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Direct Application of the Polish Constitution and International Treaties to Private Conduct

ANNA WYROZUMSKA

One of the consequences of the future Polish membership in the EU will be the direct application of the Community law in the Polish law. The issue was developed by many Polish authors; however the question of application of the Community law to horizontal relations was rather neglected. This article touches the problem only indirectly trying to show whether the Constitution itself and international treaties can be applied in Poland to private conduct.

I. Constitution

1. General Remarks

There were several constitutions in Polish history, the Constitution of 1791, 1921 1935 and 1952. The Constitution of 1952 contained regulations characteristic for socio-political relationships and ideological foundations of the communist period in Poland. Various amendments to the Constitution did not change its character. A breakthrough constituted the amending act of 29 September 1989. It introduced into the Constitution new fundamental concepts as the rule of law (Article 1), sovereignty of the People (Article 2), political pluralism and freedom of creation and functioning of political parties (Article 4), protection of ownership and freedom to pursue economic activity (Article 6). In 1992 the so-called Small Constitution had been adopted (Constitutional Act, passed on 17 October 1992, on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government) and remained in force until 16 November 1997, which is the date when the current Constitution, passed on 2 April 1997, entered into force.

None of the former Constitutions contained a provision concerning its direct applicability.¹ The lack of it did not keep the academics or the judiciary from formu-

¹ The doctrine of the Polish constitutional law understands this notion meaning the application of the constitution as a basis for the decision taken by the State organ e.g. the court (also together with statutes) or as an interpretative guideline for statutes. Indirect application of the constitution is, according to this view, the application through the statute which was adopted for the purpose of implementation of the constitution (actually in this case it is not the constitution which is applied but the statute itself). The Author is of the opinion that the above mentioned differentiation is misleading and incoherent, and differs from the concept used in relation to international agreements. That is why we adopt the unanimous concept – and use the term “direct applica-

lating the thesis of direct applicability at least for some of the constitutional provisions. However, they concerned rather the application of the Constitution in relations between State organs or between individual and the State but not in horizontal relations (individual versus individual).

The first to apply constitutional provisions more or less directly was the Chief Administrative Court (founded in 1980) and then the Supreme Court. The jurisprudence of these Courts could not further develop because of structural drawbacks of the Constitution of 1952 – its provisions were too general, susceptible to various interpretations and of a programmatic character. In 1985 the Constitutional Tribunal was founded. For the first time in Polish history the control of constitutionality of statutes and other normative acts was possible.

2. Direct Applicability of the Constitution of 1997

The Constitution of 1997 contains a broad catalogue of rights and freedoms of the individual, inspired by fundamental acts of international law, among others the International Covenants on Human Rights of 1966 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The Constitution distinguishes:

1) personal rights and freedoms (Articles 38–56), including the right to life, the right to inviolability and security of person (i.e. the prohibition of scientific experiments without voluntary consent, the prohibition of torture or cruel, inhuman or degrading treatment or punishment), the right to fair trial, the right to privacy, the freedom of religion, the freedom of opinion and expression;

2) political rights and freedoms (Articles 57–63) e.g. freedom of peaceful assembly, freedom of association;

3) social, economic and cultural rights and freedoms (Articles 64–76), among others the right to property, the right to pursue economic activity, labour rights, the right to social security, protection of health, education etc.

Several provisions have been devoted to the definition of the obligations of the individual towards the State.

The Constitution contains Article 8 para. 2, which states clearly that “the provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.” The thesis that the Constitution does not have a normative character as well as the thesis that its provisions are addressed only to the legislative or other State organs, in the sense that they determine only the scope of their competence, have been decidedly ruled out.²

tion” of the constitution narrowly as referring to truly direct effect of the constitution where the constitution itself is a sole ground for decision or is co-applied with statutes; indirect application means application for interpretation of a norm.

² On direct application of the Constitution of 1997 cf. W. Skrzydło: *Konstytucja RP – komentarz* (2000), p. 19 ff., Z. Witkowski (ed.): *Prawo konstytucyjne* (1998), p. 114; W. Sanetra: “Konstytucyjna ochrona wolności i praw pracowniczych,” *5 Przegląd Sądowy* (1998), p. 15 ff., K. Działocha: *Zasada bezpośredniego stosowania konstytucji w dziedzinie wolności i praw obywateli* (1998), p. 31 ff.

Article 8 para. 2 encompasses the whole scope of the constitutional provisions, the freedoms, rights and obligations of the human and citizen included in the second chapter of the Constitution being only a part of them. For this chapter, however, Article 8 para. 2 has the most significant meaning. The principle of direct application of constitutional norms is not unlimited. Article 8 para. 2 clearly points out possible exceptions: "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise." In this context Article 81 of the Constitution is worth attention. It specifies that rights defined in Articles 65 para. 4 and 5, 66, 69, 71 and 74–76³ can be invoked only within limits set by statutes. It is understood that the rights contained in these provisions may therefore be not applied directly. The determination whether the constitutional norm is directly applicable and contains sufficiently clear and precise norms (does not have only programmatic character), is left to interpretation.

The Constitution does not provide an answer to the question whether constitutional rights and freedoms define also the sphere of relations between individuals themselves and can be invoked by individual against the other individual (are horizontally applicable). The doctrine does not give a clear answer either. The few authors who tackled the issue are divided into two groups – one supports the categorical opinion that "the Constitution of the Republic of Poland belongs to the number of constitutional acts of democratic States which do not recognise horizontal applicability of rights and freedoms,"⁴ the other follows the opposite view. To the latter belongs P. Sarnecki⁵ who points out that certain rights are applicable in horizontal relations and protect the individual from interference on the part of the other persons, as for example the prohibition of torture or cruel, inhuman, or degrading treatment or punishment or prohibition of application of corporal punishment. However, "the effect of human rights on horizontal relations has many specific aspects. Since they are implemented by the means of civil and criminal regulations, under normal circumstances there is no need to invoke the provisions of the Constitution in relations between individuals. Only in unusual situations when statutes do not provide the appropriate level of protection the need to apply constitutional provisions directly may arise."⁶ L. Garlicki states in turn that "the concept of horizontal applicability of constitutional rights and freedoms of the individual has not so far won a broad acceptance in the Polish jurisprudence." He thinks, however, that both the new Constitution (with the general principle of direct applicability of its provisions) and foreign experience in that matter will allow for it in the near future.⁷

³ The rights enumerated in these provisions concern a minimum level of remuneration for work, right to employment, occupational advice and training, the right to safe and hygienic conditions of work, aid to disabled persons, the right of family and maternity, to special assistance from public authorities etc.

⁴ B. Banaszak: *Prawo konstytucyjne* (1999), p. 389.

⁵ P. Sarnecki (ed.): *Prawo konstytucyjne RP* (1999), pp. 45–46; similarly, A. Łabno, in the opinion on Banaszak, *op. cit. supra*, n. 4; *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 3–4 (1999), p. 281.

⁶ P. Sarnecki, *op. cit. supra*, n. 5.

⁷ *Polskie prawo konstytucyjne*, Warszawa 1999, pp. 102–103. Similarly, J. Oniszczyk: *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego* (2001), p. 185 ff.; Sarnecki, *op. cit. supra*, n. 5, pp. 45–46. M. Przyucha: "Bezpośrednie stosowanie konstytucji. Najszybsza droga do państwa prawa," *Jurysta*, No. 7–8 (2000), p. 11 ff.

3. Constitutional Norms Potentially Applicable to Private Conduct

Only few constitutional norms may be applied to private conduct. The most obvious seems the right to ownership, other property rights and the right of succession (Article 64)⁸ and the principle of equality and anti-discrimination provisions contained in Article 32 para. 2⁹ and Article 33.¹⁰ One can quote as well Article 59 providing for the right of trade unions and employers and their organisations to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements. The other provisions that may find application in horizontal relations concern the prohibition of scientific experimentation, including medical experimentation, without one's voluntary consent (Article 39), prohibition of torture or cruel, inhuman, or degrading treatment or punishment (Article 40), application of corporal punishment. It is difficult now to foresee how they will be understood or used in the future, they may need specific penalisation.

At this stage of horizontal application of the Constitution in Poland it is quite impossible to identify more precisely the substance and scope of the above mentioned norms. It also cannot be excluded that some other norms may find application to horizontal relations.

4. Enforcement Mechanisms

Constitutional rights and freedoms enjoy primary protection in the law making process (statutes have to comply with the Constitution). It has to be noted that almost all constitutional rights were complemented by statutory law.¹¹ The consequence is that the Constitution is more often used together with the statutes (either directly or indirectly).¹²

In the light of Article 8, there is no doubt that the provisions of the Constitution have to be interpreted in two ways. Every provision regulating a certain right or free-

⁸ Article 64: "1. Everyone shall have the right to ownership, other property rights and the right of succession. 2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. 3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right."

⁹ Article 32 para. 2: "No one shall be discriminated against in political, social or economic life for any reason whatsoever."

¹⁰ Article 33: "1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland. 2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value"

¹¹ The Constitution of 1997 obliged in Article 236 para. 1 the Council of Ministers, within a period of 2 years from the day on which the Constitution entered into force, to present to the Sejm all drafts of statutes necessary for the implementation of the Constitution.

¹² For D. Dudek (*Konstytucja Rzeczypospolitej Polskiej, zagadnienia podstawowe, wybór źródeł* (2001), p. 22 ff.) applying only constitutional provisions as a basis for a ruling, seems to be practically unlikely, bearing in mind that the level of detail of ordinary statutes (especially codices) is higher than the one in the Constitution; see also E. Łętowska: "Co to znaczy 'bezpośrednie stosowanie konstytucji'," *Rzeczpospolita* of 13 August 1996; A. Strzembosz in: A. Abramczyk: "Pod ochroną trzeciej władzy," *Prawo i Życie* of 28 June 1997, p. 3.

dom must be, on one hand, seen as containing guidelines for the State organs, and reflecting values that have to be respected by them. On the other hand, it provides the individual with a right, which can be invoked before any State organ.¹³ This right can be understood either as a “freedom,” which creates an obligation on the part of public authorities to restrain themselves from any action that would impede or make impossible the enjoyment of that freedom, or as a “right” that binds the public authorities to take actions to ensure the execution of that right. In both cases the individual,¹⁴ to whom the right is addressed, is equipped with legal means that will allow him to secure the observance of the particular right by public authorities – first of all the access to courts.

The natural consequence of the direct application of the Constitution is then the direct effect; an individual can invoke the Constitution before the common court.¹⁵ The individual can raise his claims against the State or against the other individual. The mechanism is strengthened by Article 45 of the Constitution providing for the right to court, Article 77 para. 2 (“Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights”) and Article 78 – the right to appeal (however, exceptions are allowed).

Many court cases in which the application of the Constitution is involved are the cases in which the constitutionality of normative act is questioned. It can be done by the individual himself or by the court that has to base its judgement on law.¹⁶ In this context Article 193 of the Constitution is worth mentioning. According to this provision any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court. The character of the court competence stemming from this provision was the substance of a long debate.

The question concerned the possible behaviour of the judge of the common court confronted with the issue of unconstitutionality of the normative acts; if the judge has no doubts as to unconstitutionality of an act, is he obliged to refer the question to the Constitutional Tribunal? At the beginning the answer was not obvious. Different standings were taken by the Constitutional Tribunal and the common courts. Some of

¹³ The obligation to observe rights of individuals is addressed in the first place to public authorities – to State organs and to local self-government. Some of these rights because of its nature can only be invoked in vertical relations (individual – State), e.g. the right to petition, the right to social security.

¹⁴ Individual means foreigner as well. Some rights are addressed exclusively to citizens – e.g. the right to social security. There is no doubt that certain rights, e.g. the right to own property, the freedom of economic activity, appertain not only to natural persons but also to economic entities which consist of these natural persons. At the same time it is not argued that only a natural person can be entitled to some other rights and freedoms (e.g. the right to life). (The Constitutional Tribunal e.g. held that the legal person may lodge the constitutional complaint on the basis of Article 79 of the Constitution for the protection of its constitutional rights and freedoms, see judgement Ts 9/98 of 6 April 1998).

¹⁵ See Saneś, *op.cit.*, *supra*, n. 2, p. 15 ff.; P. Winczorek: *Komentarz do Konstytucji Rzeczypospolitej Polskiej* (2000), p. 20.

¹⁶ According to Article 178 para. 1 of the Constitution “judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.”

the judges of the Tribunal stressed that the common judge should suspend proceedings and ask the Tribunal – the sole competent body to determine the issue of unconstitutionality. According to one opinion, “Article 8 cannot be understood as allowing the judge who noticed the conflict between statute and the Constitution to ignore the statutory provision and base its decision directly on the Constitution, because it would lead to chaos. The judge is bound by the Constitution but also by the statute and unless the statute is in a specific procedure disqualified and excluded from the legal system, it cannot be not taken into account by the judge.”¹⁷

The judges of the common courts were of a different view.¹⁸ The Supreme Court had the occasion to formulate its opinion in the decision of 26 May 1998¹⁹ in connection to election complaints. The Court emphasised “independence” of the common court and held that if the judge discovers the conflict between the statute and the Constitution, he has to base its decision directly on the Constitution. But this does not mean that he has to refer the question to the Constitutional Tribunal, he may do so in case of doubts. The competence of the Constitutional Tribunal to adjudicate on the conformity of statutes and international agreements to the Constitution is not infringed.²⁰ The decisions of the Tribunal and the courts and their effects are different. The Tribunal adjudicates on law and is able to annul the statutory provision, its judgement is final and binding *erga omnes*.²¹ On the other hand, the common court settles individual social relations, its finding on the non-conformity of statutes to the Constitution is not binding for other courts dealing with similar cases. However, the courts may share the same opinion.

The same token is reflected in the ruling of the Supreme Court of 3 December 1998.²² The Supreme Court, while answering the question referred to it by the lower court, acknowledged that the regulation which had to be applied in the present case was unconstitutional and held that in a situation like this, when the court finds the norm unconstitutional, it has to ignore it. Similar opinion was expressed by the Supreme Court (different panel of judges) in the judgement of 26 September 2000²³ and also by the Chief Administrative Court in the judgement of 4 December 2000.²⁴ The latter noticed that its jurisdiction in the framework of the direct application of the Constitution includes the possibility not to apply the statutory provision *in concreto*. In such a case the court is obliged to apply the norm higher in the hierarchy of sources of law.

¹⁷ See opinion of the former President of the Constitutional Tribunal A. Zoll in: A b r a m c z y k, *op. cit.*, *supra*, n. 13, p. 12. Similarly, L. G a r l i c k i: *Polskie prawo konstytucyjne. zarys wykładu*, Part I (1997), pp. 56–57; A. M a c z y Ń s k i: “Bezpośrednie stosowanie Konstytucji przez sądy,” *Państwo i Prawo*, No. 5 (2000), p. 9.

¹⁸ E.g. D. C z a j k a: “Czy sędziowie mogą stosować konstytucję?,” *Gazeta Sądowa*, No. 3 (1999), p. 3; W. S ł u g i e w i c z: “Konstytucyjne aspekty funkcjonowania orzecznictwa sądów powszechnych,” *Przegląd Sądowy*, No. 2 (2000), pp. 32–34.

¹⁹ III SW 1/98, similarly, judgement of 19 April 2000, II CKN 272/ 2000 not published.

²⁰ Article 188 para. 1 of the Constitution.

²¹ Article 190 of the Constitution.

²² III CZP 38/98.

²³ III CKN 1089/00.

²⁴ V S.A. 613/00.

Facing these decisions the Constitutional Tribunal seems to ease its standing. In the judgement of 22 March 2000, answering the legal question referred to it,²⁵ the Tribunal observed that Article 8 of the Constitution on direct application of the Constitution does not impede the application of the Constitution by common courts. However, the courts should use this tool only when it is necessary and possible, and with due care. Direct application of the Constitution cannot lead to neglecting statutory norms in force and cannot be understood as a power to decide the case on the basis of the Constitution instead of the statute. Furthermore, the Tribunal admitted that the common judge has no obligation but rather discretionary power to refer the question of constitutionality of normative acts to the Tribunal.

At this moment the issue seems settled.

Two additional mechanisms may serve the individual to enforce constitutional rights:

1) constitutional complaint – according to Article 79 para. 1 of the Constitution, “everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgement on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.” (The issue may be dealt by the Constitutional Tribunal in different procedures as well. The application can be lodged by the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens’ Rights, the National Council of the Judiciary, the constitutive organs of units of local self-government; the national organs of trade unions as well as the national authorities of employers’ organisations and occupational organisations; churches and religious organisations (Article 191));

2) complaint to Ombudsman – according to Article 80 of the Constitution “everyone shall have the right to apply to the Commissioner for Citizens’ Rights for assistance in protection of his freedoms or rights infringed by organs of public authority.” The Ombudsman may act as well on his own initiative or on the initiative of the other institutions. His inquiries may lead him to direct the matter to the institution concerned (also the court, he can intervene in different forms and stages in the court proceedings), including the Constitutional Tribunal.

In the case of some constitutional rights the specific mechanisms may exist, e.g. labour rights protected by the State Labour Inspection. Protection given by the Inspection to constitutional labour rights and freedoms has constitutional dimension (Article 24 of the Constitution obliges the State to exercise supervision over the conditions of work).²⁶

²⁵ P. 12/98; similarly, judgement SK 15/00 of 21 May 2001.

²⁶ See Sanecka, *op. cit.*, *supra*, n. 2, pp. 22–23; “Ochrona praw pracowniczych,” in: H. Lewandowski (ed.): *Polskie prawo pracy w okresie transformacji w oświetleniu prawa wspólnotowego* (1997), p. 124 ff.

Constitutional rights and freedoms may be also protected by international mechanisms accepted by Poland. The most important ones are the mechanisms provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the International Covenant on Human Rights of 1966 (foreseen in the Optional Protocol). It is obvious that in the above mentioned international procedures the claim is addressed against the State and not against a private party.

5. Application of the Constitution to Private Conduct by Courts

Nowadays therefore the substantial question is whether the courts apply the Constitution in private law relations, i. e. in relations between individuals but also in the relations between an individual and the State when the State does not exercise its public power but acts in the scope of private law (civil law, labour law etc). There are not many judgements in this field since the application of the Constitution as such has no long tradition. The Constitution is rarely invoked by the parties; more often it is the court referring to it on its own competence. In most cases the constitutional norm is used as a guideline, indirectly, for the purpose to interpret the inferior norm.

For illustration one can quote the ruling of 12 January 1999²⁷ in the case brought by Franciszka and Kazimierz H. against Edward H. for termination of the contract of transfer of the farm by parents to their son. The Supreme Court recognised that the action was justified in the light of the conduct of the son. The son showed disregard towards the hardship of his parents -within a few years sold the livestock, stopped cultivating the soil and started to sell it out and squandered the obtained significant financial means – leading to bankruptcy of the farm. The Court held that his behaviour was incompatible with the principles of community life. The reference to these principles could be found in several statutes e.g. the Act on social security of farmers which had to be applied in this case. To define the meaning of the principles of community life the Supreme Court referred to Article 2 of the Constitution declaring that “the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.” Thus referring to the principles of community life means, according to the Court, referring to the idea of justice in law and to the universal values in the culture of our society (principles of ethic and fair conduct). The same reasoning was used in a similar case brought by Edward S. against Bogdan S., of 14 October 1998.²⁸ After considering the interest of successor in the light of the principles of community life the Supreme Court dismissed the case.

An example of the decision to which the court applied the Constitution directly (although together with statutory norms), is, as it seems, the judgement of the Supreme Court of 18 September 1998.²⁹ The applicants Teresa and Zygmunt B. re-

²⁷ I CKN 971/97.

²⁸ II CKN 928/97.

²⁹ III CKN 609/97.

quested the Court to establish the servitude of necessary access through the neighbouring property situated in P. owned by Elżbieta A.S. The lower court established the easement but the court of appeal dismissed the request. The Supreme Court shared the opinion of the court of appeal. It observed that the purpose of the easement of necessary access is to serve the function of the ownership of a real estate, especially its usage. However, in such cases there is a conflict between two competing rights and, as a result, the property rights of a neighbour are to be limited. Therefore, the evaluation of admissibility of the establishment of such easement has to be very careful. In the circumstances of the present case, the Court found justifiable to protect rather the right of the neighbour. In doing so it referred *inter alia* to Article 21 para. 1 of the Constitution ("The Republic of Poland shall protect ownership") and to the European Convention on Human Rights and Fundamental Freedoms (Article 1 of Protocol No. 1).

Since property is subject to legal protection equal to everybody (Article 64 para. 2 of the Constitution) – continued the Court – in the case of the lack of access to a part of real estate resulting from the owner's autonomous act of will, he may not, on the basis of this, request interference in somebody else's property right, claiming priority of protection of his right. The equality of the legal protection of the property rights of the neighbouring estates results in the fact that the applicants may seek a way of improving the functionality of their property by contract, on the other hand, inadequate access to the public road caused by erection of a building covering the whole width of the property does not justify the request to establish the easement of necessary access by the court.

In its judgement of 17 October 1997,³⁰ in the case brought by Katarzyna K. with participation of Jerzy K. concerning division of the gained property of spouses, the Supreme Court reversed the judgement of the court of appeal. The reason was that the court of appeal did not take into account the amended provisions of Article 218 para. 4 of the Co-operative Societies Act which constituted a violation of Article 316 para. 1 of the Code of Civil Procedure ("a court of appeal shall decide on the basis of law in force at the closure of the hearing of an action"). The Court further added that it violated the constitutional principle of protection of property rights (Article 64 of the Constitution) as well as the interest of the Republic of Poland, which, in the opinion of the Court, makes it possible to allow the cassation, despite it being brought after expiry of the term provided for in the Code of Civil Procedure.

Apart from the legal protection of property rights, the Constitution is also applied in the labour law cases. A special example may be the jurisprudence developed with regard to the right to equal treatment and the principle of non-discrimination, even before the adoption of the Constitution of 1997. For example, in the ruling of 13 November 1990,³¹ the Supreme Court held that an employee has, in the period of notice, the same rights as the other employees of the company including the right to remuneration.

³⁰ III CKU 47/97.

³¹ IPR 352/90.

neration in a specified amount. Consequently, if all employees were granted a raise in wages and the applicant was ignored only because of his period of notice, it should be treated as the violation of law. In the judgement of 7 January 1997³² the Supreme Court stated *inter alia* that in case of division of the bonus from the “put aside” profit worked out in yearly account periods, an employee who reliably performed his tasks in those periods may not be deprived of a share in this remuneration; while according to the view uttered in the judgement of 23 October 1996,³³ the omitting an ex-employee while granting benefits, which is a component of the remuneration for work, in the period of his employment, violates the rules of remuneration for performed work, remuneration according to quantity and quality of work and equal treatment of the employees (respectively Articles 80, 78, 11³⁴ of the Labour Code). In the ruling of 13 February 1997,³⁵ the Supreme Court held that physicians couldn’t be discriminated by alignment of turn of duty. In all these judgements one of the basis was, in fact, the respect for the constitutional right to equal treatment; however, it was not explicitly stated in every case.

The Constitution was invoked in regard to labour relations in the judgement of the Supreme Court of 7 December 1999³⁶ concerning the action for reinstatement which was brought by Ryszard J. against Manufacturer of Transport Equipment “PZL-Ś.” S.A. The Supreme Court held that the provisions of the collective labour agreement³⁷ regulating the rules of special protection of employees against the termination of employment, are valid, although contrary to Article 240 para. 3 subpara. 1 of the Labour Code which excluded the modification of protective statutory norms through the collective agreement. Deciding on the effectiveness of the provision contained in the collective agreement, the Supreme Court referred to the general provision of Article 59 para. 2 of the Constitution which provides for the trade unions as well as for employees and their organisations the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements.

Exercise of this right – the Court stated – which belongs to the category of “freedoms, rights and duties of man and citizen” may be limited only by statute and only when it is “necessary in a democratic state of law for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons” (Article 31 para. 3 of the Constitution). Thereto, pursuant to Article 59 para. 4 of the Constitution, the limitations are allowed only to the extent which is admissible on the basis of the international agreement to

³² I PKN53/96.

³³ PRN 94/96.

³⁴ Article 11 is a collateral norm to Articles 32 and 33 of the Constitution, it was introduced to the Labour Code in 1996. The level of generality of the provisions of the Constitution and of the Labour Code regulating the question of equal treatment and prohibition of discrimination is similar.

³⁵ IPKN5/9.

³⁶ N I PKN 438/99.

³⁷ We left aside the question of a legal character of a collective agreement (whether private or public law act) and rather concentrated on the nature of relations to which it is applied.

which Poland is a party. Then the Court referred to the ILO Convention No. 87 on the freedom of trade unions and protection of trade union's rights of 1948 and found that the exclusions under the Labour Code are contrary to the said Convention.

Consequently, the Court held that the provision of the Labour Code was contrary to the Constitution and the provisions of the ratified convention. Therefore, the parties to the collective agreement were entitled to agree that the employer is not allowed to terminate an employment contract for the reason of an employee's incapacity to work resulting from professional disease if the employee's state of health, confirmed by a physician's certificate, enables him to work at a different post.

6. Application of the Constitution to Private Conduct and the Constitutional Tribunal

As mentioned above, the jurisprudence of the Constitutional Tribunal, especially in the sphere of constitutional complaints, may to – certain extent – evidence the application of the Constitution to private law relations. The private law character of the relations provides only a “deep” background for the case, since the essence of the constitutional jurisdiction lies in deciding on the conformity of internal law to the Constitution. Consequently, if the compliance with the Constitution of e.g. the statutory provision is questioned, it is not the conformity to the Constitution of the conduct of other individual, but of the State organ – the legislator – that is called into question. Therefore, the Constitution is invoked against the State and not against a private party.

The illustration of these issues may be the constitutional complaint of the Proexport Ltd.³⁸ The complaining company maintained that the provision of the Act on the Administration of Agricultural Estates Owned by the State's Treasury of 1991, permitting the limitation of the execution of claims from the Agricultural Property Agency of the State Treasury (State's legal person) when the limitation is not allowed in a case of private enterprise, is contrary to the principle of non-discrimination (Article 32 of the Constitution). The Constitutional Tribunal did not share this opinion. He found the limitation of responsibility justified in the light of the principle of proportionality and the principle of social justice. Important is that the Tribunal confirmed that the non-discrimination principle is equally applied to natural and legal persons, therein to State's legal persons.

Anna W. brought the constitutional complaint against provisions of the Co-operative Societies Act of 1982³⁹ which, according to her opinion, infringed i.e. her constitutional rights – the principle of protection of ownership and the right of succession enshrined in Article 64 and derived as well from Article 21 para. 1. Indeed, the Tribunal found the provision in question, depriving the successor of the co-operative tenants' housing rights only by reason of a failure to comply with the time limit, as contrary to Article 21 para. 1.⁴⁰ The Tribunal saw the constitutional provision as the

³⁸ Judgement of 24 February 1999, TK 4/98.

³⁹ Judgement of 21 May 2001, SK 15/00.

⁴⁰ “The Republic of Poland shall protect ownership and the right of succession.”

clear obligation towards the State – to enact the law that could comply with the will of the decedent and would not impede the succession.⁴¹

The Constitutional Tribunal is also competent to give rulings on questions of law submitted by the common courts with regard to cases pending before these court. An example of this kind of decision is the judgement of the Tribunal of 17 May 1999⁴² concerning question of law submitted by two different common courts on matters of, i.a. compatibility with the anti-discrimination clause of the provisions of two Regulations of 1974 and of 1992 concerning some of the duties and rights of persons employed in the public health service, including principles of remuneration for work. Under the Regulations the person on medical duty was not paid for overtime. The Tribunal found no infringement of Article 32 para. 2 of the Constitution and referred to its earlier judgements,⁴³ where it stated that “differentiation of the employee’s rights and duties according to the character of employment and the nature of work is a characteristic feature of labour law. The invoked constitutional norm (i.e. Article 32) grants protection against discrimination which can be recognised on the basis of generally accepted standards, however, cannot be interpreted as a prohibition of differentiation between the situation of different social and professional groups, if such differentiation is subject to a justified discussion within the democratic society.” According to the Court, medical duties have some specific features that the legislator could take into account while setting out the admissible time and the rules for remuneration of such duty.

The constitutional rights and freedoms operating in horizontal relations may also be protected by the Commissioner for Citizens’ Rights who has the competence to apply to the Constitutional Tribunal in cases concerning the question of constitutionality of any normative act. In the judgement of 3 October 2000⁴⁴ the Tribunal found Article 62 of the Act of 1994 on Lease of Locals and Lease Allowances, to the extent the provision excluded the possibility of valorisation of rent bail, incompatible with Article 64 para. 1 in connection with Articles 31 para. 3 and 64 para. 2 of the Constitution. The lack of valorisation caused a situation when in case of termination of a lease, the tenant received only a symbolic amount of money. The regulation adopted by the legislator obviously led, according to the Tribunal, to infringement of the tenants’ rights, as they were to bear all the consequences of depreciation of currency (inflation). The Tribunal held this also contrary to the private law principle of equality of the parties of legal relations (the legislator did not take into account the profits that the lessors could gain using funds coming from the rent bails).

⁴¹ Similarly, judgement of 25 February 1999, K 23/98.

⁴² P 6/98.

⁴³ E.g. U. 6/96 of 26 November 1997.

⁴⁴ TK K 33/99.

II. International Treaties

1. General Remarks

Direct applicability of international treaties in the Polish legal order actually started only in the 80's. During the interwar period the system of introduction of treaties into the domestic law was based on the dualistic approach; a treaty ratified with the prior consent of the parliament and published in an official journal was transformed into domestic law, became a statute and was functioning as a statute, with all the consequences of such transformation (so under the Constitution of 1921, of 1935, until 1952). The transformation into domestic law excludes – at least in theory – the direct application of a treaty. The Constitution of 1952 did not contain any provision on effect of treaties in internal legal order. For many years the treaties were applied almost solely through transposing acts of internal law or owing to express provisions referring to international treaties contained in some statutes. In the 60's, however, the doctrine presented the opinion that the silence of the Constitution may be read as acquiescing the application of treaties *ex proprio vigore* providing that the treaty was ratified and promulgated.

The concept was taken up by the judiciary but applied rarely, depending on actual political needs. When it was politically inconvenient the courts rejected any effects of treaties. In such cases they used to refer to Article 62 of the Constitution of 1952 which read that the judge was independent and subject only to the Constitution and statutes (which obviously meant not treaties). Actually, the first judgement in which the court applied the above mentioned doctrine and based the *ratio decidendi* on an international agreement was the judgement of the Supreme Court on the registration of the Independent Trade Union Solidarity (NSZZ Solidarność) of 10 November 1980. Unquestionably, the Court recognised the rights of the employees to establish trade unions arising from the ILO Convention No. 87 and No. 98. The Court stated that a group of employees could rely on the provisions of the convention as a basis for a claim to positive action on the part of the State. However, a few years later – in 1987, in a similar case on registration of an independent trade union – the Supreme Court changed its opinion (undoubtedly because of political reasons) and rejected the direct effect of the ILO Convention No. 87 and of the International Covenant on Civil and Political Rights of 1966.⁴⁵

The essential change took place in Poland after the turn of 1989. Since then direct application of ratified and published treaties in principle had not been called into question. It was closely connected both to the change of the political system and to the amendment of the Constitution of 1952 which provided for the prior consent of the parliament for ratification of the most important categories of treaties (in this way the constitutional novel of 1989 and so-called Small Constitution of 1992). The accession of the Republic of Poland to the European Convention on Protection of Hu-

⁴⁵ The decision of the Supreme Court SN I PRZ 8/87 of 25 August 1987.

man Rights and Fundamental Freedoms of 1950 (ECHR) was also of great importance. All remaining doubts were additionally dispelled by the Constitution of 1997.⁴⁶ According to Article 9 of the Constitution of 1997 "the Republic of Poland shall respect international law binding upon it." This provision is seen as a directive for the organs of the State. Thus, it is the obligation of the government, the parliament, the judiciary and other State organs to observe treaties to which Poland is the party while applying law or lawmaking. The obligation to assure the conformity of domestic law to international treaties follows as well from Article 188 of the Constitution, as the Constitutional Tribunal has been conferred on the competence to adjudicate on matters of the conformity of statutes to ratified international agreements whose ratification required prior consent of the parliament and the conformity of legal provisions issued by the central State organs to ratified international agreements. In relation to non-ratified treaties, i.e. treaties concluded by acceptance, approval etc., the obligation to implement the treaty in domestic law is similarly imposed on every organ of the State but it is rather limited to transposition.

By virtue of Article 87 of the Constitution of 1997 the ratified treaties became the sources of Polish universally binding law. The Constitution incorporated them into the Polish legal order. They operate in the same way as the Constitution, statute and regulation and have their specified position in this system.

According to Article 91 para. 1 of the Constitution "after promulgation thereof in the *Journal of Laws of the Republic of Poland (Dziennik Ustaw)*, a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute." Article 91 para. 1 sets out three prerequisites for direct applicability of international agreements. The treaty has to be:

1) ratified (i.e. the consent of the Republic of Poland to be bound by the treaty must be expressed by the President; for ratification of several categories of international agreements the President has to obtain prior consent expressed by a statute, which requires the consent of both chambers of the Parliament – the Sejm (lower chamber) and the Senate (higher chamber); the categories of agreements which require such statutory authorisation are listed in Article 89 para. 1 of the Constitution;⁴⁷ other agreements, which do not require ratification are concluded by the Government),

2) promulgated in the *Dziennik Ustaw*,

3) suitable for direct application (i.e. its enforcement does not require enactment of a statute).

⁴⁶ See A. Wasilkowski: "International Law and International Relations in the New Polish Constitution of 2 April 1997," 23 *POLYBIL* (1997–1998), p. 7 ff.

⁴⁷ Article 89 para. 1: "Ratification of an international agreement by the Republic of Poland, as well as denunciation thereof, shall require prior consent granted by statute - if such agreement concerns: 1) peace, alliances, political or military treaties; 2) freedoms, rights or obligations of citizens, as specified in the Constitution; 3) the Republic of Poland's membership in an international organisation; 4) considerable financial responsibilities imposed on the State; 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute."

The effectiveness of ratified treaties in relation to other sources of law depends upon the mode of their ratification. On the basis of Article 91 para. 2 and Article 188 point 1 it is indisputable that in case of a conflict with statutory law the treaty ratified with a prior consent expressed by statute prevails upon statutory law, however, not upon the Constitution. It seems indisputable as well that a treaty ratified without statutory authorisation in case of conflict takes precedence over regulations (Article 188 para. 3). Yet, the practice has not answered the question whether the treaty ratified without the consent of the parliament is equal with the statute.

2. Direct and Indirect Applicability

The doctrine has, since long, pointed out the necessity to apply international agreements in the domestic legal order and to distinguish between the direct and indirect (i.e. for the purpose of interpretation of domestic law) application of treaties. It also formulated the indispensable criteria for direct application of treaties; only treaties containing provisions having self-executing character may be applied in this way (the provision must, first of all, contain a clear and precise norm establishing a right or an obligation).

Direct application of treaties – ratified, published in the *Dziennik Ustaw* and containing self-executing provisions – is unanimously understood as the direct effect of the treaty provisions. Consequently, the individual may rely upon such provisions and invoke them against the State before any organs of the State, i.e. in vertical relations. The court thus may base its judgement directly on such treaty (*ratio decidendi*). Such need arises in situations of legal lacuna in the system of national law, when the matter in question is regulated exclusively or in a large part only by international law or when there is a conflict between a domestic and international norm that cannot be eliminated through interpretation of national law. However, it means that a treaty may not be applied when it comes out that the scope of the rights guaranteed by a treaty is narrower than the scope of such rights in domestic law. In the Polish practice, there are already many examples of direct application of international treaties by the courts.⁴⁸ The most frequently invoked international agreements are the treaties concerning the protection of human rights.

Up until now the jurisprudence concentrated mostly on application of treaties in vertical relations. However, the application of treaties in horizontal relations – individual versus individual – does not seem to give rise to any fundamental doubts, especially when one considers that the Constitution stipulates *expressis verbis* that

⁴⁸ See e.g. W. Czapliński: "International Law and Polish Domestic Law," in: R. Müllerson, M. Fitzmaurice, M. Andenas (ed.): *Constitutional Reform and International Law in Central and Eastern Europe* (1998); W. Czapliński, A. Wyrozumska: *Prawo międzynarodowe publiczne* (1999), p. 385 ff.; W. Czapliński, A. Wyrozumska: *Sędzia krajowy wobec prawa międzynarodowego* (2001), p. 105 ff.; R. Kwiecień: *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego* (2000); M. Masternak-Kubiak: *Umowa międzynarodowa w prawie konstytucyjnym* (1997); J. Łętowski: "Sądownictwo polskie a koncepcja praw człowieka," in: *Prawa Człowieka – wymiar sprawiedliwości*, edited by the Centre for Europe, University of Warsaw (1995), p. 30 ff.

a ratified treaty is a source of internal law. Therefore, if the treaty fulfils the formal and material criteria mentioned above, regulates specified relations of private-law nature, then it shall be directly applied to these relations.

3. Enforcement Mechanisms

The rights and duties of individuals set out in international agreements, just like constitutional rights and freedoms, enjoy – primarily – legislative protection (a statute should comply with a treaty ratified with the prior consent granted by statute, a regulation should comply with a ratified treaty, etc.). This kind of protection is particularly important when a treaty in question is not suitable for direct application; not only when the provisions of a treaty are not of a self-executing character but also in a case of non-ratified treaties, i.e. treaties concluded by approval of the Council of Ministers. Approved treaties are not sources of universally binding law, so their effectiveness in the Polish legal order depends on transposition (implementing statute or regulation is necessary; sometimes the reference to this kind of treaties in domestic statute – express provision allowing for application of such treaty). Since the ratified treaties are directly applicable the individual may invoke them before the common court – against the State or against individual. It is worth to notice, by the way, that this right is not questioned, although Article 178 of the Constitution points out that the judges are subject to the Constitution and statutes and does not mention international treaties.

Similarly to the constitutional rights and freedoms, the individual may claim the rights granted by a treaty by means of constitutional complaint. In this procedure the treaty is invoked not against an individual as such but against the State (although reasons for the complaint may have origin in a private-law act/relation). The constitutional complaint is restricted within narrow limits (see I (4)); it must charge a statute or regulation with incompatibility with ratified treaty – and at the same time – with infringement of constitutional rights and freedoms. The individual, therefore, may not in this way claim the application of the treaty to his case, or complain of e.g. non-application or improper application of treaty provisions by a court etc.

These questions were explained in two judgements of the Constitutional Tribunal. In the judgement of 8 June 1999,⁴⁹ the Tribunal held that the compliance of the legal act in question with the Constitution (and not with any other normative act) is the only subject of the constitutional complaint. The Tribunal examined whether it was possible to find any other link to international agreements to make the constitutional complaint possible. The claimant – a private company – argued that the failure of the common court to apply a treaty while deciding on the case infringed Article 9 of the Constitution (cited above) and other constitutional provisions concerning the position of treaties within the system of sources of law and the procedures for ratification and publication of treaties (Articles 89, 91 and 241). The Tribunal stressed that these provisions imposed obligations on the specified organs of the State but did not

⁴⁹ SK 12/98.

create any constitutional rights or freedoms for the citizens. It is then excluded that the subjects enjoying the right of complaint to the Constitutional Tribunal on the basis of Article 79 para. 1, could use this legal measure in order to control how the organs of the State fulfil their constitutional obligations.

The Tribunal repeated and developed this thesis in the judgement of 10 July 2000.⁵⁰ It examined whether infringement of Article 7 of ECHR guaranteeing that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offence was committed – and Article 15 of the International Covenant on Civil and Political Rights of 1966 – stipulating that in case of change of legislation the regulation more favourable for the perpetrator should apply – could constitute the basis for a constitutional complaint. The Tribunal observed that it might be proper to accept the idea that the term “constitutional freedoms or rights” used in Article 79 para. 1 of the Constitution, referred also to the human and citizen’s rights provided for in the fundamental acts of international law such as the International Covenant on Civil and Political Rights of 1966 or ECHR. However, the individual could base his constitutional complaint on these acts only when he is able to invoke collateral constitutional right. The wording of Article 79 para. 1 does not justify control of legality of a normative act on the basis of a norm of international law which is not enshrined in the Constitution.

Consequently, in a constitutional complaint a treaty has to be invoked together with the Constitution. This obviously might limit the scope of treaties able to be used like that. However, a case concerning the protection of rights of individual set out in a treaty (incompatibility of the statute with the treaty, etc.) may be brought before the Constitutional Tribunal also through the other procedures, and if so the link between the treaty provision and the constitutional norm is not required. These procedures are not instituted by individuals and are addressed against acts or omissions of the public authorities (see I (4)). Similarly, in the case of international procedures accepted by Poland, a complaint brought by an individual within the system of e.g. ECHR or the International Covenant on Civil and Political Rights of 1966, is a complaint against the State.

4. Application of Treaties to Private Conduct by Courts

The practice of the application of treaties in horizontal relations is not broad. Most frequently a treaty is invoked against the State. However, it is worth to notice that in the 80-ies when, due to political reasons, the direct applicability of treaties was questioned, the effect of a treaty in horizontal relations was recognised in some of the judgements, e.g. in the judgement of the Supreme Court of 14 June 1988. The case concerned protection of the trademark of the company “INTERAGRA” established in Paris. This trademark was then registered for the Polish enterprise in Poznan. The French company sought protection on the basis of Article 8 of the Paris Convention

⁵⁰ SK 21/99.

for the Protection of Industrial Property of 1883, revised in Stockholm in 1967. The Supreme Court held that since the provision in question regulates the rights and duties of the subjects entering into private-law relations, it is suitable for direct application in internal law since the day of entry into force of the Convention towards Poland.⁵¹ Similarly, the Supreme Court in the judgement of 28 June 1989⁵² held that the international agreements concerning private law and family relations might constitute the basis for the court's decision equally with the provisions of domestic law. Reasons for this may follow from the fact that, although at that time the Constitution contained no provision on the position of treaties within the domestic law, many statutes referred (as they still do nowadays) to international agreements. The International Private Law Act of 1965 (still in force) which in Article 1 para. 2 provides that the provisions of the Act shall not apply if a treaty to which Poland is a party provides otherwise, may serve as a good example.

One of the treaties that are frequently applied is the Hague Convention on the Civil Aspects of International Child Abduction of 1980. E.g. in the judgement of 18 November 1999⁵³ in case brought by Anderas P. against Urszula C. for return of a child on the basis of the above-mentioned Convention, the Supreme Court repealed the decisions of the lower courts and ordered Urszula C. to return the child back to his father. The Court referred to Article 12 of the Convention and agreed that in principle separation from the mother could not impede the return of the child illegally kidnapped to the State of his habitual residence.

If the system of national law has no lacuna or there is no obvious conflict between the international and the domestic norm, a treaty does not need to be applied directly. It is then sufficient to assure the compliance of the domestic law with a treaty through interpretation of existing domestic norm. This is the case of indirect applicability of international agreements. For indirect application of a treaty it does not matter neither the kind of procedure in which the treaty was concluded (questions of ratification, approval, publication, etc.) nor the nature of the provision of the treaty (whether self-executing or not). Undoubtedly, it is a very common way to apply treaties, in particular these concerning the protection of human rights.

An example of indirect application of a treaty in horizontal relations is the judgement of the Supreme Court of 13 November 1997. The action was brought by partners of non-commercial partnership against Jacek L. who exercised economic activity under a brand name "A . . ." and concerned the right to a word-graphic trade mark containing the word "A . . .".⁵⁴ The Court gave the interpretation of Article 5 of the Act of 1993 against Unfair Competition in the light i.a. of Article 8 of the Paris Convention for the Protection of Industrial Property of 1883, revised in Stockholm in 1967. The *inter alia* Court referred also to the Europe Agreement establishing an association between the Republic of Poland and the European Communities, in par-

⁵¹ II CR 367/87.

⁵² II CR 200/89.

⁵³ I CKN 992/99, similarly, II CKN 855/97 of 16 January 1998.

⁵⁴ I CKN 710/97.

ticular to its Article 66 para. 1 imposing on Poland the obligation not only to improve the protection of intellectual, industrial and commercial property rights but also to respect the obligations arising from other treaties, concluded earlier. The Court argued: "Nowadays it is impossible to accept that the adoption of the name (with unreasonable addition S.C.) by the plaintiffs, which actually has been used for many years as a trade mark by another firm – very well known and respected in the world market (and since the 80's in the Polish market), German company A. (. . .), is the legal use of the trade mark in the meaning of the Act against Unfair Competition." Further the Court held that "by using this name the plaintiffs infringed the protection which Poland is obliged to guarantee for foreign trade marks and offended the good commercial customs (Article 3 para. 1 of the Act)." This clearly suggests that, in opinion of the Court (we leave aside the question whether the reasoning is correct), the individual is bound by a treaty concluded by the State.

In most cases, the treaties are invoked by private parties in order to prove the existence of a conflict between the treaty and the statute which applies to the private-law relation in question. In such cases the constitutional collateral norm is frequently invoked (thus, reference to the treaty may have sometimes subsidiary character) and the action becomes in fact an action against the legislator. On the other hand, the courts are *ex officio* obliged to ensure the effectiveness of a treaty – even when the individual does not rely on the treaty provisions, the court can refer to a treaty in a particular case (in this sense the private-law relations are subject to international agreements).

In the case mentioned below the Supreme Court examined the compatibility of the statute with the treaty. It referred to the treaty to confirm the legality of the State legislative activity. Unlike the case of judicial review of constitutionality of the statutory law (see I (4)), the competence of the common courts to exercise such control in relation to compatibility of statutory law with treaties has, in principle, never been questioned. Therefore, the court, finding incompatibility of a statute with a ratified treaty, could just apply the treaty. It has, as it seems, historical explanation. The treaties were not subject to the review of the Constitutional Tribunal. Until 1997 the Constitution lacked a provision analogous to the present Article 188. Also, the Act on the Constitutional Tribunal of 1985 provided neither for the control of compatibility of statutes with international treaties, nor the control of compatibility of treaties with the Constitution. Up to 1990s, the Constitutional Tribunal rejected all attempts to extend the scope of its competence upon the international instruments.⁵⁵ The application of international agreements was the "natural" domain of the common courts. When they started to refer to international treaties more often after 1989, the Constitutional Tribunal began to take a different view on its own role and started to refer to the treaties as well.⁵⁶ Up till 1997 if it took international treaties into account, it con-

⁵⁵ See e.g. the judgements of 10 June 1987, case P/87, p. 16; and of 30 November 1988, case K 1/88.

⁵⁶ The Tribunal implicitly recognised the treaty as a source of law. On 30 November 1994 the Constitutional Tribunal answered positively the question posed by the ombudsman, whether the statute authorising the President to ratify an international agreement was subject to control from the point of view of its conformity

sidered this as an element of the rule of law principle embodied in Article 1 of the Constitution.⁵⁷

Nevertheless, let us return to the practice of the common courts. This is an example of a case where the court – according to the claims of the plaintiffs – examined the compatibility of a statute with a treaty, however, did not find any incompatibility. Anna Ż. brought an action for annulment of resolutions of the commissioner board established for the joint-stock bank company, adopted on questions which were reserved by the statutory law for the general meeting of shareholders. The Court, while examining whether it was admissible to base the action against the decisions of the board on the Commercial Code, examined i.a. whether the level of protection granted the shareholders by the Code's provisions, fulfils the requirements set in Article 2, 21, 64 para. 2, 77 para. 2 and 78 of the Constitution and in Article 1 of the Protocol No. 1 to ECHR and also in Article 6 of this Convention. The Supreme Court had no doubts that the answer should be positive. Otherwise – as follows from the judgement – the Commercial Code would have to be interpreted in the light of the principles of the Constitution and ECHR.

By this occasion the Court examined the compatibility of Article 105 of the Banking Act of 1989 with Article 64 of the Constitution which, according to the Court, guarantees the protection of property rights including the rights of shareholders. The Court noticed that, as it followed from Article 31 para. 3 of the Constitution, the constitutional protection of rights was not absolute. This provision expresses the principle of proportionality (earlier derived from the general principle of the rule of law), the prohibition of excessive interference of the State in the sphere of rights and freedoms of the individual. Also Article 1 of the Protocol No. 1 to ECHR indicates that the State-Party has not been deprived of the right to enact the law necessary to ensure the exercise of individual property rights in accordance with the public interest. Therefore, the provision of Article 105 which provides for the commissioner board the competence to pass resolutions encroaching on the rights of shareholders, remains in conformity with Article 31 para. 3 of the Constitution and with Article 1 of the Protocol No. 1 to ECHR. This regulation, in due form, balanced the competing values: on one hand, the rights of the shareholders and on the other hand, the stability of the financial system and social peace – conditions for State security and public order – and the rights of the holders of bank accounts.

We mentioned above that a treaty norm might be also applied subsidiarily together with a collateral constitutional norm (frequent in relation to the prohibition of discrimination). It was so in e.g. two cases cited above (see I (5)). In the ruling of

with the constitution. The statute is inferior to the Constitution in the hierarchy of sources of law, so it should conform with the latter. It was then presumed that by control of the ratification law the treaty itself can be controlled as well.

⁵⁷ On the analysis of the jurisprudence of the Constitutional Tribunal cf. J. O n i s z c z u k: "Umowy międzynarodowe w orzecznictwie Trybunału Konstytucyjnego," *Państwo i Prawo*, No. 14 (1995), p. 50 ff.; A. S t a n c z y k: "Umowy międzynarodowe a wewnętrzny porządek prawny w świetle doktryny i orzecznictwa Trybunału Konstytucyjnego," in: *Studia i Materiały*, edited by the Office of Constitutional Tribunal (1995), Vol. I, p. 159 ff.

18 September 1998⁵⁸ (concerning the establishment of necessary access road) the Supreme Court referred to Article 21 para. 1 of the Constitution and to ECHR.

In the judgement of 7 December 1999,⁵⁹ concerning the request for reinstatement order, the Supreme Court held that Article 240 para. 3 point 1 of the Labour Code is incompatible not only with Article 59 of the Constitution but also with the provisions of the ILO Convention No 87 of 1948. According to the Convention, the domestic legislation should not infringe the guarantees provided for by the Convention or be applied as to infringe them (Article 8 para. 2). The Court stressed that a statute could not restrict the autonomy of will of the parties to a collective labour agreement if an international agreement did not allow such restriction.

5. Application of Treaties to Private Conduct and Constitutional Tribunal

The jurisdiction of the Constitutional Tribunal is – because of its nature – limited to examining the compatibility of statutes and other normative acts with ratified treaties (we leave aside the review of constitutionality of treaties). Therefore we can, only with certain approximation, use its practice for illustration of the application of the international agreements in the sphere of private law.⁶⁰ There is, e.g. a vast jurisprudence of the Tribunal concerning the application of the principle of non-discrimination to the labour relations or access to education, derived as well from international agreements. Already, in the judgement of 3 August 1987⁶¹ concerning the compatibility of the orders of the Minister of Health and Social Security of 1985 setting out the limits for admission of women and men to medical studies with the Constitution, the Tribunal while stating that the provisions of the orders were incompatible with the constitutional principle of equality and of equal rights for women, pointed out that the acts in question were also incompatible with Article 26 of the International Covenant on Civil and Political Rights of 1966 and Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979. The Tribunal applied these treaties for interpretation of existing internal law.

In this context, the judgement of the Constitutional Tribunal of 29 September 1997⁶² seems interesting (request lodged by the Commissioner for Citizens' Rights). The Tribunal held that Article 44 para. 2 point 1 of the Act of 1996 on the Civil Service was incompatible with the Constitution to the extent that it constituted the basis for termination of an employment with a female civil service officer, without her consent, earlier than termination with a male civil service officer. It is significant

⁵⁸ III CKN 609/97.

⁵⁹ N I PKN 438/99

⁶⁰ E.g. in the year 2000 the Constitutional Tribunal referred to international treaties in 10 cases. Only two of these cases could be classified as dealing with private law relations. The first dealt with the protection of property - Protocol 1 to ECHR (decision of 12 January 2000, P. 11/98); the second – termination of the employment of the governmental administration employees without the consultation with trade unions – Article 11 of the ILO Convention No 87 (decision of 13 March 2000, K. 1/99).

⁶¹ P 2/87.

⁶² TK K 15/97.

that for the interpretation of the meaning of the constitutional provision on equal rights for women and men the Tribunal carefully analysed the International Covenant on Economic, Social and Cultural Rights of 1966, ECHR, the European Social Charter and the UN Convention of 1979 on the Elimination of All Forms of Discrimination against Women. This judgement indicates that the Tribunal applies international law indirectly and that such indirect application may, as well, ensure full effectiveness of international law.

In the above case we treated the relations between the employer and the civil service officer as horizontal. Similarly, if relations between the patient and the physician – therein in relation to sick leaves – can be considered as “private-law,” we may then point out the judgement of the Constitutional Tribunal of 1998. In this case, already under the Constitution of 1997, the Tribunal recognised the provision of the Regulation of the Minister of Health and Social Security on certification of temporary inability to work, which obliged the physician to put the statistic number of the disease in the certificate, incompatible with the Constitution (Article 31 para. 3, 47, 51 para. 1, 2 and 5) as well as with Article 8 of ECHR and Article 17 of the International Covenant on Civil and Political Rights of 1966. The Tribunal clearly based its decision (*ratio decidendi*) on international treaties.⁶³

III. Final Conclusion

Though, in the case of Poland, only a short period can be taken into account, and the practice is not vast, it shows that the Constitution of 1997 and international treaties are both applied in vertical as in horizontal relations. However, for the Constitution – it is rather the modest beginning of this practice. National courts when called upon to enforce private acts, inquire into the conformity of those acts with – first of all – statutes, and then principles of either constitutional or international law. This short practice makes it impossible to give a detailed list or a scope of these principles.

In comparison to statutes, the application of the Constitution and/or international treaties to private conduct, has some specific features due, on one hand, to the nature of these acts, in many cases their general character and, on the other hand, the private nature of the relations in question. The awareness of the possibility of the direct application of the Constitution and of the international obligations taken by Poland is not deep enough. Therefore, the application of the Constitution and treaties depends rather on the judges of the common courts.

⁶³ U. 5/97.

Proposed Changes in the Polish Constitution of 1997 ahead of Poland's Accession to the European Union

KRZYSZTOF WÓJTOWICZ

One of the most characteristic features of the Constitution of Poland adopted in 1997 is its opening to the rules of international and supranational law.¹ In particular, it incorporated provisions clarifying the relationship between international and domestic law. It was assumed that the Constitution, being the basis for the binding force of all legal norms within the state, should comprise rules that allow for precise definition of the place of international legal norms in the national legal system. The general principle in Article 9 stresses that "the Republic of Poland shall respect the international law by which it is bound," and the provisions of Article 87 generally define the status of international agreements within the Polish legal system. A model for the specific transposition of all ratified agreements has been adopted and, under the provisions of Article 91 (1), following promulgation thereof in the Official Journal of the Republic of Poland, such agreements constitute part of the domestic legal order and are applied directly, unless application depends on enactment of a statute. International agreements ratified upon prior assent by statute have precedence over statutes if such agreements cannot be reconciled with the provisions of such statutes.

As early as in the preparatory stage a point discussed was whether, apart from rules relating to "classical" international law, the Constitution should also include provisions which could constitute the legal basis for Poland's eventual accession to the European Union. At the time the prospect of Polish membership was fairly remote and it seemed quite reasonable to postpone adoption of such measure until accession drew nearer. The advantage of this solution was the possibility of taking into account developments in the Union's legal and institutional *acquis* and the experience of the member states. However, the view that prevailed was that early adoption of integration provisions would show unequivocally Poland's commitment to joining the integration processes in Europe. There was also a weighty domestic consideration

¹ See A. Wasilkowski: "International Law and International Relations in the New Polish Constitution of 2 April 1997," 23 *PolYBIL* (1997-1998), p. 7; W. Czaplinski: "International Law and the Polish Constitution," in: M. Wyrzykowski (ed.): *Constitutional Essays* (1999), p. 289; K. Wójtowicz: "The Receptivity of the Constitution of the Republic of Poland to International and Supranational Law," in: *The Principles of Basic Institutions of the System of Government in Poland* (1999), p. 255.

– that submission of the integration clauses in the Constitution to popular vote in the required referendum would be of important political significance and would send a signal both to the political class and the people regarding the nation's position on the delicate question of limitation of the exercise of the most fundamental powers of the state. As a result, some provisions clearly inspired by the integration option were incorporated into the text of the Constitution.

The analysis that follows goes in two directions. The first focuses on the provisions which can serve the integration purpose but which since their interpretation raises some doubts, it seems advisable to define more precisely and unequivocally. The second direction aims at identifying the constitutional provisions that are at variance with European Union law² and ought to be amended prior to ratification of the accession treaty. The suggested amendments to the Constitution take into account developments in the constitutional law of the member states and European Union law.

Analysis of the provisions of the Polish Constitution for consistency with EU law is necessary because, in line with Article 133(2), before ratifying an accession treaty the President may refer it to the Constitutional Court for a ruling on its conformity with the Constitution. The review of constitutionality will cover the whole EU law except for derogations granted Poland. The Court may also check the constitutionality of the statute assenting to ratification of an accession treaty, and if it finds that the accession treaty or the assenting statute is inconsistent with the Constitution the process of ratification is valid only if the relevant constitutional provisions are amended in accordance with Article 235.³

If, however, assent to ratification of the accession treaty is granted by means of a referendum, adjudication on the constitutionality of such assent will not be within the competence of the Constitutional Court.

It is not clear whether the Constitutional Court is competent to rule on the constitutionality of the accession treaty after its ratification and entry into force. In the doctrine the view was expressed that should preventive review take place a decision of the Court finding the treaty consistent with the Constitution could be considered *res iudicata*, rendering ex post review inadmissible.⁴ On the other hand, if the Court has not handed down a decision in the course of the preventive review, subsequent

² The term "European Union law" as used here also comprises European Community Law. The analysis of the provisions of the Polish Constitution draws on an earlier paper by the author: K. Wójtowicz: "Konstytucja Rzeczypospolitej Polskiej a członkostwo w Unii Europejskiej," in: E. Póławska (ed.): *Konstytucja dla rozszerzającej się Europy* (2000), pp. 155 ff.

³ The existence of a special procedure for revision of the Polish Constitution seems to undermine the view that the course of expressing assent to ratification of an agreement which protects the sovereign's interests could provide the grounds for implied revision of the Constitution within the scope regulated by this agreement. This view is consistent with the stance of the Constitutional Court expressed in a resolution of 30 November 1994 in which it stated that if "an international . . . agreement is inconsistent with the Constitution, its signature, authorisation of its signature and ratification are unconstitutional." For a more detailed discussion of this question see L. Garlicki: "Członkostwo Polski w Unii Europejskiej a sądy," in: Póławska, *op. cit.*, *supra*, n. 2, pp. 212 ff.; K. Wójtowicz: "Skutki przystąpienia Polski do Unii Europejskiej dla sądów i Trybunału Konstytucyjnego RP," in: Z. Witkowski (ed.): *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* (1998), pp. 87 ff.

review of conformity with the Constitution is not in the light of Article 188 to be excluded, although recognition of the treaty as inconsistent with the Constitution would confront the Polish authorities with the following alternative: either initiation of procedures for revision of the Constitution or renegotiation of the Treaty.

The fundamental provision in the Constitution relating to integration is Article 90, pursuant to which:

(1) The Republic of Poland may, by virtue of international agreement, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters. (2) The statute assenting to ratification of an international agreement referred to in paragraph 1 shall be passed by the Parliament by a two thirds majority vote in the presence of at least half of the statutory number of Members Members, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. (3) Assent to ratification of such agreement may also be given by means of a national referendum in accordance with the provision of Article 125. (4) Any resolution in respect of the choice of procedure for assenting to ratification shall be passed by the Parliament Parliamentary by an absolute majority vote taken in the presence of at least half of the statutory number of Members.

The provision quoted above constitutes the element of the constitutional integration act⁵ and in line with the aim of this paper a question that needs to be asked is whether the formula used in this provision is correct or requires modification.

First of all, it should be noted that the authors of the Constitution rightly assumed that accession to an integration organisation differs from the legal point of view from accession to a classical international organisation. Article 90 plays the role of the particular rule in relation to the general principle of accession to international organisations provided for in Article 89 (1/3), according to which ratification of an international agreement requires prior assent by an ordinary statute whose adoption does not require a qualified majority.

From the point of view of the candidate state the basic element differentiating the two situations is the result of the accession treaty. In the case of an integration organisation as exemplified by the European Union, the accession treaty allows for the transfer of state powers outside the apparatus of the State. The constitutional significance of this act makes a qualified procedure necessary. When there is no transfer of state powers the ordinary procedure is sufficient. As a principle, the idea of embodying in the Constitution a special procedure allowing for accession to the integration organisation merits positive evaluation. If the Constitution includes rules relating to exercise of national sovereignty and establishes a division of powers between state organs it should also include exceptions to those rules.

⁴ See S. B i e r n a t: "Constitutional Aspects of Poland's Future Membership in the European Union," 36 *Archiv des Völkerrechts* (1998), p. 422.

⁵ See J. B a r c z: "Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich," in: M. K r u k (ed.): *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* (1997), p. 205.

A subjective and objective aspect are discernible in the formula used in Article 90 (1). The former concerns the organisation to which powers are transferred. The text of the provision refers in general terms to "international organisations" or "international institution" without mentioning any particular bodies as in the case of similar clauses in the constitutions of some of the member states.

The transfer of the exercise of powers to international institutions or organisations is provided for in the constitutions of Belgium (Article 34), Denmark (Article 20/1), Spain (Article 93), Netherlands (Article 92) and Luxembourg (Article 49-bis).

The provision of Article 90 (1) of the Polish Constitution reflects to some extent the existing constitutional models and at the same time corresponds with the legislation technique according to which in the constitution general terms should be used rather than proper names.

On the other hand there is no organisation other than the European Union, to which in the intention of the authors of the Constitution, Article 90 could refer. The objection that the term "international organisation" is too general and would not prevent Poland from entering in future, for instance, the Commonwealth of Independent States or other organisations, even ones unknown at the time of the referendum was already raised in the referendum campaign preceding the adoption of the Constitution in 1997.

These objections failed to evoke a broader response on the part of the public being considered exaggerated and divorced from political realities. Furthermore it is stressed in the doctrine that an "organisation" or "organ" must share with Poland adherence to common system of universal values such as democratic government and respect for human rights. It excludes a transfer of powers to organisations acting at variance with the principles proclaimed in the Constitution such as rule of law, human rights and respect for international obligations binding on Poland.⁶ More serious doubts were raised in spring 2001 during a parliamentary debate concerning the procedure to be applied for ratification of the Statute of the International Criminal Court. The view was expressed that powers of the Court with respect to states, particularly the obligation to surrender citizens even if protected by constitutional clauses prohibiting a extradition and irrespective of immunities granted by domestic law, necessitated recourse to Article 90 rather than Article 89.⁷ Thus, if this view had been accepted, Article 90 would have been shorn of the original intent and future accessions to international organisations could have been seriously hampered.

It should be noted that there are member states which chose different methods of describing the organisation to which powers may be transferred.

In France, Article 88-1 of the French Constitution adopted in 1992 states: "The Republic shall participate in the European Communities and the European Union." Article 23 of the German Basic Law stipulates that "the Federal Republic of Germany shall participate in the development of the European Union [and] to that end may

⁶ See *ibid.*, p. 211.

⁷ See the draft resolution passed by the Polish Parliament on 31 January 2001, No. 2618.

transfer sovereign powers." Similarly, Article 7(6) of the Portuguese Constitution refers to "construction of the European Union."

It seems therefore to follow that explicit indication of the European Union as the beneficiary of the transfer of competence could dispel the political objections of certain sections of the public in Poland and at the same time would identify more precisely the extent of Article 90's application, thus more faithfully expressing the original intent underlying this provision.⁸

The second aspect of Article 90(1) concerns the object (material content) of the international agreement allowing for the transfer/delegation of competence as the delegated competence may relate only "to certain matters." We can see that even the categories of delegated powers are not specified, which contrasts with what was done in some of the constitutions of the member states. Certainly, such a general description of the categories of delegated powers does little to clarify the problem and only spells out that the powers delegated are of the kind that belong typically to the state.

In fact the crux of the problem is that in the case of accession to the European Union the competence transferred/delegated is closely connected with the exercise of national sovereignty.

As is clearly known, sovereignty is expressed through the exercise, directly by a sovereign or in its name, of the powers necessary for the functioning of the state as a separate entity. Apart from the powers associated with international autonomy, they consist primarily in promulgating law, administering justice, keeping public order, controlling the public finances, and organising and maintaining the armed forces.⁹

For example, the Community's legislative competence lies in adopting universally binding, general and abstract legal rules which are directly applicable (have direct effect) in the legal order of the member states without any interference on the part of national parliaments. Such acts are Regulations (Article 249 of the Treaty establishing the European Community, TEC). Moreover, in accordance with the jurisdiction of the European Court of Justice (ECJ), in some cases, direct effect may also be attributed to directives and decisions addressed to the member states. The Communities may adopt individual acts (decisions) which are binding in their entirety upon both natural and legal persons in the member states.

In a 1964 interpretation of the Treaty establishing European Economic Community the ECJ stated that, by virtue of due providing this organisation with real powers stemming from a limitation of sovereignty or a transfer of powers from the States to

⁸ In line with Article 49 of the Treaty of European Union membership of the European Union also means membership of the Communities on which the EU is based. It has been argued in the doctrine that the terms "Communities" and "pillars of the European Union" do not "demarkate different organisations but only different capacities with partially specific legal instruments and procedures." See A. von Bogdandy: "The Legal Case for Unity: The European Union as a single organisation with a single legal system," 36 *CMRL* (1999), p. 887.

⁹ For more details see B. De Witte: "Sovereignty and European Integration: The weight of legal tradition," 2 *Maastricht Journal of European and Comparative Law* (1995), pp. 145 ff.; W. Czapliński: "Członkostwo w Unii Europejskiej a suwerenność państwowa – zarys problemu," in: P. Popławska, *op. cit.*, *supra*, n. 2, pp. 119 ff.; C. Mik: *Europejskie prawo wspólnotowe* (2000), pp. 264 ff.

the Community, the members have limited their sovereign rights, albeit within circumscribed fields.¹⁰

Article 4 of the Polish Constitution states that "Supreme power in the Republic of Poland shall be vested in the Nation. The Nation shall exercise such power directly or through its representatives." If, in accordance with Article 90 (2) and (3), assent to a transfer of legislative, executive and judicial competence is given either by the sovereign Nation or its representatives in the Parliament, the voters in a referendum or the Parliament should know the extent to which the exercise of the sovereign's attributes of power have been limited.

Though from the term "in relation to certain matters" used in Article 90 (1) it is possible to conclude that a transfer of the entirety of competence is inadmissible, we can find no single positive indication concerning what can be transferred and no single negative one regarding what cannot.

That makes it necessary to refer to the treaties constituting the Union and the Communities and thus indirectly try to identify the scope of the powers transferred by the member states. This is, in a sense, a classical approach based on the concept of the legal personality of international organisations, which is expressed through the exercise of certain powers. The personality of an organisation is derivative in character, stemming from the will of states as expressed in the treaty which called the said organisation into existence. Thus, states also decide on the scope of the competence with which a particular organisation is equipped.

In Article 5 EC it was proclaimed that "the Community shall act within the limits of the powers conferred upon it by this Treaty." This is how the principle of "conferred powers" or "enumerated powers" was expressed; the principle according to which the Communities cannot overstep the powers transferred by the member states. Thereby, the states preserve the original right to establish their competence (*Kompetenz-Kompetenz*)¹¹ and none of the EC organs can grant any powers independently, a point confirmed in Article 7 (1) EC which states that the Community "shall act within the limits of the powers conferred upon it by this Treaty." And this is, for example, the case when legal acts are issued by the EC institutions (Article 249 EC).

However, the above principles have not been developed in the Treaties in the form of a substantive separation of powers as is usually the case in the constitutions of federal states. In reference to the retention of powers by the member states, it is stated in general terms in Article 6 (3) TEU that the Union respects the national identities of the member states and, as indicated by the content of the detailed provisions, that the powers of the states include, for example, the taking of the necessary measures for protection of the essential interests of its security (Article 296 EC), in the event of war (Article 297 TEC) or in certain cases in the field of public health (Article 152/5 TEC). But as regards the competence of the Union/Communities, the Treaties point to the objectives which should be achieved, whereas the specific pow-

¹⁰ Case 6/64 *Costa v ENEL*, ECR [1964], p. 585.

