as that of legal certainty, loyal cooperation or proportionality, is quite obvious, yet worth repeating.

The proposed PSC in Turkey's Negotiating Framework would be directly discriminating on the basis of nationality. As important as other principles are, the most obvious and egregious breach in the case of the inclusion of a PSC on free movement of persons in the future Turkish Accession Agreement would be first and foremost that of the principle of non-discrimination. Hence, since there is an overlap between the potential future breach caused by the PSC and arguably, the most important value or principle on which the Union is founded, it is only logical to have a look at the area that would be most affected by the adoption of the contested clause. Moreover, the stronger and more entrenched a principle is, the greater constraining power it has on Member States whenever they act within the scope of the Treaties, i.e. another reason to focus on the principle of non-discrimination on the basis of nationality.

The principle of equality is a multi-faceted and complex legal concept,[1034] which has been a source of inspiration since ancient times. "Nothing is more fascinating and more deceptive than equality" according to Advocate General Lagrange.[1035] As interesting and inspiring the concept might be, the focus in this study is on the general principle of equality as manifested in EU

1034 J. Wouters, "Constitutional Limits of Differentiation: The Principle of Equality," in *The Many Faces of Differentiation*, ed. B. de Witte, D. Hanf, and E. Vos (Intersentia, 2001), 302.

1035 Opinion of AG Lagrange in *Case 13/63 Italy v Commission*, [1963] ECR 190.

law,[1036] and more specifically on the principle of non-discrimination on the basis of nationality. Since the Court ruled that the non-discrimination rules of the Treaty constitute "merely a specific enunciation of the general principle of equality, which is one of the fundamental principles of Community law",[1037] and that the 'principle of equal treatment' and the 'principle of non-discrimination' "are simply two labels for a single general principle of Community law",[1038] those two 'labels' are used interchangeably throughout this study.[1039] As to the content of the principle of equality, the Court established that it "prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment".[1040] This is also known as the Aristotelian notion of equality which dictates that likes be treated alike, while unalikes be treated unalike in proportion to their unalikeness, i.e. also know as formal equality.[1041]

The aim of the following section is to demonstrate the central and defining role the principle of non-discrimination played in establishing the internal market, the historical core of the integration project. It argues that equality constitutes part of its "very foundations" and the latest Treaty revisions are merely an illustration of the further entrenchment of this central position. Moreover, equality is a principle that has been identified as "superior rule

1036 Davies explains the centrality of the term "advantage" to the definition of discrimination in EU law as follows: "Whereas Aristotle regarded discrimination simply as different treatment of similar situations, EU law has narrowed the concept slightly and, in most of its written definitions, finds discrimination only to exist where there is an advantage created for one group or another." Hence, he argues that treatment that is different, but not advantageous does not constitute discrimination in EU law. See, G. Davies, "Discrimination and Beyond in European Economic and Social Law," *Maastricht Journal of European and Comparative Law* 11, no. 1-2 (2011): 15.

1037 *Joined Cases 117/76 and 16/77 Ruckdeschel*, [1977] ECR 1753, para. 7; *Case C-122/95 Commission v Germany*, [1998] ECR I-973, para. 62; *Joined Cases C-364/95 and C-365/95 T. Port GmbH & Co.* , [1998] ECR I-1023, para. 81.

1038 *Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH*, [2005] ECR I-791, para. 33.

1039 For comments on the relationship between the concepts of equality and discrimination see, C. Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Antwerpen – Oxford: Intersentia, 2005). 40; G. Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003). 10.

1040 *Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH*, para. 33. The Court refers to, inter alia, *Case C-442/00 Rodríguez Caballero* [2002] ECR I-11915, para. 32 and the cases cited therein.

1041 C. Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, ed. A. Rosas, E. Levits, and Y. Bot (Asser Press and Springer, 2012), 459; A. Numhauser-Henning, "EU Equality Law – Comprehensive and Truly Transformative?," in *Labour law, fundamental rights and social Europe*, ed. M. Rönnmar (Hart Publishing, 2011), 114; Davies, "Discrimination and Beyond in European Economic and Social Law," 10. For a critical analysis of the principle as defined above, see P. Westen, "The Empty Idea of Equality," *Harvard Law Review* 95, no. 3 (1982): 537-96.

of law" by the Court,[1042] which means that it would not only act as a constraint on Member States in negotiating the Accession Agreement, but would also influence the interpretation of the PSC in case of its adoption. The latter aspect concerning the interpretation of the PSC is not dealt with here, as it remains outside the scope delineated for this study.[1043]

This Chapter starts by discussing the market origins of the principle of non-discrimination on the basis of nationality. It describes how indispensable and how instrumental the principle has been, and still is, in the construction as well as regulation of the internal market. Its significance is discussed with reference to Treaty provisions containing the principle, as well as with reference to its use by the Court of Justice in deciding cases in which it was invoked.

The brief discussion of the origins and role of the principle is followed by a discussion demonstrating how the principle was embedded deeply into Union law. By now, it constitutes one of the most firmly entrenched principles in the constitutional foundations of the Union. The following sections describe the process of entrenchment, which was instigated by the Court and reinforced by Member States' approval. It is discussed with reference to Treaty provisions, which according to the Court are merely specific expressions of the general principle of equality.[1044] An overview of the Court's case law is provided from past to present with a view to demonstrating how the principle has evolved over time to acquire many additional roles to play, the role as a fundamental right being one among the most significant.

The role of the principle of non-discrimination as a fundamental right was further strengthened by the introduction of Union citizenship. Section 7.3.2 studies the relationship between the principle and the concept of Union citizenship as developed by the case law of the Court of Justice. Next, follows an examination of its entrenchment in the Treaties as well a discussion illustrating its importance and ever-wider scope of application. Subsequently, the place of the principle in the CFR is discussed, in addition to some other relevant provisions with implications for the PSC. Last but not least, to complete the picture on equality, after examining its relevance and importance for individuals, the final section focuses on its significance for Member States of the Union.

1042 See, *Case 156/78 Frederick H. Newth*, [1979] ECR 989, para. 13; *Case T-489/93 Unifruit Hellas*, [1994] ECR II-1201, para. 42.

1043 It is worth mentioning again that the purpose of this thesis is to identify the constraints on Member States at the point when they act as primary law makers drafting an Accession Agreement. The issues a PSC would raise in the post-ratification stage of the latter Agreement and the way the Court of Justice could deal with them are of different nature (though interrelated, the issue of constraints is more theoretical as opposed to the issue of how the Court deals with an existing PSC, which is more practical), and hence not covered here. They will be the topic of a future study.

1044 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.

7.2 INTERNAL MARKET ORIGIN OF THE PRINCIPLE OF NON-DISCRIMINATION

The aim of this section is to illustrate the centrality of the principle of non-discrimination to the Union legal order in general and to the free movement of persons in particular. The analysis begins by examining the function and role of the principle in the Community legal order, as well as its evolution over the decades to establish how fundamental and indispensable the principle has been and still is for what has now become the European Union. Its importance has only increased over time.

It should be noted that the analysis and discussion contained in this section is in no way novel or original. This should come as no surprise, as briefly discussed above, the four freedoms constitute the core of the internal market, and as such they have been always at the centre of scholarly attention. That has only increased with the introduction of the concept of Union citizenship.[1045] Given the inextricable link between the free movement of persons and the principle of non-discrimination on the basis of nationality, that link has been extensively studied.[1046] What is provided here is a fresh look on that relationship from a new lens: that of the PSC. This new lens provides an additional insight as to the nature of that relationship. It is hoped that the new

1045 See W. Maas, "Equality and the Free Movement of People: Citizenship and Internal Migration," in *Democratic Citizenship and Free Movement of People*, ed. W. Maas (Koninklijke Brill, 2013), 9-30; Guild, "The evolution of the concept of union citizenship after the Lisbon Treaty," 3-15; Jacobs, "Citizenship of the European Union – A Legal Analysis," 591-610; D. Kochenov, "A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe," *Columbia Journal of European Law* 18(2011): 55-109; S. Kaldenbach, "Union Citizenship," in *Principles of European Constitutional Law*, ed. A. Von Bogdandy and J. Bast (Hart Publishing and Verlag CH Beck, 2010); S. O'Leary, "Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship," *Yearbook of European Law* 27, no. 1 (2008): 167-93; M. Condinanzi, A. Lang, and B. Nascimbene, *Citizenship of the Union and Free Movement of Persons*, Immigration and Asylum Law and Policy in Europe (Leiden, Boston: Martinus Nijhoff Publishers, 2008); R. C. A. White, "Free Movement, Equal Treatment, and Citizenship of the Union," *International and Comparative Law Quarterly* 54(2005): 885-906; S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International, 1996).

1046 For few examples, see C. Hilson, "Discrimination in Community free movement law," *European Law Review* 24(1999): 445-62; N. Bernard, "Discrimination and Free Movement in EC Law," *International and Comparative Law Quarterly* 45, no. 1 (1996): 82-108; E. Johnson and D. O'Keeffe, "From Discrimination to Obstacles to Free Movement: Recent Developments Concerning the Free Movement of Workers 1989-1994," *Common Market Law Review* 31, no. 6 (1994): 1313-46; Davies, *Nationality Discrimination in the European Internal Market*; Barnard, *Substantive Law of the EU: The Four Freedoms*; B. Wilkinson, "Towards European CItizenship? Nationality, Discrimination and Free Movement of Workers in the European Union," *European Public Law* 1, no. 3 (1995): 417-37; Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach."

lens reveals whether the principle of non-discrimination is part of the "very foundations" of the Union. If so, the implication would be that Member States could not act as they wish in their role as primary law makers in the context of enlargement. Accordingly, they would be precluded from introducing a PSC on free movement of persons in the future Turkish Accession Agreement, or any other Accession Agreement for that matter.

In short, this section of the thesis tells the same story from a different angle and recapitulates some of our previous findings, this time with the spotlight placed on the principle of non-discrimination. The length and depth of the following analysis has been determined in the light of what has already been discussed in previous Chapters, as well as taking account of the relevance of various aspects of the principle in assessing its compatibility with the controversial PSC on free movement of persons.

There is no way to overemphasize the importance of the role played by the principle of non-discrimination in eradicating obstacles standing in the way of establishing the internal market. Equality is said to be "one of the foundations on which the primary pillars of Community law are built."[1047] Tridimas speaks of the principle as "the keystone of economic integration".[1048] According to Tobler, it could be said "to form a normative core in Community law".[1049] Scholars agree on "the instrumental" or "market-unifying" role of the principle,[1050] which is examined below.

