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.