¹¹ For the opposite view, see: I. P e r n i c e: "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", 36 *CMLR* (1999), p. 710.

ers required are to sought among the detailed treaty provisions. Thus, some fairly complex reasoning based on combination of different treaty regulations is needed to identify the "possessor" of a particular kind of competence.

Furthermore, among the TEC provisions we have Article 308 which says that "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

This provision paves the way to a certain special method of establishing the competence of the Community, which is through supplementation of the content of the treaties without recourse to the revision procedure provided for in Article 48 TEU.¹²

The *ratio legis* behind this distinctive "necessary and proper" clause is the consideration that the dynamic of the integration process cannot be enclosed within the rigid, narrow limits of the complex and time-consuming procedure for revising the Treaties, and that there should exist a way to avoid blocking the decision-making mechanism in the Communities. This, however, calls into question the reasonability of the conferred powers principle¹³ quoted above. The unanimity rule in the adoption of Council resolutions gives the member states only partial protection because national parliaments and voters are removed from decisions which might result in extending the powers of the Communities beyond those granted by states' consent as expressed through ratification procedures.

It ought to be remembered that the ECJ, employing the concept of implied powers, supported by the so-called parallelism principle, recognised that the granting of particular powers in international relations takes place in parallel with the delegation of internal powers to the Communities.¹⁴

In practice, this clearly visible lack of competence limits worked in favour of the Communities, resulting in dissatisfaction among the member states, which was manifested through introduction of the subsidiarity and proportionality principles by the Maastricht Treaty.¹⁵

According to Article 5 TEC, "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be

¹² For a more detailed discussion see A. D a s h w o o d: "The Limits of European Community Powers," *European Law Review* (April 1996), p. 123.

¹³ See the case brought before the Supreme Court in Denmark by opponents of EU membership. Danish Supreme Court, Case No. I 361/1997, Judgement of April 1998, Hanne Norup Carlsen v. Prime Minister Paul Nyrup, quoted and commented in: J. S c h w a r z e: "Concept and Perspectives of European Community Law," 5 *European Public Law* (1999), p. 237; see also J.A. J e n s e n: "Constitutional Law of Denmark," 9 *European Review of Public Law* (1997), p. 104.

¹⁴ Case 22/70 *Commission v. Council* ("AETR") [1971] ECR 263 and subsequent case law, in particular Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Opinion 1/76 [1977] ECR 741; for a detailed discussion see J.H.H. W e i l e r: *The Constitution of Europe* (1999), pp. 172–187.

¹⁵ See A. A r n u l l: *The European Union and its Court of Justice* (1999), p. 550.

sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." Furthermore, the Treaty of Amsterdam was supplemented with a Protocol regarding the application of the subsidiarity and proportionality principles which defines more precisely the criteria for application of these principles.

The content of Article 5 suggests that the subsidiarity principle pertains to the exercise rather than establishment of powers. Nevertheless, the above-mentioned lack of clarity in this respect leaves unsettled the role the principle will play in the future. It might be called for in the course of proceedings before the Court of Justice (e.g. when reviewing the legality of Community acts). However, the Court is a community organ and protection of the powers of the member states at the expense of Community powers has not been a particularly noticeable feature of its decisions.

Much more could be expected of national courts. However, they cannot invalidate Community acts (the principle of autonomy) and, if any relevant doubts arise, they turn to the Court to obtain preliminary rulings. That may prove different in the case of constitutional courts in countries like Germany or Portugal which have embodied the principle of subsidiarity in their constitutions as a basis for integration within the EU and an implied condition of their participation in this process. This is how the principle of subsidiarity could become a source of serious conflict.

The conclusion to be drawn from the content of the founding treaties may be that at the time of accession to the EU it is difficult to determine precisely the material scope of transferred powers. Therefore, if neither the constitution of a state nor the founding treaties of organisations provide unequivocal authority for removing doubts, interpretation turns out to be the only method left.

Practice provides us with several examples of such interpretation carried out by the constitutional courts of member states.

The Italian Constitutional Court has established the *contro limiti* doctrine and indicated that while it is true that the exercise by a state of its legislative, administrative and judicial competence can be, based on the principle of reciprocity combined with adherence to the purposes of Article 11 of the Constitution, limited by the establishment of the Communities, this kind of delegation cannot entail encroachment by the Union institutions on "the basic principles of the constitutional order" or on "the inalienable rights of individuals." In this connection, the Constitutional Court reserved the right to check the consistency of the Treaty with the Constitution.¹⁶

The French Constitutional Council has developed a test of the constitutionality of international obligations which involves asking whether such obligations do not "affect the essential conditions for exercise of national sovereignty." If, upon application of this touchstone to the ratification by France of any changes in the founding treaties of the Communities or Union they turned out to be unconstitutional, a prior change of

¹⁶ See the decision of the Corte Costituzionale Case No. 183/73 *Frontini v. Ministero delle Finanze* discussed in A. Oppenheimer (ed.): *The Relationship between European Community Law and National Law: The Cases* (1994), p. 630.

the Constitution would be the indispensable condition for the ratification. Therefore, before the Treaty of Maastricht was ratified, Article 88-2 had been added, making it possible to transfer the powers necessary for establishing the European economic and monetary union as well as for determining the rules related to the crossing external borders of the member states as well as Article 88-3 granting the citizens of the Union living in France the right of vote and at as a candidate in municipal election. Similarly, in 1999, before the ratification of the Treaty of Amsterdam, Article 88-2 of the Constitution had been reworded so that it contained the authorisation to transfer the powers indispensable for determining the rules of free movement of workers and other relevant questions. Though similar objection was not clearly expressed by the Spanish Constitutional Court, the content of its decisions imply that the integration with the EU cannot violate the basic rights and structural principles of the political system included in the Introductory Title and Article 10 of the Constitution.¹⁷

As can be concluded from a ruling of the German Federal Constitutional Court prior to the ratification by Germany of the Treaty of Maastricht¹⁸ the Court will not allow changes in constitutional principles which are not subject to revision.

The Polish Constitutional Court may also face the task of establishing the limits of delegation of powers due to the open-ended definition of such an act adopted in Article 90 (1) of the Polish Constitution. The Court could do so based on Article 4 (1) of the Constitution, which states that "Supreme power in the Republic of Poland shall be vested in the Nation," or Article 5 "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, safeguard the national heritage," In the Union's current shape, Poland's accession does not violate these provisions, but because the organisation is going to evolve it is difficult to specify the direction of future changes in the founding Treaties. If it opts for federalism, unlikely as that seems at the moment, that would require reference to the basic principles of the Polish political system.

However, from the standpoint of predictability of the law and the principle of sovereignty of the Nation proclaimed in the Constitution, it would seem more appropriate to specify the scope of the matters with regard to which no relevant powers can be surrendered to an organisation.

Two possible methods are suggested by practice. The first is to define scope of the powers which under no circumstances can be transferred by the state upon acceding to an organisation.

Article 28 (3) of the Greek Constitution provides for voluntary limitation of the exercise of national sovereignty subject to the safeguarding of human rights, democratic government and the principle of equality and on condition of reciprocity.

In Sweden, in line with Article 5 of Chapter X of the Constitution, the parliament (Riksdag) may transfer its right to decide to the European Communities provided that

¹⁷ See A.E. De Noriga: "A Dissident Voice: The Spanish Constitutional Court Case Law on European Integration," 5 *European Public Law* (1999), p. 297.

¹⁸ See the decision of the Federal Constitutional Court (BVerfG) Cases Nos. 2 BvR 2134 and 2159/92, Oppenheim, *op. cit.*, *supra*, n. 15, p. 573.

they respect rights and liberties to an extent comparable to what is proclaimed by the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The second method involves enumerating in a constitution the principles on which an organisation is founded, and which it will observe, thereby indicating indirectly the scope of the matters remaining outside its competence.

The above method was adopted in Germany.

Article 23 of the German Basic Law lists the constitutional features of the EU indicating indirectly the constitutional and legal limits of German participation in the process of European integration. Thus the provision specifies that:

With a view to establishing a united Europe the Federal Republic of Germany shall participate in the development of an European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by the Basic Law. To this end the Federation may transfer sovereign powers by law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement the Basic Law, or make such amendments and additions possible, shall be subject to paragraphs (2) and (3) of Article 79.

(Article 79 requires such a statute to be passed by a two-thirds majority in the Bundestag and two thirds of the votes in the Bundesrat).

The legal implication of this provision is the right of the Federal Constitutional Court to decide whether an act of the Union/Communities is within the scope of the powers as accepted by the Federal Republic in the accession treaty.¹⁹

The latter method seems a faithful expression of the conferred powers principle and could be applied when introducing amendments to Article 90 (1) of the Polish Constitution.

It would also be desirable for the content of this article to stress that if the Polish state delegates some powers to the Union it will preserve the ability to influence the way in which these are exercised. This is how the issue has been resolved in the constitutions of France and Portugal, where reference is made to joint exercise of powers by the member states. Such a formulation conveys correctly the sense of European integration.²⁰

The content of Article 90 (1) casts some other doubts on the matter. It refers only to assent to ratification of an international agreement which transfers powers, but says nothing about the relevant denunciation procedure. Termination of treaties, the ratification of which requires assent expressed in a statute, is clearly provided for in Article 89.

¹⁹ See P. Craig, G. de Burca: *EU Law. Text, Cases and Materials* (1998), p. 274; for the opposite view see I. Pernice, *op. cit.*, *supra*, n. 11, p. 718.

²⁰ The view is expressed in the literature that these provisions are very much inspired by the classical conception of sovereignty. Read in this light, Article 88-1 of the French Constitution means that French sovereignty has neither been renounced nor transferred, but is merely exercised in common with other States within the institutional structure of the European Union. See de Witte, *op. cit.*, *supra*, n. 9, p. 165.

Its content implies that if statutory assent is required to ratify an agreement, statutory assent is also necessary to terminate it. However, the application of Article 89 to fill the gaps in Article 90 is not possible. Compared with enactment of an ordinary statute, the political significance of transferring powers requires a special, more difficult procedure of ratification and, consequently, there is no substantive justification for lowering the level of difficulty for the procedure for termination of such an extraordinary treaty.

Consequently, it should be carefully considered whether the authors of the Constitution assumed that accession to an organisation on the basis of Article 90 is of an irrevocable nature. If it is, termination of an accession treaty would be out of the question.

This, in turn, is associated with the question of the possibility of withdrawing from the European Union. Article 56 (1) of the Vienna Convention says that "A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty." Although, neither the EU Treaty nor the Community Treaties stipulate their denunciation, they constitute an organisation and the right to withdraw from it is an obvious corollary of voluntary accession.

The doctrine does not take a consistent stance on this question. For example Lenaerts says that a member state has no right to revoke its membership because the founding treaties (apart from the European Coal and Steel Community Treaty) were concluded indefinitely, and, what is more, the main pillar of the Union – the European Community – confers enforceable rights directly on member states and individuals, has a compulsory system of judicial resolution of disputes, and community institutions deal with economic, social and political issues.²¹ It would seem, however, that the clearly expressed will of states cannot be replaced with functional argumentation where the very essence of their sovereign status is involved. As has been aptly pointed out by Manin, the right of withdrawal is implicitly embodied in the EU Treaty. Article 6 (3) TEU, according to which "the Union shall respect the national identities of its Member States."²² implies that in the case of a fundamental contradiction between actions undertaken by the Union and the policy of a member state, withdrawal from the organisation would actually be a manifestation of the national identity. In his commentary on Article 90 of the Polish Constitution Kazimierz Działocha noted that "the act of transference as well as the limitation of exercise of powers which it entails are not of a definitive nature and may be rescinded."²³ A similar position is taken by Jan Barcz.²⁴ The German Federal Constitutional Court has recognised that though the accession of Germany to the Treaty on European Union is of unlimited duration it

²¹ See K. Lenaerts, P. van Nuffel, R. Bray (eds.): *Constitutional Law of the European Union* (1999), p. 286.

²² See Ph. Manin: *Les Communautés Européennes. L'Union Européenne* (1997), p. 76

²³ K. Działocha, in: *The Constitution of the Polish Republic* (1999), chapter III, p. 3.

²⁴ See Barcz, *op. cit.*, *supra*, n. 5, p. 205.

can be revoked through the reverse act.²⁵ Of course, the way in which an acceding state discharges its obligations both to the organisation and its members would have to become a matter of negotiation.

If, therefore, we recognise the withdrawal from the European Union to be legally admissible, Article 90(1) should be changed so that it takes into account the possibility of denunciation of an agreement ratified by virtue of this provision, and using the same procedure that will be employed by Poland to transfer powers to the Union. This is because the withdrawal decision would involve the question of sovereignty in no lesser a degree than the decision to transfer powers; it should, therefore, be taken according to equally rigorous standards.

Some doubts might be raised by the procedure for assent to a decision to transfer powers on the strength of Article 90 (2, 3, 4) of the Constitution. The provision indicates that assent to ratification of the Union accession treaty (i.e. an agreement to delegate powers) may take place by means of either a statute passed as a result of applying a special parliamentary procedure or a national referendum.

Which of these options is chosen is decided by the Sejm by an absolute majority vote. In this case the decision is left to its discretion and the final choice of assent procedure will be influenced by political not legal considerations. The practice of the states which joined the Union in the last round of enlargement points to a referendum as the form of consent which most faithfully reflects the will of the sovereign authority.

Employment of this form of assent in Poland may, however, present some interpretative problems. Article 125 (1) of the Constitution stipulates that the result of a national referendum is binding, if more than half the number of eligible voters participate. What if the result of a referendum is not binding due to too small a poll? Such an eventuality is very probable considering the low turnout in the general elections that have taken place since 1989. Then again, does holding a referendum rule out any possibility of recourse to the parliamentary route later? That should be the case with a referendum that produces a binding result, whether positive or negative, because no state organ can question the decision of the sovereign people. If, however, the sovereign does not "consume" the right to take their binding decision, the discussed provision should include the possibility of allowing the Parliament to adopt a resolution to consider a ratification bill.

In the event of assent to ratification not being given, the Constitution does not put any obstacles in the way of repeating the entire procedure after some time has passed. Instances of this have occurred in the practice of other states as in the case of the accession treaty in Norway and revision of the founding treaties in Denmark.

The fact that the powers transferred to an international organisation involve legislative competence makes it necessary to adopt rules for the application of the laws

²⁵ "Germany is one of the 'Masters of the Treaties' which have established adherence to the Union Treaty concluded 'indefinitely' with the intention of long-term membership, but could ultimately revoke that adherence by a reverse act," Decision of 12 October 1993 ("Brunner"), in: *Craig, Bura, op. cit., supra*, n. 19, p. 273.

established by this organisation in the legal order of the member states. In the case of the European Union its distinctive feature, integration, requires the law of the organisation to be applied fully and uniformly on its entire territory. From the perspective of the Union, the constitutional rules of applying international law in particular countries cannot be automatically used with respect to Union law because the principles of application of international law vary from country to country. This is made even more complicated by the lack of appropriate rules in the founding treaties themselves. This loophole has been filled by the European Court of Justice through, among other things, adoption of the principle of the primacy of Community law over national law combined with the principle of the direct applicability (sometimes subject to certain conditions) in the legal order of the member states.

Although the principles of application of Community law are the product of the jurisprudence of the European Court of Justice, they are part of the *acquis communautaire* and thus far have been considered by states joining the Union to be an inseparable part of their assumed obligations. This is very likely to apply to Poland.²⁶ Since "the Constitution shall be the supreme law of the Republic of Poland" (Article 8 of the Constitution), this is the act which should set out the principles for applying the law of the organisation to which some powers (among them legislative ones) may be transferred.

Due to the absence of different constitutional regulations, it ought to be assumed that the founding treaties of the Union and Communities (primary sources) will be applied in accordance with the principles relating to ratified international agreements. According to Article 87 (1), ratified international agreements form part of the system of sources of universally binding Polish law and, after publication in the Official Journal, constitute a part of the domestic legal order and are directly applicable, unless their application depends on the enactment of statute.

There is no doubt that, if assent to ratification of the treaty of accession to the Union is given by means of a statute, the conflict of laws clause in Article 91 (2), pursuant to which "an international agreement ratified upon prior assent by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes," may be held to relate to the primary Community law.

The Constitution contains no similar conflict clause applicable to assent to ratification of an accession treaty expressed in a referendum, not through a statute.²⁷ An attempt can be made to fill this gap by means of interpretation. Since the referendum procedure is an alternative option to the statutory one, and the Sejm decides which of them is chosen without the necessity of referring to clear differentiating legal criteria, the precedence principle embodied in Article 91(2) may be extended to agreements ratified by means of a referendum. Nevertheless, the addition of a clear statement to

²⁶ See Z. Brodecki: "Acquis communautaire: Pojęcie nieznanie Konstytucji RP," in: C. Mik (ed.): *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej* (1999), pp. 75–85.

²⁷ See M. Jabłoński: "Konstytucyjnoprawne aspekty przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej," 5 *Humanistyczne Zeszyty Naukowe. Prawa Człowieka* (1998), p. 14.

the a constitutional provision to the effect that it refers to international agreements ratified upon prior assent by statute "or referendum" would dispel any doubts.

The principles of application of laws enacted by an international organisation, i.e. secondary Community law, were regulated in Article 91 (3), which states that "if an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict with statutes." The *a contrario* interpretation leads to the conclusion that this provision sanctions the primacy of the Constitution over secondary Community law.

It must be remembered, however, that the European Court of Justice has emphatically upheld the primacy of Community law over all rules of national law, including those contained in constitutions. But we must also note the objections that have been raised by the constitutional courts of some member states (e.g. Germany and Italy) as regards recognition of the primacy of Community law over constitutional norms, .

In the future, practical problems may occur in Poland in this respect when questions of law or constitutional complaint are submitted for a ruling by the Constitutional Court .

The possibility of referring a question of law to the Constitutional Court "as to the conformity of a normative act with the Constitution, a ratified international agreement or statute, if the answer to such a question of law will determine an issue currently before such a court" is provided for in Article 193 of the Constitution.

On the other hand, in line with Article 79, any person whose constitutional freedoms or rights may have been infringed can submit to the Constitutional Court a constitutional complaint with regard to "... the conformity with the Constitution of a statute or another normative act on the basis of which a court or organ of public administration has made a final decision on his/her freedom or rights or on his/her obligations specified by statute."

In line with Articles 220 and 234 TEC, only the European Court of Justice is competent to provide a final clarification of questions relating to the interpretation or validity of Community law, and it is the ECJ to which submissions for preliminary rulings on these matters are made by national courts.

Thus, it is possible that the Polish Constitutional Court will face the dilemma of whether, in the light of the wording of Article 91 (3), to adjudicate on the constitutionality of a particular regulation ("a normative act") or, on the contrary, to recognise that accession to the European Union excludes cognisance of the Court in cases involving Community law. On the one hand, the latter solution would be consistent with the jurisprudence of the European Court of Justice; on the other, it would call into question the sense of Article 91 (3).

It cannot be ruled out that, instead of considering the problem of the superior sanction of Community law to the Polish Constitution, the Polish Constitutional Court will follow the example of its German counterpart in the Brunner case and examine whether the Community acted within the competence conferred by the Treaties when adopting a particular regulation. If it overstepped its powers it would mean that

a particular provision was not based on the accession act and was, therefore, inconsistent with the Constitution which provided the legal grounds for assenting to the transfer of certain powers specified in the accession act.

Nevertheless, the fact remains that Article 91 (3) is not formulated properly.

As regards the detailed provisions of the Constitution, it is possible to point to several which should be changed before the European Union accession agreement is concluded.

Pursuant to the provisions of Article 62 a Polish citizen has the right to vote in elections to local government authorities. As is known, Article 19(1) TEC provides that "every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State."

Different interpretations can be found in the Polish doctrine with regard to the relationship between these provisions.

The opinion of the Prime Minister's Legislative Council is that they are not contradictory because the provision of the Constitution which guarantees Polish citizens the right to vote does not exclude its extension to foreign nationals by virtue of an ordinary statute. And this is the position that Poland has taken in the negotiations on accession to the European Union, recognising that the statutes specifying the principles and procedures of elections to local government bodies need revising, so that citizens of the European Union who are permanent residents of the relevant regions will have the right to vote and stand as candidates in local elections.²⁸

Such a view, however, cannot be accepted since it follows from Article 62(1) that the rights in question may be only enjoyed by the persons referred to in the article, i.e. Polish citizens, and that it cannot be extended by virtue of an ordinary statute.²⁹ For what would be the point of the Constitution using the formula "every Polish citizen has the right," if anybody could have such a right on the strength of an inferior legal act, i.e. a statute.

For that reason revision of Article 62 (1) is necessary in order to make it consistent with Article 19 (1) TEC.

In 1992 similar amendments were incorporated into the constitutions of several member states prior to ratification of the Treaty of Maastricht. In France, in Article 88 (3) of the Constitution, the right to vote and stand in municipal elections, was extended to citizens of the European Union living in France. Nevertheless, these citizens are not allowed to hold the office of mayor or deputy mayor or participate in the in choosing of senator electors and election of senators. In Spain, Article 13 of the Constitution was changed in order to enable citizens of the Union to stand in local elections, and Portugal has adopted a new version of Article 15 to give Union citizens

²⁸ See C. Banaśiński: "Stan i metody przygotowań polskiego prawa konstytucyjnego do członkostwa w Unii Europejskiej," in: Póławska, *op. cit.*, *supra*, n. 2, p. 384.

²⁹ See P. Winczorek: "Kilka uwag w kwestii dostosowania Konstytucji Rzeczypospolitej Polskiej do wymogów prawa europejskiego," in: Póławska, *op. cit.*, *supra*, n. 2, p. 192.

the right to vote and stand as candidates in municipal elections. According to amended Article 28 of the Basic Law of the Federal Republic of Germany "In county and municipal election, persons who possess citizenship of any member state of the European Community are also eligible to vote and be elected in accordance with European Community law."

The criterion of citizenship can also be found in Article 67 of the Polish Constitution according to which "a citizen . . . shall have the right to social security." Meanwhile, under the provisions of Article 42 (ex 51) TEC, the Council issued regulation No. 1408/71 concerning co-ordination of the social security systems on the basis of which citizens of the Union enjoy, in all the member states, the rights conferred by this regulation.³⁰ The literature presents, correctly, the view that after joining the European Union restriction of the right to social security exclusively to Polish citizens would be contrary to the basic Community principle of free movement of workers.³¹

It should also be noted that shortly after acceding to the European Union Poland is very likely to join the Economic and Monetary Union (EMU) once it has fulfilled the necessary conditions for adopting the single currency. The EMU rules are based on principles referred to in Title VII TEC. As can be concluded from their content, the independent European System of Central Banks, the European Central Bank and the national central banks pursue a common monetary policy.

The French Constitutional Council expressed the view that the provisions applied after the third stage of economic and monetary union imply that achievement of the objectives of EMU require pursuit of uniform monetary and exchange policies and, as a result, its members will be deprived of competence in this field, which will affect the essential conditions for exercise of national sovereignty.³² In Germany in 1992, Article 88 of the Basic Law, which states that "the Federation shall establish a note-issuing and currency bank," has been supplemented with an amendment saying that "within the framework of the European Union, its responsibilities and powers may be transferred to a European Central Bank that is independent and committed to the overriding goal of assuring price stability."

In Poland, in line with Article 227 (1) of the Constitution, the central bank of the state is the National Bank of Poland which has the exclusive right to issue money as well as to formulate and implement monetary policy. The National Bank of Poland is also responsible for maintaining the value of the Polish currency. This provision will have to be changed as will Article 227 (6) of the Constitution which stated that the Monetary Policy Council formulates the objectives of monetary policy.

³⁰ B. Schultze: "Wzajemne oddziaływanie europejskiego prawa socjalnego i narodowego prawa socjalnego państw członkowskich – przykład Republiki Federalnej Niemiec," in: H. Szurgacz (ed.): *Europejskie prawo pracy i prawo socjalne a prawo polskie* (1998), p. 70.

³¹ See C. Mirk: "Przekazanie kompetencji przez Rzeczpospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne," in: C. Mirk (ed.): *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej* (1999), p. 157.

³² See J. Rida: *Droit institutionnel de l'Union et des Communautés Européennes*, 3rd ed. (1999), p. 983.

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In conclusion it can be said that a constitutional framework for Poland's accession to the European Union has been established. There are two sets of provisions in the 1997 Constitution that will be involved in the accession process. Provisions belonging to the first group form the legal basis for the transfer of the powers of state organs by virtue of an international agreement, define the procedural conditions for conclusion of such an agreement and determine the rules of application of the law of an organisation to which the powers have been transferred. There are insufficient ground for the argument that these provisions absolutely need changing but as their interpretation raises some doubts it seems advisable to bring them more closely in line with the present state of the *acquis communautaire*, constitutional developments in the member states and Poland's view of the nature of the European integration.

In consequence the relevant provisions of the Constitution could be rewritten in the following way:

Article 90:

(1) The Republic of Poland may, by virtue of an international agreement, transfer the competence of organs of State authority to be exercised in common within the European Union, which is founded on principles of liberty, democracy, rule of law and which respects human rights and fundamental freedoms and the national identities of its member states. (2) A statute assenting to ratification or renunciation of an international agreement referred to in paragraph 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Members, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. (3) Assent to ratification or denunciation of such an agreement may also be enacted by a national referendum in accordance with the provision of Article 125. (4) Any resolution in respect of the choice of procedure for assenting to ratification or renunciation shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Members. If the result of the referendum referred to in paragraph 3 is not binding the Sejm may, by virtue of a resolution taken under the same conditions, authorise recourse to the procedure referred to in paragraph 2.

Article 91

(2) An international agreement ratified upon prior assent by statute or in a referendum shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

(3) The laws established by an international organisation shall be applied in the domestic legal order in accordance with the founding treaty of that organisation, ratified by the Republic of Poland.

Thus a possible future dispute with the European Court of Justice could be transferred to the plane of interpretation of the founding Treaties, whereas the wording of Article 91 (3) currently in force is at variance with the jurisprudence of the Court.

Furthermore there is a group of constitutional provisions which conflict with the law of the European Union and European Community law and will have to be changed prior to ratification of the accession treaty.

Article 62 (1) should be supplemented with a provision stipulating that *every citizen of the European Union residing in Poland shall have the right to vote and to stand as a candidate in local elections.*

The right to social security enshrined in Article 67 should be extended to citizens of the European Union.

Finally provisions of Article 227 vesting the National Bank with Poland the exclusive right to issue money as well as to formulate and implement monetary policy will become superfluous as soon as Poland joins the Economic and Monetary Union and the single currency.

Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law

WŁADYSŁAW CZAPLIŃSKI

Harmonisation of law is one of the most important instruments furthering economic integration of the Community Member States. Article 3.1.h calls it a factor of the functioning of the common market; it is regulated in detail in Articles 94–97 of the Treaty establishing the European Community (TEC). Moreover, the Europe Agreement points to the importance of approximation of legislation in the process of association and, as the next step, accession to the European Union.

The concept of harmonisation (or approximation) of laws was not defined in the TEC. In Community practice it covers, essentially, three different things: co-ordination of legal systems, approximation of laws and unification of law. The TEC terminology is not, however, uniform. The provisions of Articles 94 and 95, fundamental for harmonisation of laws, refer to “approximation of laws,” likewise ex Article 27 (repealed) and Article 136 (concerning social provisions). The term “harmonisation” occurs in three provisions: Article 93 (taxation), Article 132 (common commercial policy), and Article 136; “co-ordination” appears in six: Articles 44, 46 and 47 (right of establishment), Article 105 (monetary policy) and two repealed provisions of Articles 105 and 111. In the first years of the functioning of the Rome Treaty attempts at precise semantic differentiation of the respective concepts were made with the aim of conforming to the law-making rule that legislators must refer to different facts or processes when using different concepts. Gradually, however, these concepts came to be used interchangeably in Community practice.

Since the provisions of Articles 94 and 95 have a fundamental meaning in this context the concept of “approximation” of laws should play a particular role. This is due to the fact that these provisions were aimed at elimination of inconsistencies between the various national rules and regulations and, consequently, different legal systems not belonging to the *acquis communautaire*; in particular at a transformation of the respective states’ legal institutions that prevented significant discrepancies arising in the process of their application. On the other hand, the field concerned is regulated by domestic law. The doctrine distinguishes between different types of approximation of laws.

The meaning of harmonisation is not spelled out in the Treaty but it can be defined¹ through its substantive goal, that is, creation of uniform conditions of management across the whole area of the internal market.² The fundamental task of the harmonisation was to achieve identical, Community-wide understanding of exceptions to the four Community freedoms, particularly those related to protection of fundamental interests in the field of public health, public order, public morality, security and other so-called imperative requirements, justified by particular circumstances and accepted by Community institutions. The Treaty of Rome is so designed as to ensure that the provisions concerning the four freedoms correspond with the detailed provisions concerning harmonisation in a particular field. Approximation of laws aims at seeing that goods manufactured in one Member State are accepted without reservations in other Member States even if the conditions in which they are manufactured are different. So, too, in the case of free movement of services the aim of approximation of laws is to ensure that providers of services in the territory of Member States enjoy the same conditions for providing them everywhere. Naturally, services are to be provided in accordance with the provisions of the State where they are provided. If legal systems varied excessively in a particular field, providers of services would be forced to provide them on extremely differentiated terms, according to the local conditions, which could in effect constitute an obstacle to the free movement of services.

In Community law measures in the sphere of harmonisation of laws can be divided into two periods in which different approaches to this matter were adopted. In the initial period of the functioning of the Community it was considered that harmonisation should be as detailed as possible. The result was that the harmonisation Directives elaborated on the basis of Article 100 TEC (now Article 94), were of a very detailed nature. Because all these details were to be agreed by all the Member States (Directives have to be adopted unanimously), the time needed for preparation of the draft and, as the next step, adoption of the directive was relatively long. In these circumstances it proved possible to draft no more than about ten Directives yearly. Such a rate of progress was highly unsatisfactory because it soon became apparent that it would not be possible to catch up with the USA and Japan in creation of a single market. On the other hand, the advantage of the old approach to Directives was the exhaustive character of the resulting acts which had the effect of preventing Member States from introducing any additional technical requirements relating to the products to which harmonisation applied.

The European Court of Justice (ECJ) took the first step towards development of a new approach to approximation of laws. In 1979 in a celebrated judgement in the *Cassis de Dijon* case³ it established the principle of mutual recognition of standards,

¹ No analysis of the concept of harmonisation will be offered here. For that see: P. Saganek: "Wybrane problemy dostosowania prawa polskiego do prawa Unii Europejskiej," in: P. Saganek, T. Skoczny (ed): *Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii Europejskiej* (1999), pp. 29–36; P.J. Sliot: "Harmonisation," 21 *ELR* (1996), p. 378.

² Joined Cases 372-374/85 *Ministère public v O. Traen*, [1987] ECR 2141 and Case 378/85 *Commission v Denmark*, [1987] ECR 4069.

³ Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

according to which any product legally manufactured in one of the Member States must be freely tradable in the rest of the Member States.

The precedent set by the *Cassis de Dijon* ruling was soon followed by the Communities institutions and the Member States.⁴ The concept of so-called new-approach Directives was developed.⁵ From the point of view of the principles of implementation these Directives differ considerably from those adopted in the first period of harmonisation. First of all, they are decidedly shorter. They set minimum conditions that a given product must meet in order to be tradable across the whole area of the internal market. No deviations from these principles are admissible; goods meeting these requirements are labelled with the safety mark CE. In there are more detailed technical standards the framing of which was entrusted to the three European standards institutions (European Committee for Standardisation, CEN, European Committee for Electrotechnical Standardisation, CENELEC, European Telecommunications Standards Institute ETSI) which draw up the relevant standards on the recommendation of the European Commission. Responsibility for implementation of the new-approach Directives rests with national government institutions, while incorporation of Community technical into the system of domestic is the job of national standards institutions which, therefore, should be independent of government bodies. Deviations by producers from the requirements of the safety and other technical standards prescribed by the Community standards institutions are permitted but subject to certification of compliance with some other system of standards of an equivalent character. New-approach Directives are adopted on the basis of Article 95 under the co-decision procedure (Article 251 TEC) and are published in the *Official Journal*, L series. The number of new-approach Directives adopted to date has not been positively ascertained but authors agree that it is in the region of 20. Examples of such measures are, inter alia, Directive 85/374 on approximation of laws relating to civil liability for products and Directive 88/378 concerning safety of toys.⁶

It has already been mentioned that approximation of laws constituted one of the fundamental elements of the Europe Agreement (Articles 68–70).⁷ The obligations in this field were, however, relatively weak, consisting not so much in complete harmo-

⁴ See *The Commission White Paper Completing the Internal Market*, COM(85)310 final and the Council Resolution of 7 May 1985 on a new approach to harmonisation and standardisation, OJ C 136/1, 1985, annex "Guidelines on the new approach to technical harmonisation and standards."

⁵ Cf. P. S a g a n e k: "Dyrektywy nowego podejścia a problem dostosowania prawa polskiego do prawa Unii Europejskiej (wybrane zagadnienia)," PPE (at press); S. F a r r: *Harmonisation of Technical Standards in the EC* (1996), passim; D. W a l b r o e c k: "L'harmonisation des règles et normes techniques dans la CEE," CDE, No. 3 (1998), p. 249; J. P e l k m a n s: "The New Approach to Technical Harmonisation and Standardisation," 3 JCMS (1987).

⁶ See, respectively, OJ L 210/29, 1985 and OJ L 187/1, 1988 as amended by Directive 93/68. For a comprehensive account of the substantive scope of harmonisation of Community law in this area: see P.J.G. K a p t e y n, P. V e r l o r e n v a n T h e m a a t: *Introduction to the Law of the European Communities* (1998) pp. 794–801.

⁷ Cf. S. S o ł t y s i ń s k i: "Dostosowanie prawa polskiego do wymagań Układu Europejskiego," 4–5 *Państwo i Prawo (PiP)* (1996), pp. 31 ff.; S a g a n e k, *op. cit.*, *supra*, n. 1, pp. 27 ff. and the literature quoted there.

nisation of law as in the creation of conditions for the functioning of the free trade established under this association agreement. It thus constituted a commitment to diligent conduct rather than an end result; besides it is not wholly clear whether the harmonisation obligation applied to all fields or only the areas listed in the relevant provisions of the treaty. As examples might be cited not only some of the fields specified in Article 69 (rules on competition, transport, environmental protection, indirect taxation, consumer protection, company law, banking law, protection of the health and life of humans, plants and animals) but also questions resulting from such specific provisions as Article 44.1 (right of establishment) or Article 66.1 (intellectual property law).⁸

The situation changed radically with the adoption of the decisions of the Copenhagen and Essen European Councils (1993–1994). Though approximation of laws was not expressly mentioned as a precondition of the admission of Poland and other Central and Eastern European countries to the European Union, it followed indirectly from the requirement that they would have to have the ability to fulfil all obligations resulting from the Treaty. It was first made explicit a Commission White Paper (1995),⁹ to which a list of several hundred legal acts was annexed. Their adoption by the candidate countries will be the basis for assessment of their capacity to be members of the EU. These acts concern in the majority of cases the functioning of the domestic market. Poland's response to the White Paper was the National Integration Strategy adopted by the government in January 1997. It postulated that elimination of obstacles in economic relations between Poland and the Community should be the principal aim of the adaptation of Polish law to Community legislation. For that reason all rules and regulations were divided into ones relating to the legal situation of business enterprises (such as right of establishment, formation of entities, intellectual property protection, bankruptcy law) and ones relating to trade (customs law, indirect taxation, technical regulations and standards, transport and telecommunications, consumer protection). Subsequent Union documents relating directly to approximation of laws were the Commission's opinion on Poland's application for membership of the EU¹⁰ and the so-called Accession Partnership.¹¹ Both documents dealt to a large extent with approximation of legislation in areas covered by the relevant documents (*inter alia*, domestic market, economic and taxation issues, sectoral policies, quality of life and environment, justice and home affairs, foreign policy). They also confirmed that though Poland (like several other candidate countries) had not at the time of evaluation attained consistency of its domestic legal system with Community law,

⁸ See the analysis in M. Kemp i ń s k i: "Obowiązek zbliżenia ustawodawstwa Polski do przepisów obowiązujących w Unii Europejskiej w świetle Układu Europejskiego," 1–2 *Przegląd Legislacyjny* (1998), p. 14. According to Kemp i ń s k i the areas of harmonisation specified in the Europe Agreement should continue to constitute the priorities of harmonisation activities in the pre-accession period, see p. 18.

⁹ *White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union*, doc. COM(1995)163 final.

¹⁰ COM(97)2000 final.

¹¹ For text see 2(6) *Studia Europejskie* (1998), p. 165; see also Regulation 622/98 on pre-accession aid, OJ L 85/1, 1998.

nevertheless it was expected that this condition would eventually be fulfilled in future, by the time of accession to the EU. In 1998 a National Strategy for Preparation of Poland for Membership in the European Union was drawn up which stressed the importance of bringing national legislation in line with Community norms in a number of fields.

The commitment to approximation of Polish law to Community law entails transposition of a large number of Community legal acts to the Polish legal system. Obviously, this applies in the first place to the Community acts known as Directives which play a fundamental role in the process of harmonisation. But it is also necessary to transpose some of the so-called Regulations to Polish law. What then are the basic principles governing the applicability of both these categories of normative acts in the legal order of the Member States?

Community Regulations are the most typical source of law for the functioning of the European Community as a supranational organisation. They reflect to the highest degree the legislative competence of the EC. According to Article 249 TEC they are directly applicable in the domestic legal systems of the Member States. Such a solution was agreed so that the rules embodied in Community Regulations could become binding in the domestic legal orders of all Member States at the same time and identically, without the necessity of initiating the constitutional procedures required for incorporation of classic rules of international law into domestic law. Community Regulations are binding on all subjects: Community institutions, Member States and individuals. That is why the decisions of the ECJ have stressed on several occasions that the Member States are obliged to apply Regulations in their entirety and in the form they were published in the *Official Journal* of the European Communities. Community Regulations can confer rights on individuals who may pursue these rights in the courts.¹² The Member States may not interfere in the content of Community Regulations. They may not lay down rules on the implementation and interpretation of Community Regulations by national authorities (the ECJ has taken a number of Member States to task for enacting domestic legislation which embodied only part of a Regulation's provisions, thereby seeming to imply that some of these provisions were of greater importance than others).¹³

In a number of situations national authorities may enact certain provisions relating to Community Regulations provided that that far-reaching precautions are taken.¹⁴ As a rule, this is possible when the Regulation itself so provides. This applies primarily to the obligation to establish penal sanctions and the necessity of enacting administrative and procedural provisions aimed at making implementation of the Regulation possible (i.e. by determination of the competent national authorities), but also the necessity of introducing complicated legal regulations consisting of provisions adopted at different levels (Community, national and local): in such cases, because of the need

¹² Case 34/73 *Variola v Amministrazione delle Finanze dello Stato*, [1973] ECR 981.

¹³ Case 39/72 *Commission v Italy*, [1973] ECR 101 and Case 272/84 *Commission v Italy*, [1985] ECR, 1057.

¹⁴ Case 94/77 *Fratelli Zerbone snc v Amministrazione delle Finanze dello Stato*, [1978] ECR 99.

for coherence of laws the provisions of a Community Regulation can, exceptionally, be transposed in a locally adopted legal measure.

The main legal instrument of harmonisation of laws in the Community remains the Directive.¹⁵ In relation to the Community Regulation the term “unification” should be used rather than “approximation” (except for the specific provision envisaged in Article 95 TEC). Directives constitute the majority of the legal norms with which Polish law has to be harmonised in connection with prospective accession to the EU. On the other hand, there are some Regulation provisions which have to be transposed to Polish law in the pre-accession period. These refers in particular to mechanisms introduced by Community Regulations which enable the public administration to be brought in line with the institutional and financial structure of the Communities by the date of the accession. The best examples are Regulations concerning the institutions necessary for implementation of the Common Agricultural Policy.

If, therefore, it is decided to pass an act of domestic law aimed at approximation, the Polish legislator must first of all introduce the substantive provisions to such an act, and as far the Polish legislator and as far as possible word for word (and so differently than in the case of Directives). At the same time the legislator must introduce provisions which make possible the exercise of the rights conferred by Community Regulations on individuals (economic entities). Individuals must have the same possibilities of legal redress as those which aim at ensuring the exercise of similar rights under domestic law.

It should be remembered that after the accession of Poland to the EU, all Regulations forming part of the *acquis communautaire* will be directly applicable and – as a rule – immediately effective, and thus their provisions will replace the domestic legislation in the area concerned. The precondition will, of course, be their promulgation in Polish – probably through publication of a Polish version of the EC *Official Journal* by the Commission’s translation service. Moreover, in accordance with the principle of transfer of powers, national authorities will not be able to pass law on matters covered by Community Regulations, which may result in serious disputes over the division of powers.

The Directive is an act of a special character. In line with Article 249 TEC, it is binding upon Member States with respect to the aim to be achieved and the period of time within which it is to be realised. However, the choice of measures is left to the Member States. Directives are directly applicable in the sense that they imposes on a state an obligation to implement them which arises upon a directive’s entry into force in the Community sphere; as a rule, directives, addressed as they are to Member States, are not immediately effective. Individuals may claim the rights conferred by

¹⁵ The Single European Act introduced a new Article 100a (now Article 95) to the TEC, which liberalised the principles of harmonisation of laws in relation to creation of the internal market. The Council was from then on to adopt measures aiming at establishment and operation of the internal market in accordance to the co-decision procedure. Nevertheless, Declaration No. 4 appended to the final act implementing the SEA stresses that if harmonisation required amendment of the legislation of a Member State, the Commission should use directives.

a Directive if a Member State fails to enact the necessary domestic provision for their implementation of the Directive within a specified period of time or it does so improperly. Claims concerning the rights deriving from a Directive can be made against a Member State which has not fulfilled the obligations resulting from the directive (vertical direct effect). It is not possible to pursue claim to rights deriving from a Directive against other legal subjects acting in the same dimension. If a state does not implement a Directive in the time prescribed, it may be liable for any injury caused to the aggrieved person.

On the basis of the case law of the ECJ (arising from both judgements in actions for non-fulfilment of obligations and opinions under the preliminary rulings procedure) certain general principles can be formulated regarding the proper implementation of Directives.¹⁶ They constitute a set of guidelines which a national legislator should apply when passing the legal provisions for implementation of a directive, and at the same time map the methods and techniques to be used in harmonisation of laws.

1. Each state judges for itself what kind of legal arrangements should be enacted on the basis of its constitutional order for the purpose of implementing a Directive. That depends mainly on the substantive scope of the Directive and its influence on the legal situation of individuals. The obligation to pass domestic provisions relates to situations in which a Directive might be directly applicable (that is to say, its provisions are clear, precise and unconditional and allow of no discretion.

2. Because of the requirements of legal certainty and clarity of obligations resulting from legislation, it is necessary to enact legal provisions of a universally binding character¹⁷ (i.e. ones corresponding to the government ordinance under Polish law); administrative action is insufficient.¹⁸ The status of the domestic enactment should correspond to the status of the act which previously regulated a given matter under domestic law.

3. The agency empowered to pass an implementing act is determined by domestic law. It may also be regional or local government authority if the matter in question falls within their competence. In any case central governmental agencies are responsible for the due and correct implementation of a directive. States may not invoke their domestic law (including constitutional provisions) to justify non-fulfilment of the obligations stemming from Community law.¹⁹

4. The domestic law provisions must be enacted within the time limit specified by a Directive. Delays due to domestic factors cannot constitute a justification.²⁰

5. If existing provisions guarantee proper implementation of a Directive or if according to the state concerned there is no need to enact domestic legal provisions, the

¹⁶ See: M. S z w a r c: *Implementacja dyrektyw wspólnotowych przez państwa członkowskie* (2000), passim.

¹⁷ Case 239/85 *Commission v Belgium*, [1986] ECR 3645.

¹⁸ Case 102/79 *Commission v Belgium*, [1980]ECJ 1473.

¹⁹ Case 163/78 *Commission v Italy*, [1979] ECR 771.

²⁰ Case 43/80 *Commission v Italy*, [1980] ECR 3543.

European Commission should be informed to that effect. Adoption of a legal act informing that the provisions of a Directive are in fact already in force under a prior of domestic legislation may be necessary.²¹

6. The domestic legislation must expressly cite the Directive which it implements (in extreme cases, the specific provisions of this directive).

7. The Directive's nomenclature need not be translated in the domestic legislation. It serves merely to indicate to the domestic legislator which institutions of domestic law should be covered by the relevant domestic legislation. Translation might introduce institutions unknown to domestic law.

8. When transposing a Directive into domestic law, its terminology does not have to be employed.²² Domestic legislation should reflect the spirit rather than the wording of a Directive. However, in the case of some Directives (especially one concerning technical requirements, the environment, etc.), the literal meaning may be useful.

9. Directives are sometimes very detailed, in which case the only solution may be literal transposition of the text of to domestic law. It is not permissible, however, to treat a Directive as an annex to an act of domestic legislation.

10. If a Directive provides for alternative options, each Member State is obliged to choose the option which is best suited to its system of domestic law. At the same time a Member State may not question the effectiveness of domestic provisions adopted in other Member States if they are based on one of the other options provided by a Directive.

11. The act of domestic law should embrace not only the substantive provisions of a Directive but also the procedures necessary for its implementation, including determination of the competent bodies and the penalties for non-fulfilment; this requirement covers situations where such an obligation does not follow directly from the provisions of the implemented Directive; the requirement of "effective" implementation will thus be fulfilled. The provisions implementing obligations resulting from a Directive must guarantee effective protection of the substantive rights which it confers, including judicial protection.²³

12. When enacting a law aimed at implementation of a Directive, certain principles enshrined in Community law – subsidiarity, proportionality and protection of human rights (as provided for by the European Convention for Protection of Human Rights) – should be taken into account.

13. Domestic measures aimed at implementation of a Directive must be notified to the Commission. Such notification is only of an informative character and has no bearing on the validity of the domestic measures.²⁴ The implementation obligation is

²¹ Case 69/90 *Commission v Italy*, [1991] ECR I-6011.

²² Case 131/88 *Commission v Germany*, [1991] ECR I825.

²³ Case 29/84 *Commission v Germany*, [1985] ECR 1661, Case 58/89 *Commission v Germany*, [1991] ECR I-4983.

²⁴ See: Case 226/97 *Criminal proceeding against J.M. Lemmens, judgment of 16 June 1998*. It should be stressed, however, that the ECJ stated on several earlier occasions that a state which did not notify implementation provisions could not invoke them in relation to individuals; see: Case 194/94 *CIA Security International*, [1996] ECR I-2201.

not at present binding on Poland with respect to pre-accession harmonisation of law; it will be imposed on government agencies after the accession of Poland to the European Union.

Polish Practice in the Sphere of Harmonisation of Laws

Already pursuant to the Europe Agreement (which – as mentioned earlier – provided for a limited obligation in the field of approximation of laws) a government resolution (16/94 of 29 March 1994) was adopted, requiring proposed legislation to be examined for consistency with Community law. Its weak point was that its scope was limited to government documents; excluded were bills sponsored by members of parliament or the President drafts as well as amendments to government bills introduced by the parliament. The task of screening the consistency of bills with Community law was assigned to the Government Plenipotentiary for European Integration and Foreign Aid. Resolution 16/94 was revoked in 1997, since when the Council of Ministers Rules of Procedure guide process of approximation of domestic law to Community law and examination of proposed legislation for consistency with EU/Community law.²⁵ The Rules of Procedure require the sponsors of bills to seek an opinion on their conformance with Community law under the co-decision procedure; the absence of such an opinion, which is given by the Bureau of the Committee for European Integration, may constitute grounds for rejection of the draft of a bill by the Council of Ministers. With respect to bills proposed by other sponsors, the speaker of the Sejm (lower house of parliament) is required, before forwarding them for further consideration, should seek the opinion of experts in the Sejm Chancellery on the consistency of the draft with Community law.²⁶

After Poland formally applied for membership in the European Union there came a significant and prolonged delay, for political reasons, in the process of approximation of Polish legislation to Community law. That led to the creation of a special parliamentary procedure by way of an amendment to the Standing Orders of the Sejm a special European Law Committee was established on 13 July 2000. Its principal task is to screen approximation bills.²⁷ The Committee is composed of a maximum of 45 MPs (in fact 44) nominated by the Sejm. The Standing Orders amendment to speed up to speed up the procedure for the passage of approximation bills by making it similar to the “fast track” procedure. It should be noted, however, that a fundamental task of the Committee is to speed up proceedings related to approximation of Polish legislation to Community law – which is not with influence on the quality of lawmaking and may be of crucial importance at the moment the Member States decide on enlargement.

²⁵ Resolution 13 of the Council of Ministers of 25 February 1997, 15 *Monitor Polski* (1997), title 144.

²⁶ Article. 31.7 of the Standing Orders of the Sejm, 44 *Monitor Polski* (1998), title 618.

²⁷ See M. Laskowska: “The Parliamentary European Legislation Committee in the Approximation of Laws Procedure,” in this volume, pp. 57–67; J. Jaskiernia: “Tryb postępowania w Sejmie w zakresie dostosowania prawa polskiego do prawa Unii Europejskiej,” 10(55) *PiP* (2000), p. 3 ff.

It should be stated, however, that from the substantive point of view the process of adaptation of Polish law to Community law suffers from certain shortcomings. The sponsors of the relevant legislation, followed by the Council of Ministers and the Sejm, seem sometime to have settled for the simplest way out, limiting their activities to (often incorrect and careless) translation of Directives. Their nomenclature is also translated word for word, thereby introducing concepts which are not known to the Polish legal system. Alternative options are omitted – even when a Directive requires a choice between them. Sometimes a Directive's text is annexed to the statute – which would result in the necessity of amending the statute if the Directive itself s were to be amended and the annexed translation was not of an official character (introduction of the statute might, therefore, be necessary, after the publication of the Polish version of a Directive in the *Official Journal of the European Communities*).

Another method of harmonisation of Polish law with Community law is interpretation and application of Polish law in the way that the ECJ judges apply Community law. This refers in the first place to application of the Europe Agreement which should be applied according to conflict-of-laws rules in the event of Polish law being at variance with the Agreement (and by analogy with Community law). This method goes beyond the obligations laid down for association agreements by the ECJ which requires account to be taken of the fact that the Treaty of Rome and association agreements should be interpreted differently as they have different purposes.²⁸ However such application of the Europe Agreement would be appropriate from the point of view of the substantive approximation of Polish law and the technicalities of application of law. Polish courts and other bodies responsible for applying the law would be able to acquaint themselves with the way Community judges work (we should remember that every domestic judge dealing with matters with a Community element may be a Community judge). At the same time, individuals would, in accordance with the prevailing tendency in Community law, claim the appropriate content of an administrative decision. Article 91.1–2 taken in conjunction with to Article 241.1 of the Polish Constitution should constitute the basis for such application of the Europe Agreement.²⁹ It should be stressed, however, that although the Constitution stipulates that international agreements should be applied directly, it does not specify the conditions which should be met. These were determined by the Constitutional Court in a ruling on 19 June 1992 declared unconstitutional a Sejm resolution concerning disclosure of a list of MPs alleged to have collaborated with the communist-era secret police.³⁰ Self-executing rules of international law must be clear, precise and unconditional. Such criteria are met by the direct-effect conditions of Community rules, determined by the ECJ.³¹ Judicial practice has not, however, limited itself to pro-Comm-

²⁸ Cf. Opinion 1/91 on the European Economic Area Agreement, [1991] ECR I-6079.

²⁹ See S. B i e r n a t: "Kilka uwag o harmonizacji prawa polskiego z prawem Wspólnoty Europejskiej," 1–2 *Przegląd Legislacyjny* (1998), p. 21. The author cites, *inter alia*, a resolution of the Supreme Court, Ref No. III AZB 4/95, OSNAPU 1995, No.19, title 234.

³⁰ Ref. No. U.6/92, OTK, part I, pp. 196 ff.

³¹ See in particular the ECJ judgement in Case 28/67 *Molkerei-Zentrale Westfalen/Lippe v Hauptzollamt Paderborn*, [1968] ECR 218.

nity interpretation and applicability of the Europe Agreement. The Supreme Administrative Court (NSA) in a judgement of 7 October 1999³² stated that, despite the lack of a formal requirement of compliance with the *acquis communautaire*, approximation should be realised through interpretation consistent with European law since the obligations have their sources in the Europe Agreement; when deciding on the method of interpretation the criterion of consistency with international law should be taken into consideration. In another judgement (13 March 2000)³³ the NSA stated that Article 275.4–5 of the Polish Customs Code should be interpreted in the light of ECJ rulings (Case 24/68 *Commission v Italy* and Case 179/88 *Ford España*) and overturned a decision of the President of the Polish Board of Customs unfavourable to the plaintiff.

Conclusions

Approximation of laws is, together with the four Community freedoms, of key importance in the economic integration of the European Community. It makes possible the creation of a single market in Europe capable of competing with the American and Far-East markets. Without a doubt, approximation of Polish laws to European law (and especially to Community law) plays a fundamental role in the accession period. In the first period after submission of the membership application its importance was underestimated, a failing which was strongly criticised by Union institutions. It took establishment of the parliamentary European Law Committee to speed up the approximation work. The trouble is that this is not matched by the quality of the law thus made. The prime requirement is to move from a quantitative to a qualitative approach. The experience of other countries in implementation of the Community Directives should be taken into account; unfortunately, such studies are rare in Poland.

³² D. Kaniak case, Ref. No. V S.A. 434/99.

³³ Senagpo case, Ref. No. V S.A 1658/99, not reported.

The Parliamentary European Legislation Committee in the Approximation of Laws Procedure

MARZENA LASKOWSKA

Approximation of Polish law to European law is more than just an expression of Poland's aspirations to membership of the EU.¹ As a declaration of a political nature, it constitutes in the light of the so-called Europe Agreement which established an association between Poland on the one hand and the European Communities and their Member States on the other,² first and foremost an obligation under an international law. As the Agreement does not prescribe either the speed or the methods of approximation, these are for Poland to decide unilaterally. Naturally, this freedom of choice is restricted by internal factors. On the one hand, there are the limitations imposed by the concept of sources of law embodied in the Polish Constitution; on the other, the shape of the measures taken is determined by Poland's *raison d'état* and recognition of integration with the EU as a national priority.

Bringing the national legal order in line with the European order requires a great many different measures. To be effective procedures which regulate, in a comprehensive way, the process of approximation are indispensable. As this work is carried out by various organs of the state, its speed and the quality of the results depend in particular on co-ordination of their activities. That is why a large number of initiatives aimed at improving implementation of the Europe Agreement, but undertaken independently by both the Sejm (lower house of parliament) and the Council of Ministers (CM), failed, being too particularist and autonomous in character, to bring the expected results. As a result approximation of Polish law to Community law made slower progress than planned under the government timetable which forms an inherent part of the schedule of accession negotiations with the EU is concerned. Set against a numerous group of candidate countries which had forged ahead in the approximation process, Poland's tardiness became even more alarming.

That led the Presidium of the Sejm (which consists of the speaker and the deputy speakers who represent the main groupings in the parliament) to propose an amend-

¹ Though aware of all the distinctions between "European law" and "Community law," I will treat them as synonymous in this paper. This will be in line with the use of the term "European law" in the Standing Orders of the Sejm to refer to the legal order of the European Communities to which Polish legal order is to be approximated.

² The Europe Agreement was signed on 16 December 1991 and published in *Dziennik Ustaw* (Dz.U.) [Official Journal] No. 11, title 38.

ment to the Standing Orders of the Sejm (SO) aimed at acceleration and enhancement of the efficiency of the legislative procedure for bills harmonising Polish law with the EU legal order.³ Work on the creation of the said procedure (called the “European fast track”) went in two directions. First, it was thought that new mechanisms and rules for speeding up the passage of bills should be introduced in the existing simplified legislative procedure. The possibility of relying solely on the established and proven summary legislative procedure was recognised as insufficient. Both the character of approximation-related legislation and its, from the point of view of Poland’s integration aspirations, importance, gave rise to a well-founded need to set up special arrangements entirely distinct from the ones already in place. Secondly, it was unanimously concluded that it was essential to establish a special parliamentary committee whose terms of reference would cover all bills which, however different in substance, had the common denominator of aiming at harmonisation of Polish law with European law. This concept was strictly connected with a CM announcement that it would shortly introduce a number of so-called “horizontal” (or “package”) bills, that is, ones simultaneously amending various, essentially heterogeneous, statutes. Expedient and effective examination of these would be impossible if the general rules of legislative procedure, which require bills to be referred to the relevant committees which can hold a joint debate thereon, were to be applied.

Article 110 para. 3 of the Polish Constitution empowers the Sejm to appoint both standing committees and special committees.⁴ Standing committees are appointed for the duration of the Sejm’s term, their number and subject matter being specified in the Standing Orders. Special committees are appointed on an *ad hoc* basis; upon creation of such a committee, the Sejm defines its aims, principles and operating procedures. Legislators’ need to appoint *ad hoc* special committees is mostly related to the fact that a particular matter may transcend the purview of any of the standing committees (or be beyond their competence) or that the matter (or matters of a particular type) are of special importance and thus require their examination to be accelerated and focused.⁵ The specific feature of a special committee is that it functions until it has completed its tasks. The duration of its term in office ends when the Sejm

³ The amendment in question was introduced by a Sejm resolution of 13 July 2000 on amendments to the Standing Orders. It should be stressed that the Sejm was not the sole agency of reform. Under a political declaration signed by the speaker of the Sejm, the presiding officer of the Senate (upper house) and the Prime Minister, not only the Sejm but also the Senate (see Senate resolution of 4 August 2000 on establishment of the European Legislation Committee) and the Council of Ministers introduced amendments to their internal procedures (see resolution 2/2000 of the Committee for European Integration of 24 July 2000 on co-ordination and verification of translations of EU legal acts and resolution 3/2000 of the Committee for European Integration of 24 July 2000 on the procedure for government approximation bills), that is, the other bodies involved in the legislative procedure.

⁴ I have deliberately omitted investigative committees (Article 111 of the Constitution) which are regarded by some authors as a particular form of the special committee (cf. P. Czarny: “Sejm i Senat,” in: P. Sarnicki (ed.): *Prawo konstytucyjne* (1999), p. 202) since their competence as defined in the Constitution excludes their participation in the legislative procedure.

⁵ See A. Preisner: “Wewnątrzsejmowe postępowanie ustawodawcze,” in: J. Trzcíński (ed.): *Postępowanie ustawodawcze w polskim prawie konstytucyjnym* (1994), p. 172.

adopts a report on the course and results of its work.⁶ Only in justified cases may a special committee deal with a particular matter (i.e. changes in law codes) for a longer period of time. However, even in such a case, expiry of the Sejm's own term puts a definitive end to the activities of such a committee. The existence of "optional" bodies, that is ones not provided for in the Standing Orders (which, in the light of what has been said above also applies to the *ad hoc* special committees) is subject to the principle of discontinuity which is complementary to the principle of the term of a parliament.⁷ The differences between these two types of committees made it necessary to devise a status for the new committee appropriate to its approximation functions and reflecting its specific character. Since, it was pointed out, the duration of the new committee's existence is connected with, and so restricted to, the time needed by Poland to prepare for European integration, its temporary character excludes the possibility of conferring upon it the status of a standing committee. However, the counter-argument was put forward that the process of approximation of binding legislation to a continuously developing *acquis communautaire* is not a temporary matter, that is, of a kind appropriate to special committees, but would be a continuous process, maybe even more important in future than at present. This view was rejected, on the grounds that there already existed a standing committee dealing with Europe-related matters, which, after Poland's accession to the EU, could be transformed for the purpose of performing such tasks. At the same time it was stressed that the new committee would not be required to examine all approximation bills, but only those listed in a government proposal (comprising nearly 200 items) drawn up on the basis of a European Commission White Paper. The committee would thus be of a clearly temporary character. In the end it was decided that new special committee would be established, but one *de facto* endowed with a number of the characteristics of standing committees. First its existence derives from a specific provision in the Standing Orders. For this reason, although the committee will have a limited term, it can only be dissolved by means of an amendment to that effect in the Standing Orders. If no such amendment is introduced each newly constituted Sejm will be obliged to establish such a committee, which means that that it loses the "optional" element typical of special committees. Such a construction seems to disregard the distinction (embodied in Article 110.3 of the Polish Constitution) between standing and special committees, based on the criterion of whether or not there is a legal obligation to establish them. Secondly, each newly constituted Sejm, while establishing such a specific special committee, will only determine its composition, but not the subject matter of its activities or operating procedures as these are determined by the Standing Orders of the Sejm. Any departure from this principle would require the introduction of appro-

⁶ See B. Szepietowska: "Uwagi na temat działu pierwszego Regulaminu Sejmu," in: *Komentarz do Regulaminu Sejmu Rzeczypospolitej Polskiej zawierający opinie pracowników z lat 1991–1997* (1997), Part I, p. 2.

⁷ More on the effects of the principle of discontinuity in the personal, material and institutional dimensions in A. Preisner: "Skutki upływu kadencji Sejmu dla prac nad projektem ustawy," in: *Trzeciński, op. cit., supra*, n. 5, p. 190.

priate amendments. Not should be taken of Jerzy Jaskiernia's observation that there has ensued a modification (or, more strictly speaking, a reduction) of the purview of the standing committees as a result of the establishment of the new special committee. This is due to the fact that approximation bills no longer have to pass through the relevant standing committees, although until then they fallen within their purview.⁸

The discussion in parliament concerning the name of the new special committee was only of a linguistic significance. In the initial stage of the passage of amendments to the Standing Orders it was known as Grand Committee for European Law, the reasons for this designation lying in various circumstances. First of all, there was the structural/organisational argument, that is, the committee's composition (up to 45 members) and the way it was determined (the members are elected in a joint vote on the recommendation of the Sejm Presidium after consultation with the Council of Senior Members). However, the importance of its tasks was stressed and the analogy with committees which found in Scandinavian parliamentary systems was emphasised.⁹ In the end the "Grand" was dropped and it was named the European Legislation Committee (ELC).

It is the CM which decides whether a bill is considered by the ELC – irrespective of the source of a legislative initiative¹⁰ – as in accordance with Article 56u of the Standing Orders it alone is authorised to make a legally effective determination that a bill is in the approximation category. Such a *sui generis* monopoly has a rational justification, as it is the government which is responsible for the conduct of negotiations with the EU and has the most complete and up-to-date knowledge of binding Community law, of the necessary scope and sequencing of changes in the legislation and the most advisable speed at which Poland should proceed. These circumstances have decided that in practice only government-sponsored bills are submitted to the Sejm for the purpose of harmonisation of Polish law with European law and that only these classified as such by means of "approximation clause") are the subject of ELC proceedings. It is worth stressing that once granted the "approximation clause" cannot be withdrawn by the CM, although under the provisions regulating the summary legislative procedure the sponsor of a bill may withdraw it at any time prior to the conclusion of the second reading. However, it should be stressed that such classification of a bill by the executive power is not exempt from parliamentary control, as it is checked by the speaker of the Sejm.¹¹ Thanks to this mechanism it can said that investment of the CM with the sole power to decide whether a bill is approximation legislation does not infringe the principle of separation of the legislative and execu-

⁸ J. Jaskiernia: "Tryb postępowania w Sejmie w zakresie dostosowania prawa polskiego do prawa Unii Europejskiej," 10 *PiP* (2000), pp. 15–16.

⁹ The similarity was to be manifested by transferring to the committee certain integration-related prerogatives vested in parliament as a whole. One example is the Danish European Affairs Committee which coordinates the activities of the Folketing in matters relating to the EU, but first and foremost entrusts to the Government the mandate for representing Denmark's position in the Council of the EU.

¹⁰ Under Article 118. paras. 1 and 2 of the Constitution, legislation can be initiated by MPs, the Senate, the President, to the CM or a group of at least 100 000 citizens.

¹¹ For a different view see Jaskiernia, *op. cit.*, *supra*, n. 8, pp. 10–11.

tive power. It is, however, worth mentioning that in the course of amendment of the Standing Orders it was proposed that it should be the Sejm Presidium that approved government decisions regarding the choice of procedure as it is more politically pluralised than the speaker of the Sejm and therefore ensures an even more effective safeguard against any temptation to misuse the legislative fast track to push through bills only very loosely, if at all, connected with approximation.¹² Under the arrangement eventually adopted in justified cases the speaker of the Sejm may, after consulting the ELC Presidium, refer a bill to a relevant standing committee or the Codification Amendments Special Committee. In that case recourse to the European fast track is excluded.

The new procedure is special in a number of ways. It was incorporated into the Standing Orders of the Sejm under Chapter 1c ("Procedure for Bills approximating Polish Law to EU Law"),¹³ of Part II of the Standing Orders ("Proceedings in the Sejm"). It should be emphasised that this set of provisions is not autonomous. The procedure is in no way complex or comprehensive. The provisions contain exclusively such elements as are specific to the proceeding of the ELC. The general provisions (Chapters 1 and 6 of Part II) and the provisions relating to summary legislation (Chapter 1a of Part II of the Standing Orders) apply (by inference directly, not accordingly) to questions which are not regulated differently, on the basis of an explicit renvoi. The order in which these rules should be used is in a way unclear as they provide guidance for two different legislative procedures. That is why they contain different dispositions. Since the European track is supposed to be first and foremost fast one can assume that the provisions relating to the summary legislative procedure must be applied in the first place. Where that is impossible (e.g. in case where it would lead to a conflict of rules) the simplified procedure provisions should be applied. It should, of course, be taken into account that the use of the summary procedure gives rise to the necessity of observing considerable restraint. Since it is of an exceptional its extensive application is inadmissible. Moreover, in reconstructing a model of the approximation procedure the limits of invention are demarcated by the provisions of the Constitution, which very often regulate the legislative procedure in considerable detail and take precedence over provisions contained in the other legal acts.

The new arrangements incorporated in the Sejm Standing Orders with respect to the European fast track include ones that which are permanent elements and ones whose application is discretionary.

¹² Cf., for example, a speech by Deputy L. D o r n in: *Sprawozdanie stenograficzne z 81 posiedzenia Sejmu RP w dniach 28, 29 i 30 czerwca 2000*, pp. 84–85, and one by T. M a z o w i e c k i at a session of the European Integration Committee and the Rules and Members' Affairs Committee, 4 July 2000, Bulletins 68 and 60, respectively.

¹³ Aside from Chapter 1c of Part II of the Standing Orders there is another provision (Article 31 para. 3b) which is applicable in exceptional cases and only in relation to the European fast track. It concerns the conditions which a bill submitted to the Sejm must meet and stipulates that when the approximation bill is submitted by the President, the CM, the Senate or the Sejm committee, a translation of the EU provisions must be annexed.

The permanent elements are:

1. shortening from 7 to 3 days the minimum time between delivery of copies of the draft legislation to MPs and the first reading of the bill
2. delivery to MPs of a Polish translation of the provisions of the European law to which Polish law is to be approximated no later than the date of delivery of the approximation bills, this being a precondition of the initiation of proceedings
3. setting a timetable (and specifying when necessary the scope of co-operation with other committees) for the passage approximation bills before commencement of their detail consideration
4. co-operation of the ELC with the European Integration Committee
5. a specific procedure for introduction of amendments to approximation bills by MPs (see below)
6. submission of bills for their second reading at the first sitting of the Sejm following receipt of the ELC's report (unless the speaker of the Sejm, after seeking the opinion of the Committee chair, decides otherwise)
7. consideration of amendments proposed by the Senate at the first sitting of the Sejm.

The discretionary elements are:

1. substitution of delivery to MPs of approximation bills with notification that copies are available from the Sejm Chancellery of the Sejm or circulation of copies of the bills in computer disk form with simultaneous notification by electronic mail (this is the first time that the Standing Orders provided for the use this kind of technology)
2. the right of the ELC to present on its own initiative a written opinion on any approximation bill
3. the possibility of seeking an opinion on a bill from other committees within the time limit specified in the timetable.