7.2.1 Its place in the Treaties

The principle of non-discrimination has permeated many areas of EU law, but our main concern here is its relationship with the rules on the four freedoms and more specifically the free movement of persons. To begin with the general prohibition of discrimination on the ground of nationality in the EEC Treaty, Article 7 EEC (now Article 18 TFEU) provided that "[w]ithin the scope of appli-

1047 L. Waddington, "The Expanding Role of the Equality Principle in European Union Law," in *Policy Paper Series on Constitutional Reform in the EU 2003/04* (Italy: European University Institute, Robert Schuman Centre of Advanced Studies, 2003), 2.

1048 T. Tridimas, *The General Principles of EC Law* (OUP, 1999). 45; cited in Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*: 35.

1049 A. Numahuser-Henning, "Introduction: Equal Treatment – A Normative Challenge," in *Legal Perspectives on Equal Treatment and Non-Discrimination Law*, ed. A. Numahuser-Henning (The Hague: Kluwer Law International, 2001), 21.

1050 For the former role see, G. De Búrca, "The Role of Equality in European Community Law," in *The Principle of Equal Treatment in EC Law*, ed. A. Dashwood and S. O'Leary (Sweet & Maxwell, 1997), 14 and 30; for the latter see, G. More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?," in *The Evolution of EU Law*, ed. P. Craig and G. de Búrca (OUP, 1999); see also, Waddington, "The Expanding Role of the Equality Principle in European Union Law," 2.

cation of the this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." It was further specified in what is now Article 45 (2) TFEU, which provided that freedom of movement for workers "shall entail the abolition of any discrimination based on nationality between the workers of the Member States as regards employment, remuneration and other conditions of work and employment." The principle is implicit in the other free movement provisions, as they have been formulated differently.[1051] The provisions on the freedom of establishment (Article 49 TFEU), freedom to provide services (Article 56 TFEU) and free movement of capital (Article 56 TFEU) prohibit any "restrictions" on those freedoms. The concept of "restrictions" is wider than non-discrimination and catches also non-discriminatory measures that constitute obstacles in front of establishing a unified market.[1052]

The most basic and most important weapon in identifying as well as fighting the obstacles in front of the free movement of the four factors of production has been the principle of non-discrimination based on nationality. According to Van den Bogaert the principle "lies at the heart of the application of [Union] provisions on the free movement of workers, the freedom of establishment and the freedom to provide services".[1053] The fact that the Treaty provisions on the four freedoms have been formulated differently seems to obscure this fact.[1054] However, once we look at the Court's analysis of cases dealing with the freedoms, the importance of the principle becomes more obvious.

1051 According to Davies, one explanation for that might be the fact that the concept of discrimination "seems to sit more comfortably with situations involving people than those involving goods and services". See, Davies, *Nationality Discrimination in the European Internal Market*: 56.

1052 Van den Bogaert confirms the latter argument by pointing out to the definition of the concept "restrictions" laid down in the General Programmes for the abolition of restrictions on the freedom of establishment and freedom to provide services of 18 December 1961, OJ Eng. Spec. Ed. Second Series IX, 7 and 32, as well as to early case law of the Court (see, *Case 33/74 Van Binsbergen*, [1974] ECR 1299, para. 25; and *Case 2/74 Reyners*, [1974] ECR 631). Restrictions are defined as "any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as a result of the application of such a provision, or of administrative practices, prohibits or hinders the person providing services in his pursuit of an activity as a self-employed person by treating him differently from nationals of the State concerned. Moreover, "any requirements imposed, pursuant to any provision laid down by law, regulation or administrative action or in consequence of any administrative practice, where, although applicable irrespective of nationality, their effect is exclusively or principally to hinder the provision of services by foreign nationals" are also to be regarded as restrictions (Title III). See, S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (The Hague: Kluwer Law International, 2005). 122-23.

1053 Ibid., 124.

1054 Hilson, "Discrimination in Community free movement law," 445-46.

Before looking into the role of the principle in the Court's case law, it should be noted from the outset that as important as the four freedoms are, they have never been absolute. The drafters of the Treaty have specified grounds on which Member States are able to derogate from them. In the area of free movement of persons, these grounds are "public policy, public security or public health",[1055] and in the area of free movement of goods there is a longer list of grounds laid down in Article 36 TFEU.[1056] However, the fact that Member States take measures on one of these grounds do not give them free hand in doing whatever they like. The Court interprets these grounds very restrictively.[1057] Moreover, against the possibility of abusing those grounds,[1058] there is precaution in the Treaties themselves. The last sentence of Article 36 TFEU demonstrates that clearly by providing that the prohibitions or restrictions on one of the grounds provided by the article itself shall not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States". The Court has made the test even stricter by adding a proportionality test whereby it checks whether the objective of the measure tested could be attained in a less restrictive way.

7.2.2 Its development in the case law of the Court

It soon became clear that as important as it was to fight discriminatory measures, this was only a modest first step in dismantling the barriers fragmenting the internal market. Thus, the Court in its case law moved to fight also non-discriminatory measures, also called indistinctly applicable or equally applicable measures, under the broader label of "restrictions".[1059] However, it soon became equally clear that the list of grounds enumerated in the Treaties

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1055 See, Article 45(3) TFEU for free movement of workers, and Article 52(1) TFEU for freedom of establishment and freedom to provide services. For further details see also, "Chapter VI – Restrictions on the right to entry and the right to residence on grounds of public policy, public security or public health" of Directive 2004/38/EC.

1056 The grounds listed in Article 36 TFEU are "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national reassures possessing artistic, historic or archeological value; or the protection of industrial or commercial property".

1057 *Case 41/74 Van Duyn*, [1974] ECR 1337, para. 18; *Case C-348/96 Donatella Calfa*, para. 23; *Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri*, [2004] ECR I-5257, para. 65.

1058 There is secondary law in the area of free movement of persons clarifying how exactly those grounds are to be interpreted and applied by Member States. See, Chapter VI of Directive 2004/38/EC of 29 April 2004, OJ L 158/77, 30.04.2004, which replaced Council Directive 64/221/EEC. See respectively, notes 837 and 450 above.

1059 The first case on free movement of workers in which "a genuinely non-discriminatory measure was involved" was *Case C-415/93 Bosman*. For an in-depth discussion see, Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*: 130. For a general discussion on "restrictions", see Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*: 75-77.

on which Member States could derogate from the freedoms was far from meeting their needs. There were many more legitimate interests, which the States would wish to protect, such as the environment, the consumers' interests, culture, fundamental rights etc., but were not able to under the limited number of grounds listed in the Treaties. Acknowledging the need for additional grounds of derogation first in the area of free movement of goods, in its ground breaking *Cassis de Dijon* ruling,[1060] the Court created new exceptions, initially called "mandatory requirements", to the free movement provisions. However, these exceptions would apply only if the measure concerned was not discriminatory, pursued a legitimate aim in the public interest and was proportionate.

What the creation of the additional grounds of derogation meant for the Court's analysis in identifying and classifying different types of measures, was that it was mainly the fact whether the measure concerned was discriminatory or not which determined whether or not and how it could be justified.[1061] Thus, after asking the very first question, which is whether a measure is a quantitative restriction or measure having an equivalent effect in the area of free movement of goods, or whether it constitutes a "restriction" regarding the other freedoms, next, the Court asks whether the measure is discriminatory or put differently "distinctly applicable". It is the answer given to that question that determines whether the measure can be justified under the Court created exceptions mentioned above or not.[1062] While non-discriminatory measures can be justified under both Treaty provided and Court created exception grounds, discriminatory measures can be justified only under the limited grounds provided in the Treaty.

In other words, the fact whether there is discrimination on the grounds of nationality between products, workers, services, or capital is essential in how the Court resolves each and every case. It was in *Gebhard* that the Court unified its approach to the Court created exceptions regarding all the freedoms, and the fact that non-discrimination is the very first condition that needs be fulfilled clearly demonstrates how important the principle is in the functioning of the freedoms. To look at the whole test, the Court in *Gebhard* provided that:

> '…national measures liable to hinder or make less attractive the exercise of *fundamental freedoms* guaranteed by the Treaty must fulfil four conditions: they must be applied in a *non-discriminatory* manner; they must be justified by imperative

1060 *Case 120/78 Cassis de Dijon*.

1061 Hilson, "Discrimination in Community free movement law," 451.

1062 Unfortunately, the Court's case law has not always been consistent in this respect. There are cases in which the Court evades discussing whether the restrictive measure is discriminatory or not. For such an example, see *Case C-28/09 Commission v Austria*, [2011] ECR I-13525. For the relevance of discrimination in the Court's analysis and a critique of the Court's inconsistent approach, see S. Weatherill, "Free Movement of Goods," *International and Comparative Law Quarterly* 61, no. 2 (2012): 543-45.

> requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'[1063]

The Court's analysis illustrates the crucial role played by the principle of non-discrimination in the proper functioning of the freedoms, as the internal market needs to be equally accessible to goods, services, and persons originating from different parts of the market. As Waddington puts it, equality "lies at the heart of the four fundamental freedoms of movement".[1064] The principle was so central to the functioning of the internal market that to increase its effectiveness, the Court had to broaden the prohibition to cover also "indirect discrimination" or what has also been called "covert discrimination".[1065]

The concept of indirect discrimination is well established and well known. It suffices to briefly mention here that it was intended to catch "*seemingly neutral differentiation criteria with a disproportionate impact* or effect upon a group (or object) that is protected by an explicit prohibition of discrimination".[1066] It takes place, for instance, when a measure does not formally discriminate on the basis of nationality, but on other seemingly neutral ground such as place of residence or possession of a particular qualification available only domestically, and as a result "is liable to have such [discriminatory] an effect".[1067] The fact that the Court does not require proof of discrimination, but accepts the mere likelihood of such effect,[1068] demonstrates both the importance of the principle as well as the Court's efforts to increase the effectiveness of the prohibition of non-discrimination via its case law.

7.3 Embedding equality deeper into Union law

The following sections aim to demonstrate that the importance of the principle of equal treatment has continuously increased and evolved over time, as has its power of constraint on Member States. As mentioned above, the Court recognized equal treatment as one of its general principles of law. It contributed further to pushing the principle up in the hierarchy of norms, by

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1063 Emphasis added. *Case C-55/94 Gebhard*, para. 37. The Court refers to *Case C-19/92 Kraus*, para. 32.

1064 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 2.

1065 See, *Case 152/73 Sotgiu*, [1974] ECR 153, para. 11; *Case C-111/91 Commission v Luxembourg*, [1993] ECR I-817, para. 9; *Case C-419/92 Scholz*, [1994] ECR I-505, para. 7.

1066 Tobler, *Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*: 57. For the definition of the concept of "indirect discrimination", see also Davies, *Nationality Discrimination in the European Internal Market*: 15-16.