The procedure for introducing amendments to approximation bills is considerably different than in the simplified legislative procedure. Under Article 119 of the Polish Constitution amendments to a bill may be introduced by its sponsor, MPs and the Council of Ministers. Despite the fact that the plural has been used by the legislator in relation to the MPs, introduction of amendments is understood in the Polish parliamentary tradition to be a right of individual MPs.¹⁴ Before the amendment to the Standing Orders discussed here was introduced, the only deviation from this principle concerned the passage of law codes, where the right to introduce amendments at the second reading stage belongs to a group of at least 15 MPs (Article 56s para. 2 of

¹⁴ In relation to MPs' right to introduce legislation a counter-proposal is put forward (irrespective of the wording used by the legislator). According to some authors, the statement that MPs have the right of initiative should be interpreted as meaning that it must be always of a collective character which would imply that it cannot be exercised by a MP acting individually (see L. G a r l i c k i: "Uwaga 13 do art. 15 Małej konstytucji," in: L. G a r l i c k i (ed.): *Komentarz do Konstytucji Rzeczypospolitej Polskiej* (1997)). But others maintain that this question is determined by the provisions of the Standing Orders, as there is no explicit stipulation in the Constitution (cf. M. K r u k: "Prawo inicjatywy ustawodawczej w nowej konstytucji RP," 2 *PS* (1998), pp. 17–18). Article 29.2 of the Standing Orders states that members' bills may be introduced by Sejm committees or at least 15 MPs.

the Standing Orders). This is an exceptional provision whose *ratio legis* springs primarily from the need to eliminate the possibility of law codes (which are statutes regulating a particular branch of law in a comprehensive and profound manner) undergoing ill-considered or unconstitutional amendments. The conferring in this case of a group character on the right to introduce amendments has not been challenged on constitutional grounds. It is stressed, however, that in a democratic state, based on the principle of election of representatives by the sovereign, departures from the power individual MPs to influence the shape of the law through the introduction of amendments are admissible only in special circumstances.¹⁵ This arrangement could be adopted in the Standing Orders thanks, among other things, to the flexible formulation of the right in question in the Exercising of the Mandate of Deputy and Senator Act of 9 May 1996. Under to its Article 14 para. 1.5 every member of parliament has the right to participate in debates on bills, which should be understood to mean that the power to introduce amendments does not need to be individualistic.¹⁶ In the new approximation procedure this right has been subjected to major restrictions. First of all, it is of a collective character at each stage of the legislative procedure. It may be exercised by a group of three MPs (in the Committee) or of five MPs (during the second reading). Moreover – and this is a particularly controversial measure – the circle of persons entitled to introduce amendments has been considerably restricted. The right to introduce amendments to approximation bills belongs solely to members of the ELC. Thus it is a (collective) right that belongs solely to a small number of MPs, constituting at the very most 10% of the whole of the parliament. The stringency of this restriction is underscored by the fact that the detailed consideration of bills in committee is a fundamental stage of the legislative procedure during which specific legal content of the bills to be debated is actually shaped.¹⁷ The Standing Orders of the Sejm ought to create the possibility for amendments to be introduced in the course of the committees work by MPs who do not sit on the ELC also because the right to propose changes to the content of the bill belongs to all MPs in the same degree.¹⁸

The form of amendments has also undergone modifications and been given a qualified form in the approximation procedure. Both in the Committee and at the plenary sitting of the house (during the second reading of the bill) all proposals for amendments must be introduced in writing. It clearly follows from the foregoing that this mechanism has been constructed in a way that makes exercise of the right to propose amendments to approximation bills appreciably more difficult. It is worth

¹⁵ See J. Jaskiernia: *Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym* (1999), p. 172.

¹⁶ On MPs' individual and group rights and the notion of "participation in performance of a given act" see M. Kudej: "Status prawny posła i senatora w Rzeczypospolitej Polskiej," in: A. Gwiżdż (ed.): *Założenia ustrojowe, struktura i funkcjonowanie parlamentu* (1997), pp. 181–191.

¹⁷ See M. Kudej: "Proces ustawodawczy w Rzeczypospolitej Polskiej," in: E. Zwierchowski (ed.): *Postępowanie ustawodawcze* (1993), p. 38.

¹⁸ Cf. L. Garlicki: "Uwaga 25 do art. 15 Małej konstytucji," in: Garlicki, *op. cit.*, *supra*, n. 14, p. 21.

bearing in mind that there is a persuasive *ratio legis* behind such an approach since it is a well-known fact that one of the principal cause of the length of the legislative procedure in the Sejm is the necessity of putting to the vote a large number of amendments (which MPs tend to submit in abundance, especially at the second reading stage) that have such minimal support that their adoption by the house is excluded a priori. Moreover, it is evident that because of the specific character of approximation bills (which for the most part duplicate the relevant European rules) the scope for possible amendments is, naturally, very limited.

A new article in the Standing Orders, 56w para. 2, prompts a profound reflection. It stipulates that the drafts of law codes may, to the extent that their aim is to approximate Polish law to Community, be referred to the ELC and that the provisions of Chapter 1c then apply (unless the speaker of the Sejm decides otherwise). Consequently, in connection with the *renvoi* provided for in Article 56u, some of the provisions of the separate procedure for the summary legislative procedure may be applied to draft law codes. Such a regulation is controversial in the light of Article 123 para. 1 of the Polish Constitution which contains a catalogue of the legislation to which the summary procedure cannot be applied that specifically includes law codes. However, even if we take no account of the admissibility of direct application of elements of the summary procedure with respect to bills in this special category, there can be no doubt that it was the legislator's will to protect such bills against the possibility of enactment under a procedure shorter than the simplified one.¹⁹ Not without reason is the length of the legislative procedure (divided into several stages and further prolonged by requirement to submitting bills to three readings) identified with a guarantee that legislators will be assured of optimum conditions for adoption of legislative measures.²⁰ If we take into account that changes in legislative procedure in the Standing Orders may concern only elements which have not been determined in the Constitution, the admissibility of directing law codes to the European fast track, since there is a prohibition against considering them under the summary procedure – arouses reasonable reservations.

The process of approximation of Polish law to the European legal order raises questions concerning the possible necessity of introducing amendments to the Polish Constitution. Judging by opinions expressed by representatives of the doctrine,²¹ Article 62 para. 1 as well as Article 227 para. 1 of the Constitution may be examples of provisions inconsistent with European law. However, it needs to be emphatically

¹⁹ This requirement has in principle been fulfilled through the establishment in the Standing Orders a separate, markedly slower procedure for law codes.

²⁰ More on the importance of the speed of the legislative procedure in the context of approximation laws in A. Szmyt: "O możliwościach przyspieszenia toku prac ustawodawczych," 5 *Bulletin.BsiE* (1999), pp. 76 ff.

²¹ See, *inter alia*, M. Kruc: "Konstytucja narodowa a prawo europejskie: czy Konstytucja Rzeczypospolitej wymaga zmiany?," in: E. Popławska (ed.): *Konstytucja dla rozszerzającej się Europy* (2000), pp. 183–184; P. Winczorek: "Kilka uwag w kwestii dostosowania Konstytucji Rzeczypospolitej Polskiej do wymogów prawa europejskiego," in: Popławska, *op. cit.*, *supra*, pp. 191–192; K. Wójcik: "Konstytucja Rzeczypospolitej a członkostwo w Unii Europejskiej," in: Popławska, *op. cit.*, *supra*, pp. 172–173.

stressed that any amendments to the Constitution, even if they belong in the approximation category and must take the form of a statute, cannot be considered under the European fast-track procedure. This argument requires a few words of explanation, especially because the Standing Orders do not provide for a separate procedure for introducing amendments to the Constitution.²² It should be taken into consideration that urgency and a large number of simplifications are the main features of the new procedure. On the other hand, it is unquestionable that constitutional norms may be amended only by means of a special procedure involving requirements and difficulties that are not necessary in the case of ordinary statutes, since a special procedure for introducing amendments to the Constitution is both a premise and a guarantee of the supreme legal force of this act.²³ Another incontrovertible argument is the fact that certain specific elements of the legislative procedure for enactment of amendments to the Constitution, observance of which excludes the possibility of simultaneous use of the approximation procedure, have been regulated in the Constitution itself (Article 235).²⁴

However, not all the aspects of the new legislative track are equally self-evident. Even some of the doubts raised during the debate on the draft resolution were not unequivocally settled in the provisions of the resolution amending the Standing Orders. Moreover, at the very first sessions of the ELC it was found that the practice is a source of further, unbargained-for problems. Among the questions arousing the greatest controversy we should note:

- the admissibility of consideration by the Committee of bills whose provisions contain matters going well beyond the scope of approximation of Polish law to EU law,
- the conformity with the principles of lawmaking technique of framing statutes which simultaneously amend a number of legal acts each dealing with different matters,
- the quality of the translations of the EU legislation to which Polish law is to be approximated,
- the lack of clear criteria determining the order in which bills are submitted by the CM and the timetable of proceedings in the Committee,
- the possibility of using a clause stating that an approximation statute enters into force on the date of Poland's accession to the EU.

Based on analysis of the new provisions of the Standing Orders and almost a year of its functioning, several comments can be formulated on the effectiveness of the

²² The lack of a special procedure for the introduction of amendments to the Constitution in the Standing Orders can be explained by the fact that their creation considerably antedated the enactment of the new Constitution. On the other hand it seems desirable that the Standing Orders (frequently amended) should also be amended in this domain, so that are fully in line with the Constitution.

²³ See: L. G a r l i c k i: "Uwaga (2) do art. 106 p.u.m.," in: G a r l i c k i, *op. cit.*, *supra*, n. 14.

²⁴ One example is Article 235 para. 3 of the Constitution which stipulates that the first reading of a bill to amend the Constitution may take place no earlier than 30 days after the submission of the bill to the Sejm. This provision lengthens the simplified legislative procedure and excludes the possibility of using the European fast track.

European fast track, its results to date, prospects and possible future role it may play in future, but also its inherent dangers.

It can be stated that the purposes for which the ELC was created and to which a special procedure was assigned has been achieved. A significant reflection of this can be found in the favourable report issued by the European Commission in December 2000, in which even at this early (only six months after the new Standing Orders provisions entered into force) a considerable acceleration in the pace of approximation of Polish law to EU legislation, was noted. It is unquestionable that objective statement of such a tendency has strengthened Poland's negotiating position and is conducive to speeding up the progress of the accession negotiations. The functioning of the new procedure has made it possible to reduce the gap between Poland and other candidate countries and diminish the risk of Poland being transferred for that reason to the second group of applicants (as regards date of accession).

However, the effects of the amendments to the Standing Orders are decidedly more extensive. The new arrangements, introduced and successfully tested – and in some cases having a solely technical such as, for example, the circulation to MPs of the texts of draft legislation by electronic mail – which thus far have been employed solely for approximation bills, are likely to find their way into the simplified legislative procedure. Perhaps the transformation of legislators' right to introduce amendments from an individual to a group prerogative (modelled, in this pioneering respect, on the procedure applied in the passage of law codes) is a forerunner of a more general tendency to eliminate opportunities for MPs to propose amendments and recommendation which are bound to fail, as they do not have the support of a sufficient number of members. It should, however, be borne in mind that new procedural measures introduced in the approximation procedure cannot be (and are not) a placebo for all the existing weaknesses and deficiencies of the simplified legislative procedure. It should be remembered that certain elements, however encouraging in themselves, arouse such great controversy that that, though admissible as exceptions, they cannot be accepted as rules.

Furthermore, a certain model of co-operation between the Sejm and the CM has been created and tested. There can be no doubt that the further course of the European integration process will give this question a particularly timely and sensitive dimension. That is why careful scrutiny of the mutual relations between the organs of the legislative and executive powers makes it possible to identify the strengths and weaknesses of their co-operation in this field and is conducive to its improvement in future.

A secondary, though not negligible, effect of the functioning of this special procedure of the Sejm is the enhanced role of the CM in the legislative procedure. It is the Government's decision whether (as noted earlier) a bill is directed to the European fast track and so due to the more stringent procedure for introducing amendments, also whether the content of the approximation bills proposed by the CM is "stiffened."

The design of the approximation procedure creates a threefold danger. Firstly, inherent in the European fast track is the possibility of what might, in the light of the

principle of a democratic state ruled by law, be excessive simplification and acceleration of the examination of bills in relation to the simplified legislative procedure. Undoubtedly, excessive use of certain procedural mechanisms could lead to a reduction and downgrading of the role of the parliamentary opposition. Secondly, the priority treatment of approximation bills when setting the parliamentary timetable and the existence of arrangements which make incursions into the text of legislation proposed by the Government more difficult gives rise to a temptation (signs of which have already been in evidence) for the CM to abuse this procedure and to some extent to try to force through normative concepts that the Sejm would otherwise find hard to accept. Thirdly, the haste that is a feature of approximation legislation tends to debase the quality of the resulting law, among other things because of the essentially weaker preparation of bills and unreliable fulfilment of the formal obligations resting on the CM as the subject of the right to introduce legislation. It is impossible to eliminate these dangers without introduction of changes in the present state of the law. Fortunately, for the moment they are of a hypothetical character. Practice to date justifies the assumption that agreement and co-operation between the main political groupings in Poland aimed at the best possible preparation of Poland for EU membership by are a constraint which effectively prevents abuse and distortion of the special legal procedure. One should be conscious, however, that the responsibility for the success of the approximation procedure lies mainly with the MPs representing the majority party in the Sejm (and, above all, with the speaker) and the Government. On their self-restraint depends whether these threats remain potential.

The Negotiations Decision-Making Machinery

CEZARY BANASIŃSKI

I. Specific Features of the European Union's Eastward Enlargement

The present round of accession negotiations is in many respects incomparable with previous rounds. The accession of Austria, Finland and Sweden to the Union was preceded by these countries' participation in the European Economic Area (EEA). A considerable part of the *acquis communautaire* (about 60% according to various estimates) was covered by the negotiations which preceded establishment of the EEA.¹ Again, at the time of the Greece, Spain and Portugal accessions to the Communities the *acquis communautaire* was far less extensive than it is now. The finalisation of the Community internal market project at the beginning of the 1990s has facilitated trade and free movement of services, capital and persons within the Union, but at the same time has complicated preparations for accession. It should be noted that candidates must have adopted the entire *acquis communautaire* upon accession to the European Union at the latest, and not only the regulations relating to the internal market.

The unprecedented nature of the present enlargement also points up the necessity of major changes within the Union. Thus a reform of Union institutions to prepare them to function efficiently with almost double the number of Member States is essential. The necessary minimum was agreed at the European Council in Nice. The debate on the next stage of the institutional reform will coincide with the new enlargement. It is specific Union policies which will then be subject of the required reforms. In particular this applies to the Common Agriculture Policy which is under pressure not only from the enlargement process but also the next round of World Trade Organisation negotiations, and has recently run into criticism by consumers. The challenges and dilemmas confronting structural policy ahead of the prospective enlargement are the subject of the debate initiated by the Second Report of the European Commission on Economic and Social Cohesion. However, the enlargement process ought not be impeded by the necessity of internal reforms which undoubtedly complicate negotiations. The final decisions will in fact be taken with the participation of some of the candidate countries who by then will have become full-fledged members of the Union.

¹ G. A very: "The Commission's Perspective on the EFTA Accession Negotiations," 12 *SEI Working Papers* (1995), p. 13.

II. Rules of Accession Negotiations

The aim of the current European Union accession negotiations with 10 candidate countries from Central and Eastern Europe plus Cyprus and Malta is to determine the terms of membership.

Accession negotiations differ fundamentally from traditional international negotiations. The subject of accession negotiations is not prospective relations between “us and them” as in typical international negotiations, but relations between “us in future.”² This specific aspect of the nature of European Union membership negotiations should influence the practise of the whole process. In determining the terms of enlargement the Union should aim at strengthening a candidate country so that it will be able to use its rights in the best possible way and fulfil its membership obligations. The interest of the enlarged Union should also be one of the factors taken into account by the candidate country in negotiations.

The basic rules of negotiation evolved in the course of previous European Union enlargements define the decision-making process in the accession negotiations. Three rules – requiring, respectively, acceptance of the *acquis communautaire* at the beginning of negotiations, the inter-governmental character of accession negotiations and separate negotiations with each candidate country – have determined the dynamic and results of negotiations ever since the first enlargement of the Communities in 1970s. A feature of the present enlargement is the greater attention paid by the Union to commitments made by candidate countries during the negotiation process. Based on this an additional rule can be distinguished – the conditionality of negotiations with respect to the progress of adaptation.

A. Acceptance of the *acquis communautaire* at the Beginning of Negotiations

A country applying for European Union membership declares its readiness to accept the entire *acquis communautaire* at the very beginning of the entry talks. This rule distinguishes the accession negotiations from typical international negotiations. During international negotiations the parties usually make mutual concessions aimed at working out a balanced agreement. A different situation obtains in the accession negotiations and in that sense they are asymmetrical in character. A country applying for membership of the Union must accept the obligations resulting from membership and cannot expect changes in fundamental rules on which the functioning of the Union is based. The rule requiring acceptance at the beginning of negotiations considerably limits the area of the accession negotiations. Consequently, transitional periods and fixed and temporary derogations³ are exceptions from this rule. They must, therefore,

² *Ibid.*, p. 1

³ A fixed derogation means that specific provisions of Union law are permanently excluded from application to a particular Member State (for example, Denmark's exemption from the rules relating to purchase of real estate). A transitional period provides for postponement of the entry into force of specific provisions of Union law together with submission of a plan for their gradual implementation. Under a temporary derogation as opposed to a transitional period, a candidate is not required to submit a plan for gradual implementation.

be of a limited character both quantitatively (limitation of the number of required exemptions) and qualitatively (the criteria to be fulfilled by the requested exemptions). The qualitative criteria relating to acceptance of transitional arrangements are presented to the candidates at the beginning of the negotiations. Any transitional arrangements must be limited in both duration and scope and should be accompanied by a clearly defined adaptation plan. These arrangements must not be of a kind that could cause changes or disruptions in the functioning of the Union and its policies, in particular, of a competition-distorting nature. The acceptance assessment of a transitional period takes into account the interest of the Union, of the candidate country submitting the request and of other candidate countries. These general criteria for the acceptance of transitional arrangements have been specified in detail during the accession negotiations and their full version is included in the Strategy for Enlargement together with a classification dividing transitional periods into the acceptable, the negotiable and the unacceptable.⁴ Acceptance of transitional periods is a basic part of the agenda of accession negotiations. It is recognised that in the present enlargement candidate countries will not be able to obtain fixed derogations in the negotiation process, except in extraordinary situations which are of no practical consequence for the Single Market.⁵

Candidate countries have for many reasons asked for several hundred kinds of transitional arrangements in the course of the present negotiations, mainly on the grounds of the high costs of adaptation and technical difficulties.⁶ Determination of the way in which new members will participate in Union policies, in particular in the Common Agricultural Policy and the structural policy, as well as determination of the future contribution of each candidate country to the European Union's budget will also be a subject of the current accession negotiations.

However, the required acceptance by a candidate country of the whole *acquis communautaire* at the beginning of the accession negotiations does not rule out changes in the European Union itself due to the implications of the negotiated enlargement. Each enlargement has necessitated modification of the provisions of the institutional treaties. New members must be provided with appropriate representation in the institutions of the European Union. Enlargement also affects the way in which Union policies function. In the case of the present enlargement its scale means that the internal reforms will be particularly deep, and the first steps in this direction were taken as early as the mid-1990s, i.e. during the negotiation of the Amsterdam Treaty. However, some of these changes will be implemented only after the enlargement.

⁴ European Commission: *Enlargement Strategy Paper* (2000), p. 26.

⁵ An example of a fixed derogation is approval of subsequent sales of Swedish chewing tobacco that was a subject of negotiations during the last enlargement. A. M a y h e w: "Enlargement of the European Union: An Analysis of the Negotiations with the Central and Eastern European Candidate Countries," 39 *SEI Working Papers* (2000), p. 13.

⁶ By October 2000 the European Commission had recorded over 500 requests for transitional arrangements. Transitional arrangements may also be demanded by the European Union itself; it has already done so in the case of free movement of workers with respect to all the candidate countries except Cyprus and Malta.

B. The Inter-Governmental Character of Accession Negotiations

The rule whereby accession negotiations are conducted on an inter-governmental basis also determines the shape of the decision-making process. A country applying for European Union membership negotiates with all (fifteen) of the Member States. In the decision-making process during the negotiations this means that it is the Council of the European Union which plays the prime role and which acting unanimously approves the Union's common position papers. In accordance with Article O of the Treaty on European Union accession treaties also have to be ratified in all Member States. Also further to Article O, during the last enlargement the accession treaties had for the first time to be ratified by the European Parliament as well.⁷ However, in practice, the negotiations are for the most part concerned with technical problems and Member States accept without reservations the European Union's proposed common position papers which are prepared by the European Commission. The Commission also plays a key role in informal negotiations.

The fact that the European Union's common position papers require unanimous acceptance by all the Member States has profound consequences for the ways in which negotiations are conducted and the decision-making machinery within the Union can be influenced by a candidate country. Consequently, the diplomatic efforts of a candidate country should not be concentrated on Brussels alone. In many cases there will be only one Member State, or at the most several Member States, opposed to a particular transitional arrangement requested by a candidate country. In such situations the candidate country tries to persuade the capitals of the opposed Member States to favour its proposals. Ahead of the ratification of accession treaties candidate countries should also strive to win support for their membership in all the Member States, especially in those where there is weak public support for enlargement of the European Union.⁸

Prolonged disputes within the Union over the content of a common position paper to be submitted to countries applying for membership are also a consequence of the rule requiring negotiations to be carried out with all the Member States. Such disputes concern only the handful of areas which go beyond the technical aspects of negotiations. Thus far, the best example relating to the present enlargement is the negotiations within the Union on a transitional period for movement of workers from Central and Eastern Europe.

⁷ P. Nicolaides, S.R. Boe an: *A Guide to the Enlargement of the European Union* (1997), p. 19.

⁸ Historically, a referendum on the accession of a candidate country to the European Union has taken place only once, in France on 23 April 1972 with respect to the accession of Great Britain. D. D i n a n: *Ever-closer Union* (1999), p. 66. Demands for a national referendum on the next enlargement have come from the Freedom Party in Austria, the junior partner in its coalition government. Even if such referendums do not take place, weak public support for enlargement could handicap the ratification process of accession treaties by Member States' governments and parliaments.

C. Separate Negotiations with Every Country Applying at the Same Time

With only one exception in the history of EU enlargements to date only simultaneous negotiations on the terms of membership with several candidate countries have taken place. The present negotiations involve a group of 12 countries. Negotiations between them and the European Union are being carried out at the same time but separately. Consequently, meetings of the Inter-Governmental Conference on Accession at the level of heads of delegations or their deputies have taken place separately, even if the meetings are held on the same day and have the same or a similar agenda. During previous enlargements this rule eventuated in profound consequences for the negotiations decision-making machinery. It gives the European Union possibilities of obtaining concessions from a candidate and accordingly exerting an influence on the other candidates. In the practice of previous and present enlargements there has been no common ground in relation to the Union between the countries applying for membership, notwithstanding the convergent interests in many cases.⁹ Moreover, there also advantages for candidate countries in negotiations of the terms of membership. Some of them might fear that joint negotiations could hold up enlargement process since they would necessitate the negotiation of satisfactory terms of membership for each candidate individually before progress could be achieved.

Despite the fact that negotiations with each of the applicant countries are formally separated from the practical aspects, the enlargement will encompass a group of countries. The countries that are not included in this group will probably have to wait over a year for the next enlargement. Candidate countries' awareness of this fact has impacted significantly on the functioning of the negotiations decision-making machinery. The combination of the requirement of separate negotiations and pressure for enlargement by a group of countries has resulted in the appearance of a group negotiations dynamic. During the last enlargement this phenomenon manifested itself in a greater tendency on both sides, but mainly among the candidates, to make concessions in their negotiations under the pressure of concessions by other candidates and a amount of time left for initiating the accession treaties ratification procedure shrinking to a minimum.¹⁰ It seems likely that in the present enlargement the group negotiation dynamic will also act as a factor tending towards acceleration of the decision-making process in the last phase of the negotiations. A different scenario, i.e. postponement of enlargement due to failure to achieve agreement with one or more countries on the terms of membership, is not very probable.

The group negotiations dynamic phenomenon has so far been little in evidence since the deadline for conclusion of negotiations is still distant. In mid-2000 it surfaced as pressure for movement towards provisional closure of the accession negotiations at the same or a similar pace (which in practice means pressure to speed up the

⁹ During the present enlargement the candidate countries of the Luxembourg Group (i.e. Cyprus, the Czech Republic, Estonia, Poland, Slovenia and Hungary) carry out regular exchanges of information in a framework of meeting at the political and expert level. Chancellery of the Prime Minister: *Accession Negotiations. Poland on the Road to the European Union*, 2nd ed. (2000), p. 74.

¹⁰ Avery, *op. cit.*, *supra*, n. 1, pp. 11–12.

pace of concessions). The closer the date for conclusion of negotiations (according to the Strategy for Enlargement this should take place by the end of 2002), the stronger the pressure for concessions exerted by concessions made by other candidates. Judging by previous enlargements, the last weeks and days of the negotiations will determine the ultimate shape of the terms of enlargement.

E. The Conditionality of Negotiations with Respect to Progress in Adaptation

In previous enlargements the accession treaties were signed on the assumption that candidate countries would implement the *acquis* as agreed during the negotiation process. In the event of partial or improper implementation of the *acquis* the European Court of Justice could force a candidate country after it had become a Member State to assure compliance of its national law with the *acquis*. Introduction of a verification mechanism to check that the *acquis* is being implemented in the pre-accession period and conditioning negotiations on the extent of progress in adaptation are distinctive characteristics of the present enlargement.

Regular once-yearly reports by the European Commission are the basic tool used in the verification process. Initially, these annual reports contained only a general assessment of a candidate country's advance in the transition process and fulfilment of the Copenhagen criteria. At present, the annual reports also include a detailed assessment of progress in preparations for membership in all areas of negotiations.¹¹ The annual report timetabled for autumn 2002 will most likely bring the final assessment of the membership qualifications of the candidate countries.¹²

However, the assessments presented in the annual reports are not the only means of realisation of the rule of limited trust. During the accession negotiations in each of their chapters the European Union does not rest content with the declared commitments of candidate countries. Progress in negotiations as reflected in the provisionally closing of accession negotiations sometimes depends directly or implicitly of achievement of a specific level of advancement in the adaptation process. This also applies to the negotiation chapters in which a candidate is not seeking particular arrangements or agreement has been already achieved. The European Union's Strategy for Enlargement reserves the European Commission the right to recommend a re-opening of negotiations in a provisionally closed chapter in the event of non-fulfilment by a candidate of the adaptation commitments undertaken during the negotiations.¹³ The European Union has not so far exercised this power; however, the warning of so doing has been used several times to stir candidate countries into greater adaptation efforts.

¹¹ Mayhew, *op. cit.*, *supra*, n. 5, p. 10.

¹² 152 *Uniting Europe*, 9 July 2001.

¹³ *Enlargement Strategy Paper*, *op. cit.*, *supra*, n. 4, p. 28.

III. Accession Negotiations Process

The formal opening of accession negotiations with Poland and the other countries in the first group took place in Brussels on 31 March 1998. A decision to initiate a process of Union enlargement by all the candidate countries from Central and Eastern Europe plus Cyprus (eleven countries in all) had been taken by the European Council at its summit in Luxembourg on 12 and 13 December 1997. However, the decision of the European Council provided for initiation of accession negotiations only with the five Central European countries farthest advanced in political and economic reformation (the Czech Republic, Estonia, Poland, Slovenia and Hungary) and Cyprus.¹⁴ Initiation of negotiations with the next group of candidate countries (Bulgaria, Romania, Lithuania, Latvia, Slovakia and Malta) took place two years later further to decisions taken by the European Council summit in Helsinki in December 1999.

Screening Polish legislation for its compatibility with the Community legal system formed the preliminary stage of the negotiations which started in Brussels on 27 April 1998. The assessment covered twenty-nine of the thirty-one negotiation chapters (the two excluded from the negotiations were "Institutions" and "Others"). In the case of areas where the *acquis communautaire* is very voluminous, such as agriculture, environmental protection and transport policy, there were several screening sessions.

Acquainting candidates with Union law and identification of problems which require further negotiations was the purpose of the screening procedure. Screening lists setting out the Union's legal acts in a particular field were circulated by the European Commission and formed the basis for the review of legislation. Candidate countries filled out the lists with the provisions in their own law corresponding to the Community acts. In addition to government departments social partners were also involved in the process: they received the screening lists and could participate in co-ordination meetings. During these co-ordination meetings, which took place in Poland before departure for the screening sessions, the Polish positions were co-ordinated with respect to dates and ways of implementation of the Community legislation in a particular chapter.

Based on the results of these screening, in the second phase of negotiations Poland prepared position papers for each of the 29 negotiation chapters. Preparation of a position paper comprised several stages. The first stage was preparation of a draft by a Task Sub-Group working as a subordinate part of an Inter-Ministerial Team for the Preparation of the European Union Accession Negotiations. Producing the first draft of a position took from around two weeks to several months depending on the complexity of the chapter. Next, the draft position was referred to the Negotiating Team which made whatever modifications might be required to bring it in line with the negotiating strategy and tactics. The drafts were then submitted to the Committee for European Integration which recommended their acceptance by the Council of

¹⁴ A. Mayhew: *Recreating Europe: The European Union's Policy towards Central and Eastern Europe* (1999), p. 176.

Ministers in either an unmodified or, as in several cases, a modified version. By the end of 1999 Poland had submitted to Brussels all the position papers provided for in the timetable (29 positions).¹⁵

After familiarising itself with a candidate country's position paper the European Union prepares a response in the form of a EU common position. Draft positions in most cases are prepared by the Directorate for Enlargement in co-operation with other Directorates-General of the European Commission. Only in the case of the positions in the fields of Common Foreign and Security Policy and Justice and Home Affairs, which are excluded from the competence of the Community, are the draft positions prepared by the Presidency of the EU in close co-operation with Member States and the European Commission. A draft position is subject to discussion in the forum of the Enlargement Group of the Council of the European Union. A document agreed within the Group must be accepted by the Member States' ambassadors to the European Union at a COREPER meeting and then must be formally accepted by the Council of the European Union. The approved text of the EU position is transmitted by the Union to candidate country delegations at a meeting of the Inter-Governmental Conference on Accession at the level of Heads of Delegations or their Deputies. The Inter-Governmental Conference on Accession is the institutional instrument created, following the example of previous EU enlargements, as a forum for co-ordination meetings between Member States and candidate countries. The Minister of Foreign Affairs is the Head of Poland's delegation to the Inter-Governmental Conference on Accession and the Government Plenipotentiary for Poland's European Union Accession Negotiations is his Deputy.¹⁶

In most cases the initial common positions contained many detailed questions concerning the contents of the positions and intentions of the Polish side. This made necessary the preparation of an answer by Poland. Draft answers to the EU common position are prepared by the member of the Negotiating Team responsible for the chapter in question in co-operation with the relevant Task Sub-Group and interested ministers. If it is found necessary to go beyond what was previously agreed in the original position paper, a new version is submitted to the Committee for European Integration and the Council of Ministers as the proposed modification of the position paper. After acceptance by the Negotiating Team, the reply to the EU common position is delivered to the Union by the Head of the Negotiating Team. This document serves as the basis for the preparation by the European Commission of a modified EU common position. Its proposals are approved by the Council of the European Union in the form of a EU common position. When agreement is achieved by the parties on the chapter in question, a provisional closure of negotiations in that field takes place. This means that the provisions contained in the Polish and European Union positions are agreed; however, they remain subject to modification pending the closure of negotiations in all the other negotiation chapters. The final closure of negotiations in all

¹⁵ *Negotiation Positions* (1999), p. 17.

¹⁶ *Negotiator's Glossary* (2000), pp. 47–48.

chapters simultaneously will take place in the final stage of the negotiations when the positions are supplemented by whatever new additions to the *acquis communautaire* have come into effect during the negotiations and both sides adjust their positions accordingly.

In the first years of negotiations the European Union common positions were not sufficiently concrete, in particular in the fields where a response to candidate countries' requests was required. The Union was not able to respond to proposals submitted by candidate countries even in situations where they concerned minor matters with no particular implications for the functioning of the single market of the enlarged Union, which was indicative of a lack of political will to speed up progress in the negotiations. Attention was drawn to this problem by the European Commission in the Strategy for Enlargement published in autumn 2000. The Commission recommended concentrating during the negotiations on the consequential questions contained in the requests for transitional arrangements submitted by candidate countries. The "road map" for the accession negotiations embodied in the Strategy for Enlargement defines the envisaged negotiating timetable. The road map disciplines the negotiating parties and was one of the more important of the candidate countries' desiderata from the very beginning of the negotiations. The road map provides that "accession conferences undertake, if possible in the year 2001, most of outstanding essential negotiation questions, with exception of those, which have the greatest budgetary implications. In the first half of 2002 the Union will refer to the latter together with the chapter 'institutions' and the other unresolved problems."¹⁷ The first test of the accession negotiations road map was passed successfully during the Swedish Presidency (January–June 2001) and this increases the chances of concluding negotiations in 2002.

In the final stage agreements reached during the negotiations will take the form of the terms of Poland's accession embodied in the Treaty of Accession (the membership negotiation process will be concluded by the signature of the Treaty of Accession by the Member States of the European Union and Poland. Following ratification of the Treaty by the signatories Poland will become a member of the European Union).

IV. Structures Responsible for the Negotiation Process in Poland

The negotiations decision-making machinery must not only meet the need to ensure efficient technical co-ordination of the work of the different government departments and agencies involved – tasks performed in Poland by the Chief Negotiator together with the Negotiating Team and the Inter-Ministerial Team for the Preparation of the European Union Accession Negotiations – but also guarantee the necessary legitimization of the decisions taken as in many cases the position papers determine strategic public policy options. For this reason the key decisions in the negotiation

¹⁷ *Enlargement Strategy Paper, op. cit., supra*, n. 4, p. 6.

process, including acceptance of position papers, are taken by the Council of Ministers acting on the recommendation of the Committee for European Integration. The Prime Minister exercises political control of the negotiations. The nature of the negotiating process is such as to require diplomatic activity. This defines the role of the Ministry of Foreign Affairs. The Minister of Foreign Affairs is the Chair of the Polish Delegation to the Inter-Governmental Conference on Accession.

In the candidate countries there is no universal model of negotiating structures and decision-making mechanisms for the negotiation process. As a rule in all the candidate countries it is the government which performs the decision-making functions in the negotiation process. The one exception is Slovenia where position papers, before submission to the Union, are approved by the parliament. This is due to the fact that the Slovenian Negotiating Team is to a significant extent independent of the government.¹⁸ Usually – in the Czech Republic, Estonia, Bulgaria, Lithuania, Latvia, Romania, Slovakia and Hungary – the final role in the negotiating process is played by the Ministry of Foreign Affairs. In most of the aforementioned countries the Chief Negotiator is at the same time a deputy Minister of Foreign Affairs.

As a rule, structures called Negotiating Teams or Delegations to Accession Negotiations operate in all the candidate countries. Their basic role is to negotiate and co-ordinate the work of government departments and agencies during the negotiation process. The Chief Negotiator usually controls the activities of these structures; however in Hungary and Lithuania it is not the Chief Negotiator but the Minister of Foreign Affairs.¹⁹ As a general rule there are more differences than similarities between the negotiating structures and the decision-making process involved in negotiations.

The basic characteristics of the Polish model are described below. Its specific features are the result of decisions taken in the form of legal acts by the government at the beginning of the negotiation process in March 1998. The first was the Regulation of the Council of Ministers of 24 March 1998 appointing a Government Plenipotentiary for Poland's European Union Accession Negotiations,²⁰ followed by the Ordinance of the Prime Minister (No 19, 27 March 1998) establishing a Negotiating Team for Negotiation of Poland's Membership in the European Union and the Ordinance of the Prime Minister (No 53, 16 July 1998) establishing an Inter-Ministerial Team for Preparation of the European Union Accession Negotiations.

Framing negotiations process policy and its co-ordination and negotiation of the Accession Treaty on behalf of the Government are the task of the Plenipotentiary for Poland's European Union Accession Negotiations, also called the Chief Negotiator. The Chief Negotiator has also been empowered powers to draft legislation and other documents relating to the negotiation of accession in the European Union. The Chief Negotiator is required to submit regular reports on his activity to the Council of Ministers. He is also deputy Head of the Poland's delegation to the Inter-Governmental Conference on Accession. However, the Chief Negotiator is not responsible for the

¹⁸ *Accession Negotiations, op. cit., supra*, n. 9, p. 109.

¹⁹ *Ibid.*, pp. 107–113.

²⁰ *Dziennik Ustaw* (Dz.U.) [Official Journal], No. 39 (1998), title 225.

state of adaptation of Polish law to Community requirements. This task and the responsibilities in this field lie with the Chairman of the Committee for European Integration. Under the Council of Ministers Regulation the function of Plenipotentiary is performed by a secretary of state in the Chancellery of the Prime Minister.²¹

Executive powers, i.e. implementation of negotiations strategy and co-ordination of the negotiation process, have been assigned to the **Negotiating Team**. The main tasks of the Negotiating Team are: preparation and approval of the draft position papers of the Polish Government, preparation and approval of replies to European Commission queries (but only within the terms of reference of the position papers) or revision of draft negotiating instructions. The Negotiating Team, which meets at least weekly, comprises 19 members, representatives of key ministries holding the rank of secretary or under-secretary of state and nominated personally by the Prime Minister. As a rule, they do not represent the interests of their ministries in the Negotiating Team forum. The Chief Negotiator is the chair of the Negotiating Team.²²

Established together with the Negotiating Team was an **Inter-Ministerial Team for Preparation of the European Union Accession Negotiations**. The Inter-Ministerial Team was set up as a legal and organisational basis for the functioning of Task Sub-Groups which are chaired by the deputy ministers responsible for specific matters relating to the accession negotiations. The Task Sub-Groups provide the technical back-up for the negotiations, framing approaches to negotiation problems and analysing their possible social, economic and financial effects. The Inter-Ministerial Team was divided into 37 Task Sub-Groups. Their role was to prepare draft position papers on each of the negotiation chapters and analyse the social, economic and budgetary effects of the adopted positions. The Task Sub-Groups prepare documentation and draft position papers which are submitted to the Negotiating Team. The Task Sub-Groups are composed of representatives of ministries which present the positions of the their departments in the Sub-Group forum. The Chairman of the Committee for European Integration is the Chair of the Inter-Ministerial Team and the Government Plenipotentiary for Poland's European Union Accession Negotiations Union is the Deputy Chair.²³ Now that the drafting of position papers has been completed the work of the Inter-Ministerial Team and the Task Sub-Groups has almost petered out.

Programming and co-ordinating Poland-Union integration policy and the adaptation of the legal, institutional and economic system to the standards in force in the European Union are the main task of the Committee for European Integration established in August 1996. It is a central government body.²⁴ The Committee for European Integration may be chaired by the Prime Minister or minister responsible for European integration matters. Except for the Chairman and the Secretary of the Committee for European Integration, the Committee is composed of the ministers in charge

²¹ *Accession Negotiations, op. cit., supra*, n. 9, pp. 21-22.

²² *Ibid.*, pp. 23-24.

²³ *Ibid.*, pp. 20-21.

²⁴ Dz.U., No. 106 (1996), title 494.

of key sectors of the administration involved in the integration process. Within the negotiation process the Committee for European Integration recommends to the Council of Ministers the adoption of the position papers which have been prepared and approved by the Negotiating Team. The Chief Negotiator was made a member of the Committee under a rule saying that the Chairman of the Committee may appoint three additional members whose experience or functions could have a positive influence on efficient execution of the tasks assigned to the Committee.

The **Council of Ministers** plays a key role in the decision-making process in the context of the negotiation process. The Council of Ministers adopts the position papers upon a recommendation from the Committee for European Integration. Modifications and amendments to the position papers also need to be approved by the Council of Ministers. Modifications of the position papers, which took place for the first time in spring 2001, have been necessitated by considerations of the progress made in negotiations with the European Union, the chances of achieving the complex aims and headway in adaptation activities, and re-assessments of the meaning of particular proposals in the context of additional analysis. Amendments in the position papers are also made to accommodate any additions to the *acquis communautaire* since submission of the original position papers by Poland.

The **Prime Minister** is responsible for the political direction of all aspects of the negotiations. The Prime Minister issues guidance on the negotiation process in consultation with the Minister of Foreign Affairs, the Secretary of the Committee for European Integration and the Government Plenipotentiary for Poland's European Union Accession Negotiations. The political directorate of the negotiations is an informal body. Its activities have so far been limited, especially in the period of technical negotiations. However, its role may increase when the negotiations approach their culmination phase since more options of a political nature requiring immediate high-level decisions may appear in this period.

The role of the negotiating structures within the **Ministry of Foreign Affairs** deserves separate description. The Minister of Foreign Affairs is the Head of the Polish Delegation to the Inter-Governmental Conference on Accession and the partner in talks with the EU foreign ministers who are members of the Council of the European Union for General Affairs which also deals with enlargement matters. Moreover, diplomatic missions in the EU Member States and in the candidate countries co-ordinate foreign contacts in the framework of the negotiations. A particular role in the negotiation process is played by the Polish Representation to the European Union. The Representation provides ad hoc specialist support during the negotiations. Its role also includes circulation of information and documentation between the Polish Government and EU institutions.²⁵ However, the Representation has a limited influence on the work of the Negotiating Team.

²⁵ *Accession Negotiations, op. cit., supra*, n. 9, pp. 24–25.

V. European Union Structures Responsible for the Negotiation Process

On the European Union side the current negotiating structures, institutions and procedures have not changed much from the model followed during the last enlargement.²⁶ The negotiations decision-making machinery within the Union is determined by the inter-governmental character of negotiations.

As a result, the key decisions are reserved for the European Council and the Council of the European Union which guarantee and represent the element of inter-governmental co-operation within the Union. Traditionally, the burden of preparation of decisions and provision of technical facilities for the negotiations services rests with the European Commission. Because of the technical character of the negotiation process (excluding some exceptions) and the importance of the informal negotiations, the role of the European Commission is more consequential than its formal responsibilities suggest. The European Parliament has played a part in the enlargement process since the entry into force of Treaty on European Union. It consists mainly in the necessity of approval by the Parliament of the negotiations outcome, i.e. Accession Treaties.

Although the **European Commission** does not have decision-making responsibilities it plays a key role in the accession negotiations. First, it is the European Commission which prepares the European Union's draft common positions that are then approved by the Council of the European Union. Second, the Council of the European Union may ask the European Commission to prepare proposals for resolving specific problems when a deadlock in the negotiation arises.²⁷

Within the European Commission the progress of the negotiation process is at present co-ordinated by the Directorate-General for Enlargement (DG ELARG) which reports to the Commissioner responsible for enlargement.²⁸ The tasks of the DG ELARG include: 1) managing and co-ordinating the legislation screening process; 2) co-ordinating the preparation of EU draft common positions; 3) preparing draft legislation relating to the negotiations; 4) representing the Commission in discussions on enlargement in the Council of the European Union; 5) co-ordinating technical services relating to the EU enlargement.²⁹

Within the structure of the DG ELARG there are 13 teams. They are responsible for negotiations with each candidate country (including Turkey). The work of the teams is directed by the European Commission's Chief Negotiators. The duties of the teams are of a vertical nature – each of them prepares negotiations with one of the

²⁶ Mayhew, *op. cit.*, *supra*, n. 5, p. 69.

²⁷ Avery, *op. cit.*, *supra*, n. 1, p. 3.

²⁸ During the last enlargement, the role of the DG ELARG was played by the Task Force for the Accession Negotiations consisting of four units reporting to the Commissioner responsible for external relations. Nicollides, Boeana, *op. cit.*, *supra*, n. 7, p. 16. Prior to November 1999, i.e. the internal reform of the Commission, a Task Force for the Accession Negotiations, with a similar structure, was responsible for the negotiations. *Accession Negotiations*, *op. cit.*, *supra*, n. 9, p. 35.

²⁹ *Accession Negotiations*, *op. cit.*, *supra*, n. 9, p. 36.

candidate countries – and a horizontal nature – members of sub-teams share responsibility for negotiations in one or more areas of negotiations with all the candidates (for example, the team responsible for negotiations with Poland is simultaneously responsible for negotiations in the environment area with all candidate countries). The combination of vertical and horizontal responsibilities is meant to ensure cohesion between EU draft negotiation papers in relation to all candidate countries.³⁰

In contrast to the EU Council presidency, the European Commission has at its disposal the services of experts who can assist in the framing of proposals acceptable to the parties to the negotiation. Traditionally, the European Commission would like to be seen as an ally of candidate countries, negotiating with the Member States on their behalf. Fulfilling this role, the European Commission may informally assist the candidate countries by supporting them in defining and achieving negotiating goals.³¹ However, this practice is circumscribed by the limits imposed by the institution's Union loyalties.³² Because of limitations in the formal negotiation procedures within the Inter-Governmental Conference on Accession, a wide area of informal consultations lies open in cases where the European Commission plays a key role.

The inter-governmental character of the negotiation also means that the **Council of the European Union** is the main decision-making body during the negotiations. A Working Group for Enlargement has been established within the Council for the purpose of the current enlargement. It usually consists of officials from the Committee of Permanent Representatives to the European Union. The group co-ordinates most of the work related to the negotiations and, based on proposals from the European Commission, also submits proposals for points to be agreed to the Committee of Permanent Representative to the European Union. These are subject to the formal approval of the Council of the European Union.³³ Decisions of the EU Council are taken by unanimous vote. The Presidency of the Council of the European Union is responsible for presentation of European Union positions. The role of the Presidency as regards the content of the common position increases in event of disagreement within the EU Council. Then on the presidency rests the responsibility for working out compromise decisions, as was evidenced in the course of the biggest dispute among Member States during the present negotiations, which concerned the substance of the common position in the area of free movement of people. The timely formulation of a common position in due time in this area was mostly due to the Swedish Presidency, for which adherence to the accession negotiations timetable laid down in the Strategy for Enlargement was a priority task.³⁴

The European Council is the most important decision-making body ensuring the international character of the European Union. During the enlargement it is playing a role similar to that formulated in Article 4 of the Treaty on European Union: it

³⁰ *Ibid.*, pp. 35–36.

³¹ *Avery, op. cit., supra*, n. 1, p. 6.

³² *Mayhew, op. cit., supra*, n. 5, p. 68.

³³ *Ibid.*, p. 69.

³⁴ 147 *Uniting Europe*, 4 June 2001, pp. 1–2.

stimulates development of the enlargement process and defines the main directions of this development. However, the role of the European Council is not limited to taking decisions on measures aimed at enlargement of the Union. Earlier, too, during the accession negotiations process decisions taken by the Council influence the pace and progress of the accession negotiations. The European Union's political commitment to enlargement of the European Union needs to be continually reaffirmed and defined in detail at successive summits of the European Council. This is particularly true for the present enlargement which will have profound consequences for the functioning of the Union. From this point of view the summit in Nice played a positive role, approving not only a treaty reforming the institutions of the Union but also the Strategy for Enlargement prepared by the European Commission. Decision on the date of accession and the composition of the group of candidate countries to be admitted to the European Union in the first wave will also be taken by the European Council.

The European Parliament, in accordance with the accession treaties ratification procedure set up in Article 49 of the Treaty on European Union, will have to express its consent to enlargement by an absolute majority vote in favour of the accession treaties.³⁵ The European Parliament's role in the enlargement process takes a number of forms. The enlargement-related of the European Parliament are co-ordinated by its Foreign Affairs Committee. Once a year the Committee prepares reports on candidate countries which form the basis for resolutions on enlargement adopted at plenary sessions. Also important for supporting the negotiation process is the co-operation of the Joint Committee with the parliaments of the Associated Countries (including Poland). The Joint Committees serves as a forum for exchanging views on co-operation between candidate countries and the European Union and for framing proposals for activities that could streamline the enlargement process. But, essentially, at the present stage of negotiations the role of the European Parliament is relatively limited as a result of both time constraints and the preferences given for activities in other fields.³⁶

VI. Prospects for Conclusion of the Process

As in the cases of all previous accessions the real negotiations involve a number of extremely complicated problems of fundamental importance to the parties to the negotiation process. In the case of the present enlargement the key question is extension of the provisions of the Common Agriculture Policy to the candidate countries as from the date of accession. It is on this point that differences between the parties' starting positions are widest. Also of major importance for the final stage of negotiations are other elements of the financial package, including the rules of the new members' structural policy entitlements and the mechanisms for adjusting their contributions to the Union budget in the first years of membership.

³⁵ The European Parliament's contribution to the accession process has been described in a study available on the Internet at http://www.europarl.eu.int/enlargement/positionep/ep_overview_en.htm.

³⁶ Mayhew, *op. cit.*, *supra*, n. 5, p. 68.

It is not unlikely that in the final stage of negotiations there will also appear, as suggested by the EU, the question of transitional periods for access of workers from the Central and Eastern Europe to the Union labour market. However, some candidate countries – the ones furthest advanced in their preparations for membership, notably Hungary – have accepted the EU proposals; others are most likely shelving negotiations to the very last stage. Contrary to observers' expectations it looks as though an issue pressed by the candidate countries – transitional periods for purchase of real estate in these countries by EU citizens – will in fact be resolved during the present stage of talks. Only Poland has so far been unable to accept the EU proposals and close negotiations in this area.

Practice has shown that in the final stage of negotiations the various outstanding issues are not discussed separately but are lumped together in a form of framework agreement – the final negotiation package. The experience of previous enlargements points to the key role of the final stage of the negotiations which, in accordance with the “road map” for the accession negotiations provided in the Strategy for Enlargement, is take place in mid-2002. Significant progress in the negotiations on the most difficult questions (especially those with financial implications) will be achieved only in the final stage of the process. Last-minute breakthroughs in the negotiations are nothing new but typical in case of many difficult international negotiations and also previous enlargements.³⁷ In this final phase of negotiations the centre of gravity in the decision-making machinery will shift from the structures ensuring the efficiency of the technical negotiation process to the political level.

³⁷ Nicolaides, Boe an, *op. cit., supra*, n. 7, p. 18.

The Treaty of Nice and Enlargement of the European Union

JAN BARCZ

I. The European Council meeting held in Nice on 7–11 December 2000 is of fundamental importance for the process of Union enlargement. The Heads of State or Government adopted the “Enlargement Strategy Paper”¹ presented by the European Commission which defined the timeline for the process of accession of new states; before the conference in Nice, the EU declared that it would be in a position to take in new members by the end of 2002, while the documents adopted at the Nice summit included the statement² that the first group of new Member States should take part in the European elections of 2004, which implies that the accession will take place by 1 January 2004 at the latest. Moreover, the European Council took political decisions which wound up the work of the 2000 Intergovernmental Conference. The results of the Conference as well as a political consensus reached in Nice is the Treaty of Nice (ToN), signed on 26 February 2001,³ which, after it enters into force, will amend the EU founding treaties (the treaties establishing the European Communities and the Treaty on European Union, TEU) for the functioning of a Union consisting of nearly 30 Member States.

From the formal point of view the ToN is, as mentioned above, a treaty amending the EU founding treaties. Such an amendment requires, in accordance with Article 48 TEU,⁴ the prior convening of “a Conference of representatives of the governments of the Member States” (which, as far as the ToN is concerned, refers to the Intergovernmental Conference which was launched on 14 February and ended with the Nice Summit). After the treaty is signed, it requires “ratification by all the Member States in accordance with their respective constitutional requirements.”⁵ The draft the ToN (its first version was submitted on 12 December 2000), after certain corrections clearing up certain doubts had been made at the level of the Committee of the Permanent

¹ *Enlargement Strategy Paper*, presented by the Commission on 8 November 2000 together with a set of its regular reports on candidate states’ progress towards accession. OJ C 80/1, 2001.

² See para. 6 of the Presidency Conclusions adopted at the Nice Summit.

³ See OJ C 80/1, 2001.

⁴ *Traktat o Unii Europejskiej [Treaty of the European Union]*, Introduction and translation by J. B a r c z (2000), pp. 92–93.

⁵ Practice shows that the ratification process in the case of the treaties amending the treaties establishing the EU/TEC lasts several months. The Treaty of Amsterdam may serve as an example; it was signed on 2 October 1997 and entered into force on 1 May 1999.

Representatives (COREPER), was submitted in mid-January 2001 to the legal services of the European Commission for final drafting. The ToN was signed, as mentioned, earlier on 26 February 2001. Because of the length of the ratification practice in the EU Member States it will probably enter into force by mid-2002 at the earliest.

II. From the point of view of the enlargement process the ToN has a fundamental importance in two dimensions: the substantive and the procedural (the speed of the enlargement process).⁶

1. Substantive importance of the ToN. In the previous "waves" of enlargement (1973, 1981, 1986, 1995) the candidates acceded to a Community/Union whose structure was clearly defined. During the last stage of the accession negotiations an "institutional adaptation" was brought about that was basically technical in character. The coming enlargement of the European Union is of a different character from a qualitative point of view, as, inter alia, it will double the number of Member States. Consequently, "institutional" preparation has become necessary to face such a challenge. When today's candidates started their accession negotiations they did not know what kind of institutional structure the Union would have at the date of their accession. The importance of the ToN lies in the fact that, on the one hand, it eliminates these question marks (which opens the way to completing the accession negotiations in the "Institutions" chapter); on the other, it winds up the process of the Union's own "preparations" for enlargement; the ToN's entry into force will signify that the Union is in a position to welcome new Member States as of the end of 2002. The "Declaration on the Future of the Union" (Declaration 23 of the Final Act annexed to the ToN) explicitly states that with ratification of the ToN the European Union will have completed the institutional changes necessary for the accession of new Member States.⁷ The ToN, thereby puts an end to possible EU reservations saying that further preparation of the Union in the "institutional" area will be necessary, which would result in slowing down the speed of the enlargement process.

2. Procedural importance of the ToN. The efficient proceedings of the 2000 Intergovernmental Conference (especially the fact that it completed its business in 2000, as the Helsinki Summit Presidency Conclusions stipulated)⁸ and the fact that a political consensus was reached at the Nice summit and the ToN signed have a direct bearing on the pace of the enlargement process. As mentioned earlier, the process of ratification will take several months. The ToN will thus enter into force by mid-2002 at the earliest. Ratification of the accession treaty will also take several months. If signature of the accession treaty and commencement of the ratification procedure is conditioned by the entry into force of the ToN, a simple adding-up of the periods required for ratification of both treaties (ToN and accession treaty) makes it clear that

⁶ Cf. J. B a r c z: *Konferencja Międzyrządowa 2000. Główne problemy z polskiego punktu widzenia (bilans pierwszego półrocza)* (2000).

⁷ See para. 2 of the Declaration, OJ C 80/85, 2001.

⁸ In the Presidency Conclusions adopted at the Helsinki summit (December 1999) the Member States undertook „to make every effort to complete the Intergovernmental Conference on institutional reform by December 2000.”

the possibility of joining the Union as of 1 January 2003 or even 1 January 2004 would be doubtful. That led the candidate states to propose that the ratification procedures of both the ToN and the accession treaties be conducted in parallel.⁹ Though such an arrangement seems acceptable from the legal point of view, it would require the agreement of all the current Member States. Completion on schedule of work on the ToN is also of fundamental importance to conclusion of the accession negotiations: otherwise it is not possible to close negotiations in the "Institutions" chapter (decisions in this field are usually taken in the final stage of accession negotiations – and the Declaration of the European Union (Declaration 20 of the Final Act annexed to the ToN) is nothing more than the CP (Common Position) of the Member States in the chapter "Institution").

III. The scope of the ToN encompasses the issues which became the subjects of debate at the 2000 Intergovernmental Conference. The Presidency Conclusions adopted by the Helsinki European Council in December 1999 set out the Conference Agenda in which it was stated that it would deal with the institutional issues that were not disposed of at Amsterdam and which needed to be settled before enlargement. The Conference was therefore to examine three principal issues (the so-called basic agenda): the composition of the Commission, the weighting of votes in the Council and the possible extension of qualified majority voting in the Council. It also stated that the Conference should examine "other necessary amendments to the Treaties arising as regards the European institutions in connection with the above issues and in implementing the Treaty of Amsterdam." Reforms of the European Parliament, the judicial institutions, the Court of Auditors and two advisory bodies, the Economic and Social Committee and the Committee of the Regions, were considered. The Conclusions provided for additional clauses that made possible a further widening of the Conference agenda: these concerned the necessary amendments to the Treaties for development of the Union's so-called "second pillar" (Common Foreign and Security Policy) and a general clause which authorised the States holding the EU Presidency to "propose additional issues to be included in the agenda of the Conference." Several such issues emerged on the threshold of the Conference: modification of the formula of so-called "closer co-operation," amendments to Article 7 TEU, simplification of the provisions of the treaties, establishment of a new division of powers between the EU and the Member States, investment of the Union with international legal personality, establishment of a European public prosecutor's office, definition of the notion of "legislative act," etc.¹⁰

⁹ See "The 2000 Intergovernmental Conference – the Polish Point of View," Document presented by the Minister of Foreign Affairs of the Republic of Poland, Bronisław Geremek, on 14 June 2000 during the 5th Session of the Intergovernmental Conference on the Accession of Poland to the EU.

¹⁰ For a complete list of the proposals see *Presidency Report to the Feira European Council*, Brussels, 14 June 2000, CONFER 4750/00 (annex 7.3).

¹¹ *Ibid.*, p. 50.

¹² See "IGC 2000. Follow-up to the Feira European Council and Organisation of Work," Brussels, 5 July 2000, CONFER 4755/2000.

The Portuguese¹¹ and French¹² presidencies reaffirmed that the Conference should concentrate on the institutional preparation of the Union for enlargement. At an informal European Council summit in Biarritz (13–14 October 2000) the Member States agreed that only two additional issues should be included in the Conference Agenda: amendments to Article 7 TEU and modification of the closer co-operation formula.¹³ This approach contributed to speeding up the proceedings of the Conference as the agenda was not encumbered with topics not related directly to the necessity of institutional preparation of the Union for enlargement.¹⁴ The candidate states stressed that these issues were of fundamental importance for the future structure of the European Union. The candidates should, therefore, be able to participate in activities concerning these issues immediately upon accession to the Union. The compromise reached in Nice provides for a new Intergovernmental Conference to be convened in 2004 to address four items: the division of powers between the European Union and the Member States, the status of the Charter of Fundamental Rights of the European Union, simplification of the Treaties, and strengthening the role of national parliaments in the process of European integration. It is stressed in this context that “those candidate States which have concluded accession negotiations with the Union will be invited to participate in the conference. Those candidate states which have not concluded their accession negotiations will be invited as observers” (which seems to suggest that the first round of new accessions will take place on 1 January 2004 at the latest).¹⁵

IV. Both the proceedings and the results of the Conference are of fundamental importance for the candidate states as regards the above-mentioned substantive and procedural circumstances. That is why they called for intensive consultations going beyond the hitherto, somewhat modest Union practice (i.e. in the framework of the so-called Structural Dialogue). The Helsinki Presidency Conclusions addressed these expectations. The forthcoming Presidencies were to ensure that candidate countries were “regularly briefed” on the progress of the Conference and “have the opportunity to present their points of view on matters under discussion in the existing forums.” Vague as these statements were, the candidates did indeed have the opportunity to

¹³ See *Conseil européen informel de Biarritz (13-14 octobre 2000): compte rendu*. The Charter of Fundamental Rights was formally adopted at the Nice summit as a political document. Poland's position concerning the Charter was presented at a special „hearing” of the candidate States on 19 June 2000 in Brussels. See “Intervention de M Jerzy Kranz sous-secretaire d'Etat au ministere des Affaires etrangeres de la Republique de Pologne, Bruxelles, le 19 juin 2000” (document in the possession of the author).

¹⁴ Cf. para. 1.2.c. of Poland's position (“The 2000 Intergovernmental Conference – the Polish Point of View,” *op. cit.*, *supra*, n. 9): „The Conference Agenda should concentrate on implementation of the objectives laid down at the European Council meetings in Cologne and Helsinki in 1999, that is on preparation of the European institutions for the enlargement process within a fixed period of time – to the end of 2002. Poland notes the need for broad reforms of the European Union. It is in favour of and active and forward-looking programme of such reforms. They should, however, be harmonized with the Agenda of the 2000 Intergovernmental Conference so that its activities are not prolonged and the dynamism of the enlargement process weakened.”

¹⁵ *Declaration on the Future of the Union*, paras. 5, 7, 8, OJ C 80/85–86. See also: *Laeken Declaration on the Future of the European Union*, Annexed to the Presidency Conclusions – Laeken, 14 and 15 December 2001. Document SN 300/01 ADD1, p. 2.

present their views and to be briefed on the proceeding of the Conference.¹⁶ The starting point were letters sent by the foreign ministers of the candidate states in January and February 2000¹⁷ to Jaime Gama, the foreign minister of Portugal, the country then holding the Presidency of the Council. Irrespective of this, during the Portuguese Presidency and its French successor special meetings for the candidate states were convened (in June and November). The topics of the Conference agenda were also subjects of intensive consultations in the framework of political contacts. Alone among candidate state Poland presented its position in a separate document.¹⁸ Finally, in the framework of the European Conference, the heads of state and government of the candidate countries had the opportunity to present their positions on the eve of the European Council summit.

The main issues covered by the Polish document were as follows:

- composition of the Commission: Poland declared itself in favour of the “one state one commissioner” principle;
- reweighting of votes in the Council: Poland argued for strengthening the demographic criterion and the need to compensate the “big” countries for forgoing their “second” commissioner;
- Poland supported the idea of extending the number of areas where decision are taken by a qualified majority; however, each such area should be analysed separately; the idea of connecting these areas more broadly with the co-decision procedure provided in Article 251 TEC was supported;
- reform of the European Parliament (EP): the number of seats should be limited and the present system of allocation of seats (based on a principle of degressive proportionality which favours the “small” states) should be modified; however, the partnership between “large,” “medium” and “small” states should be taken into account;
- reform of judicial institutions: in Poland’s view a reform of judicial institutions is indispensable; however, the size of Member States’ representation should not be reduced and amendments to the preliminary rulings procedure (Article 234 TEC) should be introduced with caution;¹⁹
- the Court of Auditors: as in the previous case the size of Member States’ representation should not be reduced;
- advisory bodies, i.e. the Economic and Social Committee and the Committee of the Regions: the number of seats in both these bodies should be reduced and their representativeness should be strengthened;

¹⁶ Cf. J. B a r c z, *op. cit.*, *supra*, n. 6, para. 1.4.

¹⁷ See also Foreign Minister Bronisław Geremek’s letter of 24 January, forwarded at the beginning of February 2000; M.A. C i c h o c k i, O. O s i c a: “Listy do Jaime Gamy. Stanowisko krajów kandydujących do Unii Europejskiej wobec konferencji międzyrządowej 2000,” Centrum Stosunków Międzynarodowych, *Raporty i Analizy*, No. 4 (2000).

¹⁸ “The 2000 Intergovernmental Conference – the Polish Point of View,” *op. cit.*, *supra*, n. 9.

¹⁹ During the Conference it was mooted that national courts should take over a part of the competence of the Court of Justice in this regard. However, in its opinion, Poland noted that this would result in significant, additional difficulties for the acceding States’ courts which have no experience of dealing with such questions.

– other issues: closer co-operation should continue to be open in character and must not on any account lead to a permanent categorisation of Member States; moreover, Poland was doubtful of the advisability of extending closer co-operation to the EU Second Pillar (Common Foreign and Security Policy).

V. The provisions of the ToN regarding the basic agenda of the Conference are of the greatest significance. As mentioned earlier, it covers three issues:

1. Composition of the Commission: Already at the 1996 Intergovernmental Conference it had been decided that “big” countries’ loss of their entitlement to a second Commission member would be compensated by a reweighting of votes in the Council and reallocation of seats in the EP. During the Portuguese presidency it was stated that permanent solutions should be found.²⁰ However, almost till the end of the Conference nothing but basic, though divergent options had been decided. Two approaches emerged: the concept (supported by the “small” States) of “one state, one commissioner” and the opposing idea of reducing the size of the Commission and introducing a system of rotation (this approach was supported by the “big” States).

The compromise²¹ reached during the Nice summit foresees two stages as far as the composition of the Commission is concerned: as from 1 January 2005 the Commission will consist of one representative of each Member State; once the Union has grown to 27 Member States, the Council, acting unanimously, will cap the size of the Commission at a number less than the number of Member States. It will also establish a rotation system based on the principle of equality.²²

It is worth noting that each new member will be entitled, at the time of its accession, to have one Commissioner (Article 4 para. 4 of the Protocol on Enlargement of the European Union), which seems very important from both the political and practical point of view.²³

2. The reweighting of votes in the Council proved a particularly difficult issue to resolve and a compromise was reached only in the final stages of the Nice summit. Several factors were considered: the “big” states expected to be compensated for the loss of their “second” Commissioner. There emerged a general conflict between the “small” countries (which insisted on a so-called “double majority” system under which to be adopted a decision would need to be backed by both a majority of votes and a majority of Member States) and the “big” which pressed for a new system of weighting votes (in which the demographic criterion would play a fundamental role).²⁴

²⁰ See *Presidency Report to the Feira European Council*, *op. cit.*, *supra*, n. 10, p. 13.

²¹ See Article 4 of the *Protocol on Enlargement of the European Union*, annexed to the ToN, OJ C 80/51–52, 2001.

²² The difference between a “rotation system based on the principle of equality” and “exclusive rotation” (the idea pushed by the “big” states) should be noted. The second means that “big” states would be wholly exempt from the rotation requirement (as they would be granted a “permanent” member of the Commission).

²³ Aside from the discussed provisions, the ToN introduced further amendments relating to the functioning of the Commission: changes were made in the procedure for appointment of Commissioners (Article 214 TEC as amended by the ToN) and the position of the President of the Commission was strengthened (Article 217 TEC as amended by the ToN).

²⁴ See *Presidency Report to the Feira European Council*, *op. cit.*, *supra*, n. 10, pp. 19 ff.

Irrespective of this, all the current Member States wanted to establish a vote weighting system that, after the enlargement of the Union, would prevent the least efficient members from hindering the decision-making process.

At Nice²⁵ the “small” states attained a version of the “double majority” system under which Council decision will require at least 258 (out of 345) votes in favour, cast by a majority of members (if the Treaty requires them to be adopted on the recommendation of the Commission) or by at least two-thirds of the members (in other cases). The position of the “big” states was at the same time strengthened. The demographic criterion was strengthened by the new weighting of votes that was eventually adopted (as the five “big” states will command 60% of votes).²⁶ Moreover, another check was introduced involving the percentage of the population of the Union in the vote on a given subject: at the request of a Member State a check it has to be determined that a decision has the backing of the Member States representing at least 62% of the total population of the Union. If it does not, the decision will not stand. This arrangement strengthens the position of the “big” states. It should also stressed that the number of areas in which decisions are taken by qualified majority voting is at the same time covered by the co-decision procedure (Article 251), which means that the allocation of seats in the European Parliament is also important.²⁷ In this context the position of Poland as a future Member State is very advantageous. This is no so much a matter of Poland and Spain both receiving 27 weighted votes (which is extremely important from the prestige point of view), as of the consequences resulting from belonging to the group of “big” states.

3. Extension of the areas where decisions are taken by qualified majority voting (QMV). In the course of the discussions it became evident that QMV was one of the most controversial questions.²⁸ This is not surprising as extending the areas where QMV applies is considered by the present Member States to be the principal mechanism which (together with closer co-operation) will be the main factor influencing the dynamism and evolution of integration after enlargement. However, although over 70 new areas of decision-taking by QMV were discussed before the informal European Council meeting in Biarritz that number was in the end reduced to 30–35²⁹ and the consensus reached in Nice covers 27 areas (22 from the entry into force of the ToN; as for the rest of the areas, the introduction of QMV depends on various conditions).³⁰

From the point of view of enlargement of the Union this issue is of great importance primarily for the present Member States. Extension of the number of areas covered by QMV will enable them to maintain control over the speed and course of the process of integration. It will also insure against progress being blocked by the

²⁵ See para. 2 of *Declaration (no 20) on the Enlargement of the European Union*, OJ C 80/82–83, 2001.

²⁶ European Commission document SEC(2001)99 of 18 January 2001, par.C.

²⁷ Germany is the only Member State which has kept its present number of seats in the EP (99).

²⁸ See “IGC 2000, Follow-up to the Feira European Council and Organisation of Work,” 5 July 2000. Document CONFER 4755/00, p. 3.

²⁹ See “IGC 2000, Presidency Note Extension of Qualified Majority Voting,” Brussels, 28 September 2000, Document: CONFER 4776/00.

³⁰ See European Commission Document: SEC(2001)99 of 18 January 2001, para. IIA and the annexed list of areas covered by QMV.

least efficient (new) Member States. Though the candidate states were in favour of this line of reform, they wanted each area to be examined separately. This was because the candidate states have not been able to identify their interests in each area.

VI. Among the "other necessary amendments" referred to in the "basic agenda" the following should be mentioned:

1. European Parliament. In the course of the Conference the necessity of limiting the number of seats was accepted. Initially it was decided to maintain the upper ceiling laid down in the Amsterdam Treaty – 700 members (Article 189, ex-art 137 TEC)³¹ – but the ToN has established a new one (732).³² The interim measures adopted are as follows. The total number of MEPs for the 2004–2009 term will be the number of representatives of the "old" Member States plus the number of representatives of the new Member States resulting from accession treaties signed by 1 January 2004 at the latest. If the total number of representatives is less than 732, a pro rata adjustment will be made so that the number is as close as possible to 732. Article 189 and the new distribution of seats in the EP will take effect as from the elections in 2009.³³ Because the new States will accede to the Union at some date between 2004 and 2008 the number of MEPs may temporarily exceed 732.³⁴ As far as the allocation of seats in the EP is concerned, two options were discussed during the Conference: simple extrapolation of the current system (the principle of degressive proportionality) or a strengthening of the demographic criterion in conjunction with the necessity of the compensating the "big" states for the loss of their "second" Commissioner. The ToN provisions reduce the number of representatives of the present Member States by 91 (only Germany and Luxembourg will have the same number of MEPs as at present). Poland, like Spain, will obtain 50 seats. Generally speaking, the provisions of the ToN are in line with Poland's position regarding both the reduction of seats in the EP and the demographic criterion.³⁵

2. Judicial institutions. A radical reform of the system was carried out. This resulted from the fact that both the Member States³⁶ and the Community institutions³⁷

³¹ Cf. *Presidency Report to the Feira European Council*, op. cit., supra, n. 10, pp. 33 ff.

³² Article 189 TEC as amended by the ToN, OJ C 80/50, 2001.

³³ See para. 1 of *Declaration on the Enlargement of the European Union*, OJ C 80/50.

³⁴ See *Protocol on Enlargement of the European Union*, Article 2, OJ C 80/49, 2001. See also European Commission Document SEC(2001)99, 18 January 2001.

³⁵ The European Parliament position was considerably strengthened. A number of areas where a decision is adopted by a qualified majority is at the same time subject to the co-decision procedure (whereby the assent of the EP is required before a decision can become effective). This applies to seven areas (Articles 13, 62, 63, 65, 157, 159, 191 TEC); in the case of Article 161 the direct assent of the EP is needed. The ToN regulates a number of other questions relating to the functioning of the EP: Article 191 deals (under the co-decision procedure) with the governance of political parties at European level as well as their funding; Article 190 regulates performance of the duties of Members (though questions relating to taxation require unanimity within the Council). The position of the EP was also strengthened in the areas covered by Article 230 and Article 300.6 TEC. Nevertheless, the EP considered the decisions of the Nice European Council in these areas to be unsatisfactory. Cf. *European Parliament: Overview of the Results of the IGC*, Brussels, 19 December 2000, Document CM/427130 EN.

³⁶ Cf. "Interim Report on Amendments to be Made to the Treaties regarding the Court of Justice and the Court of First Instance," Document CONFER 4729/00 presented on 4 April 2000 in the framework of the Conference.

agreed on the necessity of such a reform. Both the Court of Justice and the Court of First Instance had been overloaded with cases (especially after the entry into force of the Amsterdam Treaty) and it became obvious that the overload would only increase the enlargement process went forward,³⁸ not least because the judicial authorities of the new Member States are not very efficient.

The ToN reforms in this area cover the following:

- concretization of the structure of the judicial organs: the Court of First Instance will be granted the status of a Community institution; moreover judicial panels will be established (staff cases, actions in the field of intellectual property rights);
- improvement of the efficiency of the Courts by introduction of changes in their internal structures (establishment of a so-called “grand chamber,” changes in the structure of the chambers, the possibility of appointing Advocates-General in the Court of First Instance);
- improvement of the division of jurisdiction between the Courts, while preserving the Court of Justice’s full competence in the field of ensuring uniformity in the application of Community law.³⁹

From the point of view of the candidate states a requirement relating to national representation in the Courts seems crucial: Article 221 stipulates that the Court of Justice shall consist of one judge per Member State; under Article 224.1 the Court of First Instance is to comprise at least one judge per Member state. Proceedings under Article 234 TEC (preliminary rulings) have been modified – they will not put an additional burden on national courts. It is important, though, that the ToN provisions of the ToN make possible further reorganisation of Community judicial institutions by simplifying procedures: a number of cases may be determined directly by the Council (acting by a qualified majority); other cases are included in the Statute or the Rules of Procedure (approved by the Council acting by a qualified majority).⁴⁰

3. The Court of Auditors and the advisory bodies of the institutions. Article 247.1 stipulates that the Court of Auditors shall consist of one representative of each Member State, which is of great importance from the point of view of the candidates.⁴¹ As far as the Economic and Social Committee and the Committee of the Regions are concerned, the ToN limits the number of members of each committees to 350 (Article 258 and

³⁷ Cf. “The Future of the Judicial System of the European Union,” a „discussion paper” presented by the Court of Justice and the Court of First Instance on 10 May 1999.

³⁸ Cf. H.-J. R a b e: “Zur Reform des Gerichtssystems der Europäischen Gemeinschaften,” *5 Europarecht* (2000), pp. 811 ff.

³⁹ See, in the Polish literature, J. B a r c z: “Reforma wspólnotowych organów wymiaru sprawiedliwości w pracach Konferencji Międzyrządowej 2000,” in: C. M i k (ed.): *Materiały z konferencji naukowej, Toruń 16–17 listopada 2000*, B. K u r c z: “Traktat Nicejski a reforma unijnego sądownictwa,” *Sprawy Międzynarodowe* (2000), Vol. 4, pp. 27 ff.

⁴⁰ Cf. Document SEC(2001)99 of 18 January 2001, para. E.

⁴¹ Also introduced were amendments relating to the European Central Bank (the Council, acting unanimously, may amend rules governing the decision mechanism in the ECB Executive Board) to the European Investment Bank (the Council, acting unanimously, may change the composition of the Executive Board and amend the rules governing the decision-making procedure). Cf. Document SEC(2001)99 of 18 January 2001, para. G.

263.2 respectively). The democratic legitimacy of both Committees has been strengthened: the Economic and Social Committee is to consist also of “representatives of organised civil society;” in accordance with Article 263 the representative in the Committee of the Regions must either “hold a regional or local authority electoral mandate or [be] politically accountable to an elected assembly” of one of the Member States. These amendments are fully in line with the course of the administrative and local government reforms in Poland. Poland, like Spain, was given 21 seats in each Committee.⁴²

VII. Two issues – relating to closer co-operation and amendments to Article 7 – were added to the agenda of the Conference.

1. Closer co-operation. The question of closer co-operation was included in the Conference agenda for two principal reasons: on one hand, the Member States were to co-operate in important areas associated with the integration process within the framework of the treaties establishing the European Union, as integration would be threatened if Member States undertook co-operation (as in the case of the initial period of the operation of the Schengen area) outside the treaties. On the other hand, the closer co-operation mechanism would enable the most efficient Member States to exert an influence on the course and dynamism of the integration process. If we disregard the very interesting but rather nebulous speculations about the future of the Union in the speeches of political leaders, it is precisely to closer co-operation that such ideas as an EU “inner core” or “pioneering group of states” refer.

During the Portuguese presidency several options in the framework of so-called “predetermined” closer co-operation (Economic and Monetary Union, the Schengen accords) and the enabling clauses provided in the relevant provisions of the TEU and TEC⁴³ were decided on. It was thought, however, that closer co-operation could be made more flexible by reducing the number of the Member States required to undertake such co-operation (under the provisions of the Amsterdam Treaty closer co-operation measures must involve at least a majority of Member States, i. e. eight) and abolishing the veto. Some of the Member States and the candidate countries feared that closer co-operation would lead to a permanent categorisation of the Member States and to the elimination of some of them (especially the less efficient) from important areas of the integration process.⁴⁴

The ToN measures provide for a balanced compromise.⁴⁵ On the one hand, the number of Member States required to undertake closer co-operation was reduced (it is still eight,⁴⁶ but it should be remembered that new States will be joining the Union, which means in effect a relative lowering of the ceiling) and veto powers with respect to closer co-operation in the framework of the TEU and TEC (Third Pillar) were abolished; in the Second Pillar the Member states may challenge a European Council

⁴² See paras. 3 and 4 of *Declaration on Enlargement of the European Union*, OJ C 80/83–84, 2001.

⁴³ See *Presidency Report to the Feira European Council*, *op. cit.*, *supra*, n. 10.

⁴⁴ Cf. “The 2000 Intergovernmental Conference – the Polish Point of View.” *op. cit.*, *supra*, n. 9, para. 3.2.

⁴⁵ Document SN 1247/01, pp. 16 ff.

⁴⁶ Article 43 para. A TUE as Amended by the ToN, OJ C 80/11 ff., 2001.

decision. On the other hand, a number of principles were established which will prevent the emergence of a permanent division among the Member States or the elimination of some of them from important areas of integration: enhanced co-operation is excluded from areas which fall within the exclusive competence of the Community, must respect the *acquis communautaire*, must not undermine the internal market or constitute a barrier to trade between the Member States, and must be open to all Member states.

2. Amendments to Article 7 TEU. This issue emerged during the Conference in relation to the Austria case.⁴⁷ The fact of the matter is that Article 7.2 TUE provides for the imposition of major sanctions (suspension of certain rights of Member states, including voting rights in the Council) if it is found that “a serious and persistent breach” (Article 7.1) of the principles referred to in Article 6.1 (“principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law”) has occurred. It does not provide for any “interim” effects. At first, it seemed impossible to include this issue in the agenda of the Conference because of the political and controversial context.⁴⁸ However, a turning point was reached in the first months of the French presidency when the scope of the envisaged modification of Article 7 was determined. During the informal meeting of the European Council in Biarritz (13-14 October) the States agreed to include the issue to the agenda of the Conference⁴⁹ and the modifications were accepted during the Nice summit.⁵⁰ Article 7.1 as amended by the ToN provides that the Council (acting on a four-fifths majority of Member States) may determine that there is a “clear risk” of a serious breach by a Member State of the principles mentioned in Article 6.1 TEU and may then consider “appropriate recommendations.” Before making such a determination, the Council must hear the Member State concerned and it may call on independent persons to submit a report on the situation of the Member State concerned.

Undoubtedly, these modifications enhance the democratic legitimacy of the Union. However, they apply to the Member States only. Whether the candidate countries respect the principles set out in Article 6.1 (as a criterion of becoming a Member of the Union) is scrupulously monitored in, inter alia, the regular reports of the European Commission on their progress towards the accession.

VIII. The President of the European Commission, Romano Prodi, was very measures in his opinions concerning the ToN, pointing out that “Nice was a clear demonstration of what is meant by agreement on the lowest common denominator.”⁵¹ Never-

⁴⁷ See M. H a p p o l d: “The EU Member States Response to Freedom Party Participation in the Austrian Government,” 40 *International and Comparative Law Quarterly* (2000), part 4, pp. 953 ff.

⁴⁸ Cf. *Presidency Report to the Feira European Council*, op. cit., supra, n. 10, annex 7.3. (“Other issues examined by the Conference”).

⁴⁹ Cf. Commission’s approval on the eve of the Biarritz meeting („IGC: the Commission proposes an addition to Article 7 of the Treaty on respect for democratic values,” DN/IP/00/1116. Date: 2000-10-04) and the European Council decision (*Conseil européen informel de Biarritz, 13-14 octobre 2000: compte rendu*).

⁵⁰ See: Article 1 of the ToN, OJ C 80/6, 2001.

⁵¹ In a speech in the European Parliament on 17 January 2001 („The time has come for a properly structured debate on the future of Europe”).

theless, from the point of view of enlargement of the EU, the ToN constitutes an important stage for the following reasons.⁵²

- The ToN is an instrument (together with Agenda 2000) which makes it possible to complete the reform of the EU and which expresses the EU's readiness to welcome new Member States by the end of 2002;

- It ensures the presence of representatives of the new Member States in the Communities' institutions (the Commission, judicial bodies and the Court of Auditors), and the allocation of seats in the European Parliament and in the advisory institutions corresponds more or less to the demographic potential of Poland;

- Although there was some disagreement over weighting of votes in the Council during the Nice summit, the results of the summit are very advantageous for Poland. This is not just a question of the number of weighted votes allocated to Poland (which is important from the point of view of the prestige of the state); what really matters is the possibility of subjecting a decision (adopted by a qualified majority) to a check based on the population of the EU (the criterion being 62% of the total population of the EU) – which puts states with a bigger demographic potential in a stronger position – and the allocation of seats in the European Parliament (as decisions taken by a qualified majority are usually adopted under the co-decision procedure);

- The ToN provides for a deep reform of judicial institutions. Making their functioning more effective will to some extent make up for the inefficiency of the judicial institutions of the new Member States;

- Closer co-operation is undoubtedly a measure enabling the most dynamic Member States to determine the course and pace of the integration process, however, the ToN has put in place a concrete barrier aimed at preventing the new Member states becoming permanently marginalised (labelled as second-class members) or excluded from the most important areas of integration (the common market).

Undoubtedly, from the point of view of the speed of enlargement rapid ratification of the ToN by the Member states is the most important thing, since otherwise the accession negotiations (the "Institutions" chapter) may be delayed.

⁵² To the Polish position as far as the ToN is concerned – see: J. Barcz et al. (ed.): *The Treaty of Nice – The Polish Point of View* (2001).

Schengen and Poland

ROBERT RYBICKI

1. Introduction

The Schengen Agreement, signed by France, Germany and the Benelux countries (Belgium, Luxembourg and the Netherlands) in 1985, set as an objective the “gradual abolition of controls at the common frontiers.” It provided no more than a skeletal framework for realising this goal. Five years later, in 1990, the Schengen Implementing Convention¹ (“the Schengen Convention”) established both an institutional structure and instruments for the removal of internal border controls and the strengthening of those at the external Schengen border.² The Schengen States had their own executive body, the Executive Committee, to give effect to the many and varied measures set out in the 1990 Convention.³ These measures included enhanced co-operation in areas directly linked to free movement, such as asylum, visa and immigration policy. But they also included wider “flanking” measures on police and judicial co-operation and the establishment of a Schengen-wide database, the Schengen Information System (SIS). Co-operation between Schengen States to establish an area of free movement of persons developed initially outside the framework of the EU Treaties, it was meant to be a test project for a future Union-wide police and judicial area.⁴ As the number of EU Member States participating in Schengen has grown, from five in 1985 to 13 in 2001,⁵ so the pressure has mounted for Schengen co-operation to be brought within the European Union. The Amsterdam Treaty 1997 brought the Schengen bodies and *acquis* within the framework of the European Union and the two subse-

¹ OJ L 239, 22/09/2000, p. 19.

² The Convention is open for the all of the Member States of the European Union and only a EU Member State can adhere to the Convention (Art. 140 of the Schengen Convention).

³ See W. C z a p l i ń s k i: “Układy z Schengen jako przykład nowych form współpracy państw członkowskich UE,” in: B. G ó r a l c z y k (ed.): *Polska Policja na drodze do UE* (2000); S.M. A m i n, J. J u s t y ń s k i: *Instytucje i porządek prawny Unii Europejskiej na tle tekstów prawnych oraz orzecznictwa Europejskiego Trybunału Sprawiedliwości* (1999).

⁴ P. T w o m e y: “Cooperation Injustice and Home Affairs: Structures, achievements and proposals for the future,” in: P.G. X u e r e b (ed.): *State of the European Union Conference* (1997).

⁵ All EU Member States other than Ireland and the UK. Iceland and Norway also apply the Schengen *acquis* by virtue of an Association Agreement with these countries – Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters’ association with the implementation, application and development of the Schengen *acquis* (OJ L 176, 1999/07/10, p. 36).

quent decision defining the *acquis*⁶ and providing the legal basis⁷ for this *acquis* completed the first stage of such integration. The approach was one of "flexible" incorporation. A Protocol⁸ annexed to the EU Treaties makes clear that the *acquis* as incorporated only applies to the 13 EU Member States that are parties to the 1990 Convention. At the same time as deciding to incorporate the Schengen *acquis*, the European Union set itself the objective of developing "an area of freedom, security and justice in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime."⁹ The participation of Poland in that *acquis* will thus have a material impact on involvement in measures developing the area of freedom, security and justice and, in particular, ability of these countries to shape proposals and influence policy. Full application of the Schengen *acquis* remains a tremendous challenge not only for Poland but also for the current Schengen countries which will have to accommodate in the Schengenland extensive Polish land borders to the east but also all other countries acceding to the EU. The process of understanding the complexity of the Schengen *acquis*, its legal and organizational framework requires a great deal of administrative resources, analysis, legislative and institutional changes and has now entered into the final stage of the accession negotiations.

2. The Main Elements of the Schengen Convention

2.1. Removing Internal Border Controls

The "gradual abolition of controls at the common frontiers" is the overriding objective of the 1985 Schengen Agreement. The 1990 Convention establishes the institutional framework and means for achieving this goal. Subsequently, the Schengen provision in this area fulfils the EC requirement to adopt measures "with a view to ensuring, . . . the absence of any controls on persons, by the citizens of the Union or nationals of third countries, when crossing internal borders".¹⁰ It does not seek, however, to loosen or lift controls but, rather, to transfer these "away" from internal borders of the Schengen states. This means that controls will take place within the territories of individual Schengen States or, more usually in the case of travellers subject to passport or visa checks, at the external frontiers of the Schengen area. Controls at the borders between Schengen States may however, be re-instated at any time on the

⁶ Council Decision 1999/435/EC of May 20th 1999.

⁷ Council Decision 1999/437/EC of May 20th 1999.

⁸ Protocol Integrating the Schengen *Acquis* into the Framework of the European Union (OJ C 340, 1997/11/10, p. 93).

⁹ Article 2 of the Treaty on European Union.

¹⁰ Allocation of the Schengen Convention provisions on crossing internal borders makes the Council proposal for a Directive on the abolition of internal border controls redundant. See R. Cholewinski paper "No Right of Entry: The legal regime on crossing the EU external border" – part of the ILPA conference (11–12 May 2001) pack on *Development of the EU's Borders. Schengen and Beyond* – for more on EC regulation on the border crossing in the EU.

grounds of public policy or national security.¹¹ Full advantage of this clause takes permanently France which invokes the checks at its borders with Belgium and Luxembourg, on the grounds that "Dutch drugs policy jeopardises its ability to guarantee its internal security."¹²

2.2. Movement of Persons in Schengen

Once a person is admitted into the Schengen area, he or she enjoys freedom of movement throughout the Schengen States.¹³ For all non-EU nationals freedom of movement within the Schengen area is limited to three months. A Schengen state could also grant a long-stay visa for the time over three months, but such visas are subject to national law and do not permit to free circulation among the Schengen states, but only give right to transit through other Schengen states without a visa on the way to the Schengen state that issued the permit.¹⁴ Moreover, there are stringent conditions for entry and more thorough checks which include not only "conditions governing entry, residence, work and exit but also checks to detect and prevent threats to the national security and public policy of the Contracting Parties."¹⁵ Most of the Schengen provisions regulating the movement of persons concern these third country nationals, classified as "aliens" in the Convention. In addition to travel documents and visas, they may be required to produce documents demonstrating "the purpose and the conditions of the planned visit" and proving that they have "adequate means of support" both for their stay and their return journey.¹⁶

The conditions set out in the Convention establish a minimum threshold for entry common to all the Schengen States. But the actual conditions for entry may, by a process of cumulation, be even tighter.¹⁷ Schengen States, although obliged to refuse entry to any person who does not reach the minimum threshold for entry, are not similarly obliged to admit those who do.¹⁸ In some respects the Convention enlarges, rather than extinguishes, individual Schengen States' national powers or discretion as regards the criteria for entry. Decisions made at a national level take effect throughout the Schengen area. So if any one Schengen State considers an alien to be a threat to its, or any of the other Schengen States', public policy, national security or international relations, then that alien *must* be refused entry into Schengen territory.¹⁹ Exceptionally, however, a Schengen State may admit, into its own territory only, an alien

¹¹ Article 2(2) of the Schengen Convention.

¹² 1988 Annual Report on the implementation of the Schengen Convention (10846/1/99 (limite) CATS 23 ASIM 36 COMIX 223 (*Statewatch European Monitor*, 2001).

¹³ Articles 19–24 of the Schengen Convention.

¹⁴ S. P e r s: *EU Justice and Home Affairs* (2000), p. 67.

¹⁵ Article 6(2)(a) of the Schengen Convention.

¹⁶ *Ibid.*, Article 5(1)(c) of the Schengen Convention.

¹⁷ House of Lords Select Committee on the European Communities: *Incorporating the Schengen Acquis into the European Union* (31st Report, Session 1997–1998).

¹⁸ Under Article 5(1) aliens who satisfy the entry conditions *may* be admitted but those who do not satisfy the entry conditions in any one of the Schengen States *must* be refused entry under Article 5 – *ibid.*

¹⁹ *Ibid.*, Article 5(1)(e).

who has failed to satisfy the entry conditions on "humanitarian grounds, on grounds of national interest or because of international obligations."²⁰

The means for implementing the common entry conditions include harmonising visa policy,²¹ introducing carrier liability,²² and imposing penalties on those assisting unlawful entry.²³

Detailed provisions on the criteria for determining the State responsible for examining asylum applications no longer apply since the entry into force, on 1 September 1997, of the Dublin Convention.²⁴ This contains rules similar to those in the Schengen Convention but has a wider geographical scope as it applies in *all* EU Member States.

2.3. Police Cooperation

Police co-operation is another key element of the Convention.²⁵ This is based on mutual assistance between police authorities in the Schengen States to prevent and detect criminal offences, provided this does not involve the application of "measures of constraint" on the part of the police from whom assistance is sought.²⁶ Police authorities may also, on their own initiative, exchange information without a formal request for assistance if this may help "prevent future crime and offences against or threats to public policy and security."²⁷ This is one of the tasks which liaison officers, seconded in the framework of bilateral or multilateral agreements to police authorities in other Schengen States or to third countries, may perform.²⁸

Co-operation is not limited to exchanges of information, but may be operational in character. There are detailed rules on cross-border surveillance²⁹ and a *hot pursuit*³⁰ which enable police officers from one Schengen State to cross the border into another to continue their operations. In urgent cases, this can be done without obtain-

²⁰ Article 5(2). There is a similar provision in Article 25(1) on issuing residence permits. The reference to "humanitarian" grounds and/or "international obligations" for granting entry, visas or residence permits must include the ECHR, even though the Schengen drafters disdained to refer the ECHR at all. Article 8 ECHR will often grant rights to renewal of a residence permit if there are established family ties, and some Member States interpret the ECHR or other international to mean that family members have to be admitted see, S. P e c r s, *op. cit.*, *supra*, n. 14.

²¹ Articles 9–18 of the Schengen Convention, currently replaced by the Council Regulation (EC) No 539/2001 of 15 March 2001 (OJ L 081, 2001/03/21, p. 1).

²² Article 26 of the Schengen Convention.

²³ *Ibid.*, Article 27(1).

²⁴ A Protocol agreed in Bonn on 26 April 1994 provides that the Schengen rules on asylum will no longer apply upon the entry into force of the Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the EU. This Convention is open only to members of the EU. It entered into force in Austria and Sweden on 1st October 1997, and in Finland on 1st January 1998 – House of Lords Select Committee on the European Communities, *op. cit.*, *supra*, n. 17.

²⁵ A. K o w e s z k o: "Międzynarodowa współpraca policyjna," in: G ó r a l c z y k, *op. cit.*, *supra*, n. 3.

²⁶ Article 39(1) of the Schengen Convention.

²⁷ *Ibid.*, Article 46.

²⁸ *Ibid.*, Article 47.

²⁹ *Ibid.*, Article 40.

³⁰ *Ibid.*, Article 41.

ing prior authorization.³¹ A third type of operational co-operation concerns controlled deliveries of drugs.³² This enables police and customs authorities to follow a drugs trail to its final destination.

Co-operation is also present in a number of other areas, too. These include provisions on mutual assistance in criminal matters,³³ extradition³⁴ and the transfer of the enforcement of criminal judgments³⁵ which build on existing international Conventions. There are also safeguards to prevent prosecution for the same offence in more than one Schengen State.³⁶ National laws on some aspects of drugs policy relating to illegal trafficking, seizure and confiscation of assets derived from such traffic, and controlled deliveries of drugs are to be harmonised,³⁷ as are minimum rules on the purchase, possession, sale and surrender of firearms and ammunition.³⁸

2.4. The Schengen Information System (SIS)

A computerised joint information system - the Schengen Information System - enables Schengen States to exchange data in order to maintain public policy and security, including national security, and to apply the provisions of this Convention relating to the movement of persons.³⁹ Each Schengen State has a national computer system with a complete Schengen-wide data file. A central technical support function in Strasbourg ensures that data entered in one national system is automatically transmitted to the other sections. This means that all Schengen States have access to a common pool of data via their own national systems.⁴⁰

The persons in relation to whom data may be stored in the SIS include those being sought for extradition, aliens whose entry is objected to by any one Schengen State, missing persons or persons deemed to be in need of police protection, and witnesses and persons to be summoned or notified by judicial authorities in connection with criminal proceedings.⁴¹ In addition, data may be included on persons or vehicles for the purposes of carrying out a discreet surveillance or specific checks.⁴² Personal data entered for this purpose must relate to an individual suspected of committing or being likely to commit extremely serious offences or who may present a serious threat to

³¹ Each Schengen state, declares however in relation to each of their neighbouring countries (i) the right of other officer to apprehend a suspect on their territory, (ii) the area or a time frame of the of the operation of foreign officers in hot pursuit, (iii) the categories of criminal offence in relation to which such pursuit is possible (Art. 4.1 2-4).

³² *Ibid.*, Article 73

³³ *Ibid.*, Articles 48-53.

³⁴ *Ibid.*, Articles 59-66.

³⁵ *Ibid.*, Articles 67-69.

³⁶ *Ibid.*, Articles 54-58.

³⁷ *Ibid.*, Articles 70-76.

³⁸ *Ibid.*, Articles 77-91.

³⁹ *Ibid.*, Article 93.

⁴⁰ K. Lenaerts, P. van Nuffel: *Constitutional Law of the European Union* (1999).

⁴¹ Articles 95-98 of the Schengen Convention.

⁴² *Ibid.*, Article 99(1).

national security.⁴³ The SIS may also contain information on objects, such as stolen vehicles, firearms, identity papers or blank official documents, and registered bank notes.⁴⁴

The personal data which may be entered in the SIS include, in addition to name, date and place of birth, sex and nationality, any specific, objective and physical characteristics not subject to change as well as information indicating whether a person may be armed or violent.⁴⁵ Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, must not be entered in the SIS.⁴⁶ It is not clear whether this prohibition would preclude the inclusion of such data if it were characterized as a permanent, specific, objective and physical characteristic (for example, racial origin) or if it were considered relevant to preventing threats to public safety or security.⁴⁷

Access to data contained in the SIS is restricted to officials responsible for border, police or customs checks and those concerned with the entry and movement of aliens.⁴⁸ An EC national may not be listed in the SIS as a person to be denied entry. This general rule however, does not apply to the EC national family member who is a third-country national. In this case such family member who present threat to public policy in all Member States may be listed in the SIS and consequently denied entry.⁴⁹ Analysis of the structure of the records stored on persons indicates also that data stored under Art. 96 (unwanted persons) makes up 89% of the all entries related to persons (art. 94–99).⁵⁰

2.5. Data Protection

All Schengen States must adopt national laws ensuring a level of data protection at least equal to that provided for in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The Council of Europe standards apply to all data processed automatically, and to some manually processed data. There are additional criteria on limiting the categories of users and the purposes for which data may be used, accuracy of data, recording of the transmission and receipt of data, and liability for damage caused by the transmission and use of inaccurate data.

Before exchanging any data under the Convention, each Schengen State must establish an independent national supervisory authority to monitor compliance with

⁴³ *Ibid.*, Articles 99(2) and (3).

⁴⁴ *Ibid.*, Article 100.

⁴⁵ *Ibid.*, Article 94(3).

⁴⁶ *Ibid.*, Article 94(3).

⁴⁷ Based on Article 6 of the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (28/01/1981)

⁴⁸ Article 101 of the Schengen Convention.

⁴⁹ *P e e r s, op. cit., supra*, n. 14.

⁵⁰ Based on the figures published in the human rights watchdog organization JUSTICE, in their publication *The Schengen Information System, A Human Rights Audit* (2000).

the data protection rules.⁵¹ There are additional safeguards for data exchanged between police authorities, based on the standards set out in the 1987 Council of Europe Recommendation regulating the use of personal data in the police sector.⁵² These are supplemented by specific conditions for information exchanged without a prior request in the general interests of crime prevention, public policy and security.⁵³

In the case of the Schengen Information System, the independent national supervisory authority responsible in each Schengen State for monitoring compliance with the general data protection rules of the Schengen Convention must also supervise the data file of the national section of the SIS. Representatives from each national body serve on a joint supervisory authority whose task is to supervise the central technical support function of the SIS in Strasbourg.⁵⁴

3. Poland in Schengen – Timetable for Implementation

3.1. Legal and Practical Issues relating to Schengen *Acquis* Implementation

Article 8 of the Schengen Protocol makes it clear that candidate countries must accept the Schengen *acquis* in full. Developing this theme, the first EU Common Position of May 2000⁵⁵ concerning the Luxembourg countries provide, inter alia, that:

- (1) A high level of border control will have to be achieved upon accession.
- (2) The candidate countries are required to
 - a) Accept in full on accession the JHA provisions and the working practices designed to give them effect.
 - b) In respect of conventions and other instruments, undertake to accede to them or, if under negotiation, accept the points which have been agreed upon.
 - c) Accept on accession joint actions and joint positions as well as resolutions, decisions and statements.
 - d) Introduce administrative and other arrangements, as is necessary to effectively implement the *acquis*.
 - e) Bring institutions, management systems and administrative arrangements up to Union standards.
- (3) The candidate countries are invited to establish, a Schengen action plan.

In other words, as far as the substance of Schengen is concerned, no opt outs are possible. In addition, the above elements in the Common Positions express what is meant by the basic idea of the integration of Schengen: making the Schengen *acquis* an integral part of the EU/EC legislation in the field of justice and home affairs. This

⁵¹ Article 128 of the Schengen Convention.

⁵² Recommendation No. R (87) of the Committee of Ministers (Council of Europe, 17/09/1987).

⁵³ Article 129 of the Schengen Convention.

⁵⁴ *Ibid.*, Articles 102–118.

⁵⁵ CONF-PL 28/00.

means that the starting point is that the application of the Schengen *acquis* upon accession should be considered the norm, and that any postponement of implementing measures to the time when internal controls are in fact abolished, should be regarded as the exception.

However, the Schengen rules also make clear that a separate and unanimous Council decision will be needed before the Schengen *acquis* can be implemented in full, including most importantly the key question of the lifting of internal border controls. For such a decision to be taken the existing Schengen partners will have to verify, by means of a special evaluation process, that the new Member State concerned is able to apply the compensatory measures in full. The existence of this special implementation mechanism of Schengen does not in the EU Commissions view,⁵⁶ mean that candidate countries should not be ready and able for the partial application of Schengen upon accession. On the contrary.

The reality is that a full implementation of the Schengen provisions immediately upon accession is most unlikely to be a practical possibility for technical and operational reasons. For example, a functioning Schengen Information System (SIS) is one of the most important preconditions for such a decision. Considering that the lifting of internal border controls is dependent on the timetable of the (second generation) SIS II, which is now estimated to be operational in the end of 2005 at the earliest, it is not realistic to imagine that any decision concerning the lifting of internal border controls will take place before that time. In addition, it should be taken into account that the Schengen evaluation process itself will take some time.⁵⁷ Consequently, the full implementation of the Schengen *acquis*, in the sense of the lifting of internal border controls, cannot be applied upon accession.⁵⁸

The implementation mechanism of Schengen does not contain any predetermined timetable for the lifting of internal border controls after accession.⁵⁹ To ensure the balance between the security and freedom aspects, ideally the target should be that the full implementation of the Schengen *acquis*, including the lifting of internal border controls, should be achieved as quickly as possible after accession. It will inevitably, be subject to the capacity of the country concerned to fulfil the necessary requirements. In the Common Positions concerning the Luxembourg countries, the EU underlined that the candidate countries will need to satisfy as soon as possible all the preconditions to bringing the full Schengen *acquis* in force. The candidate countries have been encouraged to start preparing early for the full Schengen implementation

⁵⁶ EU Commission Information Note – July 2001.

⁵⁷ The traditional Schengen evaluation process should be postponed until the moment when the Schengen States and the new Member States are getting prepared to abolishing the internal border controls. All parts of the Schengen *acquis* would be evaluated in that point of time in accordance with the relevant rules of the Schengen *acquis*.

⁵⁸ EU Commission Information Note – July 2001.

⁵⁹ The Schengen Convention was signed in 1990 and it entered into force in 1993, but the full *acquis* was put into effect and the internal border controls were lifted only in 1995 (for Benelux, France, Germany, Spain and Portugal). For Austria, Italy, Greece and the Nordic countries there were several years between the signing of the Schengen accession agreement and the lifting of internal border controls (from 3 to 8 years).

as the related national measures involve extensive organisational, structural and financial challenges.

3.2. Categories of Schengen *Acquis* Provisions

The existence of this two-stage Schengen implementation process means that there is a need for further definition of those requirements that have to be implemented upon joining the EU and those that are linked to the full Schengen implementation phase.

In the current enlargement process being the first after the integration of Schengen, there is no precedent for defining a list of Schengen provisions that would have to be applied upon accession. As a matter of principle, the Schengen *acquis* should be applied upon accession, because the measures concerned are now an integral part of the justice and home affairs *acquis*. However, as there will be a separate decision concerning the lifting of internal border controls, it is evident that there is a need to identify those provisions of the Schengen *acquis* which are so fundamentally linked to the lifting of internal border controls, that it would neither be necessary nor technically possible to apply them until the moment when the internal border controls are ready to be lifted.⁶⁰ Concerning the requirement to achieve a high level of external border control, the candidate countries must be able to fulfil the requirements of the *acquis* on external border control by the time of accession.

3.3. Schengen Action Plan

As mentioned earlier in 3.1, the EU in its Common Positions concerning the Luxembourg countries, asked the candidate countries to provide an action plan for implementing the necessary preconditions for participating in Schengen (the Schengen Action Plan). The Commission has sought to clarify the contents of this requirement for the candidate countries during the technical discussions. In the Commission's view the Schengen Action Plan should cover concrete results already achieved and a detailed and verifiable programme for the adoption and implementation of the rest.⁶¹ It seems that the Schengen action plans could serve at least two purposes. For the candidate countries, they will provide an appropriate instrument for them to demonstrate their commitment and planning for the full implementation of Schengen. For the EU and the existing Member States, these action plans should help them to make an estimation of the time that could be needed between the moment at which a candidate country joins the EU and the moment at which its internal border controls with the existing Schengen states can be lifted.

⁶⁰ EU Commission Information Note – July 2001.

⁶¹ *Ibid.*

4. Schengen in the Accession Negotiations

Poland began its negotiations for the accession to the EU on 31st of March 1998. The first stage of the negotiations included a review of the Polish legislation *vis-à-vis* the EU legislation ie. *acquis communautaire*. This so called *screening exercise* took place in March 1999, thus, before the entry into force of the Amsterdam Treaty, on 1 May 1999, which transformed many parts of the *acquis* from a co-operation framework into Community competence. At the time of the screening, apart from the legal instruments on visas based on “first pillar” (EC Treaty) provisions, the *acquis* in justice and home affairs derived from the framework for co-operation set out in Title VI (Article K⁶²) of the Treaty on European Union (TEU), the “third pillar.” Under the Amsterdam Treaty apart from visa, also asylum, immigration and other policies related to free movement of persons, like judicial co-operation in civil matters are transferred from EU’s third pillar to its first pillar (albeit not all of the first pillar procedures will be immediately applicable), whereas provisions on police and judicial co-operation in criminal matters contained in the new Title VI of the TEU remain within the EU’s third pillar. At the screening however, Schengen *acquis* did not constitute the element of the negotiations within the chapter 24 (“Justice and Home Affairs”) since at that time Schengen was not a part of *acquis communautaire*.⁶³ However, the Commission recalled the Article 8 of the Protocol integrating the Schengen *acquis* into the framework of the EU, which constitutes an integral part of the Amsterdam Treaty and took the view that “for the purpose of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission.”⁶⁴ It was therefore included in the screening, even though the Amsterdam Treaty had not yet entered into force. Subsequently, prior the screening Poland was presented with an additional screening list of about 200 documents which then constituted the Schengen *acquis*. The list was analysed in Poland and to each Schengen legal document a reference was made indicating if and to what extent a similar provision already exists in the Polish legal system and if not present at all – when such provision will be implemented. During the screening Poland expressed the view that it “accepts the *acquis* with respect to this chapter, including the Schengen *acquis* and does not intend to request any transitional arrangements.”⁶⁵ Having concluded the screening procedures, the relevant units at the Ministry of Interior and Administration and Ministry of Justice, jointly responsible for negotiations in this area, moved to the next stage of the negotiations and began drafting the Negotiation Position.

⁶² Treaty of Maastricht numbering.

⁶³ Schengen *acquis* became a part of the EU *acquis* after entry into force of the Amsterdam Treaty on 1 May 1999.

⁶⁴ EU Commission: *Report from the Screening* (May 1999).

⁶⁵ *Ibid.*

4.1. Negotiation Position

The Negotiation Position in the Chapter 24 (Justice and Home Affairs) was presented to the Commission on the 8th of October 1999 r. The document⁶⁶ provides that Poland accepts the “*acquis*” under chapter 24 as in force on 31 December 1998 including the Schengen “*acquis*” – as integrated in the EU framework on 1 May 1999, and does not request any transition periods or derogations in this area. With the exception of three documents namely: (i) the *European Convention on the international validity of criminal judgements* (The Hague, 1970); (ii) the *European Convention on the transfer of proceedings in criminal matters* (Strasbourg, 1972); and (iii) the *Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against the illicit traffic in narcotic drugs and psychotropic substances* (Strasbourg 1995), Poland declared that it will adhere the whole *acquis* before 31 of December 2002. However, the reference was made that with regard to the Schengen *acquis*, Poland would expect that the European Commission would clarify procedures related to the treatment of the Schengen *acquis* in the negotiations.

4.2. Accession Documents

There have been several documents produced which help both the Commission and Poland in the process of negotiations. The most important are:

National Programme of Preparation for Membership

Being aware of the a great deal work to be done in relations to Poland’s future membership in the European Union, on the 28th of June 1998 the Polish Council of Ministers adopted the National Programme of Preparation from Membership in the European Union (NPPC). The main principles behind the NPPC are: (i) reflection of the current state of the implementation of the Europe Agreement and the state of Poland’s readiness for EU membership, (ii) the response to the “Commission’s Opinion Concerning the Polish Application for Accession to the EU;” and (iii) “Accession Partnership.”⁶⁷ The text of NPPC is modified annually so that it corresponds with successive versions of the “Accession Partnership” and sets the main objectives deriving from Poland’s accession negotiations.

Strategy of Integrated Border Management (SIBM)

Efficient external border protection remains one of the most important elements of the Schengen Convention and certainly in case of Poland one of the most difficult to achieve. Polish administration had no doubt that without a strategy on the external border protection mechanism – negotiations in JHA would be very difficult.

⁶⁶ CONF-PL 40/99.

⁶⁷ *Accession Negotiations: Poland on the Road to the European Union, Government Plenipotentiary for Poland’s Accession Negotiations to the EU, Chancellery of the Prime Minister (2000).*

In order to execute the appropriate adjustment process in the field of national border protection, a composite document devoted to these issues was created "Poland. Strategy for Integrated Border Management." The defines tasks which are needed for the Polish Eastern border – which will constitute the external frontier of the European Union. The timetable sets the accession date as 31 December 2002. The document was adopted by the Council of Ministers on 6 June 2000, and later submitted to the European Commission. The document provides that after the admission to all Schengen procedures, the Polish borders with Germany, Slovakia and the Czech Republic will become an internal Schengen borders.⁶⁸ Consequently, the present Polish borders with Ukraine, Belarus and Russia together with sea and air borders will become external borders of the European Union and Schengen. Poland declares that it will implement efficient external border protection for the which will ensure no-entry for the undesirable people. SIBM also describes the actions to be taken, and nominates all relevant parties to carry out these objectives (Border Guard, Customs, Police, veterinary services, etc.).

Implementation Progress Reports

In order to monitor the implementation of the whole *acquis communautaire* both the Commission and the each candidate states prepare systematically the whole range of reports which aim at assessing the current level of implementation, providing an comprehensive tool for observing the progress already made and envisaged plans for implementation of various parts of the *acquis*. The parts related to Schengen since its implementation to the EU legislation in May 1999 are also included in those reports. The reports contain:

- Country Regular Reports for 1988, 1999, 2000;
- Justice and Home Affairs Assessment Missions 1998 and 2001;

These reports are restricted and produced for the Council by the Commission with the aim to asses the current status of the implementation of the *acquis* in the process of accession negotiations. The reports also indicate recommendation and reflect the current understanding of the accession process by the Commission and the Member States.

4.3. Approximation of the Polish Legislation to the Schengen *Acquis*

As earlier indicated the main priorities for the negotiations in the JHA are described in the National Programme of Preparation for Membership. The current NPPM⁶⁹ provides the following priorities related to the Justice and Home Affairs, two of them relate directly to implementation of the Schengen *acquis*. These are:

⁶⁸ Depending on the negotiation process this principle could also apply to the border with Lithuania.

⁶⁹ *National Programme for Preparation for Membership, Justice and Home Affairs*, Document approved by the Council of Ministers of the Republic of Poland on June 12, 2001.

Adjustment of the visa policy to the community system

The objective is the "full harmonisation of the Polish visa policy with the common visa policy of the European Community, including the developments within the process of deepening of the Poland's integration with the EU."⁷⁰ Such harmonization will align Poland to the EU visa policy.⁷¹ This priority determines the termination of non visa arrangement with Belarus, Cuba, Russian Federation and Macedonia for the year 2001 and Ukraine for the year 2002.⁷² The documents underlines that "Poland wants to maintain good contacts with its Eastern partners, will concentrate on implementation of EU visa regulation in such way, that the visa procedures, which will affect the citizens of these countries, will be transparent, simple and in the full accordance with the Schengen *acquis*."⁷³

Another very important priority is the adjustment of the national border protection of the community requirements.

The main goal set in this priority is to make the future external border of the European Union tight and secure, to guarantee efficient protection of the internal border, to ensure free movement of persons according to the European Community standards.

A very important element in this priority is the preparation of the National Information System (KSI) capable to co-operate with the Schengen Information System (SIS) and preparation of the Polish department NSIS based on the KSI infrastructure and creation of Polish unit – the SIRENE office.

In terms of the adopting new legislation, those related to Schengen implementation are the following.

The amendment of the **Border Guard** act⁷⁴ in 2001. The act grants to the Border Guard the right to apply operating measures under principles specified in the Act on Police. Coherent with the NPPC the act also extends the rights of the Border Guard officers to operate across the whole territory of the country. This will furnish the Border Guard officers to conduct their fight against organized crime, including in particular illegal immigration. The new BG act also the list of crimes and offences which the responsibility of the Border Guard. In general it covers all crimes relating to crossing of state border and crimes relating to movement of goods and other objects across the border.

The new amended act also makes the Border Guard structures more flexible. The act separates legal forms of establishment of regional offices and i.e. border checking

⁷⁰ *Ibid.*, priority 24.1.

⁷¹ The area of the Schengen *acquis* which was taken over by the EU legislation at the time of entry into force of the Council Regulation (EC) No. 539/2001 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States and whose are exempted from visa duty (OJ L 81/2001).

⁷² Poland has already terminated the visa exemption agreements with some other countries listed in the Council Regulation 539/2001: Azerbaijan, Georgia, Kyrgyzstan, Tajikistan, Turkmenistan, Kazakhstan, Moldova and Mongolia and has introduced a visa free regime with Brazil, Israel and Singapore.

⁷³ *Ibid.*, priority 24.2.

⁷⁴ The act of April 11, 2001 amending the act on Border Guard of November 19, 1990 *Dziennik Ustaw* (Dz.U.) [Official Journal], No. 45, item. 498 of 2001 has entered into force in May 2001.

units, border guard stations. According to the act only the largest organisational units, i.e. branches will be established on the basis of regulation by the minister responsible for internal affairs, whereas the remaining ones will be established on the basis of a regulation by the Chief Commander of the Border Guard.

Recently also entered into force the amendment of the **Aliens Act** of the 1997.⁷⁵ The amendment contains all the elements of *acquis* which Poland can implement before obtaining membership and before joining the instruments that are not accessible for Non-EU countries. This means that the remaining differences between European standards and proposed solutions in the new Aliens Act cannot be eliminated before joining the European Union (and Schengen). The major hurdles for the Polish administration related to the implementation of this act are related to the establishment of the domestic information system (which will lay the ground for SIS II). The new bill also implements the equivalent provisions regarding the Schengen visa.⁷⁶ And finally the new act sets legal basis for the mentioned earlier Polish module of the Schengen Information System (SIS).⁷⁷

5. Conclusions

Schengen initially was portrayed as an implementation of the derived from the EC treaty right to free movement of persons across Europe.⁷⁸ The core documents of the Schengen cooperation (Agreement of 1985 and the Convention of 1990) have the aim to fully implement this objective and create an area without internal border controls, with compensatory measures to increase security at the external frontier and other supporting measures to fight illegal immigration and furnish mechanisms for effective police cooperation. One has to admit that with small irregularities,⁷⁹ application of the Schengen rules have proved over the last few years to be important element in the ever closer integrated Europe. Schengen initially outside of the EU cooperation framework managed to be implemented into the EU framework and include all of the EU countries in the system.⁸⁰

⁷⁵ The act of April 11, 2001 amending the Aliens Act of June 25, 1997 (Dz.U., No. 42, item. 475 of 11/05/2001).

⁷⁶ Art. 4 point 2; Art. 8 point 2 and 5 and Art. 10, of the Aliens Act, amended in 2001.

⁷⁷ Section 10a – The National Data System, Art. 75a – 75d – *ibid*.

⁷⁸ The free movement of people is one of the four basic freedoms set out in the 1957 Treaty of Rome ("the EC Treaty"). Article 3(c) lists among the Community's activities "the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital." The Treaty on European Union, agreed in Maastricht in 1992, amended that provision to include a reference to the internal market and stated, in Article 7a, that "the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." Citizens of the Union enjoy "the right to move and reside freely within the territory of the Member States" under Article 8a of the EC Treaty, but this right is "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

⁷⁹ See for example the French case, note 12.

⁸⁰ Decision 200/365/EC, OJ L 131, 01/06/2000 p. 0043, on partial application of UK and Ireland. Partial application includes: "criminal and policing rules, except for cross border pursuits, SIS without art. 96, and articles 26 (carriers liability) and 27 (illegal immigration).

It seems that everyone benefits from Schengen. For ordinary people Schengen gives the ability to frontier free travel, without the old fashioned necessity to carry a passport.⁸¹ For the police Schengen regulations give an access to the European-wide Schengen Information System and the right to follow criminals over the border. The immigration services and the Border Guards have also access to the SIS and the well protected external border.

The magic question for Poland is when will the Polish people be able to exercise their rights of border free travel across the Schengen states. It is very difficult to answer this since there at this stage of negotiations (July 2001), both sides are very reluctant to indicate any dates. Poland has declared that it will be ready for enlargement, including Schengen *acquis* at the end of 2002. In the view of the EU representatives, the most likely date of the Polish accession is the year 2004 or 2005. 2004 is the year of elections to the European Parliament and on several occasions the vision of taking part in those elections by the representatives of the candidate states was expressed,⁸² and even though it seems rather difficult to perform in the case that the full accession is not in place – special arrangement (including the mutual agreement of the current Member States and the candidate state in question) could take place, especially if the accession treaty envisaged entry into force in the year 2005.⁸³

The above mentioned are the indicators for the EU enlargement, and not for the Schengen. Based on the experience of the current member states it takes between 5 and 8 years from the signing of the convention to its full implementation,⁸⁴ and since the signing of the convention is limited to the EU member states each state must first become a member state and then adhere to the convention.

The decision on application of the Schengen in a particular country is followed by the positive opinion of the Schengen evaluation missions which is based on the very detailed analysis of the legal provisions and the infrastructure including a field inspection – carried out by the expert representing Schengen states and the subsequent Council decision. The main role of the evaluation missions is to establish if the pre-conditions for bringing the Convention into force in a candidate state have been ful-

⁸¹ An interesting example on correlation between Schengen Convention and national law (Dutch) related to the identity checks while crossing internal borders can be found in Helen Staples paper, on application of the Schengen provisions in the Netherlands, where she describes an individual who uses a forged Portuguese passport travelling on an intra-Schengen flight between Austria and the Netherlands. When stopped and detained by the authorities at the Schiphol Airport he contested this decision to the local court on the grounds of breaching the art 2(1) and (3) of the Convention. According to the judge, controls exercised on all passengers on embarking the airplane were to be classified as controls aimed at ensuring compliance with a provision of the national law, and therefore permitted. (H. S t a p l e s: "Adjudicating the Schengen Agreements in the Netherlands," 2 *European Journal of Migration and Law* (2000), pp. 49–83.

⁸² See *Presidency Conclusions*, Nice European Council Meeting, 7–9 December 2000, SN4000/00.

⁸³ Such view was expressed by the UK Foreign Office to the Commons Committee Foreign Affairs Committee

⁸⁴ 5 years from the signing of the convention in December 1996 to its full application on 26 of March (See: 2001/2000/777/EC Council Decision on full application to Denmark, Sweden, Finland, Iceland and Norway of 1 of December (OJ L 309/24, 12/09/2000), also declaration in OJ L 309/28/2000); 8 years for Greece (See: *Agreement on the Accession of the Hellenic Republic to Schengen* (OJ L 239, 22/09/200, p. 83); and 1999/848/EC Council Decision of 13 December 1999 on the full application of the Schengen *acquis* in Greece).

filled. Experts once again⁸⁵ will have a very difficult very broad and subjective goals of *et al* "assessment of the surveillance of land and sea borders" or "qualitative, quantitative, operational, organisational and technical aspect of the future NSIS"⁸⁶ in the examined countries. Such broad approach may cause a great deal of misunderstanding since there is always room of different assessments of the same situation by different experts who will look at the matter from their own personal angle. There is clearly a need for more precise guidelines for the evaluation missions in order to avoid such misunderstanding. Hopefully, such guidelines will be agreed among the member states before Poland's implementation of the Schengen *acquis* is assessed.

To sum up, it seems that the Schengen *acquis* over the last 10 years has developed into a very integrated internal security system for the European Union. Although Schengen for ordinary Europeans will always be a symbol of border free travel, as I have shown above – means much more for the law enforcement agencies and the immigration services.

For Poland and other candidate states implementation of Schengen is the ultimate goal that proves the state's ability to maintain public order and become a "trustee" or a "guarantor" in relation to the other Schengen States. For purely technical reasons (such as the necessity to join the new SIS which is due to be complete at the end of 2005), Poland and other candidate states will most likely have to wait until 2007–2008 for the full implementation of the Schengen rules and lifting of the internal border. Of course much sooner i.e. the EU accession the southern and western border control will be much more relaxed for the EU citizens that the actual border crossing will hardly be an effort for most of the Polish tourists and businessmen.

⁸⁵ The missions have already conducted their missions in Nordic countries and Austria.

⁸⁶ These are some of the indicators for the evaluation team as set in the Decision of Executive committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SCH/Com-ex (98) 26 def.) (OJ L 239, 22/09/2000, p. 138).

The European Union Charter of Fundamental Rights – History, Content and Relationship to Polish Law

ROMAN WIERUSZEWSKI

1. Background – the European Communities and Protection of Human Rights

On 7 December 2000, at the Nice summit of European Union heads of state and government, a Charter of Fundamental Rights of the European Union was solemnly proclaimed. This document can be analysed from various points of view. For example, the way in which it was prepared is in itself unique. Equally exceptional was the relatively short time period that it took to complete the final draft. Many other aspects are of interest. However, my purpose here is to examine the content of the Charter and attempt to interpret its legal dimension and conclusions to be drawn for the Polish legal system.

Before one starts to analyse the Charter it is necessary to place it in the context of the human rights policy of the European Union on the one hand and its attempt to create its own constitution on the other. Commenting on the Charter, the Polish Minister of Foreign Affairs observed:

It is difficult today to make an unequivocal estimate of the European Union's Charter of Fundamental Rights adopted at the Nice summit in 2000. On the one hand we can call it the beginning of a new chapter in the process of political unification of Europe. On the other, one cannot escape the impression that its contents and form are the result of compromises and fall short of the expectation of dreamers and visionaries.¹

What were those expectations? What is the reason for a new human rights document in Europe? Undoubtedly, the European regional system of human rights protection is the most extensive and most successful one among international mechanisms. Let us remember that in addition to the European Convention for the Protection of Human Rights and Fundamental Freedoms with its recently reformed Court we have the OSCE system and of course all European countries are parties to a number of universal treaties. At the same time the European Union has until recently been un-

¹ W. Bartoszewski: "Wprowadzenie," in: *Karta Praw Podstawowych Unii Europejskiej* (2001), p. 5.

able to pursue a clear human rights policy. Not long ago two scholars made the following observation:

The human rights policies of the European Union are beset by a paradox. On the one hand, the Union is a staunch defender of human rights in both its internal and external affairs. On the other hand, it lacks a comprehensive or coherent policy at either level and fundamental doubts persist whether the institutions of the Union possess adequate legal competence in relation to a wide range of human rights issues arising within the framework of Community policies.²

In fact the place assigned to fundamental rights in the Community Treaties has changed considerably since the European venture was first launched.³ Initially, fundamental rights were not a central concern of those who drafted the Paris and Rome Treaties, which reflected a sector-based and functionalist approach. The Treaty of Paris, which established the European Coal and Steel Community (ECSC), was concerned solely with the coal and steel industries. This sector-based approach gained strength after the failure, in 1954, of the European Defence Community (EDC) and the concomitant moves towards political union. It thus became a feature of the Rome Treaties establishing the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). Although the EEC Treaty was wider in scope than the other two, all three Treaties covered well-defined economic spheres.

One consequence of this sector-based approach was to set the founding Treaties apart from any basic law of a constitutional nature which incorporates a solemn declaration on fundamental rights. The Treaties in question were not suited to the inclusion of such a preamble, particularly since the aforementioned Council of Europe's Human Rights Convention, signed in 1950, already provided an advanced model for protection of human rights in Europe.

Nevertheless, the European Community did eventually start to develop its own approach towards protection of human rights.⁴ Since, as mentioned above, the original treaties of the Communities provided no legal basis for such a policy it was only through the case law of the Court of Justice of the European Communities that protection of human rights within the Communities was developed. The Court of Justice, in the judgments it handed down, began to monitor the observance of fundamental rights by Community institutions and the Member States in whatever action they took within the areas covered by Community law. The Court recognised, for example, the right to property and freedom to engage in economic activity, which are essential to the smooth operation of the internal market. The Court held that fundamental rights ranked as general principles of Community law and that they rested on two foundations:

² P. A l s t o n, J. H. H. W e i l e r: "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights," in: P. A l s t o n et al. (ed.): *The EU and Human Rights* (1999), p. 6.

³ See the document "The Amsterdam Treaty: a Comprehensive Guide, Freedom, Security and Justice," available at: www.europa.eu.int.

⁴ See: C. L e b e n: "A European Approach to Human Rights?," in: A l s t o n, *op. cit.*, *supra*, n. 2, pp. 88–89. Also J. P l a n a v o v a - L a t a n o w i c z: *Trybunał Sprawiedliwości Wspólnot Europejskich i ochrona praw podstawowych* (2000).

- The constitutional traditions of the Member States;
- The international Treaties to which the Member States belonged (and the ECHR in particular).

Let me quote one of the characteristic judgements in this area. The Court ruled:

The court has consistently held, in particular in its judgement of 13 December 1979 in Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those States may not find acceptance in the Community.⁵

The Court also recognised that the European Convention is of “particular significance.”⁶

In 1977 the European Parliament, the Commission and the Council of Ministers signed a Joint Declaration in which they undertook to continue respecting the fundamental rights arising from the two sources identified by the Court. In 1986 a further step was taken when a reference to the promotion of democracy on the basis of fundamental rights was incorporated into the preamble to the Single European Act.

At the same time, the idea that the Community as such should accede to the ECHR had begun to circulate. The Council decided to seek the Court’s opinion on whether membership of the Convention would be compatible with the Treaties. In its opinion of 28 March 1996 the Court held that, as Community law stood at that time, the Community was not competent to accede to the Convention.⁷

At the same time the Council of Europe relinquished its exclusive character and a process of admission of new members radically changed its composition. Due acknowledgement has to be given to the fact that the European Convention for the Protection of Human Rights and Fundamental Freedoms has had a great influence on the development of human rights standards in Europe. That influence has been particularly valuable from the point of view of former communist countries. Ideological obstacles had prevented these countries from joining the Council and consequently ratifying the European Convention. At the same time the standards of human rights protection developed within the framework of the Convention were viewed by human rights defenders in these countries as a model. Subsequently, admission to the Council, at least at the beginning of the 1990s, was considered as a proof of a given country’s democratic evolution. The situation changed when the admission criteria were lowered and many countries were taken into the Council without fulfilling the necessary conditions as regards rule of law, democracy and protection of human rights. Though nobody would be prepared to admit as much, de facto there are two types of

⁵ Case 5/88, *Wachauf v. Germany*, [1989] ECR 1219.

⁶ See Joined Cases 46/87 and 227/88 *Hoechst v. Commission*, [1989] ECR 2919.

⁷ Opinion 2/94, 34, *Common Market Law Review* [1997], pp.491–529. The Netherlands Advisory Council on International Affairs (AIV) believes that after adoption of the Treaty of Amsterdam the legal situation has changed and such an accession will be possible. See: AIV: *A European Charter of Fundamental Rights?* (2000).

Council members and it is impossible to apply identical criteria to all the states which have signed up to the European Convention. One might well wonder whether such a policy furthers the main aim of the Convention's architects, which was the unification of Europe in the realm of upholding and developing human rights and fundamental freedoms. So far it looks rather like a watering-down of the Convention.

As European integration made headway, the European Union gradually widened its field of action, reflecting the determination of the Member States to act as one in areas which previously had been a strictly national preserve (e.g. internal security or the fight against racism and xenophobia). In view of these changes, which necessarily go beyond the sector-based context of the Community's early days and impinge on the daily life of European citizens, there was a need for a clear legal texts which proclaimed respect for fundamental rights as a basic principle of the European Union.

The situation changed with the entry into force of the Treaty on European Union (TEU). Article 6 (1) states that: "The union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." From the protection of human rights point of view of crucial importance is Paragraph 2 of the article which declares that:

The union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as a general principles of Community law.

The principles set out in Article 6 – liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law – belong in the light of Article 49 of the TEU to the preconditions for admission of new member states to the Union.⁸ Respect for those principles is a condition to be fulfilled not merely at the time of accession but also permanently since in accordance with Article 7 the European Council, "may determine the existence of a serious and persistent breach by a Member State of the principles mentioned in Article 6(1)" and "may decide to suspend certain of the rights derived from the application of this Treaty to the Member State in question."

The Treaty on European Union constitutes a landmark in the Union's approach to protection of human rights. The next steps taken into this direction, in particular establishment of the institution of European citizenship,⁹ created a real need for formulation of a catalogue of the rights and freedoms to be protected in the Union framework. It is therefore clear that the main aim of the Charter is not to widen the scope of protected rights or to strengthen their protection but to enhance the coverage of the integration processes taking place within the Union.

⁸ Article 49 TEU states, in part: "Any European States which respects the principles set out in Article 6(1) may apply to become a member of the Union."

2. Preparation of the Charter

It is against this background both the content of the Charter and its drafting history should be analysed. The process of drawing up the Charter was launched by a decision of the European Council meeting in Cologne on 3 and 4 June 1999 and acting on an initiative by the German EU presidency in 1999. In the "Conclusions of the Cologne Council" it was noted that the EU had reached a stage in its development where enshrinement in a Charter of the rights that applied in the Union had become desirable, the primary aim being to make them more visible to the Union's citizens. The Council also stated that the new Charter should in no way detract from the fundamental rights that already applied within the Union, for instance as set forth in the European Convention on Human Rights.

At its meeting in Tampere on 15 and 16 October 1999 the European Council reached agreement on the composition, working methods and practical arrangements of the Forum that was to be responsible for drafting the document. This Forum, renamed a Convention in February 2000, began work on 17 December 1999 at a meeting in Brussels. It was composed of 16 Members of the European Parliament, 30 members of national parliaments, 15 authorised government representatives and one representative of the President of the European Commission. Roman Herzog, the former German head of state, was elected President of the Convention.

It was decided that not only the end-product, namely the Charter but also the very process leading to its creation should contribute to the visibility of rights. Let me mention the most distinctive elements of this process:

- All meetings of the Convention were open to the public
- All documents prepared by or submitted to the Convention were made available on the Internet
- Invitations were widely circulated among the non-governmental organisations community to present their opinions directly to members of the Convention
- During the whole process many seminars, conferences and other forms of presentation of progress in the preparation of the Charter were organised

It has to be said that full transparency was achieved and indeed that the whole process had a unique character. After 18 meetings of the Convention a final text emerged. Obviously, the members of the Convention were under enormous pressure to complete the job on time, which proved possible only because the Charter is not of a legally binding nature. That being the case, it was much easier to accept various kinds of compromises.

But one aspect of the drafting process met with criticism in countries seeking EU membership: the absence of consultations with representatives of these states and their societies. It was argued that if the Charter was to be part of the new constitution of the EU its future citizens should also be given the opportunity to present their

⁹ On the subject of Union citizenship see R. Wieruszewski: "Obywatele Rzeczypospolitej Polskiej – przyszli obywatele Unii Europejskiej," in: E. Popławska (ed.): *Konstytucja dla rozszerzającej się Europy* (2000), pp. 259–267.

opinions and proposals. As Hanna Suchocka pointedly observed: "Discussion of the Charter of Fundamental Rights should not be restricted to the EU Member States who 'know better' what kind of constitution Europe needs but should also include the EU candidate countries."¹⁰

Despite all the efforts the Charter has aroused relatively modest interest among the public in the EU Member States. This situation may change when steps are eventually taken to transform the Charter into a legally binding document.

3. General Description of the Charter

The final text of the Charter reflects a compromise between the various participants in the project. Approaches to the document differed. While some wanted it to have legal force others insisted that it remain declaratory in character. Different views were also taken of its content – what kind of rights should be included, how should they be formulated, etc. The drafters had to take account of the existing human rights treaties and other international documents and national constitutions and statutes. It was also agreed that the language of the whole document should be gender-neutral.¹¹

In order to avoid any misunderstandings with regard to the rights formulated in the Charter in a slightly or completely different form than in other treaties the preamble of the Charter:

reaffirms . . . the rights as they result, in particular, from constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights.

The Charter does not affect any of the above-mentioned sources of human rights. The Charter is composed of a preamble and seven chapters:

- Dignity,
- Freedoms,
- Equality,
- Solidarity,
- Citizens' Rights,
- Justice,
- General Provisions.

The preamble contains an interesting presentation of the principles upon which the European Union is founded: human dignity, freedom, equality, solidarity and prin-

¹⁰ See H. Suchocka: "Jaka konstytucja dla rozszerzającej się Europy," in: Popławska, *op. cit.*, *supra*, n. 9, pp. 31–32

¹¹ This means for example that the English word "everyone" is translated into French as "toute personne."

ciples of democracy and the rule of law. The Union is conscious of its spiritual and moral heritage.¹²

It is clear that the Convention wanted to avoid accusations of neglecting national traditions and values. In the preamble we read that the Union respects “the national identities of the Member States.”

The Preamble also embodies the idea of responsibilities and duties towards other persons, the human community and future generations as a principle with which enjoyment of rights must be associated.

When it was decided that all possible rights and freedoms should be included in the Charter it became clear that the way in which they were formulated would have to vary. As a result there is no consistency between the wording of the different articles. Some are formulated in a manner allowing for their direct applicability – for example, Article 8 (Protection of Personal Data) which clearly indicates the subject of protection, the rules governing the processing of personal data and the control mechanisms. Quite often the Charter merely provides that the Union “recognises and respects . . .” – see Articles 22, 34, 36. Sometimes it only lays down rules for Union policy – for example, Article 37 (Environmental Protection) or Article 38 (Consumer Protection) without presenting them as individual rights. Usually the differences reflect attitudes to the subjects covered by those rights. For example it was impossible to obtain support for an individual right to environmental protection, even if in some Member States such a right does exist and has a constitutional status.¹³

Reading the Charter it is interesting to trace the different methods of formulating rights and freedoms covered by universal or regional treaties. Quite often those differences are a result of contemporary developments. Sometimes they reflect changes in attitudes to certain rights.

The Charter offers a framework of protected rights. But it does not pretend to have exclusive competence to regulate many of them. Quite often it says that a given right or freedom “shall be guaranteed in accordance with the national laws governing the exercise of these rights.” Sometimes reference is also made to Community law.¹⁴ This formula is used in the case of all rights on the shaping of which there is no consensus within the Union or which are subjects of serious debate within Member States.¹⁵ It was decided that it would be totally inappropriate in those circumstances to impose certain regulations.

4. The Scope of Protected Rights

At an early stage of the preparatory work the Convention seriously contemplated the possibility of including only civil and political rights in the hope of thereby arriv-

¹² At the proposal of a representative of the CSU in the German version of the Charter the word “geistig-religiös” is used.

¹³ See Article 20 of the Constitution of Finland.

¹⁴ See Articles 9, 10, 14, 16, 27, 28, 30, 34, 35, 36.

¹⁵ See, for example, the discussions about the definition of family – Article 9.

ing at a legally binding document. This approach was based on the argument that economic, social and cultural rights, given their nature, cannot be embodied in a text that would have legal force. This issue became irrelevant when it was concluded that the Charter would not in fact be legally binding in character. The question of methods of protection of the listed rights has been skirted. Such a situation allows for the presentation in one document of a variety of rights and freedoms. In addition to the classic kind – political and civil – we have economic, social and cultural right and a number of new ones. The Charter sends a strong signal that in Europe human rights constitute an indivisible package of rights and freedoms. The Charter goes beyond the directions of the Cologne summit which asked for a statement of “rights applied in the Union.” Many of the rights embodied in the Charter are unrelated to the competences of Union bodies. A case in point is abolition of the death penalty.

The norm recognised by the Charter as the overarching principle of the whole concept of human rights is human dignity. The first article of the first chapter is entitled “human dignity.” The formulation of this article is identical to the German Constitution.¹⁶ Some commentators have noted that the Charter departs from the Universal Declaration or International Covenants since the term used in these documents is “inherent dignity.”¹⁷ This criticism misses the point that as provided in the Charter “dignity” ranks among the most fundamental of rights rather than general principles as in the above-mentioned documents. Thus the formula adopted offers a more concrete and higher level of protection. Since “human dignity” is also referred to in the preamble it follows that it is seen as forming the foundation of all the rights and freedoms set forth in the Charter.

The right to life is formulated in a straightforward and categorical manner. There are no exceptions to abolition of the death penalty. The Charter goes further than Protocol 6 of the European Convention. At the same time it does not prohibit other form of depravation of life – for example through a “contract” between patient and doctor. It can, therefore, be argued that the Charter accepts euthanasia.¹⁸

Article 3 covers the right to integrity of the person. It lists principles which should be followed in the fields of medicine and biology. The list is more exemplary than exhaustive in character. Prohibitions of torture and inhuman or degrading treatment or punishment and of slavery and forced labour complete the first chapter.

Under Chapter II (Freedoms) the followings rights are protected: liberty and security (6), respect for private and family life (7), protection of personal data (8), the rights to marry and to found a family (9), freedom of thought, conscience and religion (10), freedom of expression and information (11), freedom of assembly and of association (12), freedom of the arts and sciences (13), the right to education (14), free-

¹⁶ See Article 1 of the German Constitution. For more on that see: I. v o n M ü n c h: “Godność człowieka w niemieckim prawie konstytucyjnym,” in: K. C o m p l a k (ed.): *Godność człowieka jako kategoria prawna* (2001), pp. 101–118.

¹⁷ See R. K u ź n i a r: “Karta Praw bez człowieka,” 24 *Tygodnik Powszechny* (2001). That author is of the opinion that “dignity, however protected and respected, has in the Charter lost its absolute character.”

¹⁸ Such an opinion is presented by K u ź n i a r, *ibid.*

dom to choose and an occupation and right to engage in work (15), freedom to conduct a business (16), the right to property (17), the right to asylum (18) and protection in the event of removal, expulsion or extradition (19).