1067 *Case C-237/94 O'Flynn*, [1996] ECR I-2617, para. 21.

1068 See *Case C-175/88 Biehl*, [1990] ECR I-1779, para. 14; *Case C-204/90 Bachmann*, [1992] ECR I-249, para. 9; *Case C-237/94 O'Flynn*, para. 18.

naming it "superior rule of law",[1069] acknowledging it constitutes part of the "fundamental personal human rights" which it protects,[1070] and by making it an integral part of the concept of Union citizenship.[1071]

The first two sections discuss the Court's role in the constitutionalisation of the general principle by embellishing it with new important roles, and by making it an integral component of the concept of Union citizenship. The following two sections demonstrate the formal constitutionalisation of the principle by its inclusion into Treaties and the Charter by consecutive Treaty reforms. Both processes have created a virtuous circle reinforcing the importance as well as the constraining force of the principle. Moreover, it is argued that the principle has been constitutionalised not only formally, by being acknowledged as part of primary law, but also in other two senses of the term.

To begin with the first sense of the term, constitutionalisation can be summarized as "a process where the norm is entrenched and accorded higher legal status".[1072] This implies that its position in the system is consolidated in the sense that it is less vulnerable to change or repeal. Moreover, it also means that where conflicts between legal norms arise, those that are constitutionalized will be given greater weight.[1073] Even if the process might not be complete, it is widely acknowledged that the principle of equal treatment has been undergoing a process of constitutionalisation in this first sense of the term.[1074]

Constitutionalisation in its second sense is borrowed from the German legal order. It is not about hierarchy or superiority, but about the penetration or permeation of the principle of equal treatment in our case (or fundamental rights in the case of Germany) into the entire legal order.[1075] Constitutionalisation of the principle in this latter sense of the term in the Union legal order became especially visible after the inclusion of the horizontal provisions or "Provisions Having General Application" under Title II of the TFEU. Accordingly, Articles 8 and 10 TFEU require all Union activities to be informed by and be in line with the principle of non-discrimination.

It should be noted that this process(es) of constitutionalisation of the principle of equal treatment should not be seen as its complete transformation,

1069 *Case 156/78 Frederick H. Newth*, para. 13; *Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 HNL and Others*, [1978] ECR 1209, paras. 4-5; *Case T-489/93 Unifruit Hellas*, para. 42.

1070 *Case 149/77 Defrenne III*, [1978] ECR 1365, paras. 25-26.

1071 See section 7.3.2 above.

1072 M. Bell, "The Principle of Equal Treatment: Widening and Deepening," in *The Evolution of EU Law*, ed. Paul Craig and Gráinne de Búrca (OUP, 2011), 625.

1073 Ibid., 625-26.

1074 Ibid., 629-31; More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?," 535-40; Waddington, "The Expanding Role of the Equality Principle in European Union Law," 11-24; Wouters, "Constitutional Limits of Differentiation: The Principle of Equality," 306.

1075 A. von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union," *Common Market Law Review* 37(2000): 1333-34.

but rather as a process whereby it acquires roles additional to the ones already mentioned above.[1076] To use Reich's Russian doll analogy,[1077] these roles are the different dresses the principle puts on depending on the occasion and the general climate determined by Treaty changes, legislative action as well the Court's interpretation. However, unlike the dresses of a Russian doll these roles/dresses are not cut in wood or stone. They evolve in order to adjust to the vagaries of the legal climate. As such, the constitutional dress is the latest addition to the expanding wardrobe of the principle of equality.

In short, the following sections highlight some of the important developments contributing to the process of constitutionalisation of the principle of equality and demonstrate how deeply embedded it is into the Treaty structures. This demonstration aims to bolster the argument that the inclusion of a PSC, breaching such a fundamental principle or core value of the EU legal order into an Accession Agreement, would be precluded.

7.3.1 Equality as an established general principle of EU law

The principle of non-discrimination in EU law derives directly from the Treaties. It was initially enshrined in Article 7 EEC, (*ex* Article 6 EC, *ex* Article 12 EC, now Article 18 TFEU), and has always had its more specific manifestations in other provisions of the Treaties.[1078] However, according to the Court, those latter provisions are "only a specific expression of the general principle of equality which is one of the fundamental principles of [Union] law and which requires that comparable situations are not treated in a different manner unless the difference in treatment is objectively justified".[1079] The Court established further that the general principle of non-discrimination embodied in Article 18 TFEU applies only in the absence of more specific provisions in a

1076 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 29.

1077 For a more detailed description, see N. Reich, "A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law," *European Law Journal* 3, no. 2 (1997): 133.

1078 In the area of free movement of goods, see Articles 36-37 TFEU; in the area of agriculture, see Article 40(2) TFEU; in the area of free movement of workers, see Article 45(2) TFEU; in the area of free movement of capital, see Article 65(3) TFEU; in the area of transport, see Article 95(1) TFEU; in the area of competition, see Article 107(2)(a) TFEU; in the area of social policy, see Article 157(2) TFEU; in the area of external relations (humanitarian aid), see Article 214(2) TFEU. This list merely provides examples of the specific manifestations of the principle of non-discrimination in various parts of the Treaties. It is not exhaustive.

1079 *Case C-280/93 Germany v Council*, [1994] ECR I-4973, para. 67. See also, *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7; *Case 281/82 Unifrex*, [1984] ECR 1969, para. 30. For a more extensive list of cases and discussion, see Schermers and Waelbroeck, *Judicial Protection in the European Union*: 88; and Lenaerts et al., *European Union Law*: 156-57.

relevant field.[1080] Non-discrimination is "one of the fundamental principles of the Treaty which must be observed by any court".[1081] Due to its prevalent appearance in the Treaties and its foundational character, Usher has defined the principle of non-discrimination as "an underlying general principle of [Union] law".[1082]

General principles of EU law refer to "unwritten, judicially driven norms"[1083] that may be codified at one point. They are not precise or well-defined and have an overarching scope, i.e. their application goes beyond a specific field of law.[1084] According to Usher "the express prohibition of discrimination on the grounds of nationality set out in Article 6 [now Article 18 TFEU] is so wide as to preclude the development of any wider general principle".[1085] In the same vain, Tobler confirms that it is "[o]nly the prohibition of discrimination on grounds of nationality under Article 18(1) TFEU and the specific provisions reserved by it [that] applies in all fields of Union law", while almost all other non-discrimination provisions have a more limited scope.[1086] In line with our analogy above, the principle of non-discrimination based on nationality is the "black dress" that can be worn everywhere, it is deemed appropriate for all occasions, i.e. the joker, while the other dresses (other specific manifestations of the principle of non-discrimination), are suitable only on an number of limited occasions.

As already mentioned, the Court established that the general principle of equality is "one of the fundamental principles of Community law".[1087] It often used the concepts of non-discrimination and equality interchangeably, and sometimes together. It laid down that "[f]undamental rights include the general principle of equality and non-discrimination".[1088] Similarly, it ruled that the principle of equal treatment "constitutes a fundamental right".[1089] It also referred to it as "the general principle of equal treatment".[1090] According to the Court, 'the principle of equal treatment' and the 'principle of non-discrimination' "are simply two labels for a single general principle of Community law, which prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons

1080 *Case C-18/93 Corsica Ferries Italia*, [1994] ECR I-1783, para. 19; *Case C-22/98 Becu*, [1999] ECR I-5665, para. 32; *Case C-55/98 Vestergaard*, [1999] ECR I-7641, para. 16.
1081 *Case 8/78 Milac*, [1978] ECR I-1721, para. 18.
1082 Usher, *General Principles of EC Law*: 12.
1083 C. Semmelmann, "General Principles in EU Law between a Compensatory Role and an Intrinsic Value," *European Law Journal* 19, no. 4 (2013): 461.
1084 Ibid.
1085 Usher, *General Principles of EC Law*: 20.
1086 Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 447.
1087 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.
1088 *Case C-442/00 Rodríguez Caballero* para. 32.
1089 *Case C-37/89 Weiser*, [1990] ECR I-2395, para. 13.
1090 *Case C-144/04 Mangold*, [2005] ECR I-9981, para. 76.

for such treatment".[1091] In other words, in addition to its 'instrumental' and 'market-unifying role', in time, the principle has also acquired an additional role or status as a fundamental right.

To provide an example of the process in which the principle of non-discrimination acquired new roles over time, one notices that in the early case law the Court established that the abolition of discrimination was needed "in order to ensure the free movement of workers which is *essential to the common market*".[1092] Next, the Court moved to a phase, in which it confirmed the economic rationale underlying the principle, however, it also acknowledged its social role. *Defrenne II* is a good example, as the Court recognized that Article 157 TFEU pursued a double aim: economic and social. In addition to the economic aim,[1093] the Court established that the "provision forms part of the social objectives of the Community, which is not merely an economic Union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples".[1094]

The following important stage in the development of the principle of non-discrimination was the Court's recognition in *Defrenne III* that the prohibition of non-discrimination based on sex forms part of the "fundamental personal human rights", the observance of which it ensures.[1095] With the transfer of new competences to the Union and the creation of the status of Union citizenship, the situation had changed to such an extent by the beginning of the new millennium that the Court concluded that "the economic aim pursued by [Article 157 TFEU], namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right".[1096]

The cases cited above illustrate clearly the emergence and rise of the additional roles of the principle of non-discrimination over its original role linked to the establishment of an internal market. The social role of the principle, and above all that of a fundamental individual right is now clearly the robe in fashion. The 'instrumental' and 'market unifying' dress is still in use and part of the wardrobe, however, not as popular as before.

1091 *Case C-422/02 P Europe Chemi-Con (Deutschland) GmbH*, para. 33.
1092 Emphasis added. *Case 15/69 Ugliola*, [1969] ECR 363, para. 3.
1093 See, *Case 43/75 Defrenne II*, para. 9.
1094 Ibid., para. 10.
1095 *Case 149/77 Defrenne III*, paras. 26-27.
1096 *Case C-50/96 Deutsche Telekom AG*, [2000] ECR I-743, para. 57.