Let us mention some interesting innovations in the Charter's regulation of the above rights. In Article 7 the word "communication" instead of the traditional "correspondence" is used. Protection of personal data as described above is one of the "new" rights and is, therefore, quite comprehensively regulated and furnished with the proposal for a control mechanism.

In Article 10(2) right to conscientious objection is recognised as an element of freedom of thought, conscience and religion. For the first time in the history of European human rights documents the "freedom and pluralism of media" is recognised. There was some criticism of the fact that those rights are not "guaranteed," but only "respected." However, since the Union does not have any powers in this area the provisions of Article 11 protect this right only from possible encroachments by the Union.

Serious controversies arose over the problem of how the right to education (Article 14) should be formulated. The outcome was that access to vocational and continuing training was added in terms similar to the provisions of European Social Charter. Only compulsory primary education must be free.¹⁹ Parents have a right to "ensure education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions."

A new formula compared with other international treaties is used in Article 15: the "right to choose occupation and right to engage in work" instead of the traditional "right to work."²⁰ Such wording clearly excludes any possible claims for being provided with jobs.

For the first time in human rights documents the freedom to conduct a business has been included, in Article 16. This is a right that has been recognised in the jurisprudence of the Court of Justice.

The right to property (Article 17) is limited to "lawfully acquired possessions." Expropriation is allowed only in the public interest and in cases and under conditions provided for by law. Also the use of property may be regulated in the general interest.

A rather disappointing formula for the right to asylum is used in Article 18 in which reference is made only to the 1951 Geneva Convention and its Optional Protocol of 1967 and to the Treaty establishing the European Community. These documents are seen as inadequate answers to this problem. Nevertheless, due to lack of agreement, it was impossible to find a better formulation.²¹

Chapter III ("Equality") covers a wide range of provisions. In Article 21 to the traditional non-discrimination criteria used in other human right treaties – sex, race,

¹⁹ *Universal Declaration* in Article 26 and *International Covenant on Civil and Political Rights* in Article 13 para. 2 contains similar provisions. However, those documents envisage the gradual introduction of free education at the higher level as well

²⁰ See Article 6 of the *International Covenant on Economic, Social and Cultural Rights*.

²¹ According to the Treaty of Amsterdam the Council must adopt within a period of five years specific measures related to refugee policy. See Art. 63 of the *Treaty establishing European Community* (consolidated version).

colour, ethnic or social origin, language, religion, political or other views, property, and birth – have been added such potential new grounds for discrimination as genetic features, membership of a national minority, disability, age and sexual orientation. One has to remember that this list is not exhaustive. For example nationality is not included. However, in conformity with Article 12 of the Treaty establishing the European Community Article 21.2 declares that discrimination on grounds of nationality within the scope of the community law is prohibited.

The Union is quite often accused of promoting “homogeneous” tendencies. Consequently, the Charter makes it clear in Article 22 that: “The Union shall respect cultural, religious and linguistic diversity.”

Equality of the sexes is covered in a separate Article 23. It goes far beyond prohibition of discrimination: “Equality between men and women must be ensured in all areas.” The Charter reflects therefore the jurisprudence of the Court of Justice and offers a positive right to equality of the sexes.

The rights of the child (Article 24) are limited to certain aspects of childhood. The provisions of this article are borrowed from the UN Convention on the Rights of the Child and are to be interpreted in the light of that treaty. The Charter also details the rights of the elderly (Article 25) and the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community (Article 26). Those provisions are among the valuable contributions made by the Charter to international human rights law.

Chapter IV (“Solidarity”) deals with social rights. The inclusion of those rights in the Charter was a subject to acute controversy. The provisions of this chapter have been taken from other European documents, for example, the Revised Social Charter or Social Charter of the EU. Article 27 guarantees, at the appropriate levels, the rights of employees to information and consultation. Other provisions cover collective bargaining and action (Article 28), protection against unjustified dismissal (Article 30), fair and just working conditions (Article 31), prohibition of child labour and protection of young people at work (Article 32), protection of family and professional life including protection against dismissal for maternity-related reasons and the right to paid maternity leave and parental leave (Article 33), the right to social security and social assistance (Article 34), the right to preventive health care and medical treatment (Article 35), and access to services of general economic interest (Article 36). The last two articles of this chapter deal with environmental protection (Article 37) and consumer protection (Article 38). As mentioned above, there was little support for presenting those problems as individual rights. Accordingly the Charters refers only to “Union policies” in these areas.

In the whole area of social rights the drafters of the Charter were careful to avoid proclaiming new obligations and providing far-reaching entitlements. A very good example of this approach is Article 35. While guaranteeing the basic right to health care it also states that a “high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.” Such a formula

does not create a right but nevertheless states a concrete aim for Union policy in this area.

Chapter VII ("Citizens' Rights") deals with classic political rights – like the right to vote and be elected to the European Parliament (Article 39) and in municipal elections (Article 40) and the right to petition the European Parliament (Article 44). It covers also other civil rights and freedoms like the right of access to European Parliament, Council and Commission documents (Article 42), access to the Ombudsman (Article 43), freedom of movement and of residence (Article 45), and diplomatic and consular protection (Article 46). This chapter also contains a new but very important right – the right to good administration (Article 41). This right has already been created by the jurisprudence of the Court of Justice. The Charter makes it more concrete by specifying the requirements of good administration.

Chapter VI presents the basic rights in the field of criminal justice with the exception of the first sentence of Article 47 in which the general rights to effective remedy before a court of law has been established. The remaining provisions cover the right to fair trial (Article 47), presumption of innocence and the right of defence (Article 48), due process and proportionality of criminal offences and penalties (Article 49), and double jeopardy. Nothing particularly innovative has been included in these rights which is a welcome approach since they are already quite satisfactorily established in international human rights law and have a very rich jurisprudence in both the European and universal system.

The final chapter presents the general principles applicable to all the substantive provisions of the Charter.

5. Addresses and Restrictions

The question arises, to whom is the Charter addressed? The Cologne declaration required that the Charter should make rights more visible to the citizens of the Union. From this point of view, without going into details of the concept of Union citizenship, one can say that the beneficiaries of its provisions are citizens of the Member States of the European Union. But effectively speaking the Charter is in fact addressed to all individuals within the jurisdiction of the Union and its Member States. Only exceptionally do the provisions of the Charter refer to "citizens of the Union" as the beneficiaries. For example while freedom of assembly and association (Article 12 para. 1) is guaranteed to "everyone," it also says that "political parties at Union level contribute to expressing the political will of the citizens of the Union" (Article 12 para. 2), a formula that reiterates the provisions of Article 191 of the Treaty of the European Communities. Nevertheless it would be difficult to argue that right to association in the political parties can be restricted only to citizens of the Union. On the other hand, only citizens of the Union enjoy "the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State" (Article 15 para. 2).

As mentioned above, Chapter V deals with "Citizens' Rights." But some of the rights listed here are also addressed to "everybody" – for example, the right to good

administration (Article 41). Others are addressed, in addition to citizens, to “any natural or legal person residing or having its registered office in a Member State” Article 42 (right of access to documents), Article 43 (right of recourse to the Ombudsman), and Article 44 (right to petition).

The Charter makes it clear who are subjects responsible for implementation of its provisions. In accordance with Article 51 they are “the institutions and bodies of the Union with due regard for the principle of subsidiarity and the Member States only when they are implementing Union law.” In the light of Article 7 of the TEC the institutions in question are the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors.

The scope of guaranteed rights is delineated in Article 52. The Charter upholds the general rule, well established in international human rights law, that any restrictions must be provided for by law and must respect the essence of these rights and freedoms. Restrictions are allowed only in two situations:

- If they are necessary in order to meet objectives of the general interest recognised by the Union
- If there is a need to protect the rights and freedoms of others.

For interpretation of the Charter para. 2 and para. 3 of this article are crucial. These lay down that rights based on European treaties and the European Human Rights Convention should be interpreted in the same manner as in that treaties. In accordance with Article 53 the Charter should not be used as an argument for restriction of human rights. Abuse of rights is prohibited under Article 54.

6. The Charter and Polish Law

The Charter is not of a legally binding nature. Many of its provisions are controversial and are a result of far-reaching compromises. The axiological foundations of the Charter, presented in its preamble, seem to be rather vague. Let me only mention in this context the problems involved in “moral and spiritual heritage.” In the German version this appears as “moral and spiritual-religious heritage.” But a majority of the Convention members rejected any reference to a “religious” heritage. That being so, there arises the question of which version should be used for translation of the Charter into other languages?²² All this creates many dilemmas and problems for Union candidate countries. It is obvious that the Charter cannot be ignored. It is a politically binding document and it will have an influence on the development of human rights standards within the Union. However, Poland and other countries in the same situation have so far been denied the possibility of actively participation in the discussions about the Charter. The comprehensive character of the document means that some of its standards will have to be adopted and respected without any reservations. Others, however, have been left to national level

²² About that subject see an interesting commentary to the Charter in: S. H a m b u r a, M. M u s z y ń s k i: *Karta Praw Podstawowych z komentarzem* (2001).

to decide. The Union will use the provisions of the Charter in its standard-setting and policy-making decisions.

It can be claimed that the majority of the Charter's standards are already binding in Poland, in particular those which are based on the European Convention on Human Rights or the Social Charter. There are, however, many provisions whose interpretation may lead to serious controversies. Let me mention in this context Article 3 (Right to Life). All but one of the controversial aspects of this right remain up in the air. While the death penalty and executions are prohibited such questions as euthanasia, suicide and abortion are not regulated. The margin of discretion left to national legislators in those cases is bigger but not unlimited. As provided for in Article 52 the jurisprudence of the Strasbourg organs should be taken into account as well as other relevant provisions of EU law, for example those governing the principle of equality between men and women. Also, the problem of cloning of human beings should be interpreted in the light of the Convention on Human Rights and Biomedicine adopted by the Council of Europe on 4 April 1997 and its Additional Protocol of 12 January 1998.²³

Another example concerns the right to found a family (Article 9). No definition of family has been provided in the Charter. It is left for national legislators to decide the substantive scope of the right to found a family. Thus the Polish legislator is free to create the standards applying to this right.

At present adoption of the Charter does not require any immediate steps or revisions as far as human rights standards in the Polish legal system are concerned. Nevertheless this document deserves our attention at least from two points of view:

- Do we have in our legal system standards which are clearly contrary to those laid down in the Charter?
- What is our position in the debate which will lead to transformation of the Charter into a legally binding document?

As far as the first problem is concerned one could argue that the provisions of the Polish Constitution adopted in 1997 formulate modern standards of human rights protection and fulfil a vast majority of the Charter's criteria. At the same time it is obvious that in many areas practical implementation of human rights requires serious improvement. This applies to both standard-setting and implementation. Let me point in this context to such problems as: equality of the sexes, social rights, the rights of the disabled, the rights of the elderly, the right to a fair trial, and some new rights like the right to good administration, etc. Steps will have to be taken in order to improve this situation before accession to the Union.

With regard to the second problem one cannot expect the framing of a so-called "Polish position." Based on different political and ideological views there will be different opinions about many aspects of the Charter provisions including its axiological foundations. As I mentioned earlier, Poland and other Union candidate countries have been excluded from the debate about the Charter. If the Charter is to be part

²³ See T. J a s u d o w i c z: *Europejskie standardy bioetyczne* (1998).

of the future European Constitution and is expected to have a legally binding character this situation must be altered. This means that the European Union and its Member States should include representatives of the candidate countries in all debates about the Charter. At the same time these countries should also be more active in articulating their positions.

The European Union is in the process of creating a new quality in its integration policy. Adoption of the European Constitution will be a milestone along this path. The Charter must be seen as a crucial element of the prospective constitution. Inevitably, this document will be in the nature of a compromise. In some areas, however, it is impossible to reach a compromise. That makes it necessary to allow for national differences including on such fundamental questions as axiological foundations of adopted rights.

European Union Membership and Obligations under Bilateral and Multilateral Agreements to which Poland is a Party

EUGENIUSZ PIONTEK

I. Introduction

Accession of Poland to the European Union entails, among other things, harmonising its obligations under bilateral and other agreements to the Community regime. The scope of such harmonisation is a derivative of the internal legal order of the EU as a developed economic and monetary union and its treaty-based powers in external relations.

Article 307 of the Treaty of Amsterdam – TA (ex-Article 234 of both Treaty of Rome and Maastricht Treaty) states:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

Article 307 TA seems, therefore, to ensure the neutrality of the Community towards obligations under international agreements inconsistent with the Treaty which were concluded by Member States with non-member countries prior to accession of the former to the Community. Provisions akin to Article 307 TA were included in Articles 5 of the Accession Agreements with Great Britain, Greece, Spain, Portugal, Austria, Finland and Sweden.

It should be also noted that in *Juan C. Burgoa* case (1979), the European Court of Justice (ECJ) upheld such an interpretation of Article 307 TA and added:

That is without prejudice to the obligation of the Member State concerned to take, in accordance with the second paragraph of that Article, all appropriate steps to eliminate any incompatibilities between such agreements and the Treaty. Article 234 is of general scope and it applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty.¹

At the same time the ECJ stressed that the obligation of Member States to respect agreements concluded earlier with non-member countries "does not bind the Community as regards the non-member country in question."² According to the ECJ the Community is only obliged not to impede the performance by Member States of obligations which stem from a prior agreement.³ This means that for the Community such agreements are, essentially, *res inter alios acta*. As such, in accordance with the *pacta tertiis nec nocent nec prosunt* principle, they cannot be with prejudice to the Community.⁴

That is why para. 1 of Article 307 TA should be interpreted in close conjunction with para. 2, which unconditionally obliges every Member State concerned to "take all appropriate steps to eliminate the incompatibilities established." The admissibility clause of para. 1 must in this context be interpreted as a transitional provision whose aim is to help Member States to bring in line with Community law incompatible provisions in agreements with third countries.

A different interpretation would be inconsistent not only with the construction of Article 307 TA taken as a whole but also with the provisions of Article 10 TA (ex Article 5) which formulates one of the fundamental principles of Community law, the solidarity and Community loyalty.

Thus the neutrality of the Community towards obligations inconsistent with the TA incurred prior to accession by Member States under agreements with third countries should be understood as a temporary solution designed to help them to eliminate such incompatibilities.

If we take into account the character and scope of the competence and powers of Community institutions, it would be in danger of paralysis if agreements with non-member countries or even some of their provisions, which are inconsistent with Community law, remained in force for a prolonged period of time. The creation of such

¹ Case 812/79, *Attorney-General v. Juan C. Burgoa*, ECR[1980]2787, para. 6.

² *Ibid.*, para. 9.

³ *Ibid.*, para. 9; ECJ jurisprudence cites a number of examples where states successfully invoked Article 234 TEC, long after they had acceded to the Community, albeit only as regards internal relations subject to local jurisdiction. See: Case 13/93, *Office Nationale de l'Emploi v. Minne*, ECR [1994] I-371, Case C-158/91, *Ministere Public and Direction du Travail et de l'Emploi v. Levy*, ECR [1993] I-4287. These cases concerned the incorporation into national law of the provisions of ILO Convention 89 prohibiting employment of women at night in industry, which is inconsistent with Article 5 of Directive 76/207/EEC ("Equal Treatment Directive," OJ L 39/1976). It should be noted that the Commission in a 1997 communiqué (COM/87/105) called on the Member States to denounce this Convention. See also C-197/96, *Commission v. France*, ECR [1997] I-1489.

⁴ See Article 34 of the Vienna Convention on the Law of Treaties; see also C. P u g h, O. S c h a c h t e r, H. S m i t: *International Law. Cases and Materials* (1982), pp. 632–634; Comp. I. B r o w n l e e: *Principles of Public International Law* (1990), pp. 622–626; M. F r a n k o w s k a: *Prawo Traktatów* (1997), pp. 128–131.

a danger would suggest that the state concerned acceded to the Community *mala fide* with at least the intent of possibly harming its interests and the interests of other Member States, which is inconsistent with a fundamental principle of treaty law and international law as a whole.

II. Classification of Harmonisation Measures

The specificity of the necessary adaptations derives from the autonomous character of the internal legal order of the European Union in relation to public international law and the autonomy of the European Community in the vast sphere of legal relations with non-member countries where it enjoys exclusive competence or shares it with the Member States. From this point of view two fundamental categories of obligations arising from international agreements of the acceding states can be singled out.

1.1. The first category consists of obligations arising from agreements concluded by Poland with the Community as a distinct subject of international law as regards mutual relations with the Community as such. The second category consists of obligations under other international agreements.

Obligations in the first category will, as of the date of accession, be superseded, with derogatory effect, by the provisions of the Accession Agreement and the treaties establishing the European Union and the Economic Community as amended by the Treaty of Amsterdam⁵ or the Nice Treaty⁶ (if it has entered into force by the date of accession).

1.2. Obligations in the second category should be, from the point of view of the necessary harmonisation, classified as follows:

a) Obligations arising from the international agreements of the acceding country with the Community as a subject authorised to act in a particular area of external relations, and with Member States of the European Union.

b) Obligations arising from the international agreements of the acceding state with non-member countries.

1.2(a). The first kind of obligations insofar as they are covered by the provisions of the primary and secondary law of the European Community governing the internal legal order of the Community, will be replaced with the relevant provisions and acts of the harmonised national legislation of the Member States, the acceding state's internal law included.

As regards obligations arising from relations not directly covered by Community law or Community agreements with non-member countries to which acceding states have been admitted,⁷ and from other agreements concluded between the acceding

⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, signed at Amsterdam, 2 October 1997, OJ C 234, 10.11.1997.

⁶ Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJ C 80, 10.03.2001.

⁷ E.g. Convention between the European Economic Community and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation on the simplification of formalities in trade of goods (OJ L 134/1987) and Council Decision 87/267/

state and Member States of the European Union, the existing obligations can be maintained in their primary version within the framework of the public international law regime, or in a modified version with the aim of ensuring their consistency with the *acquis communautaire* by mutually agreed textual modification or by application interpretation, depending on the conditions of the legal environment in which they will apply. Such dependency may emerge as regards obligations arising from specific agreements as a whole or in part, e.g. in relation to agreements on legal assistance. Because of the dynamic character of Community law such harmonisation will be of a continuous character.

1.2(b) To be able to estimate the influence of accession to the European Union on an acceding state's agreements with third countries and international organisations, the system and content of the rights and obligations of the Community with respect to these states and organisations in specific areas is of a great importance. It should be stressed, however, that the Community uses two different kinds of legal instruments for its relations with non-member countries and international organisations.

The first kind consist of unilateral acts such as Community regulations and decisions in the sphere of detailed aspects and the Community's association procedures with respect to "overseas countries and territories" and as regards various aspects of the common commercial policy such as antidumping and countervailing measures and other related matters. The Community's freedom of action in these areas is, however, conditioned by the obligations arising from the WTO system.⁸

The second category of prerogatives consists of the Community capacity to establish its rights and obligations with non-member countries and international organisations by means of international agreements. In this regard the Community's competence is generally of a twofold character, that is, exclusive or non-exclusive (shared with Member States).⁹ The general principles according to which *ius contrahendi* is exercised are laid down in Article 300 TA.

2.1. Exclusive powers as regards treaty-making power are explicitly conferred on the Community under Article 133(1)–(4) TA. Specific exclusive powers to conclude international agreements are also conferred on the Community by Article 23 of the Protocol on the European System of Central Banks and the European Central Bank.

EEC of 28 April 1987 adopting this Convention, or Convention between the European Community, the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation on a common transit procedure (OJ L 226/1987) and Council Decision 87/415/EEC adopting this Convention.

⁸ See N. E m i l i o n, D. O'K e e f f e: *The European Union and World Trade Law – After the GATT Uruguay Round* (1996); K. J. K u i j w i j k: *The ECJ and the GATT Diemna. Public Interest versus Individual Rights* (1996); P. D i d i e r: *WTO Trade Instruments in EU Law* (1999).

⁹ On the Community treaty competences see D. M e G o l d r i c k: *International Relations Law of the European Union* (1997); T. T r i d i m a s: "External Competence of the Community and the Case-Law of the European Court of Justice: Principle versus Pragmatism," 14 *Yearbook of European Law* (1994); I. M a c l e o d, I. H e n d r y: *Practice* (1996); C. W. A. T i m m e r m a n s, E. L. M. V ö l k e r: *Division of Powers between the European Communities and their Member States in the Field of External Relations* (1981); J.-P. P i e t r i: "La valeur juridique des accords liant la C.E.E.," (1976) 12 *Revue trimestrielle de droit européenne* (1976), Part I: No. 1, pp. 51–75, Part II: No. 2, pp. 194–214.

In the areas in question, on joining the European Union, an acceding state's agreements with third countries will expire and be replaced by the relevant Community agreements. In the absence of international agreements relations between the Community and third countries will be of a non-contractual nature. The acceding state should, therefore, take the appropriate prior action in relations with these third parties.

2.2. Non-exclusive *ius contrahendi* is explicitly conferred on the Community by Article 310 TA as regards association relations with third countries and international relations, by Article 302–304 TA as regards relations with the United Nations, the Council of Europe and the Organisation for Economic Co-operation and Development, by Article 133(5) as regards services and intellectual property, by Article 181 TA as regards the development policy, by Article 174 TA as regards the environment protection, by Article 170 TA as regards the research and technology development, by Article 149(3) TA as regards education, by Article 151(3) TA as regards culture, by Article 152(3) as regards public health and by Article 155(3) TA as regards transeuropean networks.

2.3. Separate note should be made of the recognition by means of a teleological interpretation of the Community's treaty making capacity as an implied power and its right to exercise this power in areas covered by common policies whenever conclusion of an agreement is necessary to achieve Treaty objectives. Such an interpretation was first delivered by the ECJ in *ERTA* (European Road Transport Agreement),¹⁰ followed by *Kramer*¹¹ and *Inland Waterways*.¹² In *ERTA* it stated that exclusive *ius contrahendi* belongs to the Community in all matters which are governed by Community regulations in internal relations; in other cases it has ruled that *ius contrahendi* is shared between the Community and the Member States in matters where the powers of the Community and Member States overlap.¹³ The ECJ opinion is of historical importance in that parallel treaty-making powers in the said area are explicitly conferred by Article 133(5) TA.

3. Parallel (shared, mixed, joint) powers covers *inter alia* matters where adoption by both the Community and all the Member States is needed for an agreement to be concluded. In the majority of cases, however, the Community and the Member States may act autonomously. It is often the case that only the Community or only the Member States concerned exercise *ius contrahendi*; in other cases the Community and the Member States decide to act jointly. This depends mostly on whether or not the character of treaty obligations requires Community and Member States co-operation in view of the subject and purpose of the international agreement in question.

A deeper analysis of the subject discussed here is not our purpose. However, an assistance agreement for development, which was concluded autonomously by the

¹⁰ Case C-22/70, ECR [1971]263.

¹¹ Case 3, 4 and 6/76, ECR [1976]1279.

¹² Opinion 1/76, ECR [1977]741 on the Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels, comp. Case C-57/95 *France v. Commission*, 2 *Common Market Law Review* (1997), p. 935.

¹³ Opinion 1/94, ECR [1994] I-5267 on Competence of the Community to Conclude International Agreements on Services and Protection of Intellectual Property.

Community with India to promote democracy and human rights, can serve as an example. The ECJ proceedings concerning the admissibility of the autonomous conclusion of this agreement by the Community throws an important light on the interpretation of the basis of the Community's *ius contrahendi* in the sphere of shared powers in the context of the purpose of agreements. In its judgement the ECJ stated that Articles 130u and 130y (now Articles 177 and 181 TA) regarding the Community's powers in the field of human rights and democracy-related development assistance were, as Community principles and objectives, of the constitute a sufficient basis for autonomous conclusion of the agreements in question.¹⁴ It should be stated, however, that in its opinion on the Community's powers to conclude international agreements in matters covered by shared competence, the ECJ pointed out that the Community and its Member States should co-operate when concluding them.¹⁵

4. The European Community maintains active relations in an institutionalised form with various international organisations. Article 302 TA stipulates that "it shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies. The Commission shall also maintain such relations as are appropriate with all international organisations." Apart from this general authorisation, Article 304 TA contains important provisions according to which "the Commission shall establish all appropriate forms of co-operation with the Organisation for Economic Co-operation and Development, the details of which shall be determined by common accord."

Co-operation with other international organisations is traditionally used by the Community to agree on common standards in such crucial areas of economic and cognate relations as free movement of capital, competition, environmental protection, etc., constituting the basis for harmonisation of the national law of OECD members for their internal needs and from the point of view of co-operation with other member states and international organisations with the inevitable influence of such decisions on the provisions of international agreements.

It should also be mentioned that further to Article 303 TA (ex Article 230), "The Commission shall establish all appropriate forms of co-operation with the Council of Europe." In implementing this provision the European Community endeavours to use this forum to disseminate its own standards among non-member countries which belong to the Council of Europe.¹⁶

¹⁴ Case C-268/94, *Portuguese Republic v. Council*, ECR [1996] I-6177.

¹⁵ Opinion 1/78, ECR [1979] 2871 and 2913 on International Agreement on Natural Rubber. On the Community agreements concluded within the framework of the mixed competence see also D. O'K e f f e, H. S c h e r m e r s: *Mixed Agreements* (1983); E. C r e m o n a: "The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community," 2 *Oxford Journal of Legal Studies* (1982); N. N e u w a h l: "Joint Participation in International Treaties and Extnal Power by the EEC and its Member States: Mixed Agreements," 28 *Common Market Law Review* (1991).

¹⁶ See inter alia *Relations between the Community and the Council of Europe*, COM(89)124, also Convention on the Elaboration of a European Pharmacopoeia which aimed at harmonisation of the specification for medical substances manufactured in all European countries, see also doc. SEC(87)190. EFTA Group of Legal Experts, Possible Models for Cooperation between the EC and EFTA States.

But the Community's activities in the OECD or the Council of Europe do not eliminate emergence of differences between arrangements adopted in these fora and the Community's own rules in the relevant areas. The Community constantly reserves for itself the right to autonomous regulation of all matters falling within the scope of its internal legal order.¹⁷ Compliance in national law with standards developed by these and other organisations or their transposition to international agreements, does not ensure per se conformity with Community law by virtue of its primacy for all Member States, and so also for acceding states in their mutual relations. It is thus another area for review on the threshold of membership in the European Union. One example of differences between the Community legal order and international standards agreed with its Member States' participation is Council Regulation 954/79¹⁸ and the UNCTAD Linear Conferences Convention.

5. In the treaty relations of acceding states with third countries the first step should be a review of these relations from the point of view of their consistency with a European Union Member status. If necessary, the next step should consist in renegotiation of agreements with third countries to bring them in line with the Community regime.

An all-embracing definition of the kind and scale of influence exerted by this category of the Community agreement on obligations arising from agreements binding acceding states is impossible.

For example, the already mentioned Community assistance agreement with India, may be in principle considered neutral in respect of any agreements of analogous substantive scope concluded by acceding states with India. An agreement providing for assistance directed directly or even indirectly against democracy, the rule of law and respect for human and fundamental freedoms could be an exception. Because, however, it is not common international treaty practice to include this type of negative clause in agreements, whether they might be antidemocratic in character can only be judged on the basis of their context, and this belongs to the realm of interpretation, which may be questionable. It seems, however, fair to say that it is only if the Community expresses some such reservations concerning a specific agreement between an acceding state and a third country that one can speak of an obligation arising on the part of the acceding state to reach a settlement with the Community on the matter in question. After acceding to the European Union, all disputes will be considered by the ECJ.

6. A separate category of Community obligations are the common regimes established in public international law agreements concluded between Member States with effects that bear directly or indirectly on the relations of these states as European

¹⁷ See *Relations . . . , op. cit.*, *supra*, n. 16, p. 3, where it was stated that there is a "need to preserve the scope for development of the Community's powers and not hinder the realisation of the objectives of the Treaty and the Single Act.

¹⁸ OJ L 121/1979, p.1., see also Case *Commission v. Council*, ECR [1989] 1517 where the ECJ ruled that the Member States should not accede to UNCTAD Linear Conferences Convention because of the existing divergencies.

Union Members, with non-member countries. This category consists mainly of agreements relating to areas covered originally by the Pillar III of the European Union and then incorporated into the Community framework. These agreements and the concomitant Community legal acts serve the purpose of building "a common area of freedom, security and justice."¹⁹ The best example is the Schengen agreements²⁰ with their far-reaching implications for relations between acceding states and third countries in the area of external border controls, readmission, immigration, asylum and related matters.²¹ Poland, therefore, will be obliged to renegotiate agreements with third countries on such matters with a view to bringing them in line with the Community standards effective from the date of accession to the Union. If the negotiations fail, these agreements or their relevant provisions must be denounced by Poland with effect from the date of accession or any other specified by the Accession Agreement. In the sphere of non-contractual relations in the areas covered by the Schengen system, Poland should conclude the relevant agreements with third countries or regulate its relations on an autonomous basis if conclusion of an agreement proves impossible or impractical. It should be presumed that Poland will be entitled to accede as a party to all agreements concluded by the Member States as from the the signing of the Accession Agreement at the latest.

7.1. The acceding states may face complicated harmonisation processes in the sphere of treaty obligations with non-member countries in areas covered by special Community regimes such as all sectors of transport and trade relations. In these areas obligations in regard to specialised agencies and international institutions (non-governmental or governmental) intersect with the Community legal order and a complex of all kinds of bi- and multinational public international law and administrative law agreements, contractual law in international commerce and the legislation of each country with which the acceding state maintains relations in the matters in question.

The common transport policy covers transport within the Community, where different types of transport (road, rail, water and air) are regulated separately.²² The

¹⁹ See *inter alia* the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, OJ C 19/1999, Council Regulation 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, OJ L 234/1995, Council Regulation 574/1999 of 12 March 1999, OJ L 72/1999 and Council Decision of 10 July 1999 determining the legal basis for provisions or decisions forming part of the Schengen *acquis*, OJ L 176/1999. See also D. O'K e e f f e: "The Schengen Convention: A Suitable Model for European Integration," 11 *Yearbook of European Law* (1992), pp. 185–219; O. Seiffarth: *Die Änderungen im Bereich der "Dritten Säule" der Europäischen Union (Maastricht) durch den Vertrag von Amsterdam* (1997); *The Third Pillar of the Treaty on European Union. Co-operation in the Field of Justice and Home Affairs* (1996); A. D u f f (ed.): *The Treaty of Amsterdam. Text and Commentary* (1997), pp. 12–58.

²⁰ Polish edition: *Układ z Schengen i Porozumienie Wykonawcze do Układu* (1998).

²¹ See: W. C z a p l i ń s k i: "Acquis communautaire w zakresie III filara Unii Europejskiej z perspektywy polskiego prawa wewnętrznego," in: C. M i k (ed.): *Implementacja Prawa Integracji Europejskiej w krajowych porządkach prawnych* (1998); W. C z a p l i ń s k i: "Układ z Schengen (Czy pierwszy bastion 'Twierdzy Europa?')", *Przegląd Zachodni*, No. 1 (1992), pp. 91–104; M. Z d a n o w i c z: "Zewnętrzne implikacje porozumień z Schengen," *Przegląd Prawa Europejskiego*, No. 1 (1996), pp. 17–25.

²² For the scope of harmonisation of Polish law to the requirements of the Community law see Progress Report, Urząd Komitetu Integracji Europejskiej (1998), pp. 255–270.

same field is covered also by the Community agreements with international organisations and a great number of non-member countries.²³ The problems and legal technicalities of transposing these regulations to the domestic legal orders of acceding states and transferring them to treaty relations with third countries are as complicated as the regulatory structure of the relevant markets.²⁴

The following steps should be taken in the harmonisation process:

a) identification in each sector of transport of agreements between Poland and third countries whose substance is at the same time covered by agreements concluded by or with the participation of the Community and a comparative analysis of the substantive scope and the content of the obligations;

b) identification of agreements with third countries and international organisations, to which Poland is a party, not covered by the agreements concluded by or with the participation of the Community to determine their consistency with the Community legal order in a relevant sector of transport.

Generally speaking, in the process of harmonisation of Poland's treaty obligations in the area of transport in relations with third countries, special attention should be paid to the provisions on national treatment and reciprocity. The maintenance of these clauses in agreements with third countries after the accession of Poland to the European Union would be, as a rule, inconsistent with Community law requirements, at any rate without prior harmonisation of the principles relating to treatment of third country nationals with the treatment guaranteed them under the agreements concluded by the Community. On the other hand, the prior granting by Poland of the treatment reserved in the relevant areas in the Community legal order for Community nationals would unilaterally disrupt our market to the detriment of its own nationals. In this context attention should be paid to the provisions of Article 51 of the Europe Agreement between Poland and the European Community and its Member States. It stipulates that:

1. The provisions of this chapter shall not apply to air transport services, inland-waterways transport services and maritime cabotage transport services.
2. The Association Council may make recommendations for improving establishment and operations in the areas covered by paragraph 1.

7.2. Complicated legal problems also appear in the sphere of harmonisation of Poland's treaty relations with third countries in the area of trade as the commercial policy comes within the exclusive competence of the Community except for a specified catalogue of matters left to the competence of the Member States in the framework and under the supervision of the Community. Generally speaking, the Community acts as a successor of the rights and obligations of the Member states (as in the GATT case)²⁵

²³ For air transport see K. Myszona: *Status prawny przewoźnika lotniczego w świetle prawa Wspólnoty Europejskiej* (2000).

²⁴ *Ibid.*, pp. 207–235. The legal technicalities in the area of air transport were determined in relation to Poland in the PHARE Programme UNI-EXPERT Report on aviation law.

²⁵ Cases C-21-24/72, *International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit*, ECR [1972] 1227.

or as a party acting together with the Member States (as in the TRIPS case) where its powers depend on the special character of the legal instruments. Thus the point of departure in the process of harmonisation of Poland's treaty obligations in relations with third countries should be a detailed examination of their consistency with Community powers in the relevant areas as well as the principles of treatment extended by it to specified third countries autonomously or on the basis of bi- or multilateral agreements on free trade areas, association for development and others.

Article 27 of the Europe Agreement limits itself to a merely general obligation, according to which:

1. This Agreement shall not preclude the maintenance or establishment of Customs unions, free trade areas or arrangements for frontier trade except in so far as they alter the trade arrangements provided for on this Agreement.

2. Consultations between the Parties shall take place within the Association Council concerning agreements establishing such customs unions or free trade areas, and, where requested, on other major issues related to their respective trade policy with third countries. In particular in the event of a third country acceding to the Community, such consultations shall take place so as to ensure that account can be taken of the mutual interests of the Community and Poland stated in this Agreement.

In other words, Poland committed itself not to grant third countries treatment better than that granted to it by the Community. Thus the harmonisation process consists in subjecting commercial relations with third countries to the relevant Community regimes.

The following steps should, therefore, be taken in the harmonisation process:

a) identification of agreements concluded between Poland and third countries and international organisations regulating matters coming within the exclusive competence of the Community, where acceding states lose their *ius contrahendi*.

b) identification of agreements concluded between Poland and third countries and international organisations whose substantive scope is subject to agreements concluded with the participation of the Community, from the comparative angle of their scope and character of Community rights *vis-à-vis* its Member States.

c) Identification of agreements concluded between Poland and third countries and international organisations in relation to which the Community is not bound by any treaties, from the comparative angle of the scope and domain of its autonomous regime.

III. Methodology of the Harmonisation of Member States' Treaty Relations in the Field of Trade Adopted by the European Economic Community in the Process of Developing the Common Commercial Policy

1.

1.1. The first, exceptionally important legal act in the process of developing the common commercial policy (CCP) was Council Decision of 20 July 1960 on introduction of the so called EEC clause in bilateral agreements concluded between the Member States and third countries.²⁶ It provided for renegotiation and amendment of the relevant agreements if this proved indispensable to the phased implementation of the CCP.

The Member States were able to introduce the EEC clause to the majority of agreements in spite of serious objections from numerous third countries.

1.2. A Council Decision of 9 October 1961 on the procedure for mutual consultations while negotiating trade agreements between Member States and third countries and changes in the status of liberalisation with respect to these countries²⁷ obliged the Member States of the Community to forward to other Member States and the Commission the agenda of bilateral negotiations on the planned conclusion of new or resumption of existing trade agreements with third countries or the date of tacit prolongation of such agreements. On the basis of the obtained information an negotiating agenda was established. The opening of negotiations was subject to preliminary consultations within the Member States and the Commission.

The preliminary consultations also concerned the terms of trade agreements, any modification of these agreements and possibilities of exceeding quotas and imports from third countries with the assent of the Member States authorities.

1.3. A Council Decision of 9 October 1961 on unification of the application of trade agreements with third countries²⁸ stipulated that the duration of trade agreements concluded between the Member States of the Community and third countries could not exceed the transition period. As regards agreements which did not contain the EEC clause or which did not provide for one-year's notice of termination, could not exceed one year. However, the Council, acting on a proposal from the Commission, was authorised to make an exception to this rule. In that case, however, the quota lists, constituting an integral part of these agreements, would have to contain a clause providing for annual verification.

The Council also obliged the Member States and the Commission to review by 1 January 1966 all effective trade and navigation agreements concluded with third countries and to see that those agreements did not obstruct implementation of the

²⁶ OJ 84/1960, pp. 1955–1966 and *Europäische Wirtschaftsgemeinschaft – Kommission – Sechster Gesamtbericht über die Tätigkeit der Gemeinschaft (1 Mai 1962–31 März 1963)* (1963), p. 278.

²⁷ OJ 71/1961, pos. 1273.

²⁸ OJ 71/1961, pos. 1274

CCP. They were also required to agree with the Commission the expiry date of bilateral trade agreements concluded with third countries. The Commission was obliged to inform the Council of the results of implementation of the provisions of the Decision.

These acts contributed in a great degree to co-ordination of commercial relations between the Member States of the Community and third countries and provided the EEC authorities with a basis for implementation of the next step which, in accordance with Article 111 EEC (now repealed) was implementation of common action aiming at the harmonisation of the commercial policy.

1.4. A Council Decision of 25 September 1962 on framing the first CCP action plan aimed at inducing the Member States of the Community to gradually harmonise their commercial policies toward third countries. In particular the action plan recommended harmonisation of the import and export policy.²⁹

As regards import from GATT and non-GATT member states, which, however, observed GATT rules, full liberalisation was envisaged (with the exceptions permitted by GATT itself) and the schedules of goods were to be unified. As for imports from non-GATT member states which did not adhere to GATT rules, a quotas policy was to be applied. At the same time the action plan stipulated that the national quotas of the Member States and their autonomous liberalisation lists were to be eventually replaced by quotas negotiated or determined under Community procedures, which was to lead to the establishment of a single schedule of goods as far as imports from this group of countries were concerned.

As for export to third countries the action plan covered regulation of export subsidies at the level deemed necessary, unification of rules for liberalisation of exports and harmonisation of regulations concerning expansion of trade and promotion of sales on third markets.

Trade with the then communist states (so-called state trading countries) was covered by a special harmonisation regime.³⁰

1.5. Implementing the action plan on the CCP towards third countries established under Article 111 EEC for the transitional period, the Community institutions proceeded to harmonise the liberalisation schedules for third countries and to co-ordinate the actions of the Member States on abolition or reduction of quantitative restrictions in import from those states.

These issues were covered by three Council Regulations of 10 December 1968.

On the basis of Regulation 2041/68 a common liberalisation list was established. It concerned goods (Annex I) imported from third countries enumerated in Annex II. Annex I covered a vast quantity items classified according to Common Customs Tariff nomenclature. Annex II listed 127 states observing GATT principles (overseas territories included).³¹ Under the Regulation quantitative restrictions on imports of

²⁹ OJ 90/1962, pos. 2353, see also *Europäische Wirtschaftsgemeinschaft . . .*, *op. cit.*, *supra*, n. 26, pp. 278–280.

³⁰ OJ 14/1963, pos. 156, OJ 153/1963, OJ L 326/1969, OJ L 99/1974, OJ L 332/1975, OJ L 58/1976.

³¹ OJ L 303/1968, p. 1.

goods listed in Annex I were prohibited between Member States and the third countries listed in Annex II. The Council of Ministers was authorised to extend both annexes provided that no injury was caused to industry of goods within the Community pending full implementation of the CCP in accordance with Article 113 TEEC.

The Council of Ministers was also authorised to apply the following protection measures:

- removal of products from the liberalised list
- removal of states from Annex II
- establishment of common market quotas
- introduction of quantitative restrictions on imports of a product included in Annex if imports of this product threatened production of the equivalent or a directly competing product, or if interests of the Community Market so required.

Council Regulation 2043/68 of 10 December 1968³² introduced a common procedure for determining, allocating and overseeing the utilisation of imports of products from third countries.

The Member States were obliged to notify the Commission of import licences issued in each half year and other data necessary to evaluating the degree of utilisation of quotas. A Quota Management Committee consisting of representatives of the Member States and meeting under the presidency of a representative of the Commission was set up.

Council Regulation 2045/68 of 10 December 1968³³ on introduction of special procedure for imports of specific goods from specific third countries, was the next legal act in the area of bringing Member States policies' in line with the CCP. These products were not subject to quantitative restrictions. They were so-called "supervised goods" by the Council and could be imported only on presentation by importers in Member States of a certificate or other document (in the case of imports of a good forming part of the common organisation of agriculture markets) or in all other cases on the basis of a preliminary notification of importation. Moreover, the Council was the sole body authorised to introduce quantitative restrictions for supervised goods of imports of such good by the Member States in excessive amounts was detrimental to the production of goods within the Common Market.

The above Council regulations and decisions demonstrate that Community legislative activity further to Article 111 TEEC concentrated in the transition period on implementation of all the tasks in the area of realisation of the substantive scope of the CCP towards third countries, envisaged by the action plan provided in Article 113 TEEC, in the spirit of the provisions of ex-Article 235. This activity contributed to the protection of Community interests, in particular in the area of the organisation of agricultural markets and safeguarded domestic production in other branches of Member States' economies against excessive imports from the third countries.

³² *Ibid.*, p. 39.

³³ *Ibid.*, p. 43.

2. Development of the CCP in the Second Phase

As the transition period expired on 31 December 1969, the Community authorities moved to implementation of the tasks envisaged in Article 113 TEEC for the next phase. The legislative activity of the Community was aimed at unification of CCP rules as regards changes in tariff rates, conclusion of tariff and trade agreements, uniformity in measures of liberalisation, export policy and measures to protect trade, including against dumping or subsidies.

Under Article 113 TEEC the Commission was authorised to conduct negotiations on the conclusion of agreements with third countries, and the Council – on the basis of Article 114 – to conclude these agreements on behalf of the Community.

As for tariff agreements, the Community's exclusive competence was established before the Common Customs Tariff was introduced.

2.1. Council Decision of 16 December 1969 on gradual harmonisation of trade agreements concluded between the Member States of the Community and third countries and on negotiation of Common Market agreements³⁴ covered three fundamental issues of the treaty policy of the Member States of the Community as regards their relations with third countries.

Under the provisions of Title I of this Decision Member States were obligated to inform the Community of bilateral trade conventions, treaties and agreements with the third countries which, in the Member States' opinion, should be explicitly or tacitly prolonged. Member States notified the Commission at least three months prior to prolongation or termination of the agreement in question. Member States concerned conducted consultations on the information provided. If they stated that an agreement would not hinder the CCP during the period of prolongation, the Commission was authorised to submit a proposal to the Council – by way of derogation from the provisions of Article 1 of the Council Decision of 9 October 1961 – on acceptance of the explicit or tacit prolongation of the agreement. The prolongation period could not, however, exceed one year. If the agreement provided for one year's notice of termination there existed the possibility of extending it for a longer period.

Under the provisions of Title II of Council Decision (Article 7 and 8), the Commission was authorised to conduct negotiations on trade conventions, treaties and agreements with third countries in consultation with a Committee established on the basis of Article 113 TEEC and within the framework of directives issued by the Council.

On the basis of the provisions of Title III (Article 9), the Council, acting on a proposal from the Commission, after the prior obligatory consultation, could agree to bilateral negotiations of the Member States with third countries if negotiations based on Article 113 TEEC were not possible. This period was, however, limited to 31 December 1972. Article 9 constituted an exception to the Title II regulations and was to be applied if one of the Member States for important reasons considered it indispensable to open negotiations with a third state in order to prevent a disruption

³⁴ OJ L 326/1969, p. 39.

trade relations pending full implementation of the procedure foreseen in Title II The activities of Member States opening negotiations with third countries were subject to the provisions provided for in Article 10 of the Decision. Moreover, after the conclusion of the talks the Member State concerned forwarded the results of the negotiations to the Commission and notified other Member States. If no Member States expressed reservations to the Commission to the agreement under negotiation within five days of notification the negotiated agreement could, after notification from the Council, be finally concluded. In other cases, the agreement could be concluded if the Council, on a proposal from the Commission, acting by a qualified majority, assented to its conclusion.

The final provisions stipulated that the Council Decision bound the Member States as from 1 January 1970.

2.2. One of the important acts regulating issues related to imports from third countries was Council Regulation 1025/70 of 25 May 1970.³⁵ It enabled specific third countries to export goods which were not subject to quantitative restrictions.

The Council, on a proposal from the Commission, acting by a qualified majority, could assent to the addition of new products to the existing list of goods and to include new third countries in the list of states enjoying export liberalisation, provided, however, this would not lead to the necessity of introduction of the protection measures. Member States were, however, to inform the Commission of any dangers resulting from expansion imports of goods not subject to quantitative restrictions which might require resort to protection measures.

For these reasons, on a proposal from any of the Member States or on a Commission initiative, a consultation procedure within the Committee consisting of representatives of the Member States and the Commission, could be conducted. The consultations covered in particular the terms of imports and their expansion and the economic-commercial situation as regards imports of a particular product, as well as the protection measures to be taken.

In order to enable the Commission to evaluate the economic-commercial situation as regards the product in question, Member States were to inform the Commission of the development of the situation in the market in relation to trade in that product. If importation of a particular product from a third country threatened the production of the same or equivalent product within the Common Market, imports of that product could be subject to the supervision procedure, in accordance with Article 7 of Council Regulation 1025/70. The privileged states included in the list of exporting countries could not fully enjoy the rights arising from Regulation 1025/70, as imports of products not subject to quantitative restrictions was strictly supervised by the Commission and admissible to the amount meeting the needs of the Member States and not threatening the Common Market interests. In this way the Commission ensured the protection of its interests.

³⁵ OJ L 124/1970, p. 6.

2.3. On 19 December 1972 the Council adopted Decision 455/72 on establishing certain interim measures for the gradual harmonisation of the import systems of Member States of the Community with third countries.³⁶ It stipulated that if a Member State intended to change its autonomous import rules in relation to one or a group of third countries, it should notify the Commission and the Member States of the measures taken. On a proposal from the Commission or any other Member State the intended changes in import rules of the Member State concerned in relation to a third state were subject to prior discussion and the assent of the other Member States and the Commission in the consultation procedure.

The consultations were aimed at the evaluation of the possibilities to introduce common import rules in relation to the determined third country for a particular product; otherwise the Member States import rules were to be co-ordinated. Co-ordination was aimed at strengthening the Common Market and phasing common import rules.

If any of the Member States or the Commission stated that a change in the autonomous import rules of the Member State concerned weakened the Community or any of the Member States fundamental interest, the whole of the economic-commercial issues relating to the goods in question was to be a subject of joint analysis.

The Member State concerned could introduce changes in its autonomous import rules in relation to a third country:

- if no other Member State notified a need for consultations within five working days and after receiving the Commission assent;
- if another Member State or the Commission expressed no reservations during consultations, of which the Commission was to inform the Member States concerned.

In other cases the Member State concerned could introduce changes in its autonomous import rules only three weeks from the date of the start of the consultations. If, however, within three weeks the Commission, in accordance with Article 113 EEC, expressed reservations to the Council concerning the actions to be taken by a Member state, the changes in the autonomous import rules could be introduced only after the assent of the Council.

By way of derogation of the mentioned provisions the Member State concerned could introduce a change in its autonomous import rules in relation to one or more third countries, from 31 December 1974, under a condition the Council, within 5 weeks after the submission of the Commission proposal, shall not adopt a decision. This clause was introduced to the presented Decision with the intention of the socialist states, in accordance with Article 9 of the Council Decision of 16 December 1969.

Abolition of liberalisation or annulment or reduction of a quota could in urgent cases be introduced by the Member State concerned without prior consultation.

In the event of an economically warranted need for additional imports from a third state the Member state concerned, after utilising the established quota for the product in question, was entitled, in urgent cases, without prior notification to the Commis-

³⁶ OJ L 299/1972.

sion and other Member States, to create additional export opportunities for third countries. The resulting imports, however, could not exceed 20% of the quota.

In exceptional cases a Member State could, on the basis of Article 9 of the Council Decision of 16 December 1969, import from a third country non-liberalised and non-quota goods up to the highest quantity or value of imports of that product from the country concerned in any one of the preceding three years, increased by 20%. If the planned imports did not exceed the established limits, the Member State concerned notified the Commission *ex post* of the number of licences granted for imports from the state in question. On a proposal from one of the Member States or the Commission, consultations on measures taken by the Member State concerned in relation to a third country, could be held at a later date. Moreover, Council Decision 455/72 stipulated that to 31 December 1974 the necessary steps for harmonisation of the provisions on imports from the third countries would be taken.

Clearly, Decision 455/72 limited considerably the Member States competence as far as imports from third countries were concerned. At the same time it constituted an important step in the harmonisation of common import rules and made it impossible for third countries to increase exports to the Community territory above the quantities established by the Council Decision.

2.4. Council Decision 1439/74 of 4 June 1974 established common import rules for products imported by the Member States from 158 third countries, included in the common liberalisation list and specified in the Common Customs Tariff as items 01.01A to 96.06.³⁷ These products were not subject to any quantitative restrictions. In order to forestall any threats to domestic production from imports of liberalised goods, the Council established an obligatory informative-consultation procedure for the Member States of the Community.

This procedure provided in particular:

- for the need to take necessary protection measures
- for the necessity of supplying indispensable information on a situation as regards imports of liberalised goods

In accordance with the Council Decision, a supervision procedure as regards imported good competing with the internal production, was established. Imported good subjected to the Common Market supervision could be checked only after importer showed an import licence. Imports licence was granted on the basis of the application including a number of data on imported good, namely: the name, customs tariff position, country of origin and destination, price cif or franco border, precise volume of the good, date and place of receipt of the good. Imports licence was issued for strictly determined transactions within the framework of the existing import liberalisation.

In accordance with Decision 1439/74 the Member States were authorised to conduct the supervision procedure if imports of the particular good was not subjected to the Community supervision procedure. The Member States concerned notified the Com-

³⁷ OJ L 159/1974, p. 1.

mission on this fact. In the supervision procedure conducted by the Member States concerned, importer was obliged to show an import licence for a determined good from the third state.

In both cases the Member states were obliged to inform the Commission on the value and volume within the export licences, where imported goods and countries of origin were indicated.

Moreover, Decision 1439/74 authorised the Commission to introduce protection measures in the form of the shortening of the period when export licences could be used in case imports of the determined good from the third state threatened the production of the same or similar product, which could cause a damage. Independently from this, the Council could introduce other protection measures. The discussed Decision stated moreover that the Council will set up further measures aiming at the harmonisation of imports rules within the period expiring on 31 December 1975.

This Decision complemented the rules established for common organisation of agriculture markets and the Community and domestic implementing provisions resulting from it, as well as special rules set up, in accordance with Article 235 (at present Article 308) TA, for the processed agriculture products.

It should be stated, however, that Decision 1439/74 enabled a great number of countries to increase the export of goods not subject to quantitative restrictions to Member States of the Community.

The Community authorities introduced a number of protection measures with regard to imports in question which were aimed at protecting each Member State and the Community against unplanned or unintended imports even from this group of countries. Such liberalisation was, therefore, incomplete and fully supervised by the Community authorities.

2.5. With the end of the transition period and definition of the main aspects of the CCP implementation mechanism by the Community authorities in 1969, there began a process of setting the agenda for the expiry, prolongation or continuation of agreements concluded between the Member States and third countries. The position taken by the Community demonstrates its highly differentiated approach to Member States' contractual links with other countries based on the substance of these agreements, the way mutual obligations of the parties were formulated and the parties themselves.

a) The first act in this regard was Council Decision of 28 January 1969,³⁸ establishing a special regime of authorisation of tacit prolongation of determined agreements beyond the transition period. Under Article 1 the trade agreements mentioned in the annex to this decision concluded between the Member States and third countries, could be tacitly prolonged for a year.

b) In the same year, on 20 December 1969,³⁹ the Council adopted another decision determining which agreements, concluded between Member States and third countries, could be tacitly prolonged for a year (Article 1) or kept in force to 31 De-

³⁸ OJ L 43/1969, p. 15.

³⁹ OJ L 6/1970, p. 1.

cember 1970 (Article 2). The first category comprised 15 agreements, the second, of 22 agreements.

In the preamble to the decision it was noted that in accordance with the statement of the Member States of the Community, the prolongation or keeping in force to 31 December 1970 of such agreements does not constitute an obstacle to conducting negotiations with the Community, which, under ex-Article 113(3) TA, were to lead to the conclusion of the Common Market agreements with third countries.

c) Another Community act regulating agreements concluded between the Member States of the Community and third countries was Council Decision of 1 February 1971,⁴⁰ which permitted tacit prolongation or maintenance to 31 December 1972 of 37 agreements on trade, navigation and friendship. This decision made it possible to amend or terminate tacitly prolonged or still binding agreements in case during the period of prolongation it turned out that the provisions of these agreements were an obstacle to the introduction and implementation of the CCP.

d) Decision 182/73 of 18 June 1973 stipulated that agreements on trade, navigation and friendship and some other agreements included in the annex to the Decision, concluded between Member States of the Community and third countries, may be prolonged to 31 December 1970.⁴¹ The annex covered 79 agreements.

e) Council Decision 181/73 of 18 June 1973 prolonged the effectiveness of trade agreements concluded between Member States of the Community and 24 third countries.⁴²

f) Decision 327/73, adopted on 24 October 1973, referred in an annex to 74 agreements, trade protocols and economic agreements concluded between Member states and third countries, whose validity was prolonged to 31 December 1974 in the majority of the cases (some of the agreements were prolonged to the end of January 1975 while the trade agreement between Germany and Norway of 20 December 1950 was prolonged to 31 May 1975).⁴³

g) Council Decision 34/74 of 6 December 1973 on authorisation of prolongation or tacit maintenance of trade agreements concluded between Member States of the Community and third countries,⁴⁴ covered 46 agreements altogether. Article 1 of the Decision stipulated that the agreements and trade protocols mentioned in the annex to the Decision, concluded between Member States of the Community and third countries, may be prolonged or tacitly kept in force to the date given in the annex (in the majority of cases – to the end of 1974).

h) Council Decision 35/74 of 6 December 1973 stipulated that the agreements included in the annex may be prolonged to 31 December 1975.⁴⁵

⁴⁰ OJ L 31/1971, p. 18.

⁴¹ OJ L 189/1973.

⁴² *Ibid.*

⁴³ OJ L 301/1973.

⁴⁴ OJ L 30/1974.

⁴⁵ *Ibid.*, p. 7.

i) Annex to Council Decision 187/74 of 1 March 1974⁴⁶ mentioned 17 agreements and trade protocols concluded between Member states of the Community and third countries, whose validity was prolonged to the end of 1975.

j) Council Decision 482/74 of 17 September 1974⁴⁷ determined the validity periods of 24 trade agreements concluded between Member states of the Community and third countries. They were prolonged for 1975 and in the majority of cases, to 31 December 1975. Under the preamble to Decision 482/74, the validity of these agreements was prolonged on a proposal from Member States of the Community aimed at preventing disruption of contacts and trade obligations arising from these agreements. Member States argued that prolongation of the validity of these agreements did not hinder the possibility of conducting future negotiations with these countries within the Common Market framework or constitute an obstacle to introduction of common import rules for Member States by the Community authorities.

k) Council Decision 497/74 of 2 October 1974 prolonged the validity of trade agreements concluded between Member States of the Community and 87 third countries for 1975, and even for 1976 with some other countries.⁴⁸ These agreements were prolonged on a proposal from Member States of the Community pending their replacement by agreements negotiated within the Community framework. Because the majority of third countries did not enter into negotiations with the Community authorities, the EEC decided to prolong the validity of the trade agreements concluded between Member States of the Community with these third countries. Such a solution demonstrated the flexibility of the EEC.

l) Provisions provided for in Council Decision 566/75 of 16 September 1975 were a clear manifestation of this tendency. The decision prolonged the validity of trade agreements concluded between Member States of the Community and 85 third countries, in the majority of cases to the end of 1976, and agreements concluded with some of the countries as Greece, Iraq, Japan, Norway, Pakistan and Paraguay, to 1977.⁴⁹

m) Council Decision 278/76 of 24 February 1976 prolonged another 22 agreements with the third countries to the end of 1977.⁵⁰ The prolongation of the validity of these agreements was introduced on proposals from Member states aimed at preventing disruption of their contractual relations with these states, pending conclusion of agreements within the framework of the Common Market or extension to these relations of Community instruments.

n) Council Decision 376/76 of 8 April 1976 prolonged the validity of 87 trade agreements concluded between Member States of the Community and third countries for 1977, on the same conditions and for the same reasons as in the Decision of 24 February 1976.⁵¹

⁴⁶ OJ L 93/1974, p. 23.

⁴⁷ OJ L 266/1974, p. 1.

⁴⁸ OJ L 276/1974, p. 37.

⁴⁹ OJ L 247/1975, p. 29.

⁵⁰ OJ L 58/1976, p. 14.

⁵¹ OJ L 101/1976, p. 53.

o) By way of Decision 774/76 of 20 September 1976⁵² the Council prolonged the validity of 87 trade agreements concluded between Member States of the Community and third countries, in the majority of cases to the end of 1977, and as regards agreements with certain other countries – to 1978. Decision 807/76 of 4 October 1976 brought analogous solutions as regards a further 31 agreements concluded between Member states of the Community and these countries.⁵³

p) Council Decision 804/76 of 4 October 1976 prolonged to the end of 1978 the validity of 201 agreements on trade, navigation, friendship and other similar agreements concluded between Member states of the Community and third countries.⁵⁴

q) Under Decision 972/76 of 21 December 1976⁵⁵ the Council prolonged for one year the validity of 23 agreements concluded between Member States of the Community and third countries, in the majority of cases – to 30 June 1978.

r) Council Decision 341/77 of 25 April 1977⁵⁶ prolonged for 1978 the validity of 19 trade agreements concluded between Member States of the Community and third countries. Moreover, Decision 477/77 of 17 July 1977 prolonged further 85 agreements to 1978 (the agreement with Norway was prolonged to 31 May 1979⁵⁷).

s) Finally, with the Council's decision 650/77 of 27 September 1977⁵⁸ it was by the end of 1979 that the validity periods of 193 agreements – commercial, navigation and friendship – and various agreements concluded between EEC member countries and third countries, were presented.

3. Evaluation of the Methodology Accepted by the EEC for Introducing Common Commercial Policy

Starting point to the accepted procedure was the full inventory of commercial and related agreements of member countries with third countries and verification of contents and then on-going operational monitoring. On the other hand, provisions of the Rome Treaty did not univocally describe the material and subject scope of the EEC Common Commercial Policy in respect to third countries. Respective matters were formulated mainly in a functional manner, which is indicated by the provisions of Article 113, and especially Article 235 of the Rome Treaty. This opened before the Community Bodies, and also before member states, the possibility of relatively free shaping of the form and substance of the EEC Common Commercial Policy and of the way it is brought into force.

So shaped, EEC Common Commercial Policy was characterized by developed supervision-and-control powers of the Community. It deserves to be underlined, however, that the member states were provided, under the transition procedures, with the

⁵² OJ L 270/1976, p. 26.

⁵³ OJ L 283/1976, p. 22.

⁵⁴ OJ L 283/1976, p. 25.

⁵⁵ OJ L 366/1976, p. 21.

⁵⁶ OJ L 120/1977, p. 17.

⁵⁷ OJ L 197/1977, p. 26.

⁵⁸ OJ L 267/1977, p. 23.

possibility of applying for liberalization or more rigor in specific rules and with warranty for their consideration of such applications, with the condition that these will not be detrimental to the interests of member states and the Community as a whole. The possibility of taking into consideration of the interests of third-party states was not foreseen in the legal scheme of the EEC Common Policy. These states, and also their physical and legal persons interested in this, could in this situation seek protection of their commercial interests within the Community, exerting various types of pressure on the free-market partners in order to incline them toward desirable applications addressed to the EEC in order to cause thereby a respective action by its Bodies.

Third-party states could also seek to secure their own commercial interests within the Community by making respective agreements with the EEC.

IV. Closing Remarks

Poland's accession to the European Union is connected with the necessity of advance application of bilateral and multilateral agreements to the legal consequences of membership in this organization. Such adjustments, which in their essence require negotiations with the remaining parties of the respective agreements, should be preceded with detailed review conducted on one's own and in several instances also within the process of consultation with the Community, if this should ensue from the subject of the regulation and the party to respective agreements.

Into agreements regulating subject matter under exclusive jurisdiction of the Community there should be introduced clauses of expiration on the day that Poland attains membership in the European Union. In agreements regulating matters subjected to parallel competences of the Community and member states, the Community clauses should be included which reserve the introduction of adjustments to the Community policies or the replacement of respective agreements with agreements of the Community and of member states acting together (as in the case of association agreements etc.). Into remaining agreements, the Community clauses should be introduced which reserve the right of introducing adjustment changes into the autonomous policies of the Community unless these are beyond the scope of the Community law due to their subject matter.

Transition to the Second Stage of the Association between Poland and the European Communities and Their Member States¹

PRZEMYSŁAW SAGANEK

Introductory Remarks

The establishment of the European Communities and subsequent widening and deepening of the European integration required from Member States many important and costly changes of policy and law. It was reasonable to introduce them gradually or at least to make it possible for states to introduce them in such a way. Therefore, for example the establishment of the customs union had to take place within 12 years, this transition period had been divided into three stages. Also the establishment of the economic and monetary union was to take place within the transition period consisting of three stages.² Similar reasoning could be applied to the association between Poland on the one hand and the European Communities and their Member States on the other, established by the Europe Agreement signed on 16 December 1991.³ Though this agreement does not bring about full integration between Poland and the EC, its economic, social and political consequences are far-reaching.⁴ There is no question that the changes and reforms required in the light of the Europe Agreement had to take place in sequence and not instantaneously. According to the concept of asymme-

¹ Transition to the second stage was the subject of several legal opinions prepared by the team composed of W. Czaplinski, K. Pazderska, T. Skoczny and the present author. The author is deeply indebted to the other members of the team. Special thanks should be given to Prof. T. Skoczny, who was the initiator of those common research projects. All critical remarks concerning the present article should, however, be addressed to this author himself.

² The second of them was to start on 1 January 1994 (Article 116, former Article 109e EC Treaty). The date on which the third stage was to start was not directly indicated, but according to Article 123 (former Article 109 l EC), decisions preceding it were to take place at the latest immediately after 1 July 1998.

³ Europe Agreements were concluded with several states: Hungary (OJ L 347, 1993), p. 2), Romania (OJ L 357, 1994), p. 2), Bulgaria (OJ L 358, 1994), p. 3), Slovak Republic (OJ L 359, 1994), p. 2), the Czech Republic (OJ L 360, 1994), p. 2), Latvia (OJ L 26, 1998), p. 3), Lithuania (OJ L 51, 1998), p. 3), Estonia (OJ L 68, 1998), p. 3), Slovenia (OJ L 51, 1999), p. 3). In this paper references to the Europe Agreements should be read as referring to the Europe Agreement on the Association of Poland and the European Communities and their Member States, signed on 16 December 1991 (OJ L 348, 1993), p. 2).

⁴ This was evidenced in the worsening of the Polish balance of payments since 1992/1993, the time of the entry into force of the commercial part of the agreement.

try, the associated states (including Poland) have more time to adapt themselves to the association than the European Communities and their Member States.⁵

Article 6 of the (Poland–EC) Europe Agreement was devoted entirely to the transitional period of the association. This period had to be divided into two stages. It is precisely the transition from the first to the second stage that forms the subject of the present article. The transition of Poland has been anticipated since 1999 but has not taken place so far. On the contrary, analogous transition has already taken place with respect to Hungary and the Czech Republic. As the transition is not a strictly formal step but is dependent on both procedural and substantive law measures, it deserves more attention and will be discussed in length.

One should stress that there are more transitional periods in the Europe Agreement. The multiplicity thereof is due to the division of the agreement into two parts. The commercial part, embracing the chapter “Free movement of goods” was covered in whole by the competence of the European Community and could be concluded by the Community itself. On 16 December 1991 (the date of the signature of the Europe Agreement as such), an Interim Agreement on trade and trade-related matters was signed.⁶ This interim agreement repeated first of all the provisions of the Europe Agreement on movement of goods between the European Communities and Poland.⁷ The Interim Agreement (or in different words: the commercial part of the Europe Agreement) was made operational on 1 March 1992.⁸ The rules on the free movement of goods (included in the Interim Agreement) dealt mainly with the abolition of custom’s duties and other measures hampering trade in industrial goods. Trade in these goods was to be liberalised gradually. The liberalisation steps had to take place after the lapse of a prescribed period of time from the day of the entry into force of the agreement.⁹ We will not deal with those transitional periods any more, limiting our interest to the transition period provided for in Article 6 of the Europe Agreement only.

It must be remembered that for adoption of the Europe Agreement as a whole (including rules on freedom of establishment, free movement of persons, services, capital and co-operation in several fields) the approval of the Member States of the European Communities was necessary. After the ratification of the Agreement by Poland and the EU Member States and the approval by the Communities, the Europe Agreement entered into force on 1 February 1994. It is the starting point for the transition period provided for in Article 6 of the Europe Agreement.

⁵ J. G o m u ł a: “Dispute Settlement under Association Agreements with Central and Eastern European States,” 22 *P o l y B I L* (1995–1996), pp. 107–129.

⁶ O J L 114, 1992, p. 2.

⁷ To be exact, it included also provisions on the freedom of payments and rules of competition.

⁸ See: E. P i o n t e k: “Europe Agreement EEC – Poland (Legal Concept of a Scheme),” 19 *P o l y B I L* (1991–1992), p. 139.

⁹ As a rule, Poland was to abolish customs duties over the period of 7 years, see: A. v a n d e r K l u g t: “Association, Partnership and Cooperation Agreements with East European Countries,” in: P. N i c o l a i d e s (ed.): *The Trade Policy of the European Community: Legal Basis, Instruments, Commercial Relations* (1993), p. 65.

The Transition Period and Its Stages

Article 6 of the Europe Agreement reads:

1. The Association includes a transition period of a maximum duration of ten years divided into two successive stages, each in principle lasting five years. The first stage shall begin when this agreement enters into force.

2. The Association Council shall proceed regularly to examine the application of this Agreement and of Poland's accomplishments in the process leading to a market economy system.

3. During the course of twelve months preceding the expiration of the first stage, the Association Council shall meet to decide the transition to the second stage, as well as on any possible changes to be brought about as regards measures concerning the implementation of the provisions governing the implementation of the provisions governing the second stage. In doing so it will take into account the results of the examination mentioned in para. 2.

4. . . .

As can be seen, the transition period has to come to an end after a lapse of 10 years from the time of the adoption of the Agreement. Consequently, it will come to an end automatically on 1 February 2004. However, the transition from the first to the second stage of this period is not automatic. It will depend on a positive decision of the Association Council. Consequently, it would be a radical oversimplification to overlook the difference between the transition itself and the lapse of 5 years from the implementation of the Europe Agreement.¹⁰

One should stress that the transition to the second stage will impose upon Poland several obligations prescribed in the Europe Agreement. They will be discussed below in detail. Though in a short perspective this may be perceived as a disadvantage for Poland, the transition to the second stage must be assessed in its context. In this perspective it could be seen as an element of the principle of asymmetry thanks to which Poland has more time to adapt itself to the changes. Otherwise it could have already taken place on the date of implementation of the Europe Agreement. The end of the first stage is an alternative term, more convenient for Poland. In such a situation the unambiguous assessment of the transition to the second stage is not easy in terms of advantage or disadvantage.

The decision on the transition to the second stage is very important from the political and economic perspective. Both transition and lack of transition can be translated into terms of employment or unemployment, bigger or smaller budgetary revenue, better or worse climate of accession negotiations. The transition itself is a small step, which is preceded and presumably will be followed by serious events. Though they are not comparable with the results of the future accession of Poland to the EC, they are significant enough to merit our interest.

¹⁰ E. Skrzydło-Tefelska, R. Skubisz: "Skuteczność wewnętrzna prawa międzynarodowego. Układ europejski a wybrane kwestie spółek z udziałem zagranicznym," 8 *Rejent* (1994), p. 54. S. Sołtysieński: "Agreement on Association of Poland with the European Communities (Legal and Economic Issues)," 19 *POLYBIL* (1991-1992), p. 188.

It must be stressed that in order to assess the results of the transition one has to examine in detail the provisions of the Europe Agreement, which refers to the transition to the second stage. One could divide them into provisions which relate to rights and obligations, will be applicable only during the second stage and provisions and which determine the state of law required on the day of transition. The requirements of the latter type can be recognized as pre-conditions of the transition. In this case, strangely enough – even though the transition will enlarge the amount of the obligations of Poland, it will not take place unless Poland itself brings about the necessary changes of its law.

This conclusion must be accompanied by a reservation. It is possible that the decision of the Association Council on the transition to the second stage would dispense Poland from certain obligations, which would otherwise flow from the transition. One cannot exclude such a probability. The author is not competent to assess the political will of either of the parties to accept such a decision. The examples of the two associated states, which are already in the second stage of their respective associations, are not very promising as to the possibility of such derogation. On 11 April 2000 the EU–Hungary Association Council issued Decision No. 1/2000 on the transition to the second stage of the Association.¹¹ On 15 December 2000 an analogous decision was made by the EU–Czech Republic Association Council.¹² The two decisions are almost identical. They consist of two articles and a relatively short reasoning. As to articles, the first one merely states that the “transition to the second stage . . . is hereby effected.” The second one determines the date of the adoption of the decision. The reasoning is also succinct, as it refers first of all to the provisions of the respective Europe Agreements on the transition to the second stage (i.e. the equivalents of Article 6 of the Europe Agreement) and the dates of the enforcement of the respective agreement. The most important from our point of view is the 4th indent of the reasoning of each of the above-mentioned decisions. According to it: “The Parties are determined to comply with the obligations deriving from the transition to the second stage of the Association.” This provision seems to refer more to the future than to the past. This is not so obvious, as the preceding indent informs that “the Association Council . . . has regularly examined the application of the Europe Agreement” and the accomplishments (of respectively Hungary and the Czech Republic) “in the process leading to market economy system.” Though from a theoretical point of view these accomplishments do not have to equal the fulfilment of obligations, which refer to the transition to the second stage, the reality leaves no doubt as to the crucial importance of that element. If from the political point of view, the transition is a signal of the deepening of the integration, then it is dependent on the concessions made by the associated state.

The next paragraphs will be devoted to the provisions of the Europe Agreement referring to the transition to the second stage. Such a picture would be meaningless if

¹¹ Decision 2000/327/EC, OJ L 114/32, 2000.

¹² Decision 2001/128/EC, OJ L 48/22, 2001.

it were not accompanied by the presentation of the relevant Polish regulations. In some cases the clarity of presentation will require us to speak of the Polish law as it stood on the date of the adoption of the Europe Agreement and later.

The most important references to this transition are to be found in the chapters of the Europe Agreement which are dealing with the freedom of establishment and free movement of capital. The only exception is Article 42 of the Europe Agreement concerned with the movement of workers.¹³ It is of minor importance only, and will be briefly discussed at the end of the article. It is well known that the structure of the Europe Agreement resembles to some extent the shape of the EC Treaty.¹⁴ There are separate titles dealing with the four freedoms of movement (goods, persons – i.e. workers or enterprises, services and capital). In fact, the liberalisation of movement of workers and services are of such a limited scope, that it would be difficult to deal with them in a way comparable with the freedom of movement of goods and freedom of establishment. As we know, the provisions on the freedom of movement of goods refer to different transition periods, therefore, it is mainly the freedom of establishment that will remain within the sphere of our interest. The provisions on the freedom of establishment and the movement of capital are strictly interconnected. For this reason it is easy to define the sphere of our interest. It refers to the freedom of investments in Poland by persons (legal or natural) from the European Community.

The most important provision dealing with this topic is Article 44 of the Europe Agreement. It regulates mainly three questions:

- 1) the establishment of enterprises,
- 2) the treatment of enterprises already established and
- 3) the acquisition of real estate by foreign enterprises.

Similarly as in the European Community treaty, the main instrument to bring about the freedom of establishment is the prohibition of discrimination. The exact scope of this prohibition is still to be examined. The examination will be made separately with respect to each of the above-indicated topics.

Establishment of Community Enterprises in Poland in the Light of the Europe Agreement

Article 44(1)(i) of the Europe Agreement regulates the freedom of establishment of Community companies and nationals in Poland. According to this provision, Poland is to grant for the establishment of such companies or nationals treatment no less favourable than that accorded to its own nationals and companies. This provision sets a timetable for this liberalisation (understood as introduction of the national treatment). The exact time thereof depends on the kind of activity (sector). For some of them, the prohibition of discrimination has been in force since the adoption of the

¹³ Bearing in mind a very restrictive scope of the provision it would be difficult to call it "freedom of movement." On this movement see: L. Mitrus: "Swoboda przemieszczania się pracowników w Unii Europejskiej a Układ Stowarzyszeniowy," 11 *Państwo i Prawo (PiP)* (1998), p. 74.

¹⁴ Sołtyński, *op. cit.*, *supra*, n. 10, p. 181.

Europe Agreement. These sectors are listed in Annex XIIa to the Europe Agreement. They comprise most of the sectors of the manufacturing industry. Certain sectors of economy have to wait for liberalisation until the end of the transition period. They are listed in Annexes XIIc and XIId of the Europe Agreement and include i.a. banking and insurance.

In order to make the picture complete, one should mention sectors which are excluded from liberalisation as such. They comprise the acquisition and sale of natural resources and the acquisition and sale of agricultural land and forests.¹⁵

Fourthly, as one may expect, there is a group of activities, which are to be liberalised at the end of the first stage of the transitional period. The list of such activities is to be found in Annex XII b. It is of course of the greatest importance from our point of view and should be cited *in extenso*. According to it, by the end of the first stage the freedom of establishment should be granted by Poland in the following sectors:

1. Mining, processing of precious metals and stones, production of explosives, ammunition and weaponry, pharmaceutical industry, production of poisonous substances, production of distilled alcohols.

2. Services, excluding:

- financial services as defined in Annex XIIc;
- dealing and agency services in real estate and natural resources;
- legal services not including legal advice in business-related matters and international law.

As one can see, there are two basic groups of sectors, which are of interest from the point of view of the transition to the second stage – the manufacturing industry and the services sector. With a small mistake one could sum up that the end of the first stage should mean liberalisation for the entire manufacturing industry.¹⁶ The transition to the second stage shall bring with it the obligation to provide national treatment for the establishment in Poland of Community companies and nationals in a large part of the sector of services.

Of course, the requirements of the Europe Agreement set only the minimal level of liberalisation, discriminatory treatment can be eliminated sooner. Some safeguard clauses are provided for, as well. Both the economic reasons and the will to achieve full integration with the European Communities have made Poland do more than is strictly required in the light of the Europe Agreement at the moment. Still, there are areas in which the rules of the establishment of Community enterprises in Poland are discriminatory.

¹⁵ These sectors (or kinds of transactions) are listed in Annex XIIe.

¹⁶ There are only two exceptions in this respect: the freedom of establishment in the sectors of high voltage power lines and pipe-line transportation. They are to be opened at the end of the transitional period, i.e. 10 years after the adoption of the agreement.

The Polish Regulations on Foreign Investments

The Polish law regulating the establishment of foreign companies was the subject of rapid changes and great progress.

The socialist system established in Poland in the 1940's did not seriously consider the right of foreigners to invest in Poland. Such an idea could be compared with investments on the Moon. This reality must be kept in mind. As from a theoretical point of view, there were some regulations on the activities of branches and representative offices of foreign companies in Poland.

The economic crisis, which gave rise to the "Solidarity" movement, and the so-called "economic reforms" of the 1980's made Polish authorities more open toward economic activities of foreign persons. In 1982 an act on small enterprises established in Poland by foreign companies and persons¹⁷ was enacted. As its preamble referred to the so-called *Polonia* (that is to individuals of Polish nationality or origin, who live abroad), it was called an act on *Polonia* companies. This very act made possible economic activities of foreign entities in Poland. The initiation of this activity was dependent on prior consent of state authorities. The same procedure was applicable for the modification of the object of the activities. The importance of this act did not differentiate between foreign entities according to their legal form. Both natural and legal persons, as well as entities possessing no legal personality, could be given permission for economic activities in Poland.

In 1986 an act on companies with foreign participation¹⁸ was adopted. It required an administrative permit for the establishment of a company and prescribed a minimal 51% share requirement of Polish persons. The latter were limited to persons controlled directly or indirectly by the state authorities.

The end of the 1980's brought a radical change in the attitude toward economic activities as such. On December 23, 1988 a revolutionary Act on economic activities was passed by the Parliament. It introduced (or re-introduced after more than 40 years) the liberty of economic activities of Polish people. For many people it meant the reversal of the so-far real socialist attitude toward individual economic activities.¹⁹ The act on economic activities made it possible for everybody to engage in all economic activities, the exceptions were enumerated in the act itself. "Everybody" might mean also foreigners, but the scope of their economic activities was regulated in separate acts, which could be regarded as *lex specialis*.

In addition to the above-mentioned act of 1982, a new statute on companies with foreign participation was adopted and replaced the one from 1986. The new act was adopted on the same date as the above-mentioned Act on economic activities – i.e. on

¹⁷ Consolidated version in *Dziennik Ustaw* (Dz.U.) [Official Journal], No. 27 (1989), pos. 148, as amended.

¹⁸ Dz.U. No. 17, 1986, pos. 88.

¹⁹ See: A. W a ł a s z e k - P y z i o ł: "Status prawny przedsiębiorcy w świetle projektu ustawy – Prawo działalności gospodarczej," *5 Przegląd Ustawodawstwa Gospodarczego (PUG)* (1999), p. 2. Paradoxically, A. W a ł a s z e k - P y z i o ł indicates the lack of consistency of this act with the 1952 Polish Constitution, see: *ibid.*, p. 7, footnote 2.

23 December 1988. The instruments of these two acts were, however, completely different. The requirement of administrative permit for the establishment was still in force regarding economic activities of foreigners. As compared with the previous time, the acts of 1982, 1986 and 1988 meant also a great liberalisation, only when they are seen today, the narrow limits of their scope are more than evident.

On 14 June 1991 – that is half a year before the signature of the Europe Agreement, a new Act on companies with foreign participation²⁰ was enacted. One need not explain that there was only one possible direction of change – towards a more open economy and greater scope of liberalisation of foreign investment. The most important reform introduced by this act was the abolition of the requirement of permit for the establishment of a company with foreign participation. A few exceptions remained, however. They were enumerated Article 4 and Article 5 of the Act.

According to Article 4 of the Act, a permit for the establishment of a company with foreign participation was required if a company was to be active in any of the following fields:

- 1) management of sea ports or airports,
- 2) dealing and agency services in real estate,
- 3) military industry (unless a concession is required for a given kind of activity),
- 4) wholesale trade in imported consumption goods,
- 5) legal services.

According to Article 5 of the 1991 Act, in order to be established companies with foreign participation had to obtain concessions for activities, with respect to which a general concession requirement was in force.

We should pay more attention to these two requirements, though, at present, they are of historical importance only. What should be stressed is that some companies with foreign participation required an additional permit for the establishment as such. This requirement could be effective due to the limitation of the admissible forms of activities of foreigners in Poland. There was a stipulation, according to which foreign persons could “participate in profits from economic activities conducted in Poland” only within two legal forms, namely: joint-stock company (*société anonyme*, *Aktiengesellschaft*) and limited liability company (*société à responsabilité limitée*, *Gesellschaft mit beschränkter Haftung*). The establishment of such companies is dependent on the registration by the court. It can be effected only on the basis of the articles of establishment of a company. Such articles in each case have to indicate the aim of a company. If the aim of the company had referred to any of the above-mentioned areas, the court would have demanded from the applicants a permit for the establishment of the company, otherwise it would have denied their application for registration.

The same situation would have taken place with respect to concessions if they were necessary for a given activity. Concessions are used to regulate activities in some sectors regarded as sensitive, they are required from any persons or entities

²⁰ Consolidated version in: Dz.U., No. 26, 1997, pos. 143, as amended.

(both domestic ones or the ones with foreign participation). The only difference was that companies with foreign participation had to obtain their concessions before the very establishment, while domestic enterprises could apply for them later – i.a. before the direct engagement in the activities in question.

We should pay more attention to the list included in the former Article 4. The areas of economic activity indicated above comprised mainly services (though one can question whether a wholesale trade can be called a service). The only exception in this respect was the manufacturing of goods connected with military and defence matters. This detailed examination of provisions, which are no longer in force, was necessary mainly to explain, what progress has already been made and what was the basic aim of Article 44(1)(i) of the Europe Agreement. One should ask, what has this provision meant from the Polish perspective. Firstly, the freedom of establishment of Community companies was based on the prohibition of discrimination and the requirement of consent for the establishment of the company was to be eliminated, unless Polish companies were also under such an obligation. The same can be said about the obligation to obtain a concession at the time of the formation of a company. Secondly, the freedom of establishment was to be put into action gradually, the discrimination could have been eliminated step by step.

When one compares the list of activities indicated in Article 4 of the 1991 Act and in the Annex XIIb of the Europe Agreement, one can see similarities and differences. One can draw the conclusion that the very postponement of liberalisation until the end of the first stage or even of the transition period was due to the fact, that certain services and manufacturing of certain goods were regarded as more sensitive and therefore were subject to discriminatory rules. However, because of the lapse of time and (as one can expect) the approaching end of the first stage made it a problem of the day to limit the scope of discrimination still preserved by the 1991 Act. Wholesale trade, legal advice in the field of international law and manufacturing of ammunitions are just examples of sectors indicated in Annex XIIb of the Europe Agreement and covered by the regime of prior consent. There is no doubt that liberalisation was really necessary.

As stated earlier, the liberalisation steps actually made highly exceeded the minimum level required by the Europe Agreement. In 1996 a comprehensive amendment of the 1991 Act²¹ was adopted. Both Articles 4 and 5 were deleted. Since 4 May 1996 (the date of the entry into force of the amendment) the establishment of companies with foreign participation does not reveal any differences *vis-à-vis* all other companies.

The 1996 amendment meant the abolition of only a part of discriminatory provisions on foreign investment. What remained was the above-mentioned limitation of the forms of companies in the framework of which foreign persons could earn profits from economic activities in Poland. It meant actually that foreign entities were not allowed to participate in profits from: one-man enterprises, partnerships, registered partnerships and limited partnerships (KG). There is no doubt that such a requirement

²¹ Act of 29 March 1996, Dz.U., No. 45, 1996, pos. 199.

had a discriminatory character. This form of discrimination was severely criticised in the Polish legal literature as being not in conformity with the Europe Agreement, at least with respect to companies acting in the spheres indicated in Annex XIIa (i.a. the ones, which were to be liberalised on the entry into force of the Europe Agreement).

One should remember that in this context, the Europe Agreement contains several safeguard clauses, which could be invoked to justify some exceptions from the principle of non-discrimination. It must be remembered that only the above-mentioned two types of companies are legal persons in the light of the Polish commercial law. On the contrary, all partnerships are deprived of legal personality. One should refer to Article 58 of the Europe Agreement, which provides that "nothing in the Agreement shall prevent the parties from applying their law on . . . establishment of natural persons." Poland could possibly invoke this provision to justify less advantageous treatment of one-man enterprises and partnerships provided for in the Polish Civil Code. The decision also whether partnerships provided in the then Polish Commercial Code could be covered by this justification was more difficult. On the one hand, one could claim that they are not legal persons, so the economic activities were actually conducted by individuals. However, these partnerships, though without legal personality, have a so-called capacity to sue and to be sued before courts. Neglecting such an emancipation of a partnership *vis-à-vis* its members would be dubious from the point of view of the rules of interpretation of international agreements.

In this context, one should also remember Article 53. According to it, the provisions of the Chapter on the right of establishment "shall be applied subject to limitations justified on grounds of public policy, public security and public health." The fundamental question was whether the limitation of the forms of activities of foreigners in Poland could be justified on any of these grounds.

It is evident that from the perspective of a given state it is easier to prosecute its own nationals than foreigners. The risk of fraud makes states more ready to accept the formation of companies, which give better guarantee of solvency and reliability. The formation of joint-stock companies and limited liability companies is connected with the requirement of collecting sufficient capital. Its collection is to be certified. Although it is difficult to speak about full certainty, the guarantees connected with these forms of companies are much bigger.

It should be stressed that certain authors advocated the direct effect of the Europe Agreement. The idea of direct effect of Association Agreements was already present in the jurisprudence of the European Court of Justice.²² It was argued that Article 44(1)(i) was a self-executing provision.²³ It gave rise to an interpretation, according to which foreigners could invoke the right to national treatment and invalidate the limitation of allowable forms of economic activity. The idea itself was not so evident, specially before adoption of the new Polish Constitution. First of all, the rationale of the limitation adopted in 1991 Act was not of a purely illusory nature.

²² Judgement of the ECJ in case 181/73 *Haegeman v. Belgium*, ECR [1974], p. 449.

²³ See Skrzydło-Tefelska, Skubisz, *op. cit.*, *supra*, n. 10, p. 54.

Secondly, the practice of other parties of the Europe Agreement did not encourage the most generous interpretations.²⁴ One can see in this respect an astounding bond between the provisions of the Europe Agreement and domestic laws on foreigners. Poles could encounter difficulties in establishment in the EC Member States because of the provisions dealing with settlement; hence, settlement could not be granted because of the lack of establishment. The Europe Agreement, although from the point of view of the European Court of Justice is a part of EC law, is still an instrument based on reciprocity. The practice of the other party to the agreement must be taken into consideration.

The question of direct application of the Europe Agreement so as to narrow the limitation of forms of economic activities of foreign enterprises turned out to be a problem of theoretical interest only. According to the knowledge of the author, no proceeding before any Polish court related to the matter. Due to the changes in Polish law, the above-indicated problems belong now to the history of law.

The 1999 Law on Economic Activities

As was said before, Poland has gone very far in the liberalisation of the establishment of foreign enterprises. The last step in this liberalisation was the adoption on 19 November 1999 of the Law of economic activities. A few words must be said about this act. After forty years of socialism, Poland opts for complex statutes enforcing the freedom of economic activities as such (though for some people in different parts of world this freedom may seem to be self-evident). This right is indicated (or confirmed) in Article 5 of the 1999 Act, which reads: "taking up and conducting economic activities is free for everybody on equal rights, subject to the conditions provided by the law."

The 1999 Act replaced the old 1988 act, which was the subject of 40 amendments since the date of its adoption. However, it was not passed for convenience only. It was also necessary to bring the regulations on economic activities in conformity with other statutes.²⁵ The experience so-far of very liberal attitudes toward the initiation of economic activities has made Polish law-makers more rigid. Under the 1988 Act the initiation of economic activities (or in other words – the establishment of an enterprise) was dependent on mere serving a notice to local authorities. Since the adoption of the 1999 Act it has been dependent on a registration (which is itself regulated in separate provisions). This requirement is non-discriminatory in nature – it is applicable to both Polish and foreign persons.

²⁴ Several critical remarks are addressed at the EC Member States, see e.g.: V. von Wietesheim, I. Dudek: "Prowadzenie samodzielnej działalności gospodarczej na terenie Niemiec przez podmioty nie będące obywatelami państw Unii Europejskiej," 1 *Radca Prawny* (1997), p. 11. According to these authors, the initiation of economic activities in Germany is dependent on a permit, which is issued only if the economic activity in question is perceived as beneficial to the public. *Ibid.*, pp. 13–14.

²⁵ C. Kosikowski: "Nowe prawo działalności gospodarczej," 2 *PUG* (1999), p. 2.

A new statute was also necessary to introduce into Polish law such items as: the definition of small and medium-sized enterprises (one of the elements of adaptation of Polish law *vis-à-vis* the *acquis communautaire*). The 1999 act filled several lacunae, which existed under the old act, one of the most important of them was the treatment of branches of foreign enterprises. What is more, the new law regulated in a complex way both the treatment of Polish and foreign economic actors. The latter element is the very topic of this article and must be discussed in more detail.

According to the first indent of art.6, nationals of foreign states who were granted permission for settlement in Poland have the same rights as Polish nationals with respect to the establishment and conduct of economic activities.

The second indent of this article states that "on the basis of reciprocity, foreign persons have the same rights with respect to the establishment and conduct of economic activities as economic actors having the place of permanent residence in Poland." The reciprocity has to be certified by the Polish diplomatic missions, unless there is an agreement on reciprocity.²⁶ The Europe Agreement could certainly be qualified as an instrument based on reciprocity (at least *prima facie*).

According to the third indent, "when no reciprocity is granted, foreign persons can establish and conduct economic activities in Poland only in the form of limited partnership, limited liability company and joint-stock company."

First of all, one must point at the differences of objects of on the personal scope of indent 1 and the other two indents. The former applies only to physical persons (i.e. people). Only they can obtain the right to settlement. The above-indicated provision widens the scope of consequences of this right, its holder can also engage himself in economic activities in Poland. The same rules are to be applied to other persons if reciprocity is provided for. One should draw the conclusion that the Europe Agreement guarantees reciprocity and EC nationals and companies can conduct economic activities on a non-discriminatory basis.

The 1999 Law contains precise rules on branches of foreign enterprises established in Poland. Before the adoption of the 1999 Law, the right of foreign legal entities to engage directly in economic activities in Poland was doubtful. The provisions dealing with the establishment of branches (understood as parts of an enterprise as opposed to a subsidiary, the latter being equipped with legal personality) were very remote.²⁷ They were to be found in three regulations: from 1928, 1934 and 1976. Two of them pre-dated the Second World War, the third one was a product of a system that took quite a different stance with respect to foreign investments. Briefly speaking, all those acts required permit for the activities of branches of foreign enterprises in Poland. Now, the rules are precise enough to allow EC nationals and companies to engage directly in the economic activities in Poland.

²⁶ E. Bieńck-Koronkiewicz, J. Sieńczyło-Chłabczyk: "Działalność gospodarcza i przedsiębiorca na gruncie ustawy prawo działalności gospodarczej," 2 *PPH* (2000), p. 14.

²⁷ S. Sołtysiński already in 1992 rightly pointed at the necessity of changing these rules, Sołtysiński, *op. cit.*, *supra*, n. 10, p. 187.

The Access of Foreigners to the so-called “Liberated” Professions

The adaptation of Polish law to the Europe Agreement in the field of freedom of establishment cannot be limited to the elimination of discrimination in the basic statutes on economic activities. Certain activities are regulated in separate acts, some of them made Polish nationality a precondition for taking up the activity in question. The conclusion according to which the principle of non-discrimination is to apply to these activities is not obvious. One could even hesitate to call some of them “economic activities” at all. They may be perceived as a public mission. One could claim that, what is regulated is access to a profession as such, not the establishment of an enterprise. Some of these professions could be practised within the labour law relationship or outside it. In the first place the provisions on the movement of workers are applied, what means that no true freedom is in sight. On the contrary, if a given profession is practised outside a contract of employment, it is reasonable to claim that what is at stake is the establishment of enterprises. It is of hardly any importance whether these activities are regulated in one or several Polish statutes, what really matters is conformity or lack of conformity by Polish law as a whole with the Europe Agreement. What is at stake here is a *prima facie* conformity or *prima facie* non-conformity of the requirements of Polish nationality in the statutes regulating professions which are sometimes called “free” or “liberated” professions. The exact decision must be made case by case with respect to individual professions. Nevertheless, such a *prima facie* evaluation is of vital importance, as a positive one would finish any discussion about the necessity of eliminating discrimination of EU nationals in this respect. On the contrary, a negative one would still leave open the possibility of justifying discrimination referring to one of the safeguard clauses of the Europe Agreement.

One should greatly appreciate the fact, that there is a tendency toward open access to liberated professions also concerning foreigners, even in the fields in which a few years ago the requirement of Polish nationality could be perceived as natural. For example the Act on the Advocacy²⁸ no longer limits access to this profession to Polish nationals. What is required in this respect (together with certain other requirements) is the knowledge of the Polish language – in writing and in speaking, and the completion of the Polish law studies or foreign studies recognised in Poland as equivalent to the Polish ones.²⁹ Also the fact that a given person who is an advocate in his native country may give rise to exemption from the requirements otherwise binding on all candidates for this profession. According to Article 66(2) of this Act, the citizens of the European Union can be enrolled on the list of advocates by the National Council of Advocates, if they have practised as advocates in one of the countries of the European Union. Also in this case, the language requirement and the completion of law studies recognised in Poland as equivalent are applicable. What is quite obvious, the requirement of reciprocity is to be applied.

²⁸ Act of 26 May 1982, Dz.U., No. 16, 1982, pos. 124, as amended.

²⁹ Article 65(3) of the Act on Advocacy.

Almost the same solutions are used with respect to the so-called legal advisers.³⁰ The requirement of the Polish nationality was abolished and replaced by the requirement of the knowledge of language and the equivalence of law studies.

The Act on Auditors³¹ provided a possibility for foreigners to be enrolled on the list of auditors. To take use of this possibility a candidate has to be a person of recognised competence in any of the Member States of the European Union. Additionally he has to pass an exam on the Polish law before a special commission.

In this respect there are only a few statutes which refer directly to the Polish citizenship. One of them was the Act of 14 February 1991 on notaries.³² It does not provide for any possibility for foreigners to become a notary in Poland. In this context one should cite Article 53(2) of the Europe Agreement, which excludes all activities connected with the exercise of official authority from the scope of the liberalisation. This interpretation is supported by some observations. Even in the European Union the access to the profession of a notary is reserved for nationals of a given state.³³ There is no question that the authors dealing with the expected changes of the Polish laws on notaries, which are to result from the Polish accession to the European Union, do not even mention the question of nationality requirement.³⁴

The National Treatment of Community Companies

The treatment of Community companies and persons established in Poland is also to be based on the national treatment basis. What is interesting, according to Article 44(1)(ii), such treatment it is to be provided at the beginning of the transition period. This very fact could give rise to doubt, whether this question should be dealt with in the present article. However, the next sentence of Article 44(1)(ii) makes it clear, that if changes in law are necessary for the achievement of the national treatment, they are to be effected before the end of the first stage. That is why, from a practical point of view, the transition to the second stage is the deadline for the introduction of the non-discriminatory treatment. As was indicated above, this non-discrimination is in itself a pre-condition of the transition. This very fact makes us examine in more detail the problem of treatment of foreign companies.

First of all, one must examine the exact scope of this obligation. It means that both the scope of persons and of activities are covered by it. The lack of differentiation among several categories of persons makes it impossible to limit the scope of persons covered by Article 44(1)(ii) of the Europe Agreement as such. However, some differences are allowed by the other provisions of the Europe Agreement. Article 47 makes it possible to make special rules on the establishment of branches. Also the treatment

³⁰ Act on Legal Advisers of 6 July 1982, Dz.U., No. 19, 1992, pos. 145, as amended.

³¹ Act of 13 October 1994, Dz.U., No. 121, 1994, pos. 592.

³² Dz.U., No. 22, 1991, pos. 91, as amended.

³³ E. Skrzydło-Tefelska: "Swobodny przepływ osób a wykonywanie zawodu notariusza w Unii Europejskiej," 4 *Rejent* (2000), p. 180.

³⁴ R. Sztymyk: "Ewolucja notariatu polskiego w związku z przeobrażeniami w kraju i przystąpieniem Polski do Unii Europejskiej," 4 *Rejent* (1998), pp. 116–139.

of physical persons may be less advantageous because of i.a. the rules on the residence permits. That is why the general rules on foreign investments can be modified with respect to some kinds of persons.

Article 44(1)(ii) of the Europe Agreement does not clarify the scope of activities which are to be the subject of liberalisation (which is implicit in most of the cases of widening of national treatment). *Lege non distinguente*, the national treatment is to apply to all activities. Some remarks must however be made. As was shown, the freedom of establishment was to be effected in stages. In this respect the relationship between the equality of treatment on the one hand and the freedom of establishment on the other is to be examined. It is possible to imagine the equality of treatment without the freedom of establishment (it would simply mean that the enterprises already established are to be treated as national ones). In such a case it would not matter whether there is only one foreign enterprise established or several thousands thereof. One can also imagine a co-existence of some forms of the right of establishment of foreign enterprises with the lack of the equality of treatment. Some doubts can arise, however, if discriminatory treatment of foreign or foreign-controlled enterprises can also co-exist with the freedom of establishment exactly understood as prohibition of discrimination in the field of establishment.

This does not invalidate the separate character of the two concepts. Had the parties not attached importance thereto, one provision would suffice to deal with both the establishment and the treatment of foreign enterprises.

This distinction makes us examine in more detail the Polish provisions dealing with the treatment of foreign enterprises. As was presented above, the 1999 Law on economic activities sets a principle, according to which foreign enterprises are treated on the par with Polish ones, unless the provision of law state otherwise. The latter rules must be examined at present. They related to telecommunications, radio and TV sector and gambling. The criterion for this enumeration was the wording of the Polish statutes regulating the topics and providing for different treatment of foreign companies (foreign-controlled companies or enterprises with foreign participation). They will be discussed in turn.

Treatment of Community Enterprises in the Field of Telecommunications

The Telecommunications sector is an example of a regulated market. As a rule, access to it depends on licences and permits. In Poland this sector was regulated by the Act of 23 November 1990 on Post and Telecommunications.³⁵ Its Article 16 provided for restricted access of foreign enterprises to telecommunications services. Foreign enterprises or enterprises with foreign participation could not be granted concessions for several telecommunications services, especially international ones. Such enterprises could not also be granted permissions for the installation and use of radio-

³⁵ Dz.U., No. 86, 1990, pos. 504, as amended.

communication equipment if its scope of activity would exceed the borders of Poland. There were also some limitations restricting certain permissions for Polish nationals or companies in which the share of foreigners did not exceed a determined level.

The very fact of keeping such provisions in the first stage of the transition period was by no means contrary to the Europe Agreement. However, the approaching 5-year lapse period since the adoption of the Europe Agreement made the Polish authorities prepare changes in this field.

Telecommunications sector is the object of great interest in the EU law. The emergence of the EU law on the topic started as late as 1988 but since then the speed of the EU activities on the topic is impressive. One after another, access to the market of terminal equipment (1988), the market of services other than voice telephone (1990) and the rest of the sector (voice telephony and telecommunications network) was liberalised. The *acquis* in this field required adaptation of Polish law. Both the adaptation of Polish law to the *acquis communautaire* and the respect for the Europe Agreement were the reasons of the reform of the Polish telecommunications law.

On 21 July 2000 a new Act on Telecommunications³⁶ was adopted. As a rule it does not differentiate between the enterprises, according to the origin of their capital. Only transitional provision provides that until 31 December 2002 international telecommunications services may not be provided by networks exploited by foreign entities or companies with foreign participation.³⁷ This prohibition does not apply to the company – Telekomunikacja Polska S.A. and its successors.

This exception is of a provisional character only. The adoption of the new act meant that foreign enterprises and enterprises with foreign participation can now be given concessions for activities which were closed before. It is only in this context (positive, as it is) that one can evaluate the exception connected with international telecommunications services.³⁸ The above-mentioned provision of the new law is discriminatory. It does not mean, however, that it is contrary to the Europe Agreement. From our point of view the very conformity preceding the transition to the second stage is of minor importance, what really matters is a potential lack of conformity due to the future transition to the second stage. In this respect one should refer to Article 50 of the Europe Agreement. It allows Poland to derogate from the provisions on the right of establishment with respect to industries which:

- are undergoing restructuring, or:
- are facing serious difficulties, particularly when they entail serious social problems in Poland, or:
- face the elimination or a drastic reduction of the total market share held by Polish companies or nationals in a given sector or industry in Poland, or:
- are newly emerging industries in Poland.

³⁶ Dz.U., No. 73, 2000, pos. 852.

³⁷ Article 135(1)(2).

³⁸ On this limitation see: A. K r a s u s k i: "Wolność gospodarcza w prawie telekomunikacyjnym," 9 *PUG* (2001), p. 17.

With respect to activities included in Annex XIIb, such measures could be applied at the latest two years after the end of the first stage. Later they could be applied only on the basis of the authorisation of the Association Council.

What is of decisive importance is to assess whether telecommunications sector can be covered by any of the above-mentioned exceptions. There are serious grounds to believe that the exception relating to the restructuring of the market can be applied. The telecommunications sector undergoes deep changes in Poland. The competition is slowly introduced on the market, traditionally dominated by the Telekomunikacja Polska S.A. (Polish Telecommunication, referred to as TP S.A.). The market of telecommunications services is divided into three segments: local (comprising almost 50 numerical spheres), inter-sphere and international services. In 2001 the monopoly of TP S.A. had been undermined in the field of inter-sphere services. International telephony is the next field to be liberalized. It should be remembered that the monopoly of so-called national leaders in the telecommunication sector was kept until recently even by states, which are otherwise very keen on competition.³⁹ The states of Central and Eastern Europe could feel thrown into very deep water. The author does not feel as though competent to evaluate the economic aspect of the changes in the telecommunications sector. One can have the impression that we are at the beginning of a longer way and the self-confidence of the monopolist is still present. From the point of view of law, however, the evaluation is much more optimistic.

Treatment of Community Enterprises in the Fields of Radio and TV

Act of 29 December 1992 on Radio and Television⁴⁰ makes the right to broadcast radio and TV programs dependent on concessions. Such concession, according to Article 35(2) of the Act, cannot be granted to a company with foreign participation, unless the share of foreign persons or persons controlled by foreign persons in the capital of the company does not exceed 33%. Also the voting rights of such persons in the meeting of shareholders (stockholders) cannot exceed 33% (the number of voting rights usually reflects the share in capital; they may differ, however, as there may also be stocks with double or triple vote). Furthermore, concessions may be granted only if the statute of the company provides that Polish nationals are to form the majority of the members of the board of directors and the supervisory council.

The discriminatory character of the provision does not leave any doubt. The basic question is whether it can be justified by Article 50. There are serious grounds to believe that the argument about the restructuring of the market is plausible in this case as well. Literally speaking, private actors have less than 10 years to take up their activities. In result, as regards the TV sector, besides the public Polish TV and a group of smaller stations, there are two relatively strong private TV stations (POLSAT and TVN) and a new catholic station (Puls). Their main foreign competitors had much

³⁹ P. Alexiadis: "European Union Telecommunications Market," in: C.D. Long: *Telecommunications Law and Practice* (1995), p. 223.

⁴⁰ Dz.U., No. 7, 1993, pos. 34, as amended.

more time to prepare for competition. The rationale for this restriction is connected with the cultural identity of the broadcasters. The above-cited provision is rather a shield than a sword, it mainly tries to preserve the national character of broadcasting organisations. The decision as to preservation or elimination of such restrictions is very important from a legal point of view, such decision cannot however be made by lawyers themselves.

Poland has demonstrated its will to liberalise the sector in question. In 1999 a proposal for a new statute was sent to the Parliament. It was aimed to take up the limit of allowable shares of foreigners in the capital of broadcasting companies. It would be 49% instead of 33%, applying both to the share in the capital and to the percentage of voting rights. The requirement related to the majority of Polish nationals on the boards of the company would be preserved. This attempt has not been successful so far.

The Treatment of Foreign Enterprises in the Field of Gambling Services

The third exception from the national treatment is to be found in the Act on Gambling.⁴¹ Provision of gambling services in Poland is dependent on prior permission of the Minister of Finance. The permission can be given only to joint-stock companies and limited liability companies under certain conditions. The first is when a company is registered in Poland. According to the second requirement, the permission can be granted to the above-mentioned company, if all its shareholders are persons having Polish nationality and are not dependent on foreign persons or companies. We have to assess these two requirements in the light of the Europe Agreement.

Gambling is an activity of a high risk. Reliability of the provider of service is of crucial importance. The same must be said about the possibility of securing claims of potential victims of any potential infringements. This rationale justified the requirement of the special form of the company and of its Polish residence. Though after the Polish accession to the EU even such a requirement would be doubtful, in light of the Europe Agreement the requirement of the Polish residence does not seem to be contrary to non-discrimination. The latter cannot be said about the second requirement. It means that not only the company must be established in Poland, and not be dependent on foreign persons, but also none of its shareholders may be dependent thereon. This exclusion is very far-reaching. There were attempts to eliminate these limitations in 1999 and 2000. They have not been successful so far.

It is understood that the right of establishment in the field of gambling services could be postponed until the end of the first stage. However, it means that the changes are necessary before the transition. One can question whether Article 50 of the Europe Agreement could be applied somehow to this sector. It seems doubtful, however. It would be difficult to claim the existence of any special circumstances connected

⁴¹ Act of 29 July 1992, Dz.U., No. 68, 1992, pos. 341, as amended.

with the novelty of the sector or its restructuring. One should ask if gambling cannot be treated as one of financial services, which is to await liberalisation until the end of the transition period. Such a conclusion seems, however, unacceptable, as the list of financial services included in Annex XIIc to the Europe Agreement not only does not indicate gambling, but also services listed therein do not reveal any similarity *vis-à-vis* gambling. That is why the existence of discrimination in this respect could be perceived as a serious problem.

The Right to Acquire Immovable Property

The right to acquire immovable property is regulated in paragraph 7 of Article 44 of the Europe Agreement. It must be cited *verbatim*:

Notwithstanding the provisions of this Article, Community companies established in the territory of Poland shall have from entry into force of this agreement the right to acquire, use, rent and sell real property, and as regards natural resources, agricultural land and forestry, the right to lease, where these are directly necessary for the conduct of economic activities for which they are established.

Poland shall grant these rights to branches and agencies established in Poland of Community companies at the latest by the end of the first stage referred to in Article 6.

Poland shall grant these rights to Community nationals established as self-employed persons in Poland at the latest by the end of the transitional period referred to in Article 6.

As we can note the cited provision presents a time schedule of concessions. One of the deadlines refers to the end of the first stage and that is why the question of immovable property is discussed in this paper.

As one can see, three distinct sentences of para.7 regulate the situation of three different categories of persons: subsidiaries of Community enterprises (sentence 1), branches (sentence 2) and natural persons (sentence 3). The latter two groups are to be awarded sooner or later the same rights as the first one. That is why in this respect, a special care is needed to interpret the situation of companies with foreign participation. We can see that the situation of agricultural land and natural resources is regulated in a different way than the other categories of land. There is no obligation to grant the right of property for them, differently as it is the case with non-agricultural land.

One should also pay attention to the requirement of necessity of immovable property for the conduct of economic activities of a given company. We can ask, whether such necessity is to be found in each transaction, by which a foreigner obtains any right in real estate, or only to natural resources and agricultural land, hence the categories directly preceding the phrase deal with necessity. Though the wording of the English text would allow both interpretations. The comparison of the Polish and the English texts do not leave much room for doubt. The exact wording of the Polish text would rather sound "when it is necessary" and this would refer to several rights mentioned in Article 44(7) of the Europe Agreement. All such rights (of the lessee, pur-

chaser and so on) are referred to in the cited provision dealing with necessity of "these" rights for the conduct of economic activities. Such an interpretation would be in conformity with the logic. It would be strange to regulate in great detail the less extensive right (of lessee), while leaving aside the most extensive one (of the owner of land). That is why we should take the stance that the necessity is to be present in both situations and with respect to both non-agricultural as well as agricultural land. Of course, it does not mean any prohibition of purchase without indication of the connection between it and the aim of the company. However, the wording of Article 44 para. 7 is of vital importance for the permitted shape of the Polish provisions regulating the topic.

Furthermore, the above-mentioned problem of interpretation is of a relatively small importance. The most important question in this respect is the relationship between para. 7 of Article 44 of the Europe Agreement and two first paragraphs of this article. As is known, they are based on the principle of national treatment. Consequently, one should ask whether the acquisition of land by Community companies in Poland is governed by the principle of national treatment. Some authors advocated such a view.⁴² Though it is very liberal and very friendly towards integration, its relationship to the very wording of Article 44 para. 7 of the Europe Agreement is doubtful. One should draw special attention to the words opening the paragraph: "Notwithstanding the provisions of this Article." Such a formula can limit the scope of neighbouring provisions, the application of which could be advantageous or detrimental for somebody. In this case, the application of the principle of non-discrimination would be for sure advantageous for foreign investors. However, notwithstanding paras. 1 and 2 of Article 44, the access of Community companies and persons to land in Poland is regulated by special rules.⁴³

This conclusion must be checked in a very critical way. We should refer in this context to the annexes to the Europe Agreement. Annex XIId indicates matters to be covered by the national treatment at the end of the transitional period. One of them is "ownership, use, sale and rent of real property." The situation in this respect is at least ambiguous. As one could conclude, the national treatment principle is however to be guaranteed, though at a later time. The above-mentioned interpretation of Article 44(7) seems to be a mistake. This is not so simple, as the activities excluded from the scope of application of the principle of non-discrimination was just the acquisition of natural resources, agricultural land and forests. One can expect that the need to differentiate between excluded and non-excluded activities can give rise to the application of a special regime in this field.

⁴² D. Szafrński: "Działalność gospodarcza obywateli i przedsiębiorstw Unii Europejskiej na terytorium Polski w świetle postanowień Układu Europejskiego," 1 *Europa-Polska. Panorama Prawna* (1996), p. 13. K. Kruczałak: "Nabywanie nieruchomości przez cudzoziemców," 12 *Rejent* (1998), p. 103.

⁴³ E. Gorgoń: "W kwestii stosowania ustawy o nabywaniu nieruchomości przez cudzoziemców," 5 *PiP* (1999), p. 64. The author argues that Article 44(7) limited the scope of non-discrimination principle. In our opinion, this principle is however not applicable at all.

To be exact, the regime applied at present has a relatively long tradition. The right of foreigners to obtain ownership of real estate in Poland is regulated by the Act of 24 March 1920. According to Article 1(1) of this Act, a consent of the Minister of Interior and Minister of Defence is required for a foreigner to purchase real estate in Poland. With respect to agricultural land, also additional consent of the Minister of Agriculture is necessary. There is no doubt about the discriminatory character of this provision. The assessment of its conformity or lack of conformity with the Europe Agreement depends however on the interpretation of the latter. If we assumed, that Article 44(7) of the Europe Agreement was actually based on the principle of non-discrimination, we would have no choice but to confess that the provisions of the 1920 Act were contrary to the Europe Agreement. On the other hand, if the principle of national treatment was not aimed by the Europe Agreement in this respect, what could be critically assessed was not the act, but its application in a given case, specially an unreasonable refusal of permission or an unjustified prolongation of the procedure.⁴⁴ The right to acquire real estate would mean the right to acquire it in conformity with the law, which is almost as long as Polish independence.

As we have indicated, there are serious grounds to exclude the application of the non-discrimination principle with respect to the acquiring of real estate by the EU nationals. This does not mean the lack of criticism of the Polish regulations. It would be very difficult to claim that they are the greatest asset of Poland from the point of view of foreign investors. There is however a great difference between criticism and the substantiated opinion about the lack of conformity of a statute with international law. The latter would require the abolition of the statute, the former opens before us a spectrum of possible amendments and modifications.

Such modifications were actually done a few times.

In 1996 an important amendment of the 1920 Act was enacted.⁴⁵ The greatest of its achievements was the introduction of a list of exceptions from the permission requirement for the purchase of real estate. It included the purchase of a flat (apartment), the purchase of real estate by foreigners resident in Poland for 5 years (following the receipt of a residence permit) and certain transactions between family members. The greatest of importance from our point of view was the abolition of the obligation to obtain permit for the purchase of land (but no buildings) necessary for the statutory tasks of the foreign legal person. The latter term actually denoted a subsidiary of a foreigner. The surface of land that could be bought on the basis of this provision was determined to be 0,4 ha (altogether in the entire country).

The evaluation of this provision was directly dependent on the interpretation Article 44(7) of the Europe Agreement. The ones who defended the application of the principle of non-discrimination in the field of acquisition of real estate could not be satisfied with any version of the 1920 Act. As was indicated, this generous interpretation could not be regarded as well-founded. The rules on acquisition could be

⁴⁴ Its length is governed by general rule of the Code of administrative procedure.

⁴⁵ Act of 15 March 1996, Dz.U., No. 45, 1996, pos. 198.

discriminatory, they should however give access to real estate to the EC companies and nationals. That is why the list of exceptions decided on in the 1996 Act should be regarded as an achievement. In this place it should be stressed however that such an evaluation cannot be given to the entire 1996 Act. It introduced the permit requirement for the acquisition of shares in the companies disposing of land. In this respect the law was made even more restrictive than before. This requirement was aimed at the elimination of circumvention of the requirements of the 1920 Act, but this does not change the fact that its application is very far-reaching and severely criticised.⁴⁶

The need to approximate Polish law to the EU law gave rise to the next amendment of the 1920 Act. On 3 February 2001 an act amending the 1920 Act and the Taxation Ordinance was adopted.⁴⁷ According to Article 7a:

1. If a Community enterprise established in Poland or a branch of a Community enterprise established in Poland applies for a permit (to purchase real estate), Minister of Interior issues the permit, if the acquisition of real estate is directly necessary for the conduct of economic activities for which the enterprise or the branch was established.

2. The Minister of Interior refuses the permit, if such a decision is necessary because of the reasons of social policy, public security and public health.

3. Para. 1 does not apply to self-employed persons active on the territory of Poland on the basis of the Europe Agreement

4. Para. 1 does not apply to the purchase of natural resources, agricultural land or forests.

This provision makes it obligatory for the competent Polish organs to issue permits for the purchase of real estate by subsidiaries and branches of Community enterprises. In this respect it serves to put into life the obligations of Article 44(7), which makes the end of the transition period a deadline for the liberalisation of access of foreign branches to real estate in Poland (the deadline for subsidiaries being the beginning and for self-employed persons being the end of the transition period). There is still a possibility in some cases to purchase land without the permit. Though discriminatory, these provisions seem to be sufficient for the transition to the second stage.

Freedom of Movement of Capital and the Transition

The presentation of provisions of the Europe Agreement referring to the end of the first stage, would be incomplete if no mention had been made about the freedom of movement of capital. Articles 60 and 61 of the Europe Agreement refer to the end of the first stage or to the transition to the second one.

The Europe Agreement provides for the freedom of payments (Article 59 of the Europe Agreement) and to some extent the freedom of movement of capital between Poland and the EC (Article 60 of the Europe Agreement).

⁴⁶ See: J. K a w e c k a-P y s z: "Nowelizacja ustawy o nabywaniu nieruchomości przez cudzoziemców – liberalizacja czy zaostreżenie regulacji," 11 *Rejent* (1997), p. 51.

⁴⁷ Dz.U., No. 16, 2001, pos. 166.

The freedom of payments can be regarded as a part and precondition of other freedoms. That is why Article 59 provides that it should apply to the extent of the liberalization effected within the framework of movement of goods, services and persons as provided for in the Europe Agreement. Both the previous and the present Polish laws on foreign exchange have provided the freedom of payments with abroad.

The freedom of movement of capital provided for in the Europe Agreement is not absolute. According to the first sentence of Article 60(1),

with regard to transactions on the capital account of balance of payments, from the entry into force of this Agreement, the Member States and Poland respectively shall ensure the free movement of capital relating to direct investment made in companies formed in accordance with the provisions of Chapter II of Title IV, and the liquidation or repatriation of these investments and of any profit stemming therefrom.

To sum up, the parties are to guarantee three rights in this respect: 1) the right to make investments, 2) the right to transfer profits and 3) the right to liquidate and repatriate investments made. These rights are from a practical point of view a precondition of foreign investments. One should stress, that the obligations stemming from Article 60 of the Europe Agreement are not an independent instrument of full liberalization of investments, they are supplementary and curtailed to the scope of the freedom of establishment, which were discussed in the previous remarks. As the freedom of investment is to be liberalized gradually, the freedom of movement of capital is also to be established step by step. The transition to the second stage is one of their denominators. The guarantees of the right to make investments, to repatriate them and to transfer profits were provided at the beginning in the 1991 Act on companies with foreign participation. Now they are guaranteed by the foreign exchange regulations.

What is specially important from the point of view of the present article, according to the second sentence of Article 60(1) of the Europe Agreement, "notwithstanding the above provision, such free movement, liquidation and repatriation shall be ensured by the end of the first stage referred to in Article 6 for all investments linked to establishment of nationals establishing in Poland as self-employed persons pursuant to Chapter II of Title IV." This provision is one of the examples of the asymmetry of obligations underlying the Europe Agreement. It allows Poland to apply foreign currency restrictions *vis-à-vis* self-employed persons (as opposed to companies) until the end of the first period. One could question, however, if from the point of view of the Polish regulations on foreign investments this provision was only of a permissive character. It pointed at investments made by self-employed persons as such. The limitation of the acceptable forms of activities of foreigners in Poland (to capital companies only) gave rise to doubts about the consistency of the Polish law with Article 60(1). One could follow one of the two interpretations. One of them would point out that it was enough that self-employed persons were allowed to form one-man limited-liability companies. The other interpretation would, however, point at the very wording of the provision, making the explicit reference to self-employed character a decisive argument that the limitation of the forms of economic activity of foreigners were

not only at variance with the freedom of establishment but also with Article 60(1). At present, however, those dilemmas can be regarded as the ones of historical importance only, the right of establishment is almost completely liberalised, the same must be said about the foreign exchange regulations necessary for its application.

Also Article 61 of the Europe Agreement refers to the transition to the second stage. According to this provision:

1. During the first stage referred to in article 6, the Contracting Parties shall take measures permitting the creation of the necessary conditions for the further gradual application of Community rules on the movement of capital.

2. During the second stage referred to in Article 6, the Association Council shall examine ways of enabling Community rules on the movement of capital to be applied in full.

These provisions are of more programmatic than hard law nature. In fact Poland has liberalised its foreign exchange regulations, rightly recognizing the need to approximate them to the EU law as such instead of contending itself with the mere respect of the Europe Agreement.

Second Stage and Movement of Workers

A few words must be said about article 42 of the Europe Agreement. It reads, that during the second stage of the Association Council shall examine further ways of improving the movement of workers, taking into account the social and economic conditions and requirements in Poland and the employment situation in the Community. The factors, which had to be taken into consideration, indicate strong enough who was perceived as the potential beneficiary of the liberalisation of the movement of workers. The transition to the second period may have, as one could expect, also some advantages for Poland. Literally speaking the legal background of such an advantage is more than weak. Not only several factors are to be taken into consideration by the Association Council, but also the instrument provided for in this provision is of a non-binding nature. The Association Council is not empowered to make decisions in this matter, it can only make recommendations in this respect. Perhaps E. Piontek was too optimistic, when he wrote that Article 42 "keeps the door ajar for at least gradual integration of movement of workers into the mainstream of the Community regime in this domain."⁴⁸

Concluding Remarks

Only a few problems may make it difficult for the parties to agree on the transition to the second stage. Among them one should mention the lack of national treatment with respect to radio and TV sector and gambling. More understanding on the part of the EC is necessary as regards the treatment of radio and TV sector. Invoking Arti-

⁴⁸ Piontek, *op. cit.*, *supra*, n. 8, p. 145.

cle 50 by Poland to postpone the national treatment in this field is the more justified, as Poland has not abused the justifications of the Europe Agreement. The question of gambling seems to need further discussions. Otherwise, there seems to be an agreement that the transition is possible and necessary.

Poland and the Economic and Monetary Union in Europe

ARTUR NOWAK-FAR

Core Elements of the Economic and Monetary Union

General Overview

With the beginning of the third stage of Economic and Monetary Union (EMU) in Europe, a single monetary policy with the new common European currency – the euro – became a new reality for the European Union and the 12 of its Member States which fully participate in the resulting legal and monetary arrangements. The legal basis of EMU is the Treaty establishing the European Community (TEC). Its Article 4(2) stipulates, *inter alia*, that the general objectives of the Union (which are generally specified in Article 2) shall be achieved by the irrevocable fixation of exchange rates leading to the introduction of a single currency, as well as, by the formulation and implementation of single monetary and foreign exchange policies. Their main goal is maintaining price stability and supporting (however without prejudice to a higher priority goal which is price stability) the general economic policy of the Union. Article 2 of the Treaty emphasizes that “sustainable and non-inflationary growth” shall be one of the fundamental, long-term goals for the Union.

A single monetary policy is a natural and, indeed, a constituting element of monetary union. For the existence of such a union it is sufficient that the exchange rates of participating countries be fully and irrevocably fixed against one another. The introduction of one single currency replacing various national currencies in the union’s area is, *per se*, not necessary for that union to emerge. Irrespective of the more technical measures used to achieve such a union, it is a single monetary policy that has to be in place on the very first day of its existence.

Monetary policy can briefly be defined as influencing the economy through the provision of liquidity. German language publications define it, perhaps more strictly and somewhat normatively, as the exercise of all measures, by which a monetary authority in a currency area ensures optimal purchasing power and performance of its currency internally and externally.¹

A very important element of monetary policy is the choice of the guiding principles for its execution forming a consistent strategy. By selecting its monetary man-

¹ See, for example, *Der Euro: Das Lexikon zur Währungsunion* (1998), pp. 354–355.

agement strategy, a central bank decides on the way in which it plots the course of monetary policy. This course must be consistent with the central bank's final objective. The methods used in this area are even more diverse than the final objectives themselves. Central bank strategies vary, depending on the given economic context in which it operates, on the institutional framework – in relation to the financial system for instance – and on the diverging experience which different approaches entail. In the case of the European Economic and Monetary Union, the selection of this monetary policy goal and the methods of its pursuit is of critical importance. The efficiency and effectiveness of a single monetary strategy in the EMU area depends very strongly on the expectations present internally (in the EMU) and externally (in the outside world). It also depends on its credibility, consistency, sufficient flexibility, and even comprehensibility as perceived by the general public. For this reason, Tietmayer (1996) concludes that "clear strategic concepts geared to the goal of stability exercise a positive influence on how the monetary policy course is set internally, because they limit the risk of mismanagement. Owing to its rule-like character, a fully formulated strategy compels monetary policy decision-makers to act consistently over time."²

The most important features of the euro also contribute to the need of an effective and efficient single monetary policy in the EMU. Although it replaced the ecu (with 1:1 parity) on 1 January 1999, the new European currency substantially differs from its predecessor. The ecu was only a "notional" basket currency deriving its intrinsic value from the values of the component currencies. There has never been any widespread issuance of banknotes and coins in ecu denominations (bar some issues of ecu-denominated proof coins intended for collectors). The exchange rate of national currencies of the EU countries fluctuated around the ecu central rate with smaller or greater volatility. Since 1 January 1999 (to 1 January 2002) each of the EMU area national currencies had only one, irrevocably fixed exchange rate against the euro. Unlike the ecu, the euro is, according to the Treaty provisions, "currency in its own right." The new currency will not only be used in non-cash settlements, but eventually (since 1 January 2002), it will perform the function of a regular legal tender in the territory of each country participating in the EMU. By June 2002, at the latest, when all banknotes and coins denominated in national currencies will have been withdrawn from circulation, the euro will become the sole legal tender in the 12 participating EU Member States (so called Euroland). It is expected that gradually the new EMU currency will gain worldwide recognition and importance in the international monetary and financial markets even exceeding that of the ecu.

However, in order to achieve this status, both the monetary policy of Euroland and the fiscal policies of the EMU Member States must be coordinated and targeted to achieve mutually consistent objectives. According to the study done by the Delors Committee in 1985, in particular, public finance management, inflation, balance of

² H. T i e t m a y e r: "The Importance of Monetary Policy Strategy in Achieving Price Stability," in: Deutsche Bundesbank (ed.): *Monetary Policy Strategies in Europe* (1996), pp. 1–6.

payments and interest rates must be coherent with the ultimate objective now specified by the Treaty (i.e. "stable but non-inflationary growth").³

Achieving the desired coherence of monetary and fiscal goals requires considerable trust of all money and financial market participants in the ability, competence, and determination of all key players involved in the macro-economic interplay, to consistently plan and implement policies they are in charge of, and to effectively gear their actions towards the ultimate objective of price stability. The power to formulate and execute monetary policy for the EMU is now invested with the European System of Central Banks (Article 105(2) TEC) acting through its core institution, European Central Bank and the national central banks of the EMU member countries (Article 106(1) TEC). The ECB, which in mid-1998 emerged from the European Monetary Institute, does not have a significant experience or history of achievements for economic operators to rely on while judging its credibility. It would also be unwise to expect that they could extrapolate it from the credibility of national central banks of the EMU countries, even though price stability has for years been a constitutional and statutory objective of such a trust-worthy institution as the Deutsche Bundesbank.⁴

Thus, for the sake of effectiveness and efficiency of monetary policy of the European Central Bank, it was essential to build an adequate legal and operational infrastructure (within the ECB and around it) which could contribute and enhance credibility from the very first moment of its activity. Moreover, this infrastructure should assure that medium and long term goals of its monetary policy are properly coordinated with economic policies of the EMU (and other European Union) countries and that its achievements are sustainable.

Instruments of monetary policy available to the ESCB are open market operations, the so-called standing (marginal lending and deposit) facilities and mandatory reserves. According to the relevant documentation, open market operations are the main instrument to be used by the ECB. Standing facilities are to be used mainly to regulate short-term (also intraday) liquidity. Minimum reserves (now at the level of 0–2%) are to be exercised on a relatively modest scale.

The most important conclusion which can be drawn from the analysis of the monetary policy framework in the format determined by the Treaty and formulated by the EMI assures that the existing regulations provide for an effective channeling (execution) of ECB decisions either independently or through the network of national central banks. They also assure uniformity of the monetary policy formulation and implementation with respect to both the choice of its measures and the timing of their application.

³ Committee for the Study of Economic and Monetary Union: *Report on Economic and Monetary Union in the European Community* (1985), pp. 13–29.

⁴ German publications indicate that maintaining price stability is a specific constitutional obligation (*Verfassungspflicht*) arising from general Article 88 of the *Grundgesetz* and specific Article 3 of the Law on Deutsche Bundesbank (as set forth in *Gesetz über die Deutsche Bundesbank*, BGBl. I S. 1782). See also: K.A. Schachtschneider, A. Emmerich-Fritsche: "Grundgesetzliche Rechtsprobleme der Europäischen Währungsunion," 7 *DSWR* (1977), pp. 172–177.

Criteria for the Participation in the Final Stage of EMU

Pursuant to Article 121(1) of the Treaty, the transition of each EU country to the third, final stage of EMU (itself being a moment in which the single currency, the euro is adopted and the single monetary policy within the ESCB's organizational and operational framework introduced) depends on whether a country meets specific criteria of legal and economic character. In the legal realm, prior to the transition, each Member State shall ensure "compatibility" between its national legislation (including the statutes of its national central bank) and Articles 108 and 109 of the Treaty, as well as the Statute of the ESCB. Generally speaking, this provision of Article 121(1) means that each EU Member State is bound to modify its legislation concerning its central bank's organisation and monetary policy framework in order to provide it with a legally enforceable and sufficiently high degree of independence *vis-à-vis* the Community institutions, the Member State government or any other body.

Legal convergence is indeed an essential requirement for an effective policy of price stabilization. Its main function is to prohibit or significantly constrain central banks from performing fiscal or quasi-fiscal functions. The basic condition for making this prohibition work is the central bank's independence of government or other public authorities directly or indirectly involved in making decisions on public expenditures. Issing (1996) emphasized that the stabilization of prices was not possible without adequate and sufficiently strong legal regulations safeguarding bank independence and making it possible to explain to the general public its policy stance and the rationale behind it. The latter requirement is needed in order to enable the central bank to win public support for its decisions.⁵

According to various analyses, central bank independence (considered in terms of independence in the selection of monetary policy goals and instruments) is correlated – although somewhat ambiguously – with its inflation performance. The less independence the bank enjoys, the lower its credibility. As a result, central bank performance, evaluated in terms of achieving the pre-announced or implied inflation rate may become significantly less effective.⁶

The most expressive safeguard of the ESCB independence is Article 108 of the Treaty. It stipulates that, when exercising the powers and carrying out the tasks and duties conferred upon the ESCB or any of its component bodies (i. e. national central banks of the euro zone), they (or any member of their decision-making bodies) shall not seek or take instructions from Community institutions and bodies or from any government of a Member State or from any other body. In addition, Article 108 contains also a "reflexive" stipulation, according to which Community institutions and bodies and the governments of the Member States shall respect the independence of the ESCB (including the ECB and national central banks), and shall not seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

⁵ O. Issing: *Europe: Political Union Through Common Money* (1996), pp. 22–23.

⁶ For example, report given by T. Kowalski: "Ekonomiczne i instytucjonalne aspekty Ustawy o Narodowym Banku Polskim i Prawa bankowego z 29 sierpnia 1997 r.," 12 *Bank i Kredyt* (1997), pp. 4–20.

It is also possible to consider (and verify) ECB independence in terms of its institutional prerogatives.⁷ For example, Article 110 invests the ECB with competence to issue various legal acts (regulations, decisions, recommendations, and opinions) and to impose fines or periodic penalty payments on entities which fail to comply with obligations arising from its regulations and decisions. In addition, by virtue of Article 230 of the Treaty, the ECB can protect its prerogatives before the European Court of Justice. According to this provision, the European Central Bank can also seek enforcement of obligations imposed on other entities, either in the Treaty or in ESCB Statute, if these obligations serve its interest.⁸

The most important body of legislation designed to safeguard ESCB independence is that directly concerning its various attributes. According to the document published in November 1997 by the European Monetary Institute titled *Progress Towards Convergence 1996*, there are four dimensions of ECB independence.⁹ These dimensions are:

(a) *the institutional dimension*, specified in the already mentioned Article 108 of the Treaty (and reflected in Article 7 of the ESCB Statute),

(b) *the personal dimension*, specified in Article 11(2) and 14(2) of the ESCB Statute which, respectively, stipulate that the term of office of the members of the ECB Executive Board shall be 8 years and that the term of office of governors of national central banks should not be less than 5 years. In addition, these officers may be relieved from office only if they "no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct" (with a special procedure before the European Court of Justice applicable),

(c) *the functional dimension*, concerning specifically national central banks, which requires that the statutory competencies invested with them be materially and formally compatible to all the provisions of the Treaty as pertains to goals and objectives of the ESCB, and must allow them to effectively perform the tasks arising from their participation in the System,

(d) *the financial dimension*, which concerns the requirement that all component institutions of the ESCB be properly provided for with financial and other material resources to perform their functions within the ESCB.

Meeting the requirements falling under either of the above four dimensions of central bank independence (especially within the functional dimension) has also some secondary, but worthwhile effects in terms of providing the necessary uniformity to ESCB monetary policy. More specifically, as a result of fulfilling the Treaty standards of independence, the ESCB's component institutions are equally free of other Community and governmental institutional influences and can, also on the grounds of their national laws, perform all operations which may be necessary to achieve the objectives of the single monetary policy decided upon by the ECB.

⁷ A. Nowak-Far: "Niezależność Europejskiego Systemu Banków Centralnych w Europejskiej Unii Gospodarczej i Walutowej," 11 *Bank i Kredyt* (1998), pp. 4–11.

⁸ Refer to K.P.E. Lasko: *The European Court of Justice: Practice and Procedure* (1994), pp. 108–111, 538–544, 587.

⁹ *Progress Towards Convergence 1996*, European Monetary Institute (October 1997), pp. 98–103.

In the area of economic criteria, Article 121(1) stipulates that each EU Member State shall achieve a high degree of sustainable convergence prior to the transition to the last stage of the EMU. This convergence is measured by the reference to the following standards:

(a) *budgetary standards*, i.e. the standards of the sustainability of the government financial position measured by a lack of two types of excessive deficits defined more specifically in Protocols No. 5 and No. 6 attached to the Treaty of Maastricht:¹⁰

- excessive government deficit (i.e. deficit of the general government not exceeding 3% of GDP at market prices), and
- excessive public debt deficit (i. e. total gross debt at nominal value outstanding at the end of the year exceeding 60% of GDP at market prices).

(b) *non-budgetary standards*:

- *high degree of price stability* apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability,
- *foreign exchange stability*, apparent from the observance of normal fluctuation margins provided for by the exchange rate mechanism of the European Monetary System, for at least two years, without devaluing against the currency of any other Member State,
- *interest rate stability*, reflecting “the durability of convergence achieved by the Member State and of its participation in the exchange rate mechanism of the European Monetary System.”¹¹

Interestingly, the Treaty Article 104 provides for some relaxation in the practical application of the seemingly stringent requirements of Article 121 with regard to the budgetary convergence criteria. Namely, Member States can still be considered to meet these standards even in situations where their deficits exceed the reference values, provided that:

(a) the budget deficit ratio to GDP either “has declined substantially and continuously and reached a level that comes close to the reference value or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value,”

(b) although the ratio of the government debt to GDP exceeds a reference value, this ratio is “sufficiently diminishing and approaching the reference value at a satisfactory pace.”

The first procedure of qualification of Member States to the third stage of the EMU in May 1998, made it crystal-clear that the Council (which, by virtue of Article 121 is the qualifying body) had adopted a significantly relaxed interpretation of Articles 121 and 104 thus allowing such countries like e. g. Belgium (with 122.2% GDP

¹⁰ Protocol No. 5 on the excessive deficit procedure and Protocol No. 6 on the convergence criteria referred to in Article 109j [now Article 121 – A. N-F.] of the *Treaty establishing the European Community* (OJ C 191/84-90, 1991).

¹¹ This approach to the convergence criteria was presented in: A. N o w a k-F a r: *Unia Gospodarcza i Walutowa w Europie* (2001), pp. 157–161.

of public debt in 1997 and 118.1% in 1998) to adopt the euro and introduce the single monetary policy (within the ESBC framework).

Economic and Monetary Union as an Element of the Accession Agenda

According to Article 68 of the Europe Agreement,¹² Poland is obliged to approximate its existing and future laws to the European Union *acquis*. The scope of this obligation is more precisely defined in Article 69 of this Treaty. This provision lists, albeit non-enumeratively- areas in which such an approximation is especially welcome. It is somewhat striking that legal measures directly concerned with the implementation of the Economic and Monetary Union are dramatically absent in the list provided for in the said Article 69. This does not, however, mean that the EMU is a concept entirely foreign to the accession agenda. Indeed, very important basic rules of accession of Central and Eastern European countries – the so-called Copenhagen Criteria¹³ – formulated in 1993 clearly assigned high value to the EMU considerations. Namely they stated, *inter alia*, that one of the criteria for the European Union membership of this group of countries is the ability to effectively fulfill obligations which would arise from the participation in the EU, including these directly linked to the specific agenda of the Economic and Monetary Union.

There are no direct references to the EMU legislative framework in the otherwise fundamental document for the law approximation process in Poland – the Commission's *White Book* of 1995.¹⁴ This lack must be considered natural, since the *White Book's* ultimate goal was to help Poland align its regulations concerning internal market to the EU standards. On the other hand, indirectly, this document had a significant indirect impact on Poland's preparations to the EMU in a more general sense. Namely, the measures recommended in the *White Book* in fact represented a list of basic preconditions for the future, albeit not necessarily immediately following the accession and participation of Poland in the Economic and Monetary Union. Polish Government vocalized this important opinion about the *White Book*. It stated, *inter alia*, that "the participation in the EMU is not a necessary condition for the accession to the European Union. However, Polish Government considers this issue as a natural ramification of the EU membership. Irrespective of whether it will be possible for Poland to join the group of countries qualified for the euro zone, at present, the convergence criteria are important determinants of its macro-economic policy."¹⁵

¹² *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part* (OJ L 348/2, 1993).

¹³ *Conclusions of the Presidency of the European Council, Copenhagen, June 21–22, 1993* as they are offered in: B. G ó r a l c z y k (ed.): *Rozszerzenie Unii Europejskiej na wschód* (1999), pp. 31–33.

¹⁴ *Biała Księga* (1995).

¹⁵ *Raport z wykonania programu działań dostosowujących polską gospodarkę i system prawny do wymagań Układu Europejskiego oraz przyszłego członkostwa Polski w Unii Europejskiej w latach 1992–1996*, a report accepted by the Council of Ministers on May 20, 1997, *Monitor Integracji Europejskiej* (1997).

In 1996, the issue of Poland's integration with the Economic and Monetary Union was included in the agenda formulated in a general, yet politically important document called *National Strategy for Integration*.¹⁶ The *Strategy* formulated activities targeted at the participation in the EMU and set them in a comprehensive context of other necessary changes meant to bring Poland closer to the membership in the European Union. In particular, this document emphasized the importance of achieving a high rate of sustainable economic growth and a significant reduction of inflation – both considered important elements of the EMU participation agenda for the present and future EU Member States.