7.3.2 Equality as part of citizenship

The most important development that increased the prominence of the principle of equal treatment even further was the introduction of the concept of Union citizenship into the Treaties, and at least as important was the Court's interpretation of it. As discussed in detail in sub-section 6.3.2.3 above, the Court broadened the scope of the prohibition of non-discrimination based on nationality laid down in Article 18 TFEU, by extending its application to *all* Union citizens resident lawfully in the territory of a host Member State.[1097] The result was the decoupling of the principle from the economic activity requirement, which was previously necessary for its application. Being a Union citizen lawfully resident in a host Member State became sufficient to bring a person within the personal scope of the Treaty and claim a right to equal treatment with nationals of that State. While initially the Court would extend the right to equal treatment to situations and benefits that fall within the material scope of EU law,[1098] in its later case law it extended the right also to benefits that fell within the competence of Member States, when it was of the opinion that Member States had not exercised their competence in line with EU rules.[1099]

There is no need to repeat the case law on citizenship discussed above, however, it is worth emphasising the central role of the principle of equality that has become an integral part of the citizenship concept. As argued by AG Jacobs, "[f]reedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship."[1100] In the same vain, a decade later, AG Maduro reiterated that "[t]he prohibition of discrimination on the basis of nationality is no longer merely an instrument at the service of freedom of movement; *it is at the heart of the concept of European citizenship*".[1101] Scholars confirm that after the introduction of citizenship there has been "a reconceptualization of, or a qualitative change in, the relationship between the right to free movement and the right to non-discrimination".[1102] The umbilical cord between the two has been cut. Now they are no longer linked to one another, "[r]ather,

1097 *Case C-85/96 Martinez Sala*, para. 63.
1098 Ibid.
1099 The benefits at stake in this case were benefits for civilian war victims. See, *Case C-192/05 Tas-Hagen and Tas*, paras. 21-22.
1100 Opinion of AG Jacobs in *Case C-274/96 Bickel and Franz*, para. 24.
1101 See Opinion of AG Maduro in *Case C-524/06 Huber*, [2008] ECR I-9705, para. 18.
1102 A. P. Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," *Maastricht Journal of European and Comparative Law* 11, no. 1-2 (2011): 72. See also, H. De Waele, "The ever-evolving conccept of EU citizenship: Of paradigm shifts, quantum leaps and Copernican revolutions," in *Globalisation, Migration, and the Future of Europe: Insiders and Outsiders*, ed. L. S. Talani (Routledge, 2012), 101-207.

they are separately and directly linked to the fundamental status of Union citizenship".[1103]

The decoupling of the application of the non-discrimination principle from the performance of an economic activity in the Court's citizenship case law was indeed revolutionary.[1104] Now, the principle applies not because one is a worker, entrepreneur, service provider or recipient, but simply by virtue of being a Union citizen legally resident in another Member State. Thus, it is argued that the principle of equality between EU citizens has assumed "a constitutional character subject to strict judicial scrutiny".[1105] The inclusion and further elaboration of the principle in the Treaties and the Charter, which is briefly discussed below, contributed further to the constitutionalisation of the principle. What is especially notable in the Lisbon Treaty revision, and which could also be interpreted as a tacit approval of the Court's case law by the Member States, is the placement of the Treaty provisions on non-discrimination and citizenship in Part Two of the TFEU, under one title, namely "Non-Discrimination and Citizenship".

If one is to go back to the two manifestations of constitutionalisation mentioned above, that is hierarchical superiority and ubiquity (presence/penetration in various fields of law), the hierarchical superiority of the principle of equality was never in doubt, as the Court consistently repeated over the years that it constitutes "a superior rule of law".[1106] That position has been consolidated further with the added boost of Union citizenship. As to the gradual expansion of the scope of the principle, as well as its proliferation into wider areas of Union law, which is also discussed in the following section, those were developments enabled by the creation of the Union citizenship status as well as continued transfer of new competences to the Union. As argued by Van der Mei, citizenship and non-discrimination have fuelled each other. Not only has the gradual expansion of the prohibition of non-discrimination provided substance to Union citizenship, but the latter status has also served "as a source to strengthen the right to equal treatment of nationality".[1107] In other words, the central place of the principle in the Union legal order was consolidated further over time.

1103 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 72.

1104 For a more detailed account of the development of the Court's case law on Union citizenship, see De Waele, "The ever-evolving conccept of EU citizenship: Of paradigm shifts, quantum leaps and Copernican revolutions," 191-207; S. Currie, "The Transformation of Union Citizenship," in *50 Years of the European Treaties: Looking Back and Thinking Forward*, ed. Michael Dougan and Samantha Currie (Hart Publishing, 2009), 365-90.

1105 Bell, "The Principle of Equal Treatment: Widening and Deepening," 614.

1106 *Case 156/78 Frederick H. Newth*, para. 13; *Case 50/86 Les Grands Moulins de Paris*, [1987] ECR 4833, para. 10; *Case T-489/93 Unifruit Hellas*, para. 42; *T-93/94 Becker*, [1996] ECR II-141, para. 26.

1107 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 85.

Many scholars argue that the transformation of the principle or the completion of its constitutionalisation process could not be considered over as long as the concepts of "internal situations" and "reverse discrimination" continue to exist.[1108] As far as it relates to citizenship, the constitutional dress of the principle of equality is still seen as "work in progress", and perhaps it is so. However, as suggested by Van der Mei, and his interpretation of the Court's ruling in *Zambrano*, the Court does not view "reverse discrimination" as a problem of discrimination, "but rather as one of disrespecting substantive EU rights involved".[1109] Hence, going back to our wardrobe of rights, it might be perhaps useful to specify that the constitutional garment in our wardrobe is not strictly speaking a "dress", but rather a coat. A coat is a protective garment worn on top of others. It is a garment that normally one does not need (or wear) at home, i.e. in their Member State of origin. One needs it once he or she steps outside the confines of the known and familiar, i.e. in our context once a national frontier is crossed.

Hence, the argument that the process of constitutionalisation of the principle of non-discrimination on the ground of nationality would be complete once it applies to all Union citizens irrespective of what they do and in which part of the Union they reside, might be erroneous. As Europeans possess a rich wardrobe of rights, they are already protected at many levels: national (local level), constitutional (Member State level), and European (at regional level by the EU and the ECHR). As argued by Weiler, in this case the problem is not a shortage of rights, but rather their abundance.[1110] In short, in the European context, what to wear, or which specific principle of equality one should be protected by, is more a problem of luxury rather than dire need.

Moreover, for our purposes the principle is as strong and authoritative as it can be in its new "constitutional garment". Since the proposed PSC would infringe both the right to free movement as well as the principle of non-discrimination based on nationality, there is not much that the further decoupling of the two will add to our discussion. AG Colomer's Opinion in *Petersen* also demonstrates clearly how inextricably linked citizenship and free movement are at the moment. According to the AG General:

1108 Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism," 596-97; Nic Shuibhne, "Free Movement of Persons and the Wholly Internal Rule: Time to Move on?," 769-70. It should be noted however, that there are those who think, "the internal situation doctrine is a suitable instrument to meet the constitutional necessity of respecting the division of powers between the Union and its Member States". See, D. Hanf, "'Reverse Discrimination' in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?," *Maastricht Journal of European and Comparative Law* 11, no. 1-2 (2011): 57.

1109 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 81.

1110 J. H. H. Weiler, "Editorial: Individuals and Rights – The Sour Grapes," *European Journal of International Law* 21, no. 2 (2010).

> 'Cases such as *Carpenter*, *Baumbast and R*, *Bidar*, *Tas-Hagen and Tas* and *Morgan and Bucher* demonstrate a tendency towards protecting individuals, a concern with the personal situation of those who exercise a right under the Treaties which in the past was much less evident. Thus, the free movement of persons acquires its own identity, imbued with an essential nature that is more constitutional than statutory, transforming it into a freedom akin to the dynamics of the fundamental rights.'[1111]

It should be emphasised again that it was the addition of citizenship provisions and the case law of the Court that enabled free movement of persons to acquire its own identity. That would not have been possible if it had not been coupled with the principle of equal treatment. In other words, "the coat" (the constitutional protection against discrimination in cross-border situations) is arguably the EU's most significant contribution to the wardrobe of Union citizens. It is so fundamental and defining, that a wardrobe without it would not qualify as one belonging to a Union citizen. Hence, it can be argued that Member States should be precluded from withholding it from Union citizens, who will acquire that status in the future.

7.3.3 Expanding scope of equality in the Treaties

The fact that "general principles of Community law have constitutional status",[1112] as well as the fact that the principle of equality constitutes a general principle, which is one of the fundamental principles of the EU legal order,[1113] were already emphasised above. This means that the principle of equality or non-discrimination played a constitutional role, long before scholars had acknowledged it. What made that role more prominent or visible in recent years, were the Treaty changes that mirrored and confirmed the Court's case law.

As to the expansion of the scope of the prohibition of non-discrimination beyond nationality, the most important development to that effect was the inclusion of Article 13 EC by the Amsterdam Treaty. It has now been replaced and extended by Article 19 TFEU as a legal basis for the adoption of measures covering discrimination on the following grounds: "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Even though the provision did not impose any specific obligation on Member States to take action, and as such did not have direct effect, it increased the visibility of the principle and widened the Union's power in the field of anti-discrimination law.[1114] A series of Directives were enacted based on Article 13 EC;[1115]

1111 See Opinion of AG Colomer in *Case C-228/07 Petersen*, [2008] ECR I-6989, para. 17.
1112 *Case C-101/08 Audiolux*, [2009] ECR I-9823, para. 63.
1113 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.
1114 Tridimas, *The General Principles of EU Law*: 64.

however, since they do not deal with discrimination based on nationality, and have no implications for the PSC, they will not be discussed in any detail here.

The most significant developments came with the Lisbon Treaty revision. Not only was equality embedded more deeply in the Union's "basic constitutional charter, the Treaty",[1116] but the document devoting it an entire chapter (Chapter III), namely the Charter of Fundamental Rights of the EU, was elevated to acquire the same legal value as the Treaties.[1117] To begin with the additions to the Treaties, both "equality" and "non-discrimination" were explicitly named in the respective two paragraphs of Article 2 TEU, as constituting foundational values of the Union as well as of its Member States. Article 3(3) TEU instructs the Union to "combat social exclusion and discrimination". Moreover, Article 9 TEU dictates the Union to "observe the principle of equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies".

While one cannot help but wonder how the Union is to ensure its institutions give equal attention to all Union citizens, and whether that will be in line with the premises of the principle itself, Bell argues that the precise interpretation of rights conferred by constitutional texts is of lesser significance. What counts is the presence or absence of principles such as equality.[1118] Similarly, Shaw underlines the "undoubtedly foundational character of constitutional law and discourse for any polity".[1119] She claims constitutional texts offer "a privileged frame of reference for questioning the boundaries, nature and purpose of any given polity".[1120] As such, it can be argued that they have both normative power, and perhaps also transformative potential, as an entity that claims to be bound by certain principles will also need to abide by those principles, or at least provide convincing justifications for not being able to do so. In other words, the more visible and constitutionalized the principle of equality in the EU legal order is, the more difficult it becomes for the Union and Member States to deviate from it.

1115 See, Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22, 19.07.2000; Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, 2.12.2000; Directive 2002/73/EC amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269/15, 5.10.2002; Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37, 21.12.2004.