The European Union's response to these documents was an evaluation titled *Agenda 2000*. Published in 1997, it represented a summary of the most important changes (including these falling within the framework of macroeconomic policy) expected of Poland in its preparation for the EU accession. *Agenda 2000* formulated, *inter alia*, a strong (and, at the first glance, somewhat confusing) recommendation that Poland be able to "fully" participate in the Economic and Monetary Union from the very first day of its membership in the European Union. More specific requirements listed by the Commission with regard to the said recommendation evidently focused on the so called legal convergence criteria (i.e. the criteria provided for in Article 108 and 109 of the Treaty, distinctive from the economic convergence criteria set forth in its Article 121). According to *Agenda 2000*, the specific changes expected of Poland in the legal area included all arrangements which could guarantee that:

(a) monetary policy be conducted independently of external (presumably politically inspired) influence which also means that the Polish National Central Bank (NBP) be given statutory guarantees of its independence in fulfilling its objectives (themselves compatible with the ESCB's highest priority objective of price stability),

(b) the Polish National Central Bank be able to participate in the European System of Central Banks (albeit in the possible period during which Poland would not have adopted the euro – with some limitations normally applicable to the Member States with derogation).

Agenda 2000 emphasized that in order to conduct effective monetary policy within the EMU, Poland has to overcome some negative consequences of its communist past now considered to be hindrances to its effective performance as a future EU Member State. These include, for example, the lack of significant competition in the banking sector and the plaguing bad debts as well as the underdevelopment of its financial market.¹⁷ In addition, *Agenda 2000* formulated an expectation that Poland would have eventually met all the convergence criteria (including the ones of budgetary character), however not necessarily at the very moment of its accession to the European Union.

For the first time in such specific terms *Agenda 2000* set forth some important expectations pertaining to the institutional framework relevant for the monetary inte-

¹⁶ "National Strategy for Integration," in: *Monitor of European Integration* (January 1997).

¹⁷ *Ibid.*, p. 51.

gration. Most significantly, it included some guiding recommendations concerning the statutory objectives of the National Bank of Poland. Especially, it pointed out that their definition is too ambiguous which meant it did not commit the NBP to the objective of price stability required of the national central banks of EU countries. *Agenda 2000* brought to our attention some important negative considerations such as a too close credit relationship between the NBP and the government as well as the ambiguity of the legal regulation concerning the very status and direction of activities of the NBP – both unwelcome in the European Union.

The Polish government has long realized that it needed to formulate a comprehensive and consistent policy programme for economic and monetary integration within the EU. As a result, in 1997 it undertook some significant action in order to trigger approximation processes necessary to achieve this goal. The most important, although generic, plan of macroeconomic adaptation was called *Euro-2006*,¹⁸ indicating that the target date for Poland to enter the third stage of the EMU had then been 2006. Naturally, the major focus of this document was on fulfilling convergence criteria and on the general analysis of the adoption of the euro. It also provided for an assessment of possible ramifications of failure to join the EU eurozone in the foreseeable future.

Euro-2006 indeed proved to be a worthwhile stimulus for some law approximation in the area of statistics and public finance. This included a continuous approximation of the legal framework as well as practices of measuring convergence criteria. Particularly, some new legal acts were introduced which amended methodology of collection and compilation of statistical data so that it was brought in line with EU standards. In addition, some more general pieces of national legislation were amended in than statistics area thus making the whole financial system statistic monitoring closer to being complete. Most prominently, new laws on the National Bank of Poland and on public finance were introduced. Generally speaking, both pieces of legislation introduced new standards in the areas they covered – thus increasing compliance with minimum EU standards in these areas.¹⁹

Also in the non-legislative area some worthwhile effort was made in order to make it easier for Poland to fulfill convergence criteria in the medium term. Most significantly, the Monetary Policy Council (*Rada Polityki Pieniężnej, RPP*) of the National Bank of Poland (a new body created by virtue of the new NBP law of 1997 adopted measures which directly aimed at the reduction of inflation rate and the stabilization of the zloty exchange rate *vis-à-vis* the euro. In the same time, the Main Statistical Office (Główny Urząd Statystyczny – responsible for the nation-wide collection and compilation of statistical data in Poland) established regular cooperation with the EUROSTAT in order to bring its practices even closer to the EU methodology.

Published in February 2000 Poland's Negotiation Positions in the EU Accession Negotiations (*Stanowiska Polski w ramach negocjacji o członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej, PNP*) also concerned the EMU agenda. In this area they

¹⁸ *Euro-2006. Polska na drodze do Europejskiej Unii Walutowej* (1997).

¹⁹ Ustawa o finansach publicznych z 26 listopada 1998 r., *Dziennik Ustaw* (Dz.U.) [Journal of Laws], No. 155 (1998), item 1014.

actually reflected so far presented positions and activities as well as already vocalized ideas. They emphasized that Poland had introduced regulations which made it closer to the membership in the Economic and Monetary Union. In particular, fundamental criteria for meeting the convergence new provision of Article 216(5) of the Constitution of 2 April 1997 was given as an example of this process.²⁰ The said article prohibited government from taking loans or granting guarantees and extending other kinds of government's financial commitment which may result in an increase of the public debt beyond a ceiling of 3/5 of the annual GDP. *PNP* also stressed that other new pieces of legislation, such as the new law on public finance represented important initiatives aimed at curbing public expenditure and, more generally, at introducing more discipline in this area. The impact of the new body of legislation was far-reaching since it extended even onto lower levels of public governance. In more specific terms, the new law redefined important public finance categories as, for instance, budgetary needs of the general government and other units of public administration. As a result, they become more in line with the EU definitions used for the computation and monitoring of convergence criteria performance. *PNP* adequately pointed out that also the new practice of setting a ceiling for a permissible increase of public debt arising from domestic and foreign loans in annual budgetary law was an important arrangement which brought Poland closer to the membership in the EMU.

The *Negotiation Positions* correctly evaluated the importance of the new 1997 Constitution in the realm of central bank independence. They pointed out that this fundamental legal act had introduced new, higher standards in the National Bank of Poland's monetary policy legal framework. These standards were then further rectified in the new 1997 Act on the National Bank of Poland.²¹ In the concluding part covering the EMU agenda, the negotiation document foresaw some other measures which still had to be taken in order to bring Poland closer to the EMU. Most likely these would have to cover technical aspects of the NBP's activities (e.g. independent audit), its financial management, and a framework for the participation of the government's representative in the Bank's decision making meetings.

In addition, *PNP* formulated a firm declaration of the Polish government that it would endeavour to implement legal regulations which are deemed necessary to properly position Poland as a third country *vis-à-vis* the European Union Member States which adopted the euro. Specifically, the foreseen legislation could cover such area as continuity of contracts denominated in currencies of the EU countries with the euro as their national currency.

Legal Convergence Performance

The new 1997 Constitution charged the National Bank of Poland with responsibility for protecting "the value of the national currency." Moreover, being fully aware

²⁰ Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r., Dz.U., No. 78, 1997, item 483.

²¹ Prawo o Narodowym Banku Polskim z 29 sierpnia 1997 r., Dz.U., No. 140, 1997, item 938. It entered into force on January 1, 1998.

that the membership in the EMU is a natural consequence of the EU membership, the drafters of the Polish law adjusted its provisions accordingly. This approximation resulted in providing the NBP with a broad scope of independence in both choosing and implementing monetary policy goals and measures. The NBP Act was passed by the Polish Parliament (Sejm)²² on 29 August 1997 and entered into force on 1 January 1998.

The new law took into account some of the patterns of central bank independence which are acceptable, or even necessary, on the grounds of the Treaty of Maastricht. Article 3(1) of the Act on the NBP stipulates that stability of prices shall be the principal objective of the Polish central bank monetary policy. It also sets forth a rule according to which, without prejudice to the primary goal, this policy should support the general economic policy of the government.

The new law gives the NBP a broad range of prerogatives pertaining to the selection of monetary instruments (Chapter 6) and to the establishment of basic reference rates (e.g. discount rate (Article 45)). Moreover, the Polish central bank, to a considerable degree, insulated from pressures to provide for financing for public debt. Instrumental in achieving this objective are the provisions of the new 1997 Constitution which prohibit the government from financing budget deficit through the NBP and Article 42 of the NBP Act which set forth "no-automatism" rule in providing refinancing to commercial banks.

Chapter III of the NBP Act contains basic provisions regarding the relationship between the Polish central bank and the government. Article 21 stipulates that the Polish central bank shall cooperate with the relevant governmental authorities in formulating and implementing the country's economic policy while simultaneously making certain that the basic goals of its monetary policy can also be implemented. The cooperation provided for in Article 21 includes provision of information on monetary policy to other governmental bodies (e.g. specifically Article 23(1)(2)), cooperation with the Minister of Finance in the formulation of the country's financial plans, issuing opinions pertaining to drafts of various regulations originating by other governmental bodies but pertaining to economic policy or having any impact on the banking sector, and last, but not least, presentation of the NBP monetary policy goals to the Sejm (Article 12). Article 24 of the NBP Act provides that the NBP shall implement foreign exchange policy formulated by the government (in agreement with the NBP). Interestingly, the Act does not contain any provision which would specifically prohibit the NBP from seeking and taking advice or instruction from other governmental bodies or institutions pertaining to the monetary policy.²³

In the personal realm, the NBP Act fully complies with the ESCB's standards. According to Article 9(1) of the new law, the Governor of the NBP²⁴ is nominated by the Sejm after a recommendation made by the President of the Republic. The term of office

²² The name "Sejm" normally refers to the lower chamber of the Polish Parliament.

²³ In contrast, section 12 of the Deutsche Bundesbank Act contains a provision that "the Bundesbank shall be independent of the instructions from the Federal Cabinet".

²⁴ Now Mr. Leszek Balcerowicz.

is 6 years (compared to a minimum 5 years required for the governors of the ESCB's member banks).

The main decision-making body of the NBP is the Monetary Policy Council (*Rada Polityki Pienięznej, RPP*) consisting of the Governor (acting as Chairman) and 9 members nominated evenly by the President of the Republic, Sejm and Senate (the upper house of the Parliament). Member terms of office are also for 6 years. The NBP's Governor or the RPP's members can be removed from their offices only on reasonably justified grounds: e.g. if convicted of a criminal offence in an enforceable court judgment. There are also some slight, albeit insignificant, differences in specific reasons for which the Governor of the NBP and the members of the RPP can be dismissed.

The RPP is responsible for making strategic decisions concerning the goals of monetary policy and selecting its instruments in a given economic context. Another body, namely the NBP's Management Board, is in charge of the operational execution of such specifically defined monetary policy. This Board consists of 6–8 members nominated by the President of the Republic on recommendation of the NBP Governor.

It is essential to recognize that none of the RPP members formally represents the interests of the government. However, Article 15 of the NBP Act provides that a governmental representative can participate in the Council meetings. This person does not have any voting rights but can submit motions for the RPP consideration. This provision is questionable, since it can be considered in conflict with the minimal standards of the central bank independence required of the ESCB members.

Economic Convergence Criteria Performance

Poland managed to sustain its good budgetary stance throughout the last 4–5 years despite large political pressures for increasing public expenditure (although the situation in 2001 is less optimistic). Throughout the period of 1995–2000, this achievement has been reflected in budgetary criteria performance. This is summarized in Table I:

Table I: Budgetary criteria performance in Poland for the period of 1995–1999

Criterion	1995	1997	1998	1999	2000*
Budget Deficit (% of GDP)	(3.3)	(2.7)	(2.4)	(2.7)	(2.8)
Budget Debt (% of GDP)	n/a	n/a	n/a	44.5	44.2

* Estimates

Source: *Rocznik Statystyczny* for 1998, 1999, and 2000 as well as estimates given in: K. Szelaąg: "Korzyści i koszty integracji europejskiej dla polskiego systemu bankowego," 1–2 *Bank i Kredyt* (2001), pp. 14–23.

With regard to non-budgetary convergence criteria, the situation could be considered less favorable for Poland mostly because of still high inflationary pressures and reflecting expectations of money and financial for high interest rates. Table II sum-

marizes Poland's performance in two most important areas: inflation and exchange rate stabilization.

It is important to note that at present, Poland does not partake in the Exchange Mechanism II (ERMII). It is, however, contemplating the participation in this arrangement once it becomes the Member State of the European Union.

Table II: Inflation and exchange rate performance in Poland within the period of 1995–1999

Criterion	1995	1997	1998	1999	2000*
Inflation*	26.8	19.9	14.8	11.6	7.3
Exchange rate stabilization**	108	106	106	105	108

* Consumption price index.

** Value of the euro in zloty as a percent of the previous year value (assumed to be 100 for each predecesing year).

Source: *Rocznik Statystyczny* for 1998, 1999, and 2000 and another's own calculations.

Influence of the EMU Agenda on Polish Law Beyond Convergence Criteria

General Overview

Influence of the EU law regarding the EMU is an element of a broader impact the European integration process has on all the acceding countries, including Poland. According to Morawiecki (1999), this influence is especially significant in the area of reduction of inflation (resulting from a strong orientation of monetary and economic policies on the euro area), interest rate reduction, stabilization of the Polish currency (zloty) exchange rate, making the budgetary policy more stringent, and reflected in the emergence of a totally new economic conditions.²⁵ Consequently, legal regulations which have so far been introduced to the Polish legal system are reflective of these fundamental economic changes. They also provide them with an important formal framework thus making them more sustainable.

The EMU part of the EU legislation is not one of the utmost implementation priority in Poland. Nevertheless, it has been already made evident in the second section of this article, that it has been a very strong stimulus for modifications of the existing legal system. These modifications can, in many cases, be called "auxiliary" because of their non-fundamental but rather instrumental importance for the overall change in the economic reality. According to a document published by the Polish government, titled *The*

²⁵ M. Morawiecki: "Makroekonomiczne implikacje przystapienia Polski do Unii Europejskiej," in: J. Czaputowicz (ed.): *Integracja europejska. Implikacje dla Polski* (1999), pp. 123–174.

*Proceeding of the Accession Negotiation of the Republic of Poland to the European Union . . . (Przebieg negocjacji o członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej . . .),*²⁶ in 1999 approximation had still been needed in some areas fundamental for the EMU, such as statistical methodology (concerning, *inter alia*, calculation of public deficit) and some basic definitions used in the legislation regarding public finance. The document also pointed out that (arguably, in my opinion) some new arrangements would have to be made in order to guarantee continuity of contracts denominated in the currencies of these Member States which adopted the euro.

An Autonomous Interpretation of the EU Acquis – Induced Legislation

At present, the direct impact of the European Union EMU legislation on Polish law has a predominantly “technical” or “instrumental” character. This means that in many cases, the new law reflects the mere EU legal wording standards. As a result, the new legal arrangements do not necessarily assure that their practical implementation be fully in line with that applied in the European Union. Interpretation is one of the areas where this lack of coherence with the EU standards has, in some cases, become evident. The most striking examples of this phenomenon have so far been the discussions on Article 220(1) of the 1997 Constitution and then on the scope of independence of the National Bank of Poland.

Article 220(1) stipulates that „an increase of expenditure or a decrease in revenues planned by the Council of Ministers shall not cause Sejm [the Polish Parliament – A.N.-F.] to decide upon a higher budget deficit than the one set forth in the draft Annual Budgetary Law.” This provision has a direct relationship with another constitutional stipulation of Article 216(5) which prohibits all State authorities from taking loans or assuming other financial obligations which may result that the public debt (presumably, measured at the end of the financial year) exceeds 3/5 GDP. Considerable concerns arose of whether this means that any parliamentary act which in practice contributes to the prohibited excess is unconstitutional and, thus, void.

The interpretation of the said provision according to the spirit of the Maastricht Treaty would have prompted a positive answer to this question. According to such an interpretation, any legal regulation which could render a high risk of an uncontrollable or excessive deficit would have to be considered as contradicting the Treaty. It is also very likely that – had Poland been an EU Member State – such a provision might also have been deemed unconstitutional. (From the perspective of the Maastricht Treaty it is clear that the very fundamental reason for which Article 216(5) and Article 220(1) of the 1997 Constitution were introduced had been to bring the Polish budgetary law closer to this Treaty standards). However, because Poland is not a Member State, it is possible to formulate a much more autonomous interpretation of the considered provisions than if the interpretation would have

²⁶ *Przebieg negocjacji o członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej. Najważniejsze działania dostosowawcze*, Pełnomocnik Rządu do Spraw Negocjacji o Członkostwo RP w Unii Europejskiej – Kancelaria Prezesa Rady Ministrów (2000).

been formulated on the EU legislation ground. From the very Europe Agreement (the Association Treaty to which Poland is a party), no obligation arises which would induce a more *acquis*-inspired interpretation of Polish Constitution. The autonomous of *acquis* interpretation of its provisions can, therefore, depart from any EU tradition of law interpretation. The resulting dominant understanding of Article 220(1) of the Constitution is thus that this provision cannot deprive Sejm of any power to adopt laws which can increase budgetary expenditure or decrease budgetary revenue hence creating a risk that the curbing effects of Article 216(5) may not be achieved in unfavorable political circumstances.

Similar, although less foreign to the EU standards, interpretative conclusions were derived with regard to the practical application of some important provisions of the 1997 Law on the National Bank of Poland. The most important concerns regarded the scope of the NBP's legitimate (under the Constitution) power to issue generally binding legal acts. In the resulting judgment, the Polish Constitutional Court (*Trybunał Konstytucyjny*) declined the NBP this competence and indicated that the Polish central bank could address its legal acts to "bodies, which are functionally subordinated" to it.²⁷ The clause used by the Court is far from being unambiguous. Too narrow an interpretation of this judgment could reduce the necessary NBP maneuver thus prompting a legislative action in the Parliament which would bring more clarity to the existing legislation concerning the NBP.

**The 2001 Act on Consequences of the Introduction of the Single Currency
– the Euro, in Some Member States of the European Union**

An important piece of legislation for the domestic Polish legal order was adopted by the Polish Parliament in May 2001 r. as a consequence of an legislative initiative which originated in the National Bank of Poland. The resulting Law on consequences of the Introduction of the single currency, the euro, in some Member States of the European Union²⁸ made a worthwhile attempt to redefine the position of Poland as a third country *vis-à-vis* the euro area.

Indeed, Article 1 of the Law stipulates that its objective is to determine consequences resulting from the introduction of the euro in the EU with regard to the Polish legal system. Specifically, it makes reference to such important issues as the exchange of banknotes and coins denominated in currencies of these Member States which introduced the euro as their single currency and soon (on January 2002) will put into circulation euro-denominated legal tender. The main provisions of the proposed Act concern contractual obligations and formulate the following general rules:

(a) if monetary consideration agreed in a contract (irrelevant of whether in cash or non-cash form) was to be made in a national currency of one of the EU Member States adopting the euro and the date of the payment is later than December 2001, this payment must, as a general rule, be made in the euro,

²⁷ Wyrok Trybunału Konstytucyjnego z dnia 28 czerwca 2000 r. (K 25/99, Dz.U., No. 53, 2000, item 648).

²⁸ Dz.U., No. 63, 2001, item 640.

(b) however, if the date of the agreed payment falls within the period of January 2002 and 21 March 2002, it could be made either in the originally agreed national currency or the euro. (The proposed law does, however, not specify, who exactly – creditors or debtors – shall have the right of the selection of the currency of payment).

In addition, the Law provides that all deposits maintained by Polish banks (including organizational units of the National Bank of Poland) shall be converted into the euro according to the specified conversion rates²⁹ (to the two nearest eurocent³⁰). The relevant provision (Article 4(2)) stipulates that the said conversion shall be made according to their [i.e. the deposit] stance as of 1 January 2002.” This, rather unclear, stipulation, if left unamended, can be interpreted in two different ways. Since the analyzed article does not clearly sets forth the date on which the conversion shall be made, it could mean that this conversion must be done on January 1, 2002 (however the present wording of Article 4(2) does not make this issue fully clear). An alternative, more literary interpretation according to which banks could have a free choice of the moment of conversion provided that they take the status of deposits as of 1 January 2002) is less conceivable since it does not make much economic sense (deposits could be withdrawn fully or partially after 1 January 2002).

In Article 6, the Law formulates a specific rule according to which neither the introduction of the euro in majority of the EU Member States, nor any of its own provisions shall constitute a basis for the termination of a contract concluded before 1 January 2002. Neither shall it “excuse any performance arising from it, or its cancellation, or alteration any of its term.” The prohibition set forth in this article specifically refers to the change in interest rate applicable to contracts.

Article 7 of the Law provides that Polish citizens shall have the right to exchange banknotes and coins denominated in currencies of the EU Member States which adopted the euro as their currency into the single European currency. The exchange shall be done by the National Bank of Poland and its regional branches. Article 7 does not contain any specific stipulation concerning bank charges applicable to this exchange. It is evident, however, that these could be used since this provision of the proposed law provides that “the President of the National Bank of Poland can, by virtue of its ordinance, specify maximal fees which could be charged by banks upon the exchange of banknotes and coins denominated in national currencies [of the EU Member States which adopted the euro] to banknotes and coins denominated in the euro, having regard to the cost of such an exchange and level of fees charged by central banks or other institutions making such an exchange in countries which partake in the Economic and Monetary Union.” It seems, however, that in situations

²⁹ They are equivalent to the conversion rates specified in the *Council regulation 2866/98/EC of 3 May 1998 on the conversion rates between the euro and the currencies of the Member States adopting the euro* (OJ L 359/1, 1998) as amended in the *Council regulation 1478/2000 of 19 June 2000 2866/98* (OJ L 167/1).

³⁰ This provision with regard to the euro is consistent with the rule set forth in Article 5 of the *Council regulation 1103/97/EC of 17 June 1997 on certain provisions relating to the introduction of the euro* (OJ L 162/1, 1997).

where the exchange is made by the organizational units of the NBP and not the commercial banks, no charges are applicable.

In my opinion, there are some problems with this wording of Article 7 of the proposed act. Firstly, it contains a reference to a rather inaccurate term "countries which partake in the Economic and Monetary Union" (all the EU Member States do!). Secondly, it extends the right of having cash hoardings of EU currencies exchanged in Polish banks to the euro only to natural persons being at the same time Polish citizens. As a result, legal persons and foreign residents domiciled in Poland have been deprived this right thus rendering the whole solution unclear – in my opinion – as to its axiological reasoning. It is indeed rather important to note that some problems may also arise from a rather low (yet acceptable on the ground of EU law) standard concerning a transitional period during which national currencies of all the EU countries could be used simultaneously with the euro in Poland.

The Content and Framework of the Monetary Policy of the National Bank of Poland

Monetary Policy Instruments

Article 68 and 69 of the 1992 Europe Agreement signed between the European Community and Poland provides that Poland shall approximate her existing and future laws to the *aquis communautaire*. Article 69 specifies (albeit non-enumeratively) the areas which shall most immediately be subjected to this approximation. They include banking laws but do not necessarily point out that the law governing the Polish central bank will have to be accordingly amended. Article 84 of this Agreement specifically concerns foreign exchange policy. It stipulates that the European Union shall render technical assistance (only by providing for information through informal channels) to Poland in order to support her efforts to introduce full convertibility of the zloty and make possible a gradual adjustment of the NBP's exchange rate policy to that conducted within the European Monetary System. This assistance is provided with the view that Poland should ultimately join the EMS and, then, the EMU. It should be noted, however, that the two later and more specific documents addressed by the European Commission to Poland, namely *White Book* of 1995 or *Agenda 2000* of 1997, did not address monetary policy.

According to the NBP Act, the highest priority objective of the Polish central bank's monetary policy is price stability. In order to achieve this goal, the NBP can have recourse to the following instruments:

(a) mandatory reserves (from August 1, 1999 being at the level 5% applicable to all kinds of deposits but previously ranging from 5–20% depending on the type of a commercial bank's liability),³¹

³¹ According to the now abolished resolution of the RPP of March 18, 1998 (*Official Journal of the NBP* No. 4, item 7), the 5% rate was applicable to deposits denominated in foreign currencies. To zloty deposits

- (b) granting non-gratuitous loans to the commercial banking sector (either in the form of overdraft or credit under collateral, or any other form specified by the NBP),
- (c) discounting and re-discounting promissory notes,
- (d) open market operations (until 1998 with the primary use of the NBP own money market paper).³²

In the case of difficulties in the implementation of its monetary policy, the NBP can have recourse to extraordinary, intervention measures. These measures include the imposition of limits on credits and loans granted by commercial banks and the introduction of the obligation to maintain a non-interest bearing deposit calculated as a portion of foreign-sourced credit funds used up by these banks.

In the past, the dominant tool of monetary policy of the NBP had been mandatory reserves. Since mid-1999, the Polish central bank uses open market operations as its primary instrument for managing liquidity in the economy. This practice is similar to that of the ECB.

Monetary Policy and Its Legal Relevance

The monetary policy stance is essentially not a matter of legal regulations. Rather, it is a question of longer term decisions made by monetary authorities in order to achieve a desirable state of the economy. It has, however, a very clear impact on the convergence criteria performance. In Poland, the stance was announced in September 1998 in a document titled *Medium-Time Monetary Policy Strategy for 1999–2003* (*Średniookresowa strategia polityki pieniężnej za lata 1999–2003*), which, in this article, is referred to as the *Strategy*.³³

The said document indicates that in the medium-run, the gradual reduction of inflation (now slightly over 8%) shall be the primary target of monetary policy. It also specifically refers to the Maastricht Treaty convergence criteria as important standards which must be adopted by the Polish decision-making authorities concerned with both economic and monetary policy. Consequently, within a short time, Poland will, among others, have to reduce inflation to no more than 3% and maintain stringent public finance constraints.

Interestingly, the *Strategy* also indicates that as a prerequisite for future membership in the EMU, Poland will have to join the new Exchange Rate Mechanism, so called ERM II which was recommended as a replacement of the ERM (which ceased to exist after the introduction of the euro on 1 January 1999) as a vehicle of foreign exchange rate stabilisation for the EU member countries with derogation. The resulting problem is that the convergence criteria set forth in the Maastricht Treaty include

redeemable on demand 20% rate was applicable, whereas to deposits redeemable at notice 11% rate applied. In the EMU, these maximal rates could range from 0–10% and now are either 0 or 2%. Thus, they were dramatically lower than the rates in Poland.

³² The policy in this area has changed over time. Namely, before 1992, the NBP had issued and traded its own money securities. Then, the dominant practice was trading in Treasury paper. In the beginning of 1995, the NBP returned to the policy of trading in its own securities in open market operations.

³³ The text published in: 10 *Bank i Kredyt* (1998), pp. 7–13.

participation in the ERM, but not necessarily in the ERM II. There is some doubt as to the clarity of the legal and material continuity between the two systems.³⁴ In my opinion, in the present system (without the ERM, but with the ERM II), simply maintaining significant foreign exchange stability against the euro two years before joining the EMU is most likely sufficient as one of the preconditions for the participation in the third stage of EMU.

The principal goal of maintaining price stability will, according to the *Strategy*, continue to be of the greatest concern in the period of 1999–2003. In order to achieve this goal, the NBP must adopt a monetary policy of so called inflation targeting (i.e. concentration of monetary policy on a preset target inflation rate). This meant a shift in the previously (prior to 1998) implemented monetary policy which had been a mixture of monetary aggregate and foreign exchange rate targeting.

According to the *Strategy*, the NBP is to make use of all the monetary policy instruments specified in the 1997 NBP Act. However, the extent to which they are to be exercised can be different depending on the economic circumstances. The most important criterion for the application of respective monetary policy instruments will, thus, be their impact on the primary goal of the NBP, which is price stability. Because of the considerable flexibility associated with open market operations, they will continue to be the main instrument of monetary policy in Poland.

In order to eliminate or significantly reduce excessive liquidity of the banking sector, which is the biggest hindrance to the effectiveness of the transmission process in Poland, the RPP plans to restructure commercial banks' liabilities *vis-à-vis* the NBP in order to convert them into negotiable securities. This restructuring is also expected to significantly reduce the role of the NBP's own money securities in open market operations in favor of non-NBP-backed paper.

The *Strategy* contains a clear declaration that the existing standards of mandatory reserves shall be "gradually modified" in order to approximate this aspect of monetary policy to that of the European Central Bank. Generally speaking, such a declaration is very general and lacks binding provisions (e.g. especially these concerning time-frame). The basic recommendation of the ECB regarding the application of minimum reserves (reducing their rate to a maximum level of 0% to 10% of their basis) has been known since at least mid-1998.³⁵ The *Strategy* document was, however, formulated in September 1998. Hence, it is impossible to judge whether the RPP's

³⁴ Article 3 of the Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Union stipulates that "the criterion on participation in the exchange-rate mechanism of the European Monetary System shall mean that a Member State has respected the normal fluctuation margins provided by the exchange rate mechanism [but not ERM II-A.N-F.] of the European Monetary System without severe tensions for at least two years before examination". The ERM II was proposed for countries with derogation in the Resolution of the European Council on the establishment of an exchange-rate mechanism in the third stage of Economic and Monetary Union (OJ C 236/97) and represents an arrangement which is legally different from the ERM referred to in the Treaty and the Protocol.

³⁵ As *Recommendation of the ECB for a Council regulation concerning the application of minimum reserves by the European Central Bank* (OJ L 531/98, accepted and finally promulgated in OJ L 318/98 in November 1998).

declaration reflected a true readiness to reduce these reserves to a maximum 2% (as finally decided by the ECB in December 1998),³⁶ since this final arrangement might not have been known by the RPP at the time of drafting its plan. Any reduction of mandatory reserves in Poland are welcome as a measure which may help increase competitiveness of the Polish banking sector and act counter-cyclically in the present economic situation.

Conclusions

Political and economic decisions in Poland are, to a significant degree, determined by the of the European Union membership. All successive Polish governments prospects have been determined to achieve this objective by the end 2002 and now by the end of 2003.

Partaking in the Economic and Monetary Union should be considered a clear consequence of EU membership. The convergence criteria and other requirements which would have to be met prior to joining the EMU have long been taken into account by decision-making authorities in Poland. They also have had substantial impact on their activities and plans. The plan *Euro-2006* adopted in 1997 by the Polish Government and the *Medium-Time Monetary Policy Strategy for 1999–2003* formulated in 1998 by the National Bank of Poland are good examples of this type of influence of the EMU.

There are many points of view from which we can evaluate any impact the EMU agenda might so far have had on Poland. The areas analyzed in this article are the most important but not the sole ones, especially if we take into account not only the direct influence but also the more distant consequences of the EMU for third countries in the pre-accession stage of integration with the European Union such as Poland.

The first area worth evaluation is that of convergence criteria performance. It is now evident that Poland meets budgetary criteria. Non-budgetary convergence still poses a problem for economic and monetary policies in that country. The areas where this issue is most apparent are inflation and, reflective of it, interest rate level. Despite worthwhile efforts, both have, so far, been too high.

Another area of evaluation presented in this article is monetary policy. It is difficult to unambiguously judge whether a given decision pertaining to the organizational framework and instruments of monetary policy was indeed determined or inspired by the Economic and Monetary Union. Whatever the motives were, the most recent reform of the Polish law on NBP (NBP Act) increased the compatibility of the Polish central bank to the basic requirements which must be fulfilled by member institutions of the European System of Central Banks. Probably the most important provision of the new law is that imposing on the NBP the obligation to pursue monetary policy aimed at achieving price stability. Thus, the ultimate target of the NBP is

³⁶ In the ECB Regulation No 2818/98 of 1 December 1998 on the application of minimum reserves (OJ L 356/98).

the same as that of the ESCB. Consequently, whatever monetary policy the NBP adopts prior to Poland joining EMU would, in the last instance, be in line with the basic EMU goals. Such a commitment, if pursued with due determination and credibility, will be most appreciated by the present members of the EMU.

In the legislation area, a very important change brought about by the new law was an increase in NBP independence of pressures to fulfill fiscal or quasi-fiscal functions. The extent of this independence is quite satisfactory in its personal, functional and financial dimensions. However, in the case of its institutional dimension, the NBP Act does not fully meet the requirements set forth in Article 108 of the Treaty. The provision of the NBP Act which permits the participation of the government representative in the meetings of the RPP with the right to submit motions for discussion has some features of an *ex ante* consultation of the central bank decision which is prohibited under Article 108 of the Treaty. Another questionable provision of a lesser concern of the new Polish central banking law involves the consultation procedure between the NBP and the government regarding the exchange rate and monetary policies. In order to assure the required level of NBP independence (under the TEC provision), these stipulations of the NBP Act will have to be formulated in a more precise format so that no influence could be exerted on the NBP in the realm of foreign exchange and monetary policy which may, in turn, result in a situation where the ultimate objective of price stability is jeopardized.

There are some substantial differences in instruments of monetary policy in Poland and in the EMU. The NBP emphasizes exchange rate management and the importance of sterilization in cases where currency fluctuations result in inflationary impulses to the economy. Despite some significant pressures exerted on an international level, such an urgency in managing the euro exchange rate does not seem to have the utmost importance for the ECB.

Another very pronounced difference (and an evident area of adjustment the NBP had to make because of the ECB monetary policy) was that regarding minimum reserves. To summer 1999 they were very high (5–20%) in Poland, whereas in the EMU, their range was a rather modest one (0–2%). Most likely because of this difference and negative impact it had on the competitiveness of the Polish banking system, the rate of mandatory reserves was reduced to 5%.

The extent and the catalogue of open market operations available to, respectively, the ECB and the NBP, still differ. However, since the RPP wants to assign more importance to these operations, some adjustment of the NBP practices in this area is quite conceivable. It is also expected that Polish monetary policy will evolve further and become similar to that adopted and executed in the EMU. In the foreseeable future, Poland will attempt to direct its foreign exchange policy towards more stability against the euro. This means that sooner or later the zloty will become directly anchored to the euro (eventually through a more or less “shadow” imitation of the ECB’s monetary policy). Interestingly, if the above scenario comes true, the NBP will also contribute to augmentation of the international role of the euro.

EMU has already made a worthwhile impact in the area of contractual obligations. Namely, as an adjustment to the new economic and legal reality resulting from the introduction of the euro in the EU countries participating in the third stage of the Economic and Monetary Union, Poland has recently adopted a regulation which strongly emphasizes the “continuity of contracts” principle.

The Legal Framework of Accession to the European Union

MATTHIAS PECHSTEIN, PHILIPP KUBICKI

I. Introduction

The eastern enlargement process has now entered its decisive period. After completion of the Nice Intergovernmental Conference on institutional reform in December 2000, the European Union (EU) feels ready to admit new members at the beginning of 2003.¹ Earlier, in order to bring the outstanding negotiations with the first applicants to a successful conclusion by this date, the Commission drew up in November 2000 a timetable for the remaining negotiating chapters.² Now it depends on the applicants and their degree of preparation whether the first accessions becomes a reality almost ten years after eastern enlargement was adopted as official EU policy in July 1993. About a year later, on 5 April 1994, Poland became one of the first Central and East European Countries (CEEC) to apply to the European Union for membership. That marked the official beginning of the eastern enlargement process. By the start of 1996 the other nine CEECs with which the EU is now negotiating had followed suit.³ The Commission presented a so-called *avis* (opinion)s on each of the applicants along with the package of reforms known as *Agenda 2000*, which also covered the enlargement project, after the end of the Amsterdam Intergovernmental Conference in July 1997.⁴ Taking these documents and the results of the conference into account, the Luxembourg European Council finally launched the overall accession process in December 1997.⁵ In line with the Commission's proposals bilateral negotiations were started in spring 1998 with the six best prepared applicants ("first wave"). Poland was among them.⁶ The negotiations were widened to include the other six accession candidates at the beginning of

¹ See "Conclusions of the Nice European Council," *Bulletin EU*, point I.5.6. To be found at: <http://europa.eu.int/abc/doc/off/bull/de/200012/i1005.htm>.

² Commission: "Strategiepapier zur Erweiterung", Doc. 8.11.2000, COM (2000) final.

³ Hungary on 31.3.1994, Romania on 22.6.1995, Latvia on 13.10.1995, Estonia on 24.11.1995, Latvia on 08.12.1995, Bulgaria on 14.12.1995, Slovenia on 10.6.1996, the Czech Republic on 17.1.1996, Slovakia on 22.6.1995.

⁴ See *Bulletin EU Supplement* 5-15/1997.

⁵ See *Bulletin EU* 12-1997, pp. 9 and 11.

⁶ The others are Hungary, Estonia, the Czech Republic, Slovenia and Cyprus which applied on 3.7.1990. See *Bulletin EU* 12-1997, pp. 9 and 11.

2000.⁷ But the European Union has granted all of them the possibility of catching up with the first group.

Among these twelve applicants Poland has a special importance for a variety of reasons. With a population of almost 40 million Poland is the biggest candidate. In an enlarged European Union that will give it considerable political leverage. For some time Poland has maintained close political contacts with Germany and France in the framework of so-called Weimar Triangle.⁸ Also, Poland's relations with Ukraine and Belarus will be of importance for the future Union. Besides, there are economic aspects which further bolster Poland's position. The EU Internal Market will be expanded by about 40 million people. Bilateral trade with Poland still continues to grow faster than the EU's trade with any other country. In 1995 Poland already occupied seventh place on the list of EU trading partners.⁹

In the following article the process of eastern enlargement will be described from the European Union point of view with special reference to Poland. First of all, there will be a brief outline of the legal framework for accession to the European Union to help clarify the organisation of this process (II.). It will be followed by accounts of the EU's preparations for eastern enlargement (III.) and the negotiations themselves with special emphasis on free movement of workers and the property market (IV.). The article will end with a discussion of the outlook for the further course of eastern enlargement (V.).

II. Legal Framework of Accession to the European Union

The legal basis for an accession to the European Union is Article 49 of the Treaty on European Union (TEU) which says that any European State "may apply to become a member of the Union". This provision, introduced by the Maastricht Treaty, replaced the accession clauses of the three Communities (Article 237 EEC Treaty, Article 205 Euratom Treaty, Article 98 ECSC Treaty) and clarified the principle of unified membership.⁹ In view of the constitution of the European Union,¹⁰ unified membership comprises accession to the three autonomous and supranational European Communities,¹¹ i. e. the applicant becomes an equal party to the founding treaties of Paris and Rome. It also means participation in the intergovernmental "pillars" of the Common Foreign and Security Policy (CFSP) and Police and Judicial Cooperation in Criminal Matters (PJCC)) as a result of accordance to the Treaty on European Union. The applicability of Article 49 TEU to the three Communities as

⁷ Romania, Slovakia, Latvia, Lithuania, and Bulgaria plus Malta, which applied as early as 16.7.1990 (reactivated on 10.9.1998). See "Conclusions of the Helsinki European Council," *Bulletin EU* 12-1999, p. 8.

⁸ See "Commission's Opinion on Poland's Application," *Bulletin EU Supplement* 7-1997, p. 13.

⁹ W. Meng: "Arikel OEW," in H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.): *Kommentar zum EU-/EG-Vertrag*, Vol. 5 (5th ed., 1997), Article O TEU, para. 3.

¹⁰ See Article I III TEU. For a detailed description of the European Union's legal construction see M. Pechstein, C. Koenig: *Die Europäische Union* (3rd ed., 2000), paras. 56-95.

¹¹ By the time the first accession takes place, the European Coal and Steel Community will have ceased to exist, because the 1951 treaty from 1951 was concluded for a term of 50 years with no provision for extension.

well derives from appropriate interpretation of Article 47 TEU in line with which implicit amendments to the Community Treaties can also be made under the Treaty on European Union.¹²

The offer of membership to European States in Article 49 TEU reveals the limited openness of the European Union. In this respect it translates the political will embodied in the Union Treaties into the concrete terms of overcoming the division of the European continent by economic integration and political co-operation among European States (see § 2 of the TEU – Preamble and § 8 of the Preamble to the Treaty establishing the European Community, TEC).¹³ But that does not amount to an automatic right to join.¹⁴ Besides, there are other forms of participation in the process of European integration than accession (e.g. European Economic Areas or Association Agreements).¹⁵

1. Accession Effect

The accession effect follows from membership in the Union's Founding Treaties. All the actual and potential rights and obligations stemming from these and its institutional framework, known as the *acquis communautaire*, have to be accepted by new member states upon accession.¹⁶ This includes not only all the legal aspects of the treaties such as the secondary legislation, the case law of the Court of Justice, the international treaties of the Communities (including mixed agreements), international agreements between the member states relating to Community and Union activities, etc., but also the political fundamentals and objectives underlying the Treaties which are developed and expressed in declarations, resolutions and political measures within the Union framework.¹⁷ This mixture constitutes the identity of the European Union and marks the achieved level of integration and political participation. To preserve and to develop the *acquis* is one of the fundamental aims of the European Union guaranteed in Article 3 I TEU and Article 2 TEU.¹⁸ The obligation of applicants to accept the *acquis* determines this continuity in the case of accession.¹⁹

¹² See Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 413.

¹³ See T. Oppermann: *Europarecht*, 2nd ed. (2000), para. 1841; C. Vedder in: E. Grabitz, M. Hilf (eds.): *Das Recht der EU* (January 2000), Article 49 TEU, para. 8.

¹⁴ General opinion – see, e.g., Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 414; Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 14.

¹⁵ See T. Bruha, O. Vogt: "Rechtliche Grundfragen der EU-Erweiterung," 30 *Verfassung und Recht in Übersee (VRÜ)* (1997), pp. 500–501; Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 8.

¹⁶ See A. Lopian: *Übergangsrégime für Mitgliedstaaten der Europäischen Gemeinschaften*, (1994), p. 57; Commission: "Die Erweiterung Europas: eine neue Herausforderung", *Bulletin EC Supplement* 3-1992.

¹⁷ See Vedder, *op. cit.*, *supra*, n. 13, paras. 42–44 for an exact description of the *acquis*. See also Articles 2–9 of *Accession Document 1995*, [1994] OJ C 241/8.

¹⁸ See Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 4, and *Bulletin EC Supplement* 3-1992, p. 12.

¹⁹ See Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 61.

2. Accession Conditions

Article 49 TEU contains only some of the accession conditions. The remainder are derived from the Community Treaties and the Union Treaty. Before the Maastricht Treaty came into effect, the legal force of these accession conditions had been questioned.²⁰ Now that they have been established partly in Article 49 TEU and in some basic regulations of the Treaties there are no longer any such doubts.²¹ Thus the "Copenhagen criteria", set out by the European Council in June 1993 as the accession conditions for eastern enlargement, represent applicable Union and Community law formulated with respect to the special political and economic circumstances of the CEECs.²² In this connection it was emphasised for the first time that the Union's ability to enlarge is also an important aspect of the eastern enlargement process.²³

a. Conditions of Article 49 I TEU

In line with Article 49 I TEU the applicant country has to be a European state. This accession condition is the only one that has been in force since the beginning of European integration, but its legal interpretation was problematic even before the demise of the communism system with its clear political borders at the end of the 1980s.²⁴ The problem does not affect the current candidate countries.²⁵ There is far-reaching agreement that the interpretation has to be based not only on geographical considerations but also on historical and cultural factors.²⁶ In this respect wide political discretion has been left to the member states.²⁷ Nevertheless it is hard to accept that the governments of the member states are willing to consider Turkey a European state.

Furthermore, the applicant state has to respect the principles set out in Article 6 (1) TEU: These are freedom, democratic system of government,²⁸ respect for human rights and fundamental freedoms, and rule of law, all of which are part of the member states' common tradition. The substance of this condition, which was laid down in Article 49 TEU by the Amsterdam Treaty, was also recognised earlier. As a general,

²⁰ See C.-D. Ehlermann: "Mitgliedschaft in der EG," *Europarecht* (1984), p. 113; G. Meier: "Die rechtlichen Grenzen für einen Beitritt zu den Europäischen Gemeinschaften," *Europarecht* (1978), p. 12. See also the Commission's statement in Case 93/78, *Mattheus v Doego* [1978] ECR 2203, 2207.

²¹ See Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 424; also Bruha, Vogt, *op. cit.*, *supra*, n. 15, p. 484.

²² Bruha, Vogt, *op. cit.*, *supra*, n. 15, p. 485; Vedder, *op. cit.*, *supra*, n. 13, and Article 49 TEU, para. 21.

²³ See Pechstein, Koenig, *op. cit.*, *supra*, n. 10, paras. 431 and 440; see also "Conclusions of the Luxembourg European Council," *Bulletin EU* 12-1997, p. 11.

²⁴ See Dorau: "Die Öffnung der Europäischen Union für europäische Staaten," *Europarecht* (1999), p. 736.

²⁵ Hungary, Poland, Estonia, the Czech Republic, Slovenia, Cyprus, Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta.

²⁶ See Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 418; Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 10; Bruha, Vogt, *op. cit.*, *supra*, n. 15, pp. 481-484.

²⁷ Evident in the case of Turkey, which was accepted as a candidate country (see *Bulletin EU* 6-1999, p. 15.), although it has almost no common geographical or cultural ground with Europe. A case against accession of Turkey without modifying Article 49 TEU is made by Pechstein, Koenig (*supra*, n. 10), para. 418. Meng, *op. cit.*, *supra*, n. 9, Article 49 TEU, para. 48 also considers THE extensive interpretation critically.

²⁸ See Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 13.

unwritten accession condition, it is not only set out in the TEU-Preamble (see §3), but also a part of the *acquis*.²⁹ For the EU the store set by these principles depends on the constitutional reality of the applicant country.³⁰ That could be observed in the case of Spain and Portugal. One of the reasons for the admission of both these countries was, precisely, the need to strengthen their young democracies. Also, the inclusion in the Copenhagen criteria of "stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities" shows the attitude of EU in this respect.³¹ It should be noted, that "compliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations."³²

b. Unwritten Conditions

The remaining unwritten conditions have to do with basic requirements of the economic structure which represent constituent elements of the economic system of the Community and the member states: open-market economy and free competition (see Article 4 I TEC).³³ Essentially, this means that the market has to determine allocation of production factors and that the public authorities have to guarantee the basic legal prerequisites, such as property rights, freedom of trade and protection of competition.³⁴ With respect to Eastern enlargement, the European Council at Copenhagen required a functioning market economy and the capacity to cope with competitive pressures and market forces within the Union.³⁵

Finally, Union membership entails the capacity to accept the *acquis communautaire* in all its forms upon accession.³⁶ Transitional arrangements can be agreed, but they have to be limited in time and scope.³⁷ For the applicant country this means harmonisation of its system of law, in particular with the legal rules of the Community. It also implies corresponding requirements of its administrative structures. Furthermore, the applicant country has to accept the political objectives, which means not only economic-related ones sectors like Economic and Monetary Union but also the increasingly important intergovernmental policies under CFSP and PJCC.³⁸ As regards the *acquis*, which contains about 80,000 pages of legal text, fulfilment of this condition is much more difficult compared with the others, especially in view of the associated costs and efforts.³⁹

²⁹ See, e.g., the statement ON democracy of the European Council of April 1978, *Bulletin EC* 3-1978, p. 5 f.

³⁰ See, e.g., Commission, *Agenda 2000*, Vol. 1, p. 46, COM (1997) 700 final.

³¹ *Bulletin EC* 6-1993, p. 13

³² See "Conclusions of the Luxembourg and Helsinki European Councils," *Bulletin EU* 12-1997, p. 11 and *Bulletin EU* 12-1999, p. 8.

³³ Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 425.

³⁴ Bruha, Vogt, *op. cit.*, *supra*, n. 15, p. 487; Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 54.

³⁵ *Bulletin EC* 6-1993, p. 13.

³⁶ Bruha, Vogt, *op. cit.*, *supra*, n. 15, p. 488; Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 426. See also *Bulletin EC* 6-1993, p. 13.

³⁷ For more details, *vid. inf.* II.4.b.

³⁸ Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 428.

³⁹ See J. Bergmann: "Die Osterweiterung der Europäischen Union," *ZRP* (2001), p. 19.

c. The European Union's Capacity to Enlarge

A pivotal precondition of eastern enlargement of the Union was prior reform of its institutions. The accession of a large number of new members necessitated adaptation of the Union's decision-making mechanisms. The main problems – the so-called “left-overs” – were expansion of majority voting, determination of the number of Commission members and, in particular, a reweighting of member states' votes in the Council. These questions have now, after a long and difficult debate, been solved by the Treaty of Nice, signed in February 2001. The results of this treaty have been widely criticised for varying reasons. In justice it has to be granted that after the Treaty of Nice takes effect there will still remain round about 100 EU/EC regulations subject to decisions by unanimous vote, which will be found very difficult with 25–27 member states. The new number of Commission members has also raised questions. As from 2004 the large member states will lose their entitlement to a second commissioner, but the arrangement whereby each Member State has “its own” Commission member of the Commission will persist as long as the Union does not expand beyond 27 member states. Only afterwards there will be established a new system of rotating membership in the Commission. Even if member states' wish to be represented in the Commission by one of their citizens is highly understandable, the efficient functioning of the Commission with such a large number of members will surely be affected.

The most criticised of the Nice compromises was the new weighting of member states' votes in the Council, including the number awarded to the candidate states. Problematic in the procedural perspective was the fact, that the latter had not been represented at the Intergovernmental Conference and therefore unable to stand up themselves for their interests. Thus the number of votes in the Council given to the prospective members was influenced by the “patronage” of one of the current members. This fact and the Franco-German dispute over the number of votes for Germany produced to a result the logic of which is not readily apparent. The fact that Germany with a population of about 81 million has the same number of votes (29) as France, Great Britain and Italy (about 57 million each), while Poland and Spain about 39 million each – half the – German population – have received 27 votes, demonstrates clearly that size of population was not the deciding criterion. But no other criterion has been adduced by the European Council or is perceptible, so that there is no yardstick even for political control of the results in this field. Size of population is nevertheless of great importance because of the newly introduced possibility of checking whether a Council decision taken by a qualified majority also represents a minimum of 62% of the total population of the Union. Here the big member states are in a privileged position to block a decision by a coalition of smaller states. If one adds that as a third requirement a simple or qualified majority of countries irrespective of voting weights is necessary and that the size of a qualified majority in terms of weighted votes has been augmented from 71% to 74% the unavoidable conclusion is that the process of decision-making in the Council will in future be much more complicated than it is at present. The Treaty of Nice formally sanctioned “enlargeability” of the Union, but the continued viability of a Euro-

pean Union with 25 or 27 member states will demand from all these countries a great commitment to striking compromises in the interests of the whole of Europe.

3. Accession Procedure

Article 49 TEU sets out only the essential features of the accession procedure. Its present shape has been evolved by accession practice and can be divided into three phases. Its duration is variable and depends mainly on the legal and economic standards and degree of preparation of the applicant.⁴⁰

a. Initiation phase

The starting point for the procedure is an application to the Council (Article 49 [1] TEU) which can be withdrawn at any point prior to the eventual deposition of the ratification documents.⁴¹ Two steps (not mentioned in Article 49 TEU) then follow. First, the Council instructs the Commission to draw up a preliminary opinion on the application assessing the general feasibility and problems of accession by the country concerned.⁴² Next, the European Council, after considering this *avis*, decides whether, without any legal commitment, to open negotiations.⁴³ Neither the Commission's *avis* nor a positive Council decision is legally binding as regards future accession.⁴⁴

b. Negotiation phase

Neither Article 49 TEU nor preceding regulations contained any targets on how to manage accession negotiations. The first, abortive negotiations between the EU and Great Britain in 1963 were conducted by the member states with the participation of the Commission. Prior to the next enlargement round in 1969 the member states reached agreement on a different negotiations procedure, laid down in a Council decision.⁴⁵ Under this decision the negotiations process was henceforth to be managed by the Communities. It starts with the Commission proposing a common negotiating positions. After preparation of the position by COREPER⁴⁶ the Council approves by unanimous vote a common European Community position and represents it under the current presidency at the negotiating with applicants. Furthermore, the Council can authorise the Commission to conduct the negotiations or to clarify certain problems with applicants. Since the European Union was established, this procedure has been modified to allow the Council presidency, in close liaison with member states, to propose common posi-

⁴⁰ See the timelines of previous accessions in C. Preston: *Enlargement and Integration in the European Union* (1997), p. 14.

⁴¹ This was the case with Norway which failed to deposit ratification documents in 1972 and 1994 due to negative results of referendums.

⁴² Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 28; Oppermann, *op. cit.*, *supra*, n. 13, para. 1849.

⁴³ See, e.g., "Conclusions of the Luxembourg European Council" on opening negotiations with the first six CEECs, *Bulletin EU* 12-1997, p. 9.

⁴⁴ Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 29.

⁴⁵ *Europa-Archiv* 1970, p. D. 350.

⁴⁶ Committee of Permanent Representatives (of the member states). See Article 207 ECT.

tions on intergovernmental policies under CSFP and PJCC. It is also open to the Commission to put forward proposals in these areas.⁴⁷ The negotiation sessions are held at the level, on the member states' side, of ministers or deputies (COREPER) under the direction of the Council Presidency and, on the applicants', of chief negotiators.⁴⁸ The results of the negotiations are incorporated in a draft Accession Treaty.

To summarise the procedure, it can be emphasised that there is political control of the negotiations by the member states, but also an important role played by the Commission. Its right to make proposals in all areas of Community law evidences the common interest of the Community in finding optimal solutions. Furthermore, the Commission can together with the applicants explore the margin for negotiations by informal contacts with the applicants and can assist them in adaptation to Community and Union law.⁴⁹

d. End phase

The end phase is dealt with in Article 49 TEU and consists of two separate levels. In line with Art 49 (1) TEU the involvement of Community institutions relates to assent to applications. At the second level, in accordance with Article 49 (2) TEU, the member states and the applicant conclude the accession agreement. The separation of both levels is greatly reduced in practice by the fact, that the involvement of the Community institutions ensues after successful conclusion of the negotiations and shortly before signature of the agreement.⁵⁰ *De jure*, the Commission's – brief and formal – final review⁵¹ and the assent of the European Parliament, which has therefore real power of decision,⁵² concerns only the Council's decision, but *de facto* also applies to the draft of the final agreement. The Council's decision has to be taken unanimously. In this way, possible disagreements between Community institution actions and member states signature of the accession agreement are avoided. The agreement is then submitted for ratification by all the contracting States in accordance with their respective constitutional requirements. In addition to the conditions of admission and relevant adjustments to all the Treaties, which are set out in Article 49 (2) TEU, the agreement declares that the applicant State has become a member of the European Union and contracting party to the Treaties on which the Union is founded.⁵³

Both final procedure levels of Article 49 TEU are equal in rank. Arguments in support of a hierarchic relationship favouring a constitutive Council decision⁵⁴ have to

⁴⁷ See Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 91.

⁴⁸ See Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 30; for more details see A. Oosterhof: "Legal Aspects of the EU Enlargement Negotiations," *Leiden Journal of International Law*, No. 7 (1994), p. 73.

⁴⁹ See Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 92.

⁵⁰ See Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 35.

⁵¹ See, for example, the Commission's opinion on the accession of Austria, Sweden, Finland and Norway, OJ C 241/3, 1994.

⁵² This was first established in 1986 by Article 8 of the Single European Act.

⁵³ See, e.g., Article 1 of the Accession Treaty of 1994, OJ C 241/13, 1994.

⁵⁴ According to this view the member states and the applicant countries decide only on the accession arrangements. See Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, paras. 35 and 36. He bases his argument on the wording and systematic mode of Article 49 TEU.

be rejected as at variance with the European Union's constitution. Since accession pertains not only to the three Communities but also to participation in intergovernmental policies, the Council decision cannot have a constitutive meaning in this last regard.⁵⁵ Furthermore, it cannot oblige the member states.⁵⁶ For these reasons both final procedure levels are equally constitutive for accession to the European Union.⁵⁷ The involvement of the Community institutions corresponds to the Communities' position as independent subjects of international law⁵⁸ and the signature of the accession agreement by the member states to their role as "lords of the treaties."

4. Accession Agreement

The accession agreement is an international treaty and consists of two parts: an Accession Treaty (AT) and an Accession Document (AD), which is an integral part of the Accession Treaty (see Article 1 II AT 1985/1994). The agreement is completed by a signing document which contains common and unilateral statements by the contracting parties. This document is not part of the agreement, but can be used for its interpretation in line with the general principles of international law.⁵⁹

The Accession Treaty contains only provisions relating to the accession (Art 1 AT 1994⁶⁰), the entry into force of the agreement and the treaty languages (Article 2 and 3 AT 1994). Only the Accession Document sets out the admission conditions and the adjustments to the Treaties together with general provisions concerning the accession effects and modification procedures with respect to the Accession Document.⁶¹ As part of the accession agreement the Accession Document is on a par with all Union Treaties and therefore takes precedence over all Treaties (the *lex posterior* rule) and their secondary legislation (the *lex superior* – rule).⁶² For this reason a modification of the Accession Document is only possible in accordance with Article 48 TEU (see Article 6 AD 1994⁶³).⁶⁴

⁵⁵ See Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 415.

⁵⁶ This is also acknowledged by Vedder, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 35.

⁵⁷ See Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 95.

⁵⁸ See Pechstein, Koenig, *op. cit.*, *supra*, n. 10, para. 415; also Meng, *op. cit.*, *supra*, n. 9, Article O TEU, para. 94.

⁵⁹ Lopian, *op. cit.*, *supra*, n. 9, p. 41; see Article 31(2).a and b of the Vienna Convention on the Law of Treaties.

⁶⁰ See OJ C 241/9, 1994.

⁶¹ This division was originally caused by the old accession clause of the ECSC Treaty, Article 94. In line with this regulation accession should be effected by a decision of the Council. Under the old accession clauses of the EEC Treaty and the Euratom Treaty accession should be effected by an agreement between member states and applicant countries. In order to have a single document relating to admission conditions and adjustments to the Treaties, the member states introduced the Accession Document, to which accession treaties and the Council's decision could refer. Article 49 TEU has made the need for this division superfluous.

⁶² See Lopian, *op. cit.*, *supra*, n. 16, p. 51.

⁶³ See OJ C 241/21, 1994.

⁶⁴ There is an exception in the case of non-ratification by a state of the accession agreement. The agreement will come into effect, but the accession treaty and accession document can be modified by a unanimous decision of the Council. See, e.g., Article 2 (2) of the Accession Treaty of 1985.

a. Adjustments of the Treaties

By adjustments of the Treaties are meant the permanent changes which have to be made in the Union treaties as a result of a growth in the number of member states.⁶⁵ Firstly, this is a matter of adjustments in institutional regulations with respect to the structure of institutions and in provisions relating to the geographical coverage of the Treaties (see, e.g., Article 10–23 AD 1985⁶⁶).⁶⁷ Secondly, large parts of Community and Union legislation have to be modified (see, e.g., Art 26 AD 1985).⁶⁸ In order to avoid upsetting the legal hierarchy the Accession Document includes a provision saying that changes of Union and Community legislation are on a par with the modified legislation (see, e.g., Article 8 AD 1985).⁶⁹

Compared with the modification procedure of Article 48 TEU, it is still an open question whether the entailed adjustments based on Article 49 (2) TEU can go beyond purely technical modifications. According to the Commission they can and would also comprise such modifications as arise as a result of accession in a causal way,⁷⁰ Including modifications in the decision-making processes of the Union and the Communities. Ultimately, this question is not so important, because Article 49 TEU has stricter requirements in respect to the modification procedure than Article 48 TEU.⁷¹ Besides, the process of the eastern enlargement has shown that, as in Nice, the European Union prefers to make institutional reforms without the involvement of new member states.

b. Admission Conditions

The admission conditions are transitional arrangements. They make possible a departure from the *acquis communautaire* that is limited in duration and scope.⁷² In this way transitional arrangements are an exception from the of acceptance of the whole *acquis* upon accession.⁷³ They are necessitated by economic and legal contrasts between the old and new member states. Immediate and total incorporation of

⁶⁵ This is why these adjustments are called “technical”.

⁶⁶ OJ C 302/23, 1994.

⁶⁷ See M e n g, *op. cit.*, *supra*, n. 9, Article O TEU, paras. 121–124.

⁶⁸ A different procedure for secondary legislation was laid down in Article 27 AccD 1985. It had to be modified by the Council after signing the accession agreement. The effectiveness of this secondary legislation depended on the entry into force of the accession agreement. For more details see M e n g, *op. cit.*, *supra*, n. 9, Article O TEU, paras. 115–118.

⁶⁹ In the Joined Cases 31 and 35, 86, *LAISA v Council* [1988] ECR 2285, paras. 13–14, the Court of Justice chose a different interpretation, that this regulation of the accession document contains only a more simple modifying procedure than the modifying regulations of the Treaties. For this reason Article 8 AD has no effect on the rank of the modified secondary legislation. Therefore the modified secondary legislation has is on a par with the accession document. But this interpretation by the Court of Justice is not generally accepted. See V e d d e r, *op. cit.*, *supra*, n. 13, Article 49 TEU, para. 45.

⁷⁰ *Bulletin EC Supplement* 2, 78, pp. 9–10.

⁷¹ See B e c k e r: *EU-Erweiterung und differenzierte Integration* (1999), p. 69.

⁷² L o p i a n, *op. cit.*, *supra*, n. 16, pp. 71–72.

⁷³ See, e.g., Case 258, 81, *Metallurgiki Halyps v. Kommission*, [1982] ECR 4261, para. 8; Case 58, 83, *Kommission v Griechenland*, [1984] ECR 2027, para. 9. See also L o p i a n, *op. cit.*, *supra*, n. 16, pp. 73–74.

new member states is technically and politically feasible only at the cost of an excessively long period of adjustment and preparation. Therefore gradual incorporation by means of transitional arrangements is the only practicable solution of the potential conflict between the principle of full acceptance of the *acquis* and achievement of accession within a reasonable period of time. This is confirmed by the practical relevance of transitional arrangements in the case of former accessions, which were all based on such arrangements.⁷⁴

The areas in which transitional arrangements are used and the content and scope of the arrangements depend on the economic and legal disparities involved. They can be agreed in favour of both the old and the new member states, but in former enlargements they were mainly agreed in order to protect the new Members.⁷⁵ As regards the design of transitional arrangements, there are different forms.⁷⁶ But since, general speaking, they are all determined on a case-by-case basis there is no need to describe them here.

Despite the exceptional nature of transitional arrangements, a point that remains unresolved is whether there are any legal limits to their use. The answer to this question is not all that relevant. Firstly, because it is generally doubted that the member states are legally bound by the Union Treaties when negotiating accession agreements.⁷⁷ Besides, transitional arrangements are on a par with the Union Treaties and so can not be examined by the Court of Justice for their accordance with the Treaties.⁷⁸ Furthermore, it must be remembered that successful accessions are always an expression of political compromises, whose necessity is also accepted by the Court of Justice.⁷⁹ So, generally speaking, there will be no interest in legal examination of transitional arrangements. Besides, the member states have always been willing to preserve the exceptional character of transitional arrangements by using them only in order to phase in the integration of new member states. Such a practice is in accordance with all the thinking on the legal limits of transitional arrangements which holds that they are exceptions from the principles of legal uniformity and equal treatment of member states and Union citizens and therefore have to be justified: Firstly, they should assist in the adaptation of new member states. Secondly, they should be a final guarantee of adoption of the *acquis* by being limited in time and scope.⁸⁰

⁷⁴ Details in Becker, *op. cit.*, *supra*, n. 71, pp. 15–20.

⁷⁵ See Meng, *op. cit.*, *supra*, n. 9, Article O TEU, paras. 69–71.

⁷⁶ For more details see Lopian, *op. cit.*, *supra*, n. 16, pp. 84–101.

⁷⁷ See Lopian, *op. cit.*, *supra*, n. 16, p. 103; Becker, *op. cit.*, *supra*, n. 71, p. 64.

⁷⁸ See Joined Cases 31 and 35, 86 (*supra*, n. 69), para. 18. This case in fact concerned adjustments of secondary legislation. But the Court of Justice refused a legal review because of the primary status of these adjustments. And in the case of admission conditions it is undisputed that they are of primary status and therefore cannot be examined by the Court of Justice.

⁷⁹ See Joined Cases 31 and 35, 86 (*supra*, n. 69), para. 15. See also Case 93, 78 (*supra*, n. 20), para. 8, but with regard to accession conditions.

⁸⁰ Becker, *op. cit.*, *supra*, n. 71, p. 76–84.

III. Preparation of Eastern Enlargement

At the time that eastern enlargement was made official EU policy at the Copenhagen summit in July 1993 all CEECs were in legal, political and, above all, economic terms far removed from the standards of the member states. Therefore the eastern enlargement, which was from the beginning understood as a historic challenge, entailed an active levelling-up of the CEECs committed to meeting the standards of the European Union. Conscious of these circumstances, the European Council step by step developed a pre-accession strategy, based on Commission's proposals whose aim was to help CEECs achieve full legal, political and economic accession capability.⁸¹ So the existing co-operation with the CEECs in the form of Europe Agreements and Phare programs was already at the Copenhagen summit aligned towards future accession.⁸² Furthermore, a so-called Structured Dialogue was established. Parallel to initiation of negotiations with the first CEECs, the Luxembourg European Council decided on measures to enhance the pre-accession strategy. The key instrument of this strategy was the Accession Partnership.⁸³ At the same time the Commission was instructed to issue Regular Reports⁸⁴ on the progress made by each applicant CEEC towards accession. In the following sections, the instruments of the pre-accession strategy will be briefly described with special reference to Poland.

1. Europe Agreements

The Europe Agreements (EA) are a special form of association agreement according to Article 310 TEU and also the legal basis for relations with CEECs.⁸⁵ The first Europe Agreements were concluded, inter alia with Poland (July 1993),⁸⁶ i.e. before the Copenhagen summit, and did not provide a legal basis for eventual accession,⁸⁷ recognising only, in the Preamble, that this was the wish of the associated

⁸¹ See V e d d e r, *op. cit.*, *supra*, n. 13, Article 49 TEU, paras. 20–23.

⁸² *Bulletin EC* 6–1993, pp. 13–14. See also "Conclusions of the Essen European Council," *Bulletin EU* 12-1994, pp. 13 and 22–29.

⁸³ *Bulletin EU* 12-1997, pp. 8–11.

⁸⁴ Hitherto the Commission has issued three Regular Reports: the first in November 1998, the second in October 1999 and the most recent in November 2000. All three can be found at: <http://europa.eu.int/comm/enlargement/poland/index.htm>. In the text all references are to the Report on Poland. All page numbers refer to the German version.

⁸⁵ For details see G ä r t n e r: "Zu Inhalt und unmittelbarer Anwendbarkeit der Europa-Abkommen der EG mit den ostmitteleuropäischen Staaten," *Recht in Ost und West* (1993), p. 332; M. P e c h s t e i n: "Osterweiterung und Zukunftsperspektiven der Europäischen Union," *Zeitschrift für Rechtsvergleichung* (1996), p. 109.

⁸⁶ Concluded on 16 December 1991, OJ L 348/1, 1993. The interim part of the agreement came into effect on 1 February 1992, the remainder on 1 February 1994 because of the necessary ratification. For implementation details see the Commission's Regular Reports, *op. cit.*, *supra*, n. 84.

⁸⁷ In the meantime Europe Agreements have been concluded with every CEEC: with Hungary on 16.12.1991, OJ L 347/1, 1993; with Bulgaria on 8.3.1993, OJ L 385/1, 1994; with Slovakia on 4.10.1993, OJ L 359/1, 1994; with the Czech Republic on 4.10.1993, OJ L 360/1, 1994; with Estonia on 12.6.1995, OJ L 68/1, 1998, with Latvia on 12.6.1995, OJ L 26/1, 1998; with Lithuania on 12.6.1995, OJ L 51/1, 1998, with Slovenia on 10.6.1996, OJ L 51/1, 1999.

country. The aim of the Europe Agreements is to open up borders and markets over a ten-year period, divided into two parts,⁸⁸ in the course of which a free trade area is to be created, in which the EU is committed to removing trade barriers faster than the associated countries. Furthermore, the agreement envisages gradual implementation of the other three freedoms, of movement of services, people and capital. For the associated countries Europe Agreements make provision for the harmonisation of national laws with EU norms (Articles 68–70 EA Poland), which is the most essential of the accession conditions. In order to assist in such harmonisation of laws and as part of the pre-accession strategy the Commission prepared a Internal Market White Paper in 1995, which should help associated countries in preparing themselves for operating under the requirements of the internal market.⁸⁹ Lastly, Europe Agreements create an institutional framework for the implementation and monitoring of the agreements (Articles 102–110 EA Poland).⁹⁰ This framework is also the most important forum for bilateral political dialogue between CEECs and the EU. Political dialogue has also been institutionalised under Europe Agreements (Articles 2–5 EA Poland) and constitutes a distinctive feature.⁹¹ Although originally not focused on accession, Europe Agreements became an important part of pre-accession strategy, in particular due to their institutional framework.⁹²

2. Structured Dialogue

Structured Dialogue was launched parallel to the bilateral relations established under the Europe Agreements and is a multilateral framework for intensive dialogue and consultations between the EU and CEEC at governmental level.⁹³ The topics of Structured Dialogue cover Community areas with European dimensions (energy, environment, transport policy, science and research), common foreign and security policy, and justice and home affairs.⁹⁴

At the Luxembourg summit in December 1997 the European Council established a standing “European Conference” open to all European states seeking membership.⁹⁵ This forum went beyond the existing co-operation arrangements with CEECs. Acceptance of the Union’s values and internal and external objectives like observance of the principles of public international law, including the obligation to resolve territorial disputes by peaceful means, especially via the International Court of Justice,

⁸⁸ The second period of Poland’s Europe–Agreement has come effect in February 2000.