1116 *Case 294/83 Les Verts*, para. 23.

1117 See Article 6(1) TEU.

1118 Bell, "The Principle of Equal Treatment: Widening and Deepening," 626.

1119 J. Shaw, "The European Union and Gender Mainstreaming: Constitutionally Embedded or Comprehensively Marginalized?," *Feminist Legal Studies* 10(2002): 215.

1120 Ibid.

While the inclusion of "equality" and "non-discrimination" in Article 2 TEU symbolises their place at the top of hierarchy of constitutional norms, their inclusion in Article 8 TFEU (ex Article 3(2) EC)[1121] and especially the newly introduced Article 10 TFEU is a clear illustration of the effort to deeply entrench those principles in all the activities of the Union, i.e. constitutionalisation in the second sense of the term as defined in this Chapter. It provides as follows: "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Article 8 and 10 TFEU are to be found under Title II "Provisions having general application". They are among the so-called horizontal or mainstreaming provisions, which require the Union and its institutions to systematically scrutinise its measures and policies by taking into account their possible effects on the grounds identified under the provisions of Title II.[1122]

Last, but not least follows the examination of the principle of equality as it appears in the Charter. Article 6(1) TEU proclaims that "[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which *shall have the same legal value as the Treaties*."[1123]

7.3.4 Equality as enshrined in the Charter

As to the Charter, its entire Chapter III is devoted to "Equality". It contains seven articles. Our focus will be on the first two general articles, which have "a traditional justiciable and constitutional form",[1124] while the other five are more specific and aspirational.[1125] To begin with Article 20, which provides that "[e]veryone is equal before the law", the Explanations on the Charter clarify that the provision "corresponds to a general principle of law which is included in all European constitutions and has also been recognized by the Court of Justice as a basic principle of Community Law".[1126] The

1121 It reads as follows: "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."

1122 For "gender mainstreaming", see S. Fredman, "Transformation or Dilution: Fundamental Rights in the EU Social Space," *European Law Journal* 12, no. 1 (2006): 53-55.

1123 Emphasis added.

1124 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 23.

1125 The more specific articles deal with: cultural, religious, and linguistic diversity (Article 22); equality between men and women (Article 23); the rights of the child (Article 24); the rights of the elderly (Article 25); the integration of persons with disabilities (Article 26).

1126 See, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/24, 14.12.2007.

Court interpreted Article 20 CFR in line with its Explanations and confirmed that it enshrines the general principle of equal treatment, which "requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".[1127] This definition leads Tobler to convincingly argue that "Article 20 is not about 'equality before the law' understood in a traditional sense (i.e. equal application of the law to all, whatever the content of the law) but indeed the broad principle as previously recognized in its case-law".[1128]

Article 21(1) CFR contains an open-ended list of prohibited discrimination grounds, which include "sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". It draws on Article 13 EC (now 19 TFEU), Article 14 ECHR and Article 11 of the Convention on Human Rights and Biomedicine.[1129] According to Tobler, it corresponds to the general principles of equality with respect to particular discrimination grounds.[1130] Its more relevant part for our purposes is its second paragraph, which prohibits discrimination on grounds of nationality. The Explanations provide that it corresponds to Article 18 TFEU and that it should be applied in compliance with it.[1131] Waddington notes that Article 21 CFR reveals a hierarchy, with the prohibition of discrimination on the ground of nationality being *primus inter pares*, as it applies in all fields of EU law.[1132] Second come the grounds covered by Article 19 TFEU and the non-discrimination Directives, which have their own internal hierarchy.[1133] Lastly, come the remaining grounds in which the Union is not entitled to adopt any legislation.

1127 *Case C-149/10 Chatzi*, [2010] ECR I-8489, paras. 63-64. See also, *Case C-208/09 Sayn-Wittgenstein*, [2010] ECR I-13693, para. 89.

1128 Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 455.

1129 See, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/24, 14.12.2007.

1130 Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 456. To that effect, see the references to the general principle of non-discrimination on the grounds of age and Article 21 CFR, *Case C-447/09 Prigge and Others*, [2011] ECR I-8003, para. 38; *Joined Cases C-297/10 and C-298/10 Hennings and Mai*, [2011] ECR I-7965, para. 47.

1131 See, Explanations Relating to the Charter of Fundamental Rights, OJ C 303/24, 14.12.2007.

1132 Waddington, "The Expanding Role of the Equality Principle in European Union Law," 24. Tobler also notes the limited field of application of almost all non-discrimination provisions. She notes that only the prohibition of non-discrimination based on nationality as laid down under Article 18 TFEU applies in all fields of Union law. See, Tobler, "The Prohibition of Discrimination in the Union's Layered System of Equality Law: From Early Staff Cases to the Mangold Approach," 446.

1133 See, E. Howard, "The case for a considered hierarchy of discrimination grounds in EU law," *Maastrict Journal of European and Comparative Law* 13, no. 4 (2007): 445-70; E. Howard, "Equality: A Fundamental Right in the European Union?," *International Journal of Discrimination and Law* 10(2009): 29-32.

Although, strictly speaking, it does not fall under the title "Equality and the Charter", another obvious provision in the Charter capable of constraining Member States as primary law makers, which is worth mentioning here, is Article 45(1) CFR. It is situated under Chapter V of the Charter titled "Citizens' Rights", and it provides as follows: "Every citizen of the Union has the right to move and reside freely within the territory of the Member States"; whereas paragraph 2 provides that "[f]reedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State". What is striking when one compares those two paragraphs is the absolute formulation of the right to move and reside freely for Union citizens. Unlike the corresponding formulation of this right in the Treaties, there is no qualification attached to the effect that the right concerned "shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder".[1134]

As soon as one checks the explanations relating to Article 45(1) of the Charter one is informed that the right guaranteed by paragraph 1 is the right guaranteed by Article 20(2)(a) TFEU, which means "that "[i]n accordance with Article 52(2) of the Charter, those rights are to be applied under the conditions and within the limits defined by the Treaties". Undoubtedly, Charters and Declarations of Rights contain more ambitious goals and pompous language. However, that should not be a reason to brush them aside. The ideals they set and the discourse they establish are more important than their precise interpretation, as argued above. They have transformative potential, as the ideals they set are usually perceived as something to strive for, something to achieve in the long run. Hence, it makes perfect sense to establish an ideal of an unconditional right to free movement for Union citizens in a Charter of Fundamental Rights, which leads one to the expectation of the creation of an ever stronger and more absolute right to free movement of persons over the years. That expectation is undoubtedly strengthened by the Union's prospect (and above all, obligation under Article 6(2) TEU) to accede to the ECHR.

7.4 Principle of equality of Member States

What was discussed so far, was how important and foundational the principle of equality was for the nationals of Member States and the integration project, as well as how it evolved over time to acquire a broader scope and penetrate deeper into all fields of Union law. This section deals with the same principle, however this time as far as it relates to the Member States themselves. Equality

1134 Article 20(2) TFEU.

of Member States has always been a constitutional principle of Union law,[1135] which has also been acknowledged by the Court.[1136]

Member States of the EU have committed themselves to treat both each other as well as their citizens equally. While previously the principle of equality of States was an unwritten principle of EU law, after the Lisbon Treaty revisions one finds it expressly laid down in Article 4(2) TEU, which provides that "The Union shall respect *the equality of Member States before the Treaties* as well as their national identities …" [emphasis added]. Including clauses that have not existed in any other Accession Agreement allowing other Member States to suspend the free movement rights of the nationals of an acceding State, and of that State only, will put a serious question mark on both the "equality" of that State *vis-à-vis* other Member States, as well as on the equality of its citizens with other nationals of Member States. The possible inclusion of "specific arrangements" or additional PSCs concerning agriculture or structural policies would obviously also not serve promoting the equality of a new Member State with old ones.[1137]

The case *Commission v. UK* discussed in Part II above, provides a good illustration of how the Court could deal with a contentious PSC. Given the tenets laid down in the judgment, which could easily be transposed from goods to people, one could argue that Member States would be constrained from including the PSC, as the existing case constitutes a basis for a prospective sanction by the Court. Since *Commission v. UK* concerned free movement of goods and more specifically "the elimination of quantitative restrictions", and our primary concern throughout this study was the inclusion PSC on "free movement of persons", the Court could easily replace the crossed out phrases with those in brackets and establish that "[i]n *a matter as essential for the proper functioning of the common market as* [free movement of persons], *the Act of Accession cannot be interpreted as having established for an indefinite period* [at the expense of] *the new Member States a legal position different from that laid down by the Treaty for the original Member States*."[1138] Thus, even if "it was justified for the [acceding] Member States *provisionally to accept such inequalities*, it would

1135 Wouters, "Constitutional Limits of Differentiation: The Principle of Equality," 315-16; De Witte, "The Impact of Enlargement on the Constitution of the European Union," 247.

1136 *Case 231/78 Commission v UK*, para. 17; *Case 39/72 Commission v Italy*, [1973] ECR 101, para. 24.

1137 It is worth reminding that point 12, para. 4 of Turkey's Negotiating Framework reads as follows: "Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture."

1138 Emphasis added. *Case 231/78 Commission v UK*, para. 17.

be *contrary to the principle of equality of the Member States before Community law* to accept that such inequalities could continue *indefinitely*."[1139]

In short, equality of Member States is a constitutional principle of EU law, which has also been recently codified in the Treaty. It is a principle derived from the principle of the sovereign equality of States,[1140] one the fundamental principles of public international law.[1141] Even though what is of primary importance for our purposes is the principle of equality of Member States, since drafting of an Accession Treaty takes place within the scope of Article 49 TEU, which is within the scope of EU law, it is also worth mentioning the relevance of the public international law principle, since the end product (the Accession Treaty) after its ratification, is also an international agreement.

7.5 CONCLUSION

To recap, the principle of non-discrimination based on nationality is perhaps the most deeply embedded principle into the Union legal order. It has been cemented into its "very foundations" both by the Treaties as well as the case law of the Court of Justice. It has played a crucial role in integrating the various national markets into what was to be re-named as the "internal market". Scholars confirm that "[t]he very genesis of an internal Community trade law is firmly based on the principle of non-discrimination which is one of the cornerstones of the whole quasi-constitutional structure of the Union".[1142]

The Court established it is a superior rule of law, a fundamental right and a general principle of EU law of constitutional status. It is a right linked to "the fundamental status" of every Union citizen, though still to be mainly enjoyed in the existence of cross-border elements bringing the situation within the scope of Union law. The "fundamental and inalienable value which is equality"[1143] is perhaps even more fundamental and more inalienable after its inclusion into the core aims and values on which the Union claims to be

1139 Emphasis added. Ibid.

1140 The principle has been explicitly acknowledged in Article 2(1) of the UN Charter, which provides that "The Organisation is based on the principle of the sovereign equality of all its Members." See also the elaboration of the principle in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Annex to Resolution 2625 (XXV) of the UN General Assembly of 24 October 1970. For the contents of 'sovereign equality' see point 2. under, 'VI. The principle of sovereign equality of States.