⁸⁹ “Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union,” Doc. 03.05.1995, COM (95) 163 final.

⁹⁰ The following institutions were created: a ministerial level Association Council, a Committee and a Parliamentary Association Committee.

⁹¹ See *Me n g, op. cit., supra*, n. 9, Article O TEU, para. 107.

⁹² See, e.g., *Bulletin EC* 12-1997, p. 9; Commission: “Agenda 2000 Vol. II”, Doc. 15.07.1997, COM (97) 2000 final, p. A–10.

⁹³ See “Conclusions of the Essen European Council,” *Bulletin EU* 12-1994, pp. 22–23.

⁹⁴ *Bulletin EU* 12-1994, pp. 22–23.

⁹⁵ *Bulletin EU* 12-1997, p. 9. Besides the CEECs this initially applied to b Cyprus and Turkey. It now also includes the Balkans countries.

were set out as participation preconditions. The main topics are foreign and security policy, justice and home affairs, economy, and regional co-operation.

3. Phare Programme

Financial and technical pre-accession assistance for the CEECs is channelled through the so-called Phare Programme.⁹⁶ Launched at the Paris World Economy Summit in 1989 its aim was to help the post-communism countries through a period of massive economic restructuring and political change. Originally set up for Poland and Hungary,⁹⁷ the Phare Programme was in due course extended to all eleven CEECs. In response to the Luxembourg Council's launch of the present enlargement process in December 1997 the Phare became primarily targeted to accession by concentrating on two priorities:⁹⁸ around 30% of Phare allocations are used for "institution building," while the remaining 70% is earmarked for financing investments connected with the adoption of the *acquis*. Under the rules of the programme all investment projects are jointly financed.⁹⁹ In the years 1990 to 2000, the Phare programme allocated Euro 2.478 million to Poland.¹⁰⁰ Since January Phare has been supplemented by two other financial pre-accession instruments: SAPARD which provides aid for agricultural and rural development¹⁰¹ and ISPA, which finances infrastructure projects in the fields of environment and transport.¹⁰² Poland's financial assistance under these two programs in the years 2000 to 2002 will amount annually to euro 68.6 million Euro from SAPARD and between Euro 312 and 385 million from ISPA.¹⁰³

4. Accession Partnerships

The key feature of the enhanced pre-accession strategy approved at the Luxembourg summit in December 1997 is so-called Accession Partnerships with each candidate country.¹⁰⁴ They combine pre-accession financial aid with specific commitments to further accession preparations in a single framework. On the basis of a regulation the Council decides on establishment of and subsequent adjustments in Accession Partnerships by a qualified majority, but without the direct involvement of

⁹⁶ The legal basis is Regulation (EEC) No. 3609, 89 OJ L 375/11, 1989, which has undergone repeated amendment. The consolidated version can be found at: http://europa.eu.int/eur-lex/de/lif/reg/de_register_115020.html.

⁹⁷ "Phare" stands for Poland and Hungary, Aid for the Reconstruction of Economies.

⁹⁸ See *Bulletin EU* 12-1997, p. 9, 10, and Article 4 of Regulation (EC) No. 1266, 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906, 89 regulation (EC) No. 1266, 1999, OJ L 161/68, 1999.

⁹⁹ See Article 7 and Regulation No. 1266, *op. cit.*, *supra*, n. 98.

¹⁰⁰ See Report 2000, pp. 9 ff., which contains a list of investment projects for the year 2000.

¹⁰¹ Special Accession Program for Agriculture and Rural Development, Regulation (EC) No. 1268, 1999 OJ L 161/87, 1999.

¹⁰² Instrument for Structural Policies for Pre-Accession, Regulation (EC) No. 1267, 1999, OJ L 161/73, 1999.

¹⁰³ See also Report 2000, pp. 9–13, which contains information on some projects.

¹⁰⁴ See *Bulletin EU* 12-1997, p. 10.

the partnership countries.¹⁰⁵ The main element of this instrument is an assessment of short- and medium-term priorities for the accession preparations of the partnership country concerned. All priorities are accompanied by precise statements of objectives worked out in concert with the state concerned.¹⁰⁶ In addition, each partnership country is required to draw up its own National Program for the Adoption of the *Acquis* (NPAA), in which it has to set out in detail how it intends to meet the Accession Partnership priorities. All legally independent financial assistance (Phare, SAPARD, ISPA) is tied to observance by the candidate country with its Europe Agreement commitments, further steps towards fulfilment of the Copenhagen criteria, and progress and adherence to the specific priorities of the Accession Partnership. In the event of non-compliance with these general conditions there can occur a suspension of financial assistance. Implementation of Accession Partnerships is monitored in the Europe Agreement framework. By focusing and concentrating of candidate countries' previous integration efforts on accession the Accession Partnerships are a necessary follow-through of the launching of the individual accession process.

The first Accession Partnership with Poland was established on 30 March 1998.¹⁰⁷ Its designated short and medium-term priorities first based on the Commission's opinion on Poland's application, the revised version dated 6 December 1999¹⁰⁸ on the Commission's 1998 and 1999 Regular Reports. The priorities pertained for the most part to adoption of Community law and commitments related to wards adapting and strengthening administrative structure at all levels. Since the 1998–2000 Regular Reports on Poland found implementation of the priorities to be proceeding rather slowly¹⁰⁹ the revised version contains only a few changes restricted to a more precise description of the objectives with respect to the priorities. In particular, the environment and agriculture areas remain problematic. There is already a lack of alignment to Community law. In all other areas the problem concerns not so much enactment of new laws and regulations but the institution building essential to implementing and enforcing Community legislation. In the field of justice and home affairs further progress is need in border controls, but the main problem continues to be combating corruption where a considerable effort is required. The assessments of Poland's NPAA have been by and large positive.¹¹⁰ The initial lack of correspondence between Accession Partnership commitments and the first NPAA of May 1998 was improved in the revised versions of May 1999 and April 2000.¹¹¹ Also, coherence between the NPAA and commitments made in the negotiations has been improved in most recent

¹⁰⁵ Article 2 of Regulation (EC) No. 622/98 of 16 March 1998 on assistance to applicant states in the framework of the pre-accession strategy, and in particular on establishment of Accession Partnerships, OJ L 85/1, 1998. Article 4 provides for the possibility of cutting off financial support.

¹⁰⁶ OJ L 121/1 ff., 1998.

¹⁰⁷ OJ L 121/6, 1998.

¹⁰⁸ OJ L 335/8, 1999.

¹⁰⁹ See *Report 1998*, pp. 57–58, *Report 1999*, pp. 84–87, *Report 2000*, pp. 102–105.

¹¹⁰ See *Report 2000*, p. 106.

¹¹¹ *Ibid.*, pp. 105–107.

NPAA compared with the May 1999 version.¹¹² The areas where the greatest improvements are needed are the forward-looking elements of the Regular Reports and the financial perspectives.

5. Regular Reports

The Commission's Regular Reports are of great importance for concrete organisation of the accession process. Assessment of the progress of each CEEC applicant towards accession provides not only a basis on which the EU can take the necessary decisions on the conduct of the accession negotiations, but also a guideline for adjustments in the pre-accession strategy. The structure of those reports is largely similar to that of the Commission's application *avis*.¹¹³ First, there is a description of relations between the state concerned and the EU in respect of the Europe Agreement and financial supports. The Accession Partnership and NPAA is separately examined. The centre-piece of the reports is an assessment of each candidate country's progress towards fulfilling the Copenhagen criteria.¹¹⁴ With respect to the political criteria – democracy, rule of law, human rights and protection of minorities – Poland has been judged to fulfil all the fundamental requirements.¹¹⁵ But action in the field of reform of the judiciary and the fight against corruption will need to be continued and intensified. Good progress has been achieved by Poland in fulfilment of the economic criteria. Compared with the earlier 1998 and 1999 reports Poland's economy is not only still regarded as a functioning market economy but also one which should be capable of coping with competitive pressures and market forces within the Union in the near and no longer just the medium term.¹¹⁶ Although Poland has maintained adequate macroeconomic stability and again recorded an impressive growth rate (4.2%–5.6% in 1999/2000) inflation is still high (10.4%) and there are difficulties with privatisation of the steel sector and restructuring of agriculture.¹¹⁷ All in all, both macroeconomic and structural policy responses are needed in order to fulfil the economic criteria. The part of the Report dealing with the candidate's ability to adopt the *acquis communautaire* has been structured according to the twenty-nine negotiating chapters. Here progress is judged fair to middling.¹¹⁸ There is a positive assessment of the adoption of legislation in the key areas of the internal market *acquis*, standards and certification, state aid, intellectual property and consumers protection. Relatively little progress has been achieved in free movement of services, capital and persons and in public procurement. Further effort is needed in strengthening administrative capacity in order to guarantee implementation and enforcement of

¹¹² *Ibid.*, pp. 106.

¹¹³ For the structure see, e.g., "Commission's Opinion on Poland's Application," *Bulletin EU Supplement* 5-1997.

¹¹⁴ *Vid. sup.*, part II. 2.

¹¹⁵ See "Commission's Opinion on Poland's Application," *op. cit.*, *supra*, n. 113, p. 89. See also Report 2000, p. 23.

¹¹⁶ *Ibid.*, p. 35.

¹¹⁷ *Ibid.*, p. 28.

¹¹⁸ *Ibid.*, p. 97.

the *acquis*. Still problematic are the above-mentioned areas of agriculture, the environment and fisheries, where Poland has not embarked on the substantial changes that are needed. In the environment, energy and transport sectors little progress has been achieved in the way of adopting legislation.

IV. Negotiations

The starting point of negotiations is a general commitment to adoption of the whole *acquis* by the time of accession.¹¹⁹ Thus the negotiations focus mainly on transitional arrangements.¹²⁰ In view of the great number of accession candidates the 1997 Luxembourg European Council decided that negotiations with each applicant would be treated on their own merits and that their pace would depend on the degree of each applicant country's preparations.¹²¹ The time of accession therefore depends only on the applicant itself; no one will have to wait for others to catch up. For this reason the accession process has its own dynamic and it is impossible to estimate the likely length of each negotiation in advance.

1. Screening and the Present State of Progress in the Negotiations

The groundwork for accession negotiations, which were formally launched on 31 March 1998 with the first six applicants, among them Poland, is laid by a screening process. This is an analytical examination of the *acquis* by the Commission, which started in April 1998.¹²² Under this process the *acquis* is divided into 29 chapters¹²³ and presented in detail presented to the applicants at multilateral and, mostly, bilateral meetings. The purpose of screening is to identify the issues that are likely to arise in the substantive part of the negotiations. By the end of 1998 the first 20 chapters had been screened, and the remaining nine were concluded in the autumn of 1999. The chapters "Institutions" and "Other Questions" were shelved till the final stage of the negotiations. For the new *acquis* adopted since March 1998 there is a regular update of the screening exercise, which is presented to the applicants at special meetings.

¹¹⁹ *Vid. sup.*, part II. 1. With respect to eastern enlargement see also *Bulletin EU* 3-1998, p. 94.

¹²⁰ L o p i a n, *op. cit.*, *supra*, n. 16, p. 72.

¹²¹ See, e.g., "Conclusions of the Helsinki European Council," *Bulletin EU* 12-1997, p. 8.

¹²² For details of the screening, see Commission, *Strategiepapier zur Erweiterung*, Doc. 8.11.2000, COM (2000) 700 final, p. 16. The screening process was conducted with all CEECs plus Cyprus. In February 1999 it was also started for Malta.

¹²³ Free movement of goods, free movement of persons, freedom to provide services, free movement of capital, company law, competition policy, agriculture, fisheries, transport policy, taxation, economic and monetary union, statistics, social policy and employment, energy, industrial policy, small and medium-sized enterprises, science and research, education and training, telecommunications and information technologies, culture and audio-visual policy, regional policy and co-ordination of structural instruments, environment, consumer and health protection, cooperation in the fields of justice and home affairs, customs union, external relations, CFSP, financial control, financial and budgetary provisions.

On the basis of the screening results both the EU and the applicant States draw up their negotiating positions on each chapter with respect to preferred transitional arrangements. In the first substantive round of negotiations on 10 November 1998 with Poland and the other five “first-wave” applicants the first three chapters were provisionally closed.¹²⁴ To the end of the negotiations all chapters will only be closed provisionally in order to take account of changes in Community law.¹²⁵ Provisional closure of chapters requires agreement on transitional arrangements, a sufficient degree of progress in preparations and credible commitments to their continuation. These are monitored by the Commission which can recommend reopening in the event of non-compliance. To November 2000 all 29 chapters had been opened in the negotiations with the first group and in the case of Poland 11 had been provisionally closed.¹²⁶ By and large, the chapters which had also been closed with the other candidates related to technical, non-sensitive issues with few transitional arrangements on which agreement could be reached relatively easy. This result corresponded in the main to the applicants’ progress in preparations.

With the conclusion of the Nice summit in December 2000 the negotiations reached a new and critical period.¹²⁷ In order to complete negotiations with the first and best prepared applicants by the end of 2002 the Commission drew up in November 2000 a timetable for the rest of the negotiations.¹²⁸ Approved by the Nice European Council, it called for negotiations on the four freedoms and the environment chapter to take place in the first part of 2001. By the end of March four more chapters had been provisionally closed with Poland, among them free movement of goods and services.¹²⁹ The other two freedoms and the environment chapter are still pending. Estonia and Slovenia lead the negotiations with 18 provisionally closed chapters. The chapters on competition, transport policy, energy and taxation are scheduled for the second part of the year. Agriculture, regional policy, finance and institutions are to be tackled in 2002. In all those chapters the candidate countries have submitted about 500 requests for transitional arrangements, from 340 for the agriculture sector alone, an indication of the main sticking point in recent and future negotiations. For this reason it is the remaining period of the accession process which will decide not only the date of the first accessions but also the success of the eastern enlargement project.

¹²⁴ Small and medium-sized enterprises, science and research, and education and training.

¹²⁵ See, e.g., *Bulletin EU* 11-1998, p. 11.

¹²⁶ In addition to the first three chapters: economic and monetary union, statistics, industrial policy, telecommunications and information technologies, consumer and health protection, external relations, CFSP and financial control. Cyprus was the front-runner with 16 provisionally closed chapters, followed by Estonia and the Czech Republic with each 13 closed chapters.

¹²⁷ *Bulletin EU* 12-2000, point I.5. To be found at: <http://europa.eu.int/abc/docoffbullen200012p105001.htm>.

¹²⁸ Commission, *Strategiepapier zur Erweiterung*, Doc. 8.11.2000, COM (2000) 700 final.

¹²⁹ Also customs union and culture and audio-visual policy.

2. Free Movement of Workers as a Current Problem

A very controversial issue in the relevant negotiations is free movement of workers.¹³⁰ It is one of the few areas of eastern enlargement in which the European Union has demanded and will continue to demand transitional arrangements. The Commission presented its proposal for the EU negotiating position on free movement of workers on 11 April 2001.¹³¹ It calls for flexible transitional arrangements over a period of at most seven years.

Free movement of workers is one of the fundamentals of Community law.¹³² Article 39 TEC assures workers the right to take up employment anywhere in the Union and prohibits any discrimination based on nationality.¹³³ The details of this right have been elaborated in the secondary legislation. The most important act is Regulation No 1612/68 on freedom of movement for workers within the Community which sets out rules relating to eligibility for employment and employment practices.¹³⁴ Regulation of free movement of workers is completed by Article 42 TEC which requires the Council to adopt measures in the field of social security aimed at preventing disadvantaging of workers and their families exercising their right of free movement.¹³⁵

Immediate implementation of free movement of workers faces strong opposition, especially in Germany and Austria. The construction industry and trade unions fear it would have a severely damaging impact on the national labour market.¹³⁶ In their opinion the disparities in levels of prosperity between current member states and the applicant countries will cause substantial labour migrations and therefore lead to growth of unemployment. This problem will in particular affect adjacent border regions in Germany and Austria. Employers' federations, however, do not share this fear to such a degree. There have even been voices supporting immediate application of the *acquis* to free movement of workers because of the positive economic effects it might have.¹³⁷

¹³⁰ See, e.g., "Angst vor Überflutung überzogen," *Frankfurter Allgemeine Zeitung (FAZ)*, 14.04.2001, p. 13; "Brüssel will lange Schonfrist für Arbeitsmärkte," *Handelsblatt*, 12.04.2001, p. 4. For a legal point of view see H ä n l e i n, "Übergangsregelungen beim EU-Beitritt der MOE-Staaten im Bereich der Arbeitnehmerfreizügigkeit und der sozialen Sicherheit," *Europäische Zeitschrift für West* (2001), p. 165; also B e e k e r, *op. cit.*, *supra*, n. 71.

¹³¹ See the press release at: <http://europa.eu.int/comm/enlargement/docs/news.htm>.

¹³² See, e.g., Case C-415, 93, *URBSFA v Bosman*, [1995] ECR. I-4921, paras. 73 and 93; see W. B r e c h m a n n, C a l l i e s, R u f f e r t (eds.): *Kommentar zu EU-Vertrag und EG-Vertrag* (1999), Article 39, para. 1.

¹³³ For more details see B r e c h m a n n, *op. cit.*, *supra*, n. 132, Article 39, paras. 1-107.

¹³⁴ Regulation (EEC) No. 1612/68 of 15 October 1968, OJ L 257/2, 1968. The consolidated version can be found at: http://europa.eu.int/eur-lex/en/lif/reg/en_register_0510.html. This Regulation also gives every Union worker the right to enjoy the same social and tax advantages as national workers (see Article 7 II). The right to stay in any Member State after the end of employment is established in Regulation (EEC) No. 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a member state after having been employed in that state; OJ L 142/24, 1970.

¹³⁵ Based on Article 42 TEC and Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, OJ L 149/2, 1971. The consolidated version can be found at: http://europa.eu.int/eur-lex/de/lif/reg/en_register_05204020.html.

¹³⁶ See F i c k i n g e r: "Mit nichts kann man so gut Politik betreiben wie mit der Angst," *FAZ*, 19.04.2001, p. 4; "Brüssel will lange Schonfrist für Arbeitsmärkte," *op. cit.*, *supra*, n. 130.

¹³⁷ So, e.g., K. Z i m m e r m a n n (Director of the Deutsches Institut für Wirtschaftsforschung) in an interview in: *Spiegel*, 23.04.2001, p. 93.

Since forecasts of labour migration from the candidate countries vary¹³⁸ it is not possible to make an accurate prediction of labour flows. Though the Commission does not expect serious migration-driven disruptions, it does not want to rule out the possibility of repercussion for national labour markets.¹³⁹ In its opinion some member states will be more affected than others, and in some regions there will probably be sizeable increases in migration. Besides, there is also another important aspect of the discussion: the popular fears involved, especially in Germany and Austria. Since labour migration cannot be excluded, national governments and the Commission are taking these fears seriously.¹⁴⁰ And they have to be so treated because acceptance by Union citizens is an essential precondition of the success of the forthcoming enlargement.

Based on all these factors the Commission proposed very flexible transitional arrangements providing for a general transition period of five years. Within this time each member state can itself decide whether and to what degree it will open its labour market to workers from the new member states. After two years there will be an automatic review based on a factual report by the Commission. On the basis of the Commission recommendation the Council, acting unanimously, and following consultations with the European Parliament, can decide whether to shorten or terminate the transition period. In addition, every member state (current or new) can request a further review in accordance with the above-described procedure with a view to further relaxation of controls. Finally, the member states will have the possibility of invoking a safeguard clause after the end of the general period. In the event of serious disruptions in its labour market, which will be examined by the Commission, the country concerned may maintain its national provisions for a further maximum period of two years. After no more than seven years free movement of workers become fully effective across all member states. This Commission proposal accommodates in part the wishes of German Chancellor Gerhard Schröder though what he wanted was a general transitional period of seven years.¹⁴¹ He also thought that free movement of services ought to be restricted for the construction industry and trade. But the Commission has not yet acceded to this demand.

Nevertheless, the Commission's proposal met with the applicants' disapproval.¹⁴² If this proposal is approved by the 15 member states, the following considerations have to be taken into account. Transitional arrangements in the case of free movement of workers are well known in the EU's history of integration. The accessions of

¹³⁸ For details see, e.g., the compilation of several forecasts in Commission: "The Free Movement of Workers in the Context of Enlargement, Information Note." 06 March 2001, at <http://europa.eu.int/comm/enlargement/docs/index.htm>. See also Hänel, *op. cit.*, *supra*, n. 130, p. 165.

¹³⁹ See Commission note, *op. cit.*, *supra*, n. 138, p. 17.

¹⁴⁰ See the speech by Günter Verheugen, Enlargement Commissioner, 03 April 2001 (at <http://europa.eu.int/comm/enlargement/speeches/index.htm>) who regards it as a political-psychological problem which is a serious obstacle for the enlargement. See also the speech of German Chancellor Schröder at the occasion of the regional conference "Oberpfalz 2000" on 18.12.200 in Weiden, Germany, http://www.bundesregierung.de/dokumente/Rede/ix_26831.htm.

¹⁴¹ See the speech by Chancellor Schröder, *op. cit.*, *supra*, n. 140.

¹⁴² See the articles mentioned *supra*, n. 130.

Greece in 1981 and Spain and Portugal in 1986 were based on transitional arrangements in this sensitive area.¹⁴³ In both cases there was established a general transitional period of seven years.¹⁴⁴ But only in the case of Spain and Portugal was there provision for an automatic review after five years.¹⁴⁵ Compared with that, the current Commission proposal is much less rigorous. Furthermore, because of its flexibility, there is leeway for subtly differentiated bilateral agreements. Free movement of workers could be, for instance, realised partly, to protecting potentially vulnerable regions or branches of the economy. Finally, with regard to popular fears one thing cannot be forgotten: the applicant countries are also insisting on a large number of transitional arrangements. These in some cases also relate to politically sensitive areas, for instance purchase of real estate. Poland in particular is demanding very long transitional periods. And just as the European Union will have understanding for the problems of the accession candidates, they too should evince understanding for the problems of some European Union member states.

3. Transitional Periods for the Property Market

On the Polish side there is a demand for a very long transitional period of 18 years in liberalisation of the property market Poland in particular – but some other candidate countries as well – greatly fear the possibility of land for agricultural, industrial and private use being sold to a great extent to wealthy citizens and enterprises of the western member states of the Union. Nevertheless, effective realisation of this fundamental freedom of the EEC Treaty and of the right of non-discriminatory residence stemming from citizenship of the Union (Article 18 EEC Treaty) necessarily requires free access for citizens of all EU member states to the property market of the CEECs. Thus acceptance of the Polish demand for an unconditional 18-year transitional period would seriously undermine the internal market. The Commission therefore proposed in May 2001 a common EU negotiation position calling for ad hoc realisation of non-discriminatory access of investors to the CEEC property market for commercial purposes as of the date of accession.¹⁴⁶ As regards agricultural land, the Commission is willing to accept a transitional period of seven years and for sales of real estate for purely private use a transitional period not more than five years. In this field too one can expect hard bargaining between Poland and the EU, but in the end a package deal covering all the contentious questions will surely be found.

V. Conclusions

The historic challenge of eastern enlargement of the European Union has released enormous energies both in the candidate countries and inside the Union. For the CEECs

¹⁴³ For details see H ä n l e i n, *op. cit.*, *supra*, n. 130, p. 168.

¹⁴⁴ See Arts. 44, 45 I AD 1981 OJ L 291/21, 1979; Arts. 55, 56 I and 215, 216 I AD 1985, *op. cit.*, *supra*, n. 66.

¹⁴⁵ See Arts. 56 II and 216 II AD 1985, *op. cit.*, *supra*, n. 66.

¹⁴⁶ See FAZ, 3.05.2001, p. 19.

the way into the Union has been long and hard and has not yet reached its end. But enlargement will take place and the reunification of the European continent, a project which goes beyond the questions of Accession Treaties, will be the main task of if the 21st century for the Europeans.

Accession to the European Union: Membership Conditionality and Accession Criteria

MARISE CREMONA

1. Introduction

In legal terms, accession to the European Union is governed by Article 49 of the Treaty on European Union, which sets out the criteria for membership and also the procedure to be followed. In this paper, we will consider the accession criteria set out in Article 49; the procedures will be discussed only in so far as they shed light on the application of these criteria.¹ The Treaty of Amsterdam 1997 amended the Treaty on European Union so that for the first time accession formally depends on the fulfilment of qualitative political criteria and not merely being a "European State." Under Article 49(1) TEU, "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union." Article 6(1) refers to "the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

Although this formal amendment of the Treaty took place in 1997, the Community has imposed *de facto* conditions upon membership since 1993. In response to the fall of communism and the dramatic changes in central and eastern Europe and the former Soviet Union, two crucial decisions were taken by the Member States at the Copenhagen European Council in June 1993.² The first was an acceptance that "the associated countries in central and eastern Europe that so desire shall become members of the European Union." The second was the decision that henceforth accession to the Union would depend upon compliance with a number of political, economic and legal criteria (the "Copenhagen criteria"). The European Council declared that

Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.

¹ For a general discussion of enlargement issues, see Maresceau (ed.): *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* (1997). For the procedure and negotiation process, see Ph. Nicolaidis, S.R. Boe an, F. Bellon, P. Pezaros: *A Guide to the Enlargement of the European Union (II): A Review of the Process, Negotiations, Policy Reforms and Enforcement Capacity* (1999).

² "Conclusions of the European Council at Copenhagen, 21-22 June 1993," *Bull. EC* 6-1993, pt 1.13.

These conditions for the associated States were set out:

1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
2. The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union;
3. The ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

In addition, the European Council refers, as an "important consideration in the general interest of both the Union and the candidate countries," to the EU's capacity to absorb new members while maintaining the momentum of European integration. A Report by the Council to the Essen European Council in December 1994, on the development of an accession strategy, also refers in this context to "respecting [the Union's] internal cohesion and its fundamental principles." Membership conditionality thus not only relates to the ability of a prospective new member to cope with the demands of membership, but also concerns the destabilising effect of the presence of members who do not (yet) share the political, economic and legal capacity of existing members.³

By linking membership with conditionality and association status, the European Council reoriented the existing Europe Agreements (without altering their legally binding content) into instruments of an emergent pre-accession process,⁴ and this function of association agreements can also be seen in the newer Stabilization and Association Agreements for the states of south-east Europe. It is, in a sense, a radical re-working of the idea of association seen in the 1963 Ankara Agreement with Turkey. The accession conditions have the purpose of ensuring a degree of pre-accession political, economic and legal convergence. Post-accession convergence (although inevitable to some extent) is more difficult where applicants are starting from widely diverse positions, and as the Union grows bigger and the applicants are numbered in fives and tens rather than ones and twos, complex transitional arrangements are more problematic.

But Copenhagen represents a more fundamental shift. Out of this declaration has developed a perception that the European Union should play a key role in the reunification or even the re-creation of Europe, and the gradual growth of an assumption, now fully-fledged, that the European Union could, and even should, be open to the inclusion of the whole of Europe. We should be careful here: the point is not that all European States should eventually join the EU; the point is that the EU accepts at a fundamental level both that membership should be an option for all European States and the consequent obligation to assist in the fulfillment of the essential criteria for accession. As the Member States discovered in Nice in December 2000, this alteration of perspective has implications for the nature of the Union itself. As EU member-

³ The focus of this paper will be on the conditions applied to the applicant state(s), rather than the need for adjustment of the Union's own institutional framework.

⁴ Inglis: "The Europe Agreements Compared in the Light of their Pre-Accession Re-orientation," *Common Market Law Review* (2000), p. 1173.

ship, with its newly articulated conditionality, has become a goal for almost every emerging and newly stabilizing European State, it has also become an instrument of economic, political and legal change beyond its boundaries.

2. The Three Copenhagen Conditions

(a) The "Political" Condition

The first "political" criterion looks for "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." This wording is echoed by, but is not identical to, the formulation of Article 6(1) TEU, referred to in Article 49 TEU.

In the Communication accompanying its 1997 *avis* on the central and eastern European applications for membership,⁵ the Commission defined democracy in terms of free and fair elections, political pluralism (including a recognition of the legitimate role of the opposition), freedom of expression and freedom of religion, the need for democratic institutions and independent judicial and constitutional authorities. The Europe Agreements, concluded with the states of Central and Eastern Europe, define the "new political order" in the Associated states in terms of "a multi-party system with free and democratic elections."⁶ The rule of law is taken by the Commission to refer to the independence of the judiciary (as well as suitably qualified judges), and an effective, trained and disciplined police force. Elsewhere, the Community has defined the rule of law in terms of effective means of redress against administrative decisions, access to courts and the right to a fair trial, and equality before the law and equal protection by the law.⁷

What should we understand by "human rights" in this first criterion for membership? Under Article 6(2), the Union itself "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." The more specific formulation of Article 6(2), with its reference to the European Convention and the constitutional traditions common to the Member States, provides guidance as to the content of the human rights and fundamental freedoms referred to in Article 6(1).⁸ It can be argued, however, that the human rights defined in terms of the foundational principles of the Union should be interpreted more widely

⁵ *Agenda 2000*, Volume I, Part Two "The Challenge of Enlargement," Sect. I: Assessment on the basis of the accession criteria. The original *avis* of 16 July 1997 for the ten central and eastern European State applicants can be found in COM(97) 2001-2010.

⁶ See, for example, the Preamble to the Europe Agreement with Slovenia, OJ L 51, 26/02/1999, p. 3.

⁷ Council Conclusion of 29 April 1997 on the application of conditionality with a view to developing a coherent EU strategy for relations with the countries of south-east Europe.

⁸ The reference to the European Convention is not without ambiguity: as Nowak points out, although all Member States are signatories to the Convention itself, not all are party to all the additional Protocols: Nowak: "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU," in: Alston, Bustelo, Heenan: *The EU and Human Rights* (1999), p. 693.

than this might imply, to include economic, social and cultural rights, as reflected for example in the European Social Charter.⁹ In particular, the Charter of Fundamental Rights of the European Union, solemnly proclaimed by the European Parliament, the Council and the Commission at Nice in December 2000,¹⁰ may now be taken as a benchmark. Its Preamble, while not explicitly mentioning Article 6 TEU, evokes that provision:

... [T]he Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. ... [I]t is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

The Preamble also indicates the sources of the rights the Charter contains, in terms which include, but extend further than, those mentioned in Article 6(2):

This Charter reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Respect for human rights is one of the foundations of the Union, as expressed in Article 6(1) TEU, but has other dimensions as well. The link between Union membership and respect for human rights is multi-layered: it is a principle "common to the Member States," alongside democracy and the rule of law; it is also a principle binding on the Union itself, to be upheld by the Union's constituent Members, as well as by its institutions. In addition, the Treaty affirms that this principle is based, not only on the European Convention, but also on the "constitutional traditions common to the Member States," a formulation developed by the European Court of Justice in its jurisprudence on the role of fundamental rights in the Community legal order.¹¹ The protection of human rights within the constitution of a prospective Member, therefore, and its adherence to the European Convention, are a guarantee of the security of the Union's own obligations, as set out in Article 6(2) TEU.¹²

⁹ Nowak, *op. cit.*, *supra*, n. 8, p. 694.

¹⁰ OJ C 364/1, 18/12/2000.

¹¹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125. See also case C-5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609. This jurisprudence has been the subject of extensive analysis; see in particular de Witte: "The Past and Future Role of the European Court of Justice in the Protection of Human Rights," in: Alston, Bustelo, Heenan, *op. cit.*, *supra*, n. 8.

¹² Since the Treaty of Amsterdam it has been possible to suspend a Member State's membership rights in a case of a "serious and persistent breach" of the principles of Article 6(1) TEU: see Article 7 TEU.

The first of the Copenhagen criteria differs from Articles 49 and 6(1) TEU in two particular ways. In the first place, minority rights are identified specifically within human rights more generally, a reflection on the fact that a number of the applicant States have substantial minorities,¹³ and that minority rights had already been specifically included in the Preambles to the "Europe" Association Agreements.¹⁴ In its 1997 Communication the Commission points to the risk to both democratic stability and good relations with neighbouring countries where there are problems with the integration of minorities. Secondly, where Article 49 TEU refers simply to the need to respect the principles set out in Article 6(1), the first Copenhagen criterion requires "stability of institutions guaranteeing" these principles. The importance of institutional stability (referring to both political and legal institutions and structures) for democratic maturity and maintenance of the rule of law is easily appreciated. It is however noteworthy that the institutional requirements for the second and third of the Copenhagen criteria have, since Copenhagen itself, emerged as equally necessary.

(b) The Economic Condition

The second of the Copenhagen criteria contains a two-fold economic assessment: the existence of a functioning market economy, and the capacity to cope with competitive pressure and market forces within the Union. This criterion does not, unlike the first, reflect a formal, Treaty-based condition for membership of the Union. Nevertheless, the existence of a functioning market economy can be said, since the Maastricht Treaty amendments, to have become a part of the Community *acquis*. The Treaty provisions on economic policy which underpin economic and monetary union make an explicit reference to the open market economy and free competition as essential elements of Community and Member State economic policy:

. . . the activities of the Member States and the Community shall include . . . the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.¹⁵

In this sense, the second and third Copenhagen criteria are closely linked. Not only does the market economy form part of the *acquis*, so that the adoption of the full

¹³ According to Commission figures, minorities account for 44% of the population in Latvia (where 34% are Russian), 38% in Estonia (30% Russian), 20% in Lithuania (9% Russian, 7% Polish), 18% in Slovakia (11% Hungarian, 5% Roma), 14% in Bulgaria (9% Turks, 5% Roma) and 13% in Romania (8% Hungarian, 4% Roma); *Agenda 2000*, Volume I, Part Two "The Challenge of Enlargement," Sect. I: Assessment on the basis of the accession criteria.

¹⁴ See for example, the Europe Agreement with Slovakia: "... recognizing the establishment in the Slovak Republic of a new political order which respects the rule of law and human rights, including the rights of persons belonging to minorities, and operates a multi-party system with free and democratic elections; . . ." OJ L 359, 31/12/1994, p. 2.

¹⁵ Article 4(1) EC Treaty; see also Article 98 EC and the Statute of the European Central Bank, Article 2.

acquis necessitates the ability to abide by the broad economic policy guidelines formulated within the Union system; it will also involve opening domestic economies up to free competition, both from within the Union itself and externally (as part of the adoption of the Community's external trade policy).

The reference to the market economy also has a basis in existing relations between the Union and the candidate states. The "principles of a market economy" appears within the Europe Agreements, alongside democracy and respect for human rights, among the principles which are said to "form the basis of the domestic and external policies of the parties" and to constitute "essential elements" of the Agreements. One of the objectives of the Europe Agreements was to assist in the development of the emerging economies of the associated states.

In assessing progress at the time of its original *avis* in 1997, the Commission identified a number of more specific conditions in the development of a functioning market economy:

- equilibrium between demand and supply is established by the free interplay of market forces; prices, as well as trade, are liberalised;
- significant barriers to market entry (establishment of new firms) and exit (bankruptcies) are absent;
- the legal system, including the regulation of property rights, is in place; laws and contracts can be enforced;
- macroeconomic stability has been achieved including adequate price stability and sustainable public finances and external accounts;
- broad consensus about the essentials of economic policy;
- the financial sector is sufficiently well-developed to channel savings towards productive investment.

This first limb of the second Copenhagen criterion may be said to be a pre-condition for the second limb: the capacity to cope with competitive pressure and market forces within the Union. The competitiveness of the economy – not just its openness to competition but its ability to compete successfully – has become a key concern for the existing Union Member States.¹⁶ Thus the competitiveness condition is not only concerned with the strains upon the economic policies of, and social cohesion within, the potential new Member States. It is also concerned with the global competitiveness of the Union as a whole, the impact upon existing Union policies designed to combine employment-creating and cohesion policies with competitiveness, and, as the European Council said at Copenhagen, the need to maintain "the momentum of European integration" within the context of enlargement. It is not surprising, therefore, that the Commission in 1997, in explaining the criteria it had used to assess the candidate states in this respect, emphasises not only present capabilities but also signs of

¹⁶ See in particular the Conclusions of the European Council in Lisbon, March 2000, in which the Member States declared their "new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion."

adaptability to future change: "A key question is whether firms have the necessary capacity to adapt, and whether their environment supports further adaptation." The different elements taken into account by the Commission included:

- the existence of a functioning market economy, with a sufficient degree of macroeconomic stability for economic agents to make decisions in a climate of stability and predictability;
- a sufficient amount, at an appropriate cost, of human and physical capital, including infrastructure (energy supply, telecommunication, transport, etc.), education and research, and future developments in this field;
- the extent to which government policy and legislation influence competitiveness through trade policy, competition policy, state aids, support for SMEs, etc.;
- the degree and the pace of trade integration a country achieves with the Union before enlargement. This applies both to the volume and the nature of goods already traded with member states;
- the proportion of small firms, partly because small firms tend to benefit more from improved market access, and partly because a dominance of large firms could indicate a greater reluctance to adjust.

(c) The Third Condition: Acceptance of the *Acquis*

The third Copenhagen criterion refers to the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union. This phraseology indicates that what is at stake is not only a preparedness to accept the existing *acquis*, but also a willingness to accept the longer-term objectives of the existing Member States. We should also remember that the *acquis* includes not only binding legislative measures adopted under the EC Treaty, but also decisions taken under the "second" (CFSP) and "third" (Police and Judicial Cooperation in Criminal Matters) pillars, decisions of the European Court of Justice, and non-binding measures adopted under the Union Treaties. One might have thought this third criterion to be in some sense superfluous, in that the acceptance of the *acquis* results from the negotiation and conclusion of the Treaty of Accession between existing and new Member States. Insofar as the *acquis* needs to be adjusted to accommodate new members, it is not a unilateral act on the part of the acceding state, but a joint decision taken by existing and new Members. This may be the formal legal position. However, the third Copenhagen criterion sends out two very important messages.

We should remember the timing of the Copenhagen declaration. Adopted in June 1993 it followed the crucial negotiations for the Maastricht Treaty on European Union, at which for the first time the Member States had accepted the idea of permanent "opt-outs" from Community policies: full economic and monetary union (UK and Denmark), aspects of social policy (UK) and defence (Denmark). The third Copenhagen criterion was designed to send a signal that these developments should not be seen as setting a precedent for prospective Members. Following Maastricht, membership was to be of the Union as a whole,¹⁷ and it should not be possible to pick and

¹⁷ The treaty provision on accession, now Article 49 TEU, was formerly contained within the EC Treaty.

choose between Union policies. The European Economic Area Agreement (signed in May 1992 and in force January 1994) with the EFTA states illustrates that for those countries prepared to accept some but not all of the *acquis*, something less than full membership must be the solution.

This is not to imply that no derogations are possible. Derogations can always be agreed as part of the negotiating process (as they frequently are during the negotiations within the EC's internal decision-making process). However, they are likely to be temporary and limited in scope, especially where they concern the "core" of the *acquis*. In its Progress Report for 1999, the Commission attempts to offer flexibility in terms of negotiation of transitional periods, while recognising the difficulty of a less than full application of the *acquis* in an area without internal frontiers:

For the areas linked to the extension of the Single Market regulatory measures could be implemented quickly. Any transition periods should therefore be few and short. For those areas of the *acquis* where considerable adaptations are necessary and which require substantial effort, including important financial outlays (in areas such as environment, energy, infrastructure), transition arrangements could be spread over a definite period of time provided candidates can demonstrate that alignment is underway and that they are committed to detailed and realistic plans for alignment, including the necessary investments.¹⁸

Transitional periods will be acceptable, but these must be seen as "multi-speed" approaches to the common goal of complete acceptance of the full *acquis communautaire*, and not as opt-outs. One EU Commissioner, speaking in the context of Turkey's candidature, makes an interesting distinction in this respect between the negotiability of the three Copenhagen criteria:

All our decisions are debated and negotiated within the framework of our shared values and common policies. So, the policies and actions we develop are negotiated and mediated by the democratic process. It is the common values, which underlie them, that are not negotiable. The values of democracy, respect for human rights and respect for minorities, are not negotiable. Our respect for, and commitment to, a market economy are not negotiable either.

Our common policies are, of course, negotiable because they do not constitute universal values. They are, however, very important for us because they represent the instruments we have developed, and continue to develop, to enable the integration process to achieve the mutual political, economic and social benefits that the EU is all about.¹⁹

The third Copenhagen criterion also indicates that the major work of adjustment of domestic legislation and policy must take place prior to accession, and not subsequently. Earlier accessions had accommodated sometimes lengthy transitional periods, on both sides. A number of factors may account for this change. The numbers of

¹⁸ Commission 2nd Report to the Council on progress towards accession by each of the candidate countries, 13 October 1999, Composite Report sect. IV.3.4.

¹⁹ A. Diamantopoulou (European Commissioner responsible for employment and Social Affairs): "The European Social Model and Enlargement," Seminar on the harmonisation of Turkey's social policy and legislation with EU standards (IKV) Istanbul, Turkey, June 23 2000: SPEECH/00/235.

countries negotiating accession in this instance, and the ever-increasing complexity of the *acquis*, make large-scale post-accession transition unfeasible. The depth of integration already achieved within the Community, and in particular the creation of the internal market as an area without internal frontiers, makes it difficult to accommodate differentiation in some areas of the *acquis*, with its potential threat to fair competition and the level playing field.²⁰ It may also be that previous experience has made the existing Member States cautious about the possibility of accepting new Members who have not already demonstrated their capacity effectively to apply the *acquis*. For the first time, therefore, candidate states are to be expected to *demonstrate* ability to take on the obligations of membership, by a substantial programme of pre-accession "voluntary" legal approximation, in addition to formally indicating acceptance subject to negotiated derogations.²¹

However, this expectation did not arise out of nothing. We should remember that the Copenhagen conditions were directed at "the associated countries in central and eastern Europe." The association agreements concluded by these states all contain substantial provision for approximation of laws, as part of their aim "to provide an appropriate framework for [the Associate State's] gradual integration into the Community."²² The agreements assert that "the major precondition for [that State's] economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community."²³ The Chapter on approximation of laws in the Europe Agreement with Poland, for example, contains three articles: the first sets out the basic principle, the second details priority sectors, and the third outlines Community assistance for approximation.

Article 68

The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.

Article 69

The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.

²⁰ On differentiation and flexibility within the context of the internal market, see de Búrca: "Differentiation Within the 'Core'? The Case of the Internal Market," and Philippart, Sie Dhian Ho: "Flexibility and Models of Governance for the EU," in: de Búrca, Scott (eds.): *Constitutional Change in the EU: From Uniformity to Flexibility?* (2000).

²¹ Kennedy, Webb: "The Limits of Integration: Eastern Europe and the European Communities," 30 *CMLR* (1993), p. 1095; Evans: "Voluntary Harmonisation in Integration between the EC and Eastern Europe," 22 *European Law Rev.* (1997)2, p. 201.

²² Europe Agreement with Poland, OJ L 34/2, 1993, Art. 1(2).

²³ *Ibid.*, Art. 68.

Article 70.

The Community shall provide Poland with technical assistance for the implementation of these measures which may include inter alia:

- the exchange of experts,
- the provision of information,
- organization of seminars,
- training activities,
- aid for the translation of Community legislation in the relevant sectors.²⁴

Article 68 makes it clear that the commitment is ongoing: future legislation must also be compatible with Community law. It is, however, not an absolute commitment: Poland is to use its “best endeavours” against a background of mutual recognition of the importance of approximation for future integration prospects. Nevertheless, although the general provision in Article 68 does not impose a definite obligation, there are specific approximation provisions in the Europe Agreements which *are* obligatory in nature, including competition law, intellectual property and transport services.²⁵ This Agreement was concluded before the Copenhagen criteria were set out in June 1993 (it was signed in December 1991), and the element of conditionality is now more explicit.

In the year following Copenhagen, the Commission published several strategy papers on the preparation of the candidate countries for accession; harmonisation of laws is one of the elements of the new strategy, linked to both the Europe Agreements and the Copenhagen criteria:

To enable the associated countries to integrate progressively in a wider European market, as provided for by the Europe Agreements, an appropriate legal and institutional framework is needed. To achieve this, each associated country should draw up a programme of priorities and a timetable in fields such as the approximation of legislation, and the implementation of competition and state aids policies which are transparent and compatible with those of the Union.²⁶

The rationale for approximation of laws is phrased both in terms of economic development and future prospects of accession:

In the short term, a legal environment compatible with Community law is a major incentive for foreign investment, a vehicle for improved access to Community markets and a guarantee of undistorted and fair trade. In the longer term, it represents an indispensable preparation of the associated countries for their future accession to the European Union.²⁷

²⁴ *Ibid.*

²⁵ *Ibid.*, Arts. 63(3), 66(1), 56(5).

²⁶ Commission Communication: “The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession,” 13 July 1994, COM(94) 320 final. See also the follow up Communication of 27 July 1994, COM(94) 361 final.

²⁷ Commission Communication: “Relations with the associated countries of Central and Eastern Europe: Task Force on Approximation of Laws (Follow up of the European Council of Copenhagen),” 16 September 1994, COM(94) 391 final.

The creation of an "appropriate legal and institutional environment for economic development and integration" was identified as a condition for further progress in relations with the Union, and a necessary component of the successful implementation of the Europe Agreements. As the Commission stated in a 1994 strategy paper,

Approximation of law is an important prerequisite for the implementation of the Europe agreements, given the fact that the provisions of the agreements were based on concepts deriving directly from the Treaty of Rome.²⁸

In addition to stressing the need for country-based programmes for approximation (which have become the National Programmes for the Adoption of the *Acquis*), the Commission also pledged technical support and assistance, through the PHARE assistance programme,²⁹ and sub-committees of the Association Councils.

This strategy was endorsed by the European Council at Essen in December 1994. The pre-accession strategy formulated at Essen was built on the Europe Agreements, together with the "structured relationship" between the EU and the associated States (a multilateral framework for dialogue, covering second and third pillar as well as internal market and trade issues). The European Council declared that "the key element in the strategy to narrow the gap is preparation of the associated States for integration into the internal market of the Union" and invited the Commission to prepare a "White Paper" on this integration process.³⁰ The White Paper that was produced in May 1995 is an attempt to outline (and prioritize) the different fields of Community legislation which need to be addressed by the associated states.³¹ Limiting itself to the internal market, and selective within these bounds, it draws on the experience of categorising and organising Community legislation in the drawing up of the Annexes to the EEA. Each chapter, covering an element of the internal market *acquis*,³² outlines the rationale and objectives of the relevant Community law, the conditions necessary for its operation, and identifies the key measures and proposed sequence for approximation within each area. The White Paper's structure has formed a basis for the associated countries' own national programmes for the adoption of the *acquis*, for the screening exercise at the start of the accession negotiation process designed to measure the gap between a candidate country's legal system and the Community *acquis*, and for regular Commission progress reports. It should be borne in mind, however, that the White Paper does not by any means cover the whole *acquis*, important areas such as environmental and energy policy were excluded, and (even

²⁸ *Ibid.*, at para. 3(d).

²⁹ Regulation 3906/89/EC of 18 December 1989, OJ L 375/11, 1989, last amended by Reg. 1266/1999/EC OJ L 161/68, 1999.

³⁰ Conclusions of the European Council, Essen, December 1994.

³¹ "Commission White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union," 3 May 1995, COM(95)163 final.

³² There are 23 chapters, covering free movement of industrial products, competition, agriculture, transport, environment, telecommunications, financial services, direct taxation, company law and intellectual property, among others.

given the time lapse since its publication) there is no sense in which it provides a complete programme for pre-accession approximation.

As we have seen, the general approximation provisions in the Europe Agreements (Article 70 in the case of the Agreement with Poland given above) promise technical assistance from the EU to assist the process. This assistance has been channeled through the White Paper, the PHARE programme, the Commission's screening exercise and the Task Force for Accession Negotiations, created in January 1998 and since merged with the directorate-general responsible for enlargement in the Prodi Commission. There is of course a difference between bilateral contractual obligations and enlargement negotiations. However, approximation under the Europe Agreements has – in practical terms for the candidate States – effectively been subsumed into approximation as part of the pre-accession process, although the Community continues to refer to Europe Agreement obligations in assessing progress.

There is one further aspect to the third Copenhagen criterion, implicit rather than explicit in the wording of the Copenhagen conclusions themselves, but since then very much emphasised by all parties. This is the importance of effective application and enforcement of the law, together with the necessary administrative and judicial capability. Acceptance of the *acquis communautaire* entails the necessary institutional infrastructure to manage membership and to participate in Union decision-making and implementation processes. The Commission's White Paper on approximation in 1995 underlined that enacting laws was not enough, and also outlined the basic institutional demands of the aspects of the *acquis* analysed. In its 1997 Communication on enlargement, the Commission stresses this point:

It is vital that Union legislation be transposed into national law. But this is not sufficient to ensure its correct application. It is equally important for the applicants' administrations to be modernised so that they can implement and enforce the *acquis*. This will often require new administrative structures as well as properly trained and remunerated administrators. The applicants' judicial systems must be capable of ensuring that the law is enforced. . . . It is important that these countries' courts should be able, from accession, to apply the principles of Community law, such as primacy over national law or the direct effect of some legislation. It is also essential for these courts to have a sufficient number of judges trained in Community law in order to make use of the preliminary ruling procedure in Article 177 and to ensure effective cooperation with the Court of Justice of the European Communities.³³

In this sense, the Copenhagen criteria are not only about establishing "values" as membership criteria, but also set conditions without which membership of a highly complex regional organisation is not a viable proposition.

³³ *Agenda 2000*, Volume I, Part Two "The Challenge of Enlargement," Sect. I Assessment on the basis of the accession criteria.

3. Regional Cooperation and Good-Neighbourliness: An Additional Condition?

Since Copenhagen in June 1993, the three criteria discussed above have frequently been confirmed as the basis for EU membership.³⁴ However, over the intervening years, a further element has become increasingly visible: regional cooperation and good-neighbourly relations.³⁵ The first step in linking these virtues to EU accession was taken in Corfu in June 1994, in the context of the Stability Pact for Europe. The Stability Pact, launched by the Paris Conference in 1994–1995, was designed to encourage “preventive diplomacy aimed at fostering good-neighbourly relations,” and the negotiation of agreements to consolidate borders and resolve problems of national minorities between the states of central and eastern Europe and the former Soviet Union.³⁶ We have already seen that minority rights were included as such in the Copenhagen criteria, and that the maintenance of good relations with neighbouring states is put forward as one reason for their importance.³⁷ Border disputes were not referred to, but have been emphasised in subsequent discussion of good neighbourly relations.

In its Conclusions in Corfu, the European Council stated that the development of an accession strategy by the Commission and Council “will be helped by the development of good-neighbourly relations, which will be the subject of the Stability Pact.” At Essen in December 1994, at which the accession strategy was adopted, the European Council made a slighter fuller statement, again in the context of accession:

Being aware of the role of regional cooperation within the Union, the Heads of State and Government emphasize the importance of similar cooperation between the associated countries for the promotion of economic development and good neighbourly relations. The Council has therefore approved a programme to promote such cooperation. That programme will also contribute to the objectives of the Stability Pact.

Since then, regional cooperation has been included in the Europe Agreements with the Baltic states, with a paragraph added to the “essential elements” clause:

“The Parties consider that it is essential for the future prosperity and stability of the region that the Baltic States should maintain and develop cooperation among themselves and will make every effort to enhance this process.”³⁸

The agreement with Slovenia includes a reference to the Stability Pact and regional cooperation in its Preamble:

³⁴ See, for example the Conclusions of the Luxembourg European Council in December 1997, at para. 23.

³⁵ For a discussion of regional cooperation as a feature of conditionality in EU external policy more generally, see *Cremona*: “Flexible Models: External Policy and the European Economic Constitution.” in: *de Búrca, Scott* (eds.): *Constitutional Change in the EU: From Uniformity to Flexibility?* (2000).

³⁶ See Council Joint Action 93/728/CFSP on the inaugural conference of the pact for stability in Europe OJ L 339/1, 1993.

³⁷ See *supra*, n. 13.

³⁸ Europe Agreement with Latvia OJ L 26/3, 2/2/1998, Art. 2(2); Europe Agreement with Lithuania OJ L 51/3, 20/2/1998, Art. 2(2); Europe Agreement with Estonia OJ L 68/3, 9/3/1998, Art. 2(2).

RECOGNISING the contribution which the Pact on Stability in Europe can make to promoting stability and good neighbourly relations in the region and conforming their determination to work together for the success of this initiative.³⁹

In each of the Europe Agreements, the security and stability of Europe is made an explicit subject of political dialogue.⁴⁰

The Commission's Communication on enlargement in 1997 also refers to good neighbourly relations, and in particular to border disputes. The Commission, while not proposing a formal addition to the Copenhagen criteria, takes the view that the prospect of accession will act as a "powerful incentive" for the settlement of border disputes. It stresses the need for reliance on judicial dispute settlement:

The Commission considers that, before accession, applicants should make every effort to resolve any outstanding border dispute among themselves or involving third countries. Failing this they should agree that the dispute be referred to the International Court of Justice. In any event, all candidate countries should therefore, before accession negotiations are completed, commit themselves to submit unconditionally to compulsory jurisdiction, including advance ruling of the International Court of Justice in any present or future disputes of this nature.⁴¹

Significantly, this passage occurs in the section of the Communication dealing with the impact of enlargement on the Union and its policies. As the Commission says, enlargement "should not mean importing border conflicts." At its meeting in Helsinki in December 1999, the European Council endorses this approach; there is again a reference to the peaceful, judicial, settlement of border disputes in the context of the need for the candidate countries to share the values and objectives of the European Union, and compliance with the political criteria laid down in Copenhagen.⁴² Although, then, the political criteria appear on their face to be largely domestic in emphasis, they have been given an external dimension as they have been developed and applied. This external dimension is likely to be given further emphasis as the criteria are applied to prospective applicants in south-east Europe.

One aspect of regional cooperation, indeed the one which perhaps looms the largest in the context of this enlargement, has apparently been partially excluded from operating as a pre-condition for enlargement. While seeking to encourage a settlement of the "Cyprus problem," the European Council stated clearly at Helsinki that (although a settlement would "facilitate" accession) the Council's decision on the accession of Cyprus would be made without setting this as a pre-condition.⁴³ Nevertheless, in stressing that fulfillment of the political criteria for accession will be necessary before opening negotiations with Turkey, the European Council makes "par-

³⁹ Europe Agreement with Slovenia, OJ L 51/3, 26/2/1999.

⁴⁰ For example, Europe Agreement with Poland OJ L 34/2, 1993, Art. 2

⁴¹ *Agenda 2000*, Volume I, Part Two, The Challenge of Enlargement, Sect. II: The Principal Questions on the Way to Enlargement (Impact Study), 8. Border Disputes.

⁴² Helsinki European Council, December 1999, Conclusions, para. 4.

⁴³ *Ibid.*, para. 9.

ticular reference" to the Cyprus problem and international border disputes, alongside human rights issues.⁴⁴

This last point raises the question of the extent to which the Copenhagen criteria will be rigorously applied, and indeed, the procedures and mechanisms by which they are applied. It is these issues to which we will now turn.

4. Assessing Compliance: Changing Priorities

The accession process has some very distinctive characteristics. Although it is ultimately a matter of the negotiation and conclusion of an international treaty between the existing and new Member States, a treaty which must be ratified by all contracting states in accordance with their own constitutional procedures, a key role is nevertheless played by the Union institutions. The decision to open negotiations and set the process in motion is taken by the Council (in practice, the European Council), after the Commission has issued its "opinion" on the application. At this early stage, as we shall see, conditionality is already an issue. According to Article 49 TEU, the Council is to "act" in response to the application by a unanimous decision, after consulting the Commission and after receiving the assent of the European Parliament, which must act by an absolute majority of its members. The Council decision signifies the successful conclusion of the negotiations, and will therefore entail a recognition that all the relevant membership criteria have been met, as well as formal approval of the results of the negotiations. By its right of assent the European Parliament is also able to take a view on whether or not the membership conditions are met, as well as on the outcome of the negotiations and overall political implications of the proposed accession.

These three institutions (Council, Commission, European Parliament), together with the European Council, therefore play a key role in assessing compliance with the membership criteria. What of the Court of Justice? Under Article 46 TEU the Court of Justice has jurisdiction in respect of Article 49 TEU. In principle, therefore, the Court would have jurisdiction to determine whether or not the procedures laid down in Article 49 have been followed, and even, possibly, whether an applicant state meets the criteria explicitly mentioned in Article 49, including respect for the principles set out in Article 6(1), although the Court does not have jurisdiction in respect of Article 6(1) TEU itself.⁴⁵ Having said this, it is difficult to see such a case being brought before the Court; the legislative institutions must consent to the decision and a non-Member (applicant) State – with perhaps the most obvious reason to challenge a Council decision on accession – does not have standing to bring an action for annulment. In practice, then, the judgement as to whether or not the membership criteria have been fulfilled will be a political one, taken by the Commission, Council and European Parliament at different stages in the process.

⁴⁴ *Ibid.*, para. 12.

⁴⁵ As they have no formal legal status, the Copenhagen criteria (in so far as they go beyond Article 49 TEU) would not be enforceable against the Council through the Court of Justice.

Formally speaking, there are two stages at which the membership criteria are considered. The first is at the time of the decision to open negotiations, where the decision is taken by the European Council on the basis of an opinion prepared by the Commission; and the second is at the conclusion of the negotiations, when the Council adopts its final decision. In the practice of the current enlargement, assessment has in fact been more of a continuing process, as the Commission committed itself in its initial opinion and Communication on enlargement, *Agenda 2000*, to the preparation of regular (annual) progress reports, assessing progress on the basis of the Copenhagen criteria and the goals set by the Accession Partnership with each applicant.⁴⁶

In July 1997, shortly after the Inter-Governmental Conference agreed the text of what was to become the Treaty of Amsterdam, the Commission published its Opinions (*avis*) on the applications for membership from the ten central and eastern European States,⁴⁷ together with *Agenda 2000*, its assessment of the impact of enlargement on the EU's existing policies and institutions, and proposals for the enlargement process.⁴⁸ The Commission provided a factual assessment, report and recommendation, and the European Council then took the specific decisions at Luxembourg in December 1997. Prior to these initial Commission opinions and the decisions taken by the European Council, it was not clear how the Copenhagen criteria would be applied, nor the extent to which compliance would be required before the opening of negotiations.

The Commission assessments in its initial opinions were based on lengthy questionnaires sent to each candidate State during 1996, as well as bilateral meetings, reports from Member States, the European Parliament, Commission delegations and other internal organisations (such as the Council of Europe, OSCE and international financial institutions) and NGO's. Later reports have included information from the screening process and also from the National Programmes for the Adoption of the *Acquis*, adopted by each candidate state. As the Commission points out,

The Commission's task was unprecedented because the Copenhagen criteria are broad in political and economic terms and go beyond the *acquis communautaire* (for example, assessing administrative and judicial capacity), and because the *acquis* itself has expanded considerably since previous enlargements. The *acquis* of the Union now includes the common foreign and security policy and justice and home affairs, as well as the objectives and the progressive realisation of political, economic and monetary union.⁴⁹

⁴⁶ This proposal for regular Commission Reports starting in 1998 was endorsed by the European Council in Luxembourg in December 1997; see Commission's First Progress Report, November 1998; Commission's Second Progress Report, 13 October 1999; Commission's Progress Report of 8 November 2000. For the Commission's 1997 opinion and subsequent Reports on Poland, see: <http://europa.eu.int/comm/enlargement/poland/index.htm>

⁴⁷ Commission *avis* of 16 July 1997 for the ten applicants from central and eastern Europe, COM(97) 2001–2010.

⁴⁸ *Agenda 2000*, Volume I, 15 July 1997, DOC 97/6. Part II of the *Agenda 2000* Communication, "The Challenge of Enlargement" is the composite paper on enlargement prepared by the Commission and in it the Commission summarizes the conclusions of its individual opinions, as well as recommending an accession strategy covering Cyprus as well as the central and eastern European States.

⁴⁹ *Agenda 2000*, 15 July 1997, DOC 97/6, Volume I, Part II, sect. I.

The Commission (and European Council) needed, in particular, to decide on their approach to two basic issues. The first relates to timescale and has more than one dimension: at what stage should compliance be expected? To put it another way, to what extent should compliance required as a pre-condition to the opening of negotiations? In addition, should the Community be looking for compliance at the present time, or within a short, medium or longer-term time frame? As the Commission put it in October 1999, "there are two potentially conflicting objectives in the enlargement process: speed and quality."⁵⁰

The second issue raises the question of differentiation: how should the inevitable differences in the situation of the candidate states be reflected in the accession process? Here the Community had to avoid both the sense that the enlargement "convoy" was to be held back by the speed of the slowest member, and the sense of alienation from the process felt within candidate countries for whom progress was slow. This was an important consideration, in that the Union consciously saw (and sees) the accession process and the pressure of conditionality as an important incentive in the process of political, economic, legal and institutional reform within the candidate states. The challenge was to combine differentiation with inclusivity. In a wider context, and beyond the remit of this paper, the Union also had to take account of the state of preparedness of the Union itself, its institutions, and its own policies, for this unprecedented enlargement.

In the Communication accompanying the separate opinions, the Commission summarises its conclusions and explains how it has interpreted each of the three Copenhagen criteria: by its nature a unilateral interpretation, although one endorsed subsequently by the European Council. As far as the issue of timing is concerned, the Commission indicated that its time frame was essentially medium term: it took into account the current position, progress made in the recent past, and "an analysis of expected progress over the medium term, as far as the economic criteria and the countries' ability to implement the *acquis* are concerned." The first, political, criterion, in contrast, was judged on the basis of the current position, on the ground that compliance with these conditions was "a necessary, but not a sufficient condition, for opening accession negotiations." Thus the different aspects of the timescale mentioned above are inter-linked.

The more complex issue of differentiation and inclusivity was approached in the following way. First, the Commission was careful to emphasise that exactly the same procedures and criteria were used to assess each of the candidate states; there was to be no differentiation in the application of the membership criteria. Second, it would be possible to open negotiations with some of the candidate states before others. Third, the negotiations would proceed according to the progress made by each candidate individually, and accessions would not therefore necessarily coincide in time. This approach has been endorsed a number of times since; thus, in accepting the Commission's recommendation that negotiations should be opened with an initial

⁵⁰ Commission Progress Report, 13 October 1999, Composite Paper, Introduction, p.4.

group of six candidates (Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia) the European Council emphasised:

The decision to enter into negotiations does not imply that they will be successfully concluded at the same time. Their conclusion and the subsequent accession of the different applicant states will depend on the extent to which each complies with the Copenhagen criteria and on the Union's ability to assimilate new members.⁵¹

Again, in preparing the way for the opening of negotiations with a second group of candidate states (all except Turkey) in December 1999, the European Council said:

In the negotiations, each candidate State will be judged on its own merits. This principle will apply both to opening of the various negotiating chapters and to the conduct of the negotiations. . . . Candidate States which have now been brought into the negotiating process will have the possibility to catch up within a reasonable period of time with those already in negotiations if they have made sufficient progress in their preparations. Progress in negotiations must go hand in hand with progress in incorporating the *acquis* into legislation and actually implementing and enforcing it.⁵²

As this passage indicates, compliance with the third Copenhagen criterion is not merely a matter of agreeing to accept the *acquis* during the negotiations; it requires a demonstration of progress in actual implementation.

If this provides the framework of the Union's approach, how has it been applied in practice? Although the membership criteria have been presented in objective terms, and the Commission has stressed that in its assessments it has based itself on equivalent sources of information for each state, they are (inevitably) imprecise enough to leave room for flexibility in application. In the initial decision to open negotiations, differentiation in practice resulted in a very broad distinction being made between essentially two groups of candidate states, the first and second "waves" (leaving aside for the moment the particular position of Turkey). Within each group, as the passages quoted above imply, there were considerable differences, which may be expected to emerge during the negotiation process itself, and to be reflected in the progress reports. We do not yet know whether the same group approach will be adopted with respect to the closure of negotiations, or whether there will be a greater individualization between candidates at this stage. The practicalities of the final stages (conclusion and ratification of the Treaty and Act of Accession) suggest that the former may be more likely.

⁵¹ Luxembourg European Council, December 1997, para. 26. The wider dimensions of the accession process are beyond the scope of this paper. Nevertheless, it should be mentioned that the European Council at Luxembourg took care to ensure that all candidate states were included without distinction in the "accession process" and "enhanced pre-accession strategy," including the Accession Partnerships (paras. 10–22). In addition, a European Conference was set up as a forum for including applicant states which could not yet be considered as "candidates," in particular Turkey (paras. 4–9 and 31–36). This strategy was only partially successful in that Turkey refused to attend the inaugural meeting of the European Conference in March 1998.

⁵² Helsinki European Council, December 1999, para. 11.

We have already seen that in its 1997 opinions, the Commission argued that the first of the Copenhagen criteria was a pre-condition for the opening of negotiations. It took the view that all the applicant countries had the constitutional basis for democratic systems of government although some lacked the institutional stability needed to consolidate democracy and there were rule of law problems in all countries (for example, a lack of suitably qualified judges and guarantees of their independence; poorly paid police forces which require better training and discipline). Minority rights were generally "satisfactory," with the exception of the position of the Roma. In respect of human rights, accession of all the applicants to the European Convention was a positive development. The Commission identified the independence of the media as an area that needed strengthening in a number of countries. However, despite these shortcomings, it was only Slovakia that was found in 1997 not to meet the political criteria set at Copenhagen; the Commission pointed to the gap between constitutional text and the reality, which included disputes over the respective functions of president, government, Parliament and the constitutional court itself, as well as a failure to accept "the legitimate role of the opposition in parliamentary committees," and problems experienced by the Hungarian minority. By October 1999, the position had changed and the Commission concluded that Slovakia now met the political criteria for membership.⁵³

The second, economic, criteria was assessed, as we have already seen, according to a number of specific indicators relating to its two limbs. The Commission here looked at the prospect of a candidate meeting, or being close to meeting, the criteria in the medium term. It concluded that five (the Czech Republic, Estonia, Hungary, Poland and Slovenia) were functioning market economies and likely to satisfy the second, competitiveness, criterion in the medium term.

Assessment of the third criterion (the ability to undertake the obligations of membership, including adoption of the full *acquis*) has been based on a number of factors. The Commission has examined the implementation of existing obligations under the Europe Agreements, progress in achieving the White Paper's programme of approximation (in particular key single market measures, such as the financial services and taxation directives), and progress in other areas, such as energy, the environment, agriculture, transport, and justice and home affairs. Information has also been forthcoming from the "screening" process.⁵⁴ Progress in adapting to the CFSP *acquis* is evidenced by the process of political dialogue and the level of candidate state support for EU positions and policies.

The Commission's Progress Report in October 1999 reconsidered the strategy and approach to the Copenhagen conditions. Not only was there a need to take stock of

⁵³ The government elected in September 1998 had "pursued an ambitious programme of political reforms;" opposition participation in the parliamentary process had been facilitated, minority language legislation adopted and representatives of the Hungarian minority included in the government.

⁵⁴ Screening is an analytical examination of the *acquis* in order to explain it to the candidate states, to determine possible areas of difficulty in the negotiations, and to assess areas where progress needs to be made and where technical assistance is needed.

progress across the board; the balance between maintaining momentum and what the Commission called the "quality" of the process needed reconsideration. In addition, the crisis in the Balkans highlighted the role of enlargement as a factor in the stability and security of Europe, its "strategic dimension." As a result, the Commission proposed a sharper distinction between the first, political, criterion, and the others. The political criterion should still be regarded as a pre-requisite for the opening of negotiations. However, the original position taken at the time of the initial Opinions, that a country should be able to show the likelihood of compliance with the second and third criteria in the medium term, should be modified. On the other hand, the Commission took the view that to open negotiations on the basis solely of compliance with the political criteria would pose a number of risks, including the danger of setting an unwelcome precedent, and of over-long negotiations. The formula it adopted was to recommend the opening of negotiation with all candidate countries which meet the political criteria for membership and "have proved to be ready to take the necessary measures to comply with the economic criteria." This included Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia, although specific economic conditions were attached to both Bulgaria and Romania. As some candidates would not be able to meet the Copenhagen criteria in the medium term, the policy of differentiation would necessarily