1141 I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: OUP, 1998). 289.

1142 D. O'Keeffe and A. F. Bavasso, "Four Freedoms, One Market and National Competence: In Search of a Dividing Line," in *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley*, ed. D. O'Keeffe (The Hague: Kluwer Law International, 2000), 542.

1143 See the Opinion of AG Tesauro in *Case C-13/94 P v S*, [1996] ECR I-2143, para. 20.

founded.[1144] The Treaty of Lisbon acknowledges the principle at both Member State and individual levels. The Charter, which is elevated to primary law status, further consolidates the cardinal position of the principle in the EU legal order. As argued by Bell, the principle has been both widening and deepening over the years.[1145]

A PSC enabling Member States to suspend the free movement rights of Turkish nationals, as Union citizens in the future would be in violation of the principle of equality on many different levels. It would violate the principle of equality of Member States, of individuals as Union citizens, as workers, service providers, service recipients, self-employed or self-sufficient. It would trample on one of the core values on which the Union is founded. Given the fact that many of the developments mentioned in this Chapter were part of a grand legitimacy-building exercise, such as the Court's case law on fundamental rights, the introduction of the concept of Union citizenship and drafting of the CFR, it is not difficult to see how the inclusion of the PSC concerned would put a question mark on these achievements as well as on the credibility of the Union.

Moreover, as discussed in the previous Chapter, free movement of persons occupies a special place in the Court's case law, "as it straddles both the general principle of equal treatment and that of respect for fundamental rights".[1146] Both free movement and equality have been strengthened by the introduction of Union citizenship, its interpretation by the Court, and last but not least by their unequivocal codification in the CFR, which is now part of primary law.

In short, the principle of non-discrimination on the basis of nationality is of "functional and foundational or existential value"[1147] for the Union legal order. Without it, "the EU would probably not even exist or survive".[1148] Hence, it is argued that as the most powerful and entrenched principle of the Union legal order, the principles of non-discrimination in combination with the right to free movement linked to the status of Union citizenship, would constrain Member States from including a PSC directly discriminating against Turkish nationals and restricting their freedom of movement as EU citizens in the future.

1144 See Articles 2 and 3(3) TEU.
1145 See Bell, "The Principle of Equal Treatment: Widening and Deepening."
1146 Ibid., 626.
1147 Van der Mei, "The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship," 63.
1148 Ibid.

8 General Conclusion

The purpose of this study was to establish whether there may be EU law based constraints on Member States as primary law makers in the context of drafting an Accession Agreement, and if so, to identify them. This identification was carried out with referencece to the proposed PSC clause on free movement of persons in Turkey's Negotiating Framework. It was argued that in the context of preparing an Accession Agreement there are legal constraints on Member States flowing from three sources: the pre-existing relations between the associate and the EU, in this specific case Association Law built around the Ankara Agreement; the rules of the enlargement process; and finally, the constitutional foundations of the Union.

Chapter 2 in Part I analysed the past and present of the concept "association". It looked into what type of relationship it entailed so as to be able to place the EEC-Turkey Association Agreement in its proper context. While it was demonstrated that association proved to be a flexible relationship that could fit the particular needs of the associate and the EU, it was also illustrated that originally it was intended as a temporary relationship between the EEC and less developed countries wishing to become full members. The association agreements with Greece and Turkey were "undoubtedly the purest form of application of Article 238 [now Article 217 TFEU]".[1149]

In time, in addition to the association based on a Customs Union signed with Greece and Turkey, which copied the development path of the EEC, other types of associations emerged. The association with Malta and Cyprus was based on a "potential" Customs Union, while the EAs with the CEECs, and SAAs signed with the countries of the Western Balkans were based on a free trade area. All these agreements were flexible enough to accommodate the changing needs of the associates and served as stepping-stones to the membership of those state, which were ready to join the Union. Even some of the EFTA states, with which an alternative deal to membership was struck, i.e. the EEA, managed to reorient their relationship to become full EU Member States.

1149 Given how similar both agreements were, what was said regarding the Association Agreement with Greece, could by analogy, also be applied to the Ankara Agreement. P. A. Blaisse, "Report prepared on behalf of the Committee on External Trade on the common trade policy of the EEC towards third countries and on the applications by European countries for membership or association", European Parliament Working Papers, No 134, 26 January 1963, p. 36.

In short, when the political will was there, the precise type of the association was of little concern for the associates as well as the Union. As far as the Ankara Agreement is concerned, which is the centrepiece of Chapter 3, nobody questions the fact that it was designed as a genuine pre-accession agreement. The agreement was ambitious, and it aimed to achieve its objectives by gradually integrating Turkey into the common market by gradually ensuring the free movement of goods, workers, services and establishment. What was important for our purposes was to establish whether the free movement of persons regime under the association developed far enough to be able to constrain Member States from including a PSC on free movement of persons in a future Accession Agreement. The analysis of association law, especially recent case law on the standstill clauses, demonstrated that it did.

The development of the association was envisaged in three stages: preparatory, transitional, and final. As Turkey strengthened its economy, in 1973 an Additional Protocol laying down the detailed rules and timetables for the establishment of free movement of goods and free movement of persons entered into force. While the parties abided by the timetable set for the establishment of the Customs Union, they did not do so regarding the one set for free movement of workers. There was no timetable in the Additional Protocol for the freedom of establishment or the freedom to provide services. There was only a standstill clause regarding those two freedoms, which prohibited Member States from introducing new restrictions in these areas. It was the Association Council that was supposed to breathe life into those freedoms by adopting specific decisions aimed to implement them, which it never did. It only adopted three decisions concerning the rights of Turkish workers who were already legally resident and employed in the Member States. Those decisions proved crucial, as they contained directly effective provisions which Turkish workers were able to invoke in the national courts of Member States. The rights embedded in these decisions, as well as in other instruments of the Ankara *acquis*, could be regarded as a source of constraints on Member States when negotiating an Accession Treaty with Turkey.

What surprisingly proved more important in terms of realizing free movement of persons than the provisions conferring specific rights on workers and their family members in those decisions, were the standstill clauses on free movement of workers (Article 13 of Decision 1/80), freedom of establishment and freedom to provide services (Article 41(1) of the Additional Protocol). Those clauses did not confer any rights on individuals. They would simply freeze the legal situation in Member States regarding those freedoms as of the date of entry into force of the legal instruments containing those clauses. The reason why they make a difference today is the simple fact that the rules on free movement of persons in the 1970s were much more liberal than today. Since Member States did not respect the standstill clauses and introduced stricter rules on free movement of workers, freedom of establishment and

freedom to provide servcies, the recent cases result in the partial reinstatement of free movement.

The case law on the standstill clauses was not however, merely a matter of removing new obstacles, it had its twists and turns. The most important one being the *Demirkan* ruling, which established that the freedom to provide services under the Ankara Agreement could not be interpreted in line with EU law. Hence, Member States, which had introduced new restrictions regarding Turkish service recipients, were able to keep those in place, as receipt of services under the Ankara Agreement was not considered to be an activity of a sufficiently "economic" nature, remaining therefore, outside the scope of the Agreement. According to the Court, "irrespective of whether freedom of establishment or freedom to provide services is invoked, it is only where *the activity in question is the corollary of the exercise of an economic activity* that the 'standstill' clause may relate to the conditions of entry and residence of Turkish nationals within the territory of the Member States".[1150] *Tum and Dari* established that this was the case regarding freedom of establishment, and *Soysal* established that regarding the freedom to provide services.

The fact that the standstill clause in Decision 1/80 covered the first entry of Turkish workers into the territories of some Member States was mentioned first in *Commission v Netherlands*,[1151] and later confirmed in *Demir*.[1152] Moreover, recently in *Dogan*, the Court ruled further that legislation that makes family reunification more difficult also constitutes a "new restriction" within the meaning of Article 41(1) AP.[1153] Except for the *Soysal* case, the Commission put no effort into establishing the laws applicable regarding different Member States, which means that implementation is late and patchy. Many Member States fail to adjust their immigration policies until there is a judgment referred to the Court directly from their own national courts.

As slow as the implementation of those judgments might be, this does not change the fact that a PSC on free movement of persons, would be a step back even from the existing regime on free movement of persons. As argued above, membership is supposed to complement and increase the rights of nationals of candidate countries upon their accession by equating them to those of existing Union citizens, not by curtailing their existing rights. In other words, the existing legal regime is a bare minimum, which would need to be complemented with further rights, and as such it would arguably constitute a constraint on Member States when drafting an Accession Agreement.

Having identified constraints flowing from the pre-existing relations between the EU and the candidate, Part II aimed to establish possible constraints that flow from the accession process itself, the backbone of which is

1150 Emphasis added. *Case C-221/11 Demirkan*, para. 55.
1151 *Case C-92/07 Commission v Netherlands*, para. 49.
1152 *Case C-225/12 Demir*, para. 34.
1153 *Case C-138/13 Dogan*, para. 36.

Article 49 TEU. It is the one and only provision in the Treaties governing specifically enlargement. It helped us identify both the procedural as well as substantive constraints on Member States that flow from the Treaties. As important as it is, it is quite cryptic, and fails to provide the full picture of what is a long and complex process. For instance, as demonstrated in Chapter 4, it does not fully reflect the roles of Union institutions in the process. While institutions can and often do play additional roles, it is important to note that they have to stick to the basics identified in Article 49 TEU, as any deviation might trigger external sanctions, i.e. the Court could annul the Council Decision approving the Accession Agreement for not fulfilling an "essential procedural requirement".[1154]

Since there is no other primary law provision, or secondary law for that matter, that could shed light on the accession process, Chapter 4 turned to analysing past practices of enlargement. That analysis revealed that the basics of the process were laid down during the first enlargement and were further consolidated in each subsequent wave. While some fine-tuning was done when deemed necessary, the basic contours of the process remained unchanged. Similarly, the main negotiation principles that were articulated prior to the first enlargement were consistently applied in each and every enlargement. The first of these principles mandated the full adoption of the *acquis communautaire*, while the second one allowed for some derogations to the first, though only for limited pre-specified transitional periods and in limited fields. Rather than derogation, the second principle should be seen as a reinforcement of the first, as its underlying rationale was to give the newly acceding Member State additional time to adjust so that at the end of the pre-specified transitional period they are able to adopt and apply the *acquis communautaire* in its entirety. The overall aim of both principles was obviously the continuity of the Community/Union legal order.

Chapter 5 identified the substantive constraints that flow from Article 49 TEU and examined past Accession Agreements with a view to finding out whether those constraints had been respected. The main substantive constraint specified in Article 49 TEU is the term "adjustment". What could be be inferred from Article 49 TEU is that it allows only for "adjustments", which can be defined as technical changes or adaptations that are strictly necessitated by accession, that extend the application of Union *acquis* to the new Member State. The term "adjustment" is more restrictive than the term "amendment" or "revision" used in Article 48 TEU, which implies less room for manoeuvre under Article 49 TEU. The fact that the Dutch, French and German versions of the Treaty similarly use more restrictive terms to indicate the limited scope of change allowed in the context of Article 49 TEU in comparison to the terms used under Article 48 TEU also proves this point.

1154 *Case C-65/90 European Parliament v Council*.

To be able to find whether the substantive constraint imposed by Article 49 TEU was respected in the past, the rest of Chapter 5 distinguished between measures used in past Accession Agreements which share the broad underlying rationale of the term "adjustment", i.e. the eventual full extension of the *acquis* to the newcomer, and those that do not. It should be noted that while "adjustments" and "adaptations" ensure the immediate extension of, respectively, the Treaties and secondary law to the new Member State upon its accession, the other measures identified as sharing the same broad rationale postpone the full implementation of specific parts of the *acquis* for limited amount of time after the newcomer's accession. Transitional measures, quasi-transitional measures and safeguard clauses, which are examined together as measures facilitating the full integration of a Member State, allow the newcomer an additional period to prepare itself to be able to fully undertake its obligations under Union law. While transitional measures can be taken only for a pre-determined period of time, quasi-transitional measures differ in that they are supposed to be in place for a limited time, which is however not pre-determined. Regarding the latter measures, the newcomers have the obligation to join those areas, such as the Eurozone and Schengen; however, they are allowed to do so once they fulfil certain conditions.

As far as safeguard clauses are concerned, they have always applied for a pre-specified period of time and have served as safety valves in case of unforeseen problems in given areas. Unlike transitional and quasi-transitional measures they are not clauses that apply automatically upon a newcomer's accession: they are dormant clauses. They could be triggered by either the old or the new Member States so that they are able to take protective measures against an unforeseen situation. There are no uniform terms or conditions for triggering safeguard clauses. Each clause can be different. What is common to transitional measures and safeguard clauses is that they apply for a pre-specified period of time, which usually is the end of the so-called transitional period, by the end of which the newcomer is expected to be ready to operate on the same terms as the other Member States.

Lastly, Chapter 5 examined the most problematic aspect of past Accession Agreements: measures that go beyond being mere "adjustments". As past Accession Agreements are the concrete examples of past practice, the aim was to establish whether the substantive constraint that those agreements should contain only "adjustments" necessitated by accession was respected. The idea behind that exercise was that our findings on past practice would shed light on both the existence of substantive constraints as well as on future practice in this area.

While some of the measures analysed under this title could be clearly categorised as permanent derogations such as the Maltese restriction on buying secondary residences by non-residents, and the exception obtained by Sweden for the marketing and use of "snus", most of the other measures identified as *prima facie* falling under that category (as measures going beyond being

mere "adjustments") on a closer look turn out to be "adjustments" in the broad sense of the term. To provide a few examples, the inclusion of "cotton" as a product under CAP, the exception created for granting national aid to Nordic agriculture (more specifically areas to the north of the 62nd Parallel), special rights granted to the indigenous Sami people, were all necessitated by the need to accommodate the particularities of the newly acceding States. In those cases the aim was to extend the *acquis* to the newcomers by taking their special situations into account, i.e. there was no country that produced cotton prior to Greece's accession; there were no countries with harsh climatic conditions; and neither were there indigenous people, whose special lifestyles had to be accommodated prior to Sweden's accession. In any event, those were permanenet arrangements negotiated and adopted at the request of the acceding States. They were in no way unilaterally imposed arrangements by the existing Member States.

Overall, it is argued that despite the existence of a few permanent derogations that go beyond being mere "adjustments", those derogations are exceptions, which are not of such scope and nature as to seriously challenge the existence of the rule itself. They did not affect the proper functioning of the internal market, competition or one of its well-established policies. Moreover, past experience also cautions us against another danger that can be inferred from Turkey's Negotiating Framework, i.e. the statement that "the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a maximum role of individual Member States".[1155] The fisheries regime is a clear illustration of how a transitional arrangement intended for a certain period of time might turn into a permanent one, if the fate of that measure is left to the hands of the Member States in at a future point in time.

The last part turned to the constitutional foundations of the Union, with a view to establishing whether and how they could also operate as a constraint on Member States *qua* primary law makers. Just like various national constitutional courts have come up with doctrines to protect what they see as the essence of their legal orders, such as the "basic structure" doctrine of the Indian Constitutional Court or the "inner unity" or "coherence" doctrine of the German Constitutional Court, Opinions and case law of the Court of Justice demonstrate that similarly, it safeguards what it sees as the "very foundations" of the Union legal order.

Chapter 6 firstly, established the existence of the "very foundations" of the Union as a constitutional constraint on Member States. Then, it tried to identify the substance of those "very foundations" as far as they would have the effect of precluding Member States from introducing a PSC on free movement of persons. Based on the Treaties, case law and Opinions of the Court,

1155 Point 12, para. 4 of the Negotiating Framework for Turkey.

it identified three areas that could have that effect: fundamental freedoms, in particular free movement of persons, the Union citizenship status, and fundamental rights.

To begin with the freedoms, the EEC Treaty placed them under the title "Foundations of the Community" from the very start. Empowered by the case law of the Court their importance only increased over time. The Court called them "fundamental freedoms",[1156] and it even labelled free movement of workers as a "fundamental right".[1157] Scholars unanimously agreed that they constituted the crux of the internal market as well as the integration project. The introduction of Union citizenship, which was seen by the Court as "destined to be the fundamental status of nationals of Member States"[1158] pushed free movement of persons further up in the hierarchy of norms.

While initially criticised for being devoid of any substance, the case law of the Court changed the opinion of many when it linked free movement and equality directly to Union citizenship. Both became inalienable components of citizenship. The Court even slightly modified the terms of application of Union law so as ensure that Union citizens are not deprived of the enjoyment of the substance of their citizenship rights.[1159] Today many regard free movement linked to citizenship as the general rule, and the economic freedoms as its specific expressions.

The last area of relevance for our purposes that constitutes part of the "very foundations" of the Union is that of fundamental rights. In *Kadi I* the Court made that statement explicitly. It identified "respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU (now Article 2 TEU) as a foundation of the Union".[1160] In *Cresson* and *PKK*,[1161] by checking whether primary law provisions were ECHR-compliant, the Court implicitly acknowledged the "precedence" of fundamental rights over other Treaty provisions.

It was the Court that developed the *acquis* on fundamental rights over the years. Member States acknowledged the foundational role of those rights in the Treaties, and eventually enshrined them in a Charter of Fundamental Rights. Interestingly, in their process of constitutionalisation, i.e. achieving primary law status, they also constitutionalised the legal order by making it more autonomous. While for a long time, they were enforced as general principles of EU law; they now have a central place in the Treaties and the Charter. Their increasing importance has prompted the Member States to insert an obligation in the Lisbon Treaty, under Article 6(2) TEU, to accede to the

1156 *Case C-19/92 Kraus*, para. 32; *Case C-55/94 Gebhard*, para. 37.
1157 *Case 152/82 Forcheri*, para. 11; *Case 222/86 Heylens*, para. 14.
1158 *Case C-184/99 Grzelczyk*, para. 31.
1159 *Case C-34/09 Zambrano*.
1160 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 303.
1161 *Case C-432/04 Cresson*; *Case C-229/05 P PKK and KNK v Council*.

ECHR. The Union's accession will add another source and layer of constraints on Member States and Union institutions.

As to the application of those constraints on Member States, Chapter 6 clarified that the argument laid down here is not that Member States cannot ever bring the existing legal order to an end. They can do so. The argument was rather that they have to respect the "very foundations", or genetic code of the legal order, so as to preserve its essence. Changing those very foundations is not impossible, but as argued above, would mean bringing to an end the existing legal order as we know it, and replacing it with a new one. Like constitutional courts of states, the Court of Justice as the guardian of the Union legal order could in certain circumstance act to protect its *raison d'être.* The *Pringle* case[1162] demonstrated it is not inconceivable for the Court to review a Council Decision approving an Accession Agreement. It could carry out a procedural review as well as a substantive review and check whether the agreement contains anything that goes beyond what the terms of Article 49 TEU allow Member States to undertake, i.e. anything that goes beyond being an "adjustment" necessitated by the accession of a new Member State. If the Court detects such an element, especially something that would be contrary to the "very foundations" of the Union legal order, such as a PSC on free movement of persons, it could annul that Decision.

To prove that a PSC on free movement of persons would be contrary to the "very foundations" of the Union, Chapter 7 provided a case study of the principle of non-discrimination based on nationality. Non-discrimination or equality would be without doubt the most gravely violated principle, if a PSC on free movement of persons were to be included in Turkey's future Accession Agreement, as it would directly discriminate against Turkish nationals only. A PSC regarding "agricultural policy or structural funds" would similarly discriminate directly against Turkey. Hence, the aim of Chapter 7 was to demonstrate that the principle of non-discrimination is part of the "very foundations" of the Union legal order. The implication of that demonstration was that a principle of such importance would preclude the inclusion of a PSC clause that would breach it.

To demonstrate how deeply embedded the principle is in the constitutional foundations of the Union, Chapter 7 begins its analysis by looking into the very origins of the principle. That analysis clearly shows how instrumental and indispensible the principle has been in the construction and regulation of the internal market. In addition to the general prohibition of non-discrimination based on nationality, which always had a central place in the Treaties (initially, as Article 7 EEC, Article 12 EC and now Article 18 TFEU), the Treaties also contained many "specific expressions" of the principle. For our purposes

1162 *Case C-370/12 Pringle.*

the principle's most crucial and noteworthy role was as an integral part of the freedoms, and free movement of persons in particular.

The Court also played an important role in pushing the principle up in the hierarchy of norms. It ruled not only that the general principle of equality was "one of the fundamental principles of Community law",[1163] but also that it was a "superior rule of law",[1164] as well as an important part of the "fundamental personal human rights"[1165] which it protects. Chapter 7 demonstrated that the Court and Member States contributed to the constitutionalisation of the principle not only by placing it at the pinnacle of the hierarchy of norms, but also by spreading it throughout the legal order; more specifically, by making it part of the horizontal provisions of the Treaties, which require all Union activities to be in compliance with it.[1166] Moreover, its scope was expanded by the inclusion of "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" as discrimination grounds on which further measures could be taken.[1167]

Equality is also considered as one of the core components of Union citizenship,[1168] the destiny of which is on the way to becoming the fundamental status of Member State nationals[1169] as predicted and partially fulfilled by the Court. Moreover, the Charter, which now has primary law status,[1170] contains an entire chapter devoted to "Equality".[1171] One could expect that its role might be even further consolidated by the Union's future accession to the ECHR.[1172]

While most of Chapter 7 was devoted to establishing that the principle of the equality of Member State nationals constituted part of the "very foundations" of the legal order, its last section briefly examined the principle of equality of Member States, which would similarly be breached by the inclusion of a PSC clause, be it in the area of free movement of persons, agriculture or structural funds. While it was an unwritten principle of EU constitutional law for a long time,[1173] now the equality of Member States has its solid place in the Treaties as Article 4(2) TEU.

To sum up, the principle of non-discrimination or equality is an inalienable part of all three areas identified as part of the "very foundations" of the Union: the fundamental freedoms, Union citizenship as well as fundamental rights.

1163 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.
1164 *Case 156/78 Frederick H. Newth*, para. 13; *Case T-489/93 Unifruit Hellas*, para. 42.
1165 *Case 149/77 Defrenne III*, paras. 25-26.
1166 See Articles 8 and 10 TFEU.
1167 See Article 19 TFEU.
1168 See section 7.3.2 above.
1169 *Case C-184/99 Grzelczyk*.
1170 See Article 6(1) TEU.
1171 See Chapter III of CFR.
1172 See Article 6(2) TEU.
1173 See *Case 231/78 Commission v UK*.

Chapter 7 illustrated that in addition to violating those "very foundations", a PSC on free movement of persons would also breach the principle of equality of Member States. This thesis tried to demonstrate that such a clause would be a strong stab at the very heart of the existing Union legal order, which it might not be able to survive.

In short, what the story of the mountain revealed is how it gained its own life and existence partly independent from that of the will of its creator-Gods. However, our mystical mountain was to learn that having its own will, spirit, flesh and bones does not mean a carefree life devoid of constraints and limitations. On the contrary, it was to experience that it is in the nature of every "being" to be constrained by what it "is", i.e. what we can call "the terms of its existence". Its own free will, flesh and spirit were to limit it first before anything else did.

It exercised its free will and made promises. It gave its word for something it did not know whether it would still desire in the future. The time came when that promise (the promise of accession laid down in the Ankara Agreement) haunted and constrained it. Its growing body, flesh and bones were another constraint for the mountain (the Treaties, and in the context of this thesis specifically Article 49 TEU). It was a mountain; it could not be a bird and fly. As much as it loved its spirit for its beauty and uniqueness, the mountain was constrained by it as well. Yet, it still loved it above everything else. While its body grew and became large and clumsy, its unique spirit (the "very foundations") never changed. It was its essence, without which it would not be. It knew that something so precious had to be cherished and protected.

Samenvatting (Dutch summary)

GRENZEN AAN DE BEVOEGDHEDEN VAN EU-LIDSTATEN TOT VASTSTELLING VAN PRIMAIR RECHT

Een gevalstudie van de voorgestelde permanente vrijwaringsclausule op het gebied van het vrij verkeer van personen zoals opgenomen in het Onderhandelingskader voor de toetreding van Turkije tot de Europese Unie

Staat het lidstaten van de Europese Unie vrij om toetredingsverdragen autonoom op te stellen of legt het recht van de EU hen daarbij beperkingen op? Dat is de centrale onderzoeksvraag van dit proefschrift. De auteur verdedigt de stelling dat beginselen en bepalingen van EU-recht inderdaad zulke beperkingen omvatten en identificeert vervolgens de mate waarin de lidstaten als gevolg hiervan beperkt worden in hun verdragsluitende bevoegdheden. Meer specifiek wordt het voorstel tot een permanente vrijwaringsclausule op het gebied van het vrij verkeer van personen zoals opgenomen in het Onderhandelingskader voor de toetreding van Turkije als gevalstudie aangewend voor een meer fundamenteel onderzoek naar de aard van de EU-rechtsorde.

Het proefschrift onderzoekt meer bepaald drie deeldomeinen van het EU-recht waaruit beperkingen op de bevoegdheid van lidstaten tot het vaststellen van toetredingsverdragen voortvloeien. Ten eerste, de bestaande rechtsregels voorafgaand aan eigenlijke toetredingsverdragen, in dit geval het juridische kader van de Associatieovereenkomst EEG-Turkije (Deel I); ten tweede, de regels, gebruiken en gewoonten inzake toetreding van nieuwe lidstaten tot de Europese Unie (Deel II); en ten derde, de constitutionele grondslagen en rechtsbeginselen van de EU als eigen rechtsorde (Deel III).

Het eerste hoofdstuk schetst een algemeen kader en licht de belangrijkste juridische concepten, de methodologie en de opbouw van het proefschrift toe. Hoofdstuk twee analyseert vervolgens de achtergrond en ontwikkeling van het rechtsbegrip 'associatie'.. Daarbij stelt de auteur dat een associatieovereenkomst beschouwd kan worden als een volwaardig pre-toetredingsakkoord. zeker in het geval van de Associatieovereenkomst EEG-Turkije (Ankaraverdrag). Het derde hoofdstuk omvat een uitvoerige bespreking van het Ankaraverdrag en het daarop voortbouwende associatierecht, meer bepaald de regelgeving inzake het vrije verkeer van personen en de permanente vrijwaringsclausule in dat verband. Na een grondige analyse van recente rechtspraak van het Hof van Justitie van de EU hieromtrent, besluit de auteur dat de permanente vrijwaringsclausule niet alleen een stap terug zou zijn ten opzichte van het

EU *acquis* inzake het vrije verkeer van personen, maar ook een achteruitgang ten opzichte van bestaand associatierecht.

Hoofdstukken vier en vijf behandelen vervolgens beperkingen die voortvloeien uit de toetredingsprocedure zelf, opgenomen in artikel 49 van het Verdrag betreffende de Europese Unie (VEU). Het vierde hoofdstuk richt zich meer bepaald op de procedurele vereisten van die bepaling. Het behandelt hoe uitbreiding zich heeft ontwikkeld in de praktijk sinds de eerste toetreding van nieuwe lidstaten en definieert daarbij de rol van de EU-instellingen. Gaandeweg worden op die manier de belangrijkste beginselen van toetredingsonderhandelingen die zich in de praktijk ontwikkeld hebben en die inmiddels tot vaste gebruiken en gewoontes verheven werden, uiteengezet. Hoofdstuk vijf analyseert vervolgens de inhoudelijke beperkingen. Aandacht wordt vooral besteed aan het begrip 'aanpassing' vermeld in artikel 49 VEU. De auteur stelt dat de term 'aanpassing' beperkter moet worden opgevat dan het begrip 'wijziging' uit artikel 48 VEU (procedure tot wijziging van de verdragen). Als gevolg daarvan hebben lidstaten minder bewegingsvrijheid in de procedure van artikel 49 VEU. De rest van het hoofdstuk toetst vervolgens of eerdere toetredingsverdragen deze striktere lezing van artikel 49 VEU in acht nemen, of dat ze maatregelen bevatten die verder gaan dan slechts 'aanpassingen'. De auteur identificeert een aantal bepalingen die voorbij het begrip 'aanpassing' gaan, maar komt tot de vaststelling dat de gevolgen hiervan eerder beperkt zijn. Verdergaande bepalingen hebben immers geen betekenisvol effect gehad op het functioneren van de interne markt, het mededingingsrecht, of andere gevestigde EU-beleidsdomeinen.

In het zesde en zevende hoofdstuk wordt nagegaan in welke mate de constitutionele grondslagen van de EU zelf een beperking vormen voor de lidstaten in hun hoedanigheid als verdragsluitende partijen bij toetreding. Zoals veel nationale grondwettelijke hoven leerstukken hebben ontwikkeld om de essentie van hun rechtsorde te beschermen, heeft ook het Hof van Justitie van de EU zich in verschillende arresten en adviezen uitgelaten over wat het als de fundamenten van de Europese rechtsorde beschouwt. Tot deze fundamenten, zoals vastgelegd in de Verdragen en de rechtspraak, behoren in elk geval de fundamentele vrijheden, met name het vrij verkeer van personen, het EU-burgerschap, en de grondrechten. Hoofdstuk zes onderzoekt in hoeverre die fundamenten de lidstaten zouden kunnen verhinderen om een permanente vrijwaringsclausule in te voeren in het toetredingsverdrag met Turkije. In het zevende hoofdstuk toont de auteur aan dat het verbod op discriminatie op basis van nationaliteit tevens deel uitmaakt van diezelfde fundamenten. Daardoor zouden lidstaten hier niet zomaar van kunnen afwijken in de context van toetredingsprocedures met derde landen.

Concluderend kan dus worden vastgesteld dat verschillende soorten van juridische beperkingen aan de lidstaten worden opgelegd in de context van toetreding. Het resultaat hiervan is dat lidstaten bijzonder weinig speelruimte

hebben om bepalingen zoals de permanente vrijwaringsclausule in te voeren in toetredingsverdragen.

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Narin Tezcan was born in 1977 in Kardzhali, Bulgaria. After graduating from İstanbul Kabataş Erkek Lisesi, she studied International Relations at Middle East Technical University, Ankara, Turkey. In 2001, she was awarded the British Council Chevening Scholarship for following the LLM programe in International Human Rights Law at Essex University, the UK. After completing her LLM, she worked as a research and teaching assistant in the departments of International Relations and EU Studies of Bahçeþehir University, İstanbul, Turkey. In 2005, she obtained the Jean Monnet Scholarship granted by the European Commission, which enabled her to complete the Advanced LLM programme in European Business Law at Leiden University. She started her PhD research at Leiden in May 2007 as a researcher, and was appointed a PhD-fellow at the Europa Institute of the university between March 2008-March 2014. She was a visiting researcher at Fordham Law School, New York, USA, for the 2011-2012 academic year. Since November 2014, Narin has been working as a part-time Lecturer at the European Law Department of Leiden Law School.

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In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2013, 2014 and 2015

MI-224 A.F. Rommelse, *De arbeidsongeschiktheidsverzekering: tussen publiek en privaat. Een beschrijving, analyse en waardering van de belangrijkste wijzigingen in het Nederlandse arbeidsongeschiktheidsstelsel tussen 1980 en 2010*, (diss. Leiden), Leiden: Leiden University Press 2014, ISBN 978 90 8728 205 9, e-ISBN 978 94 0060 170 3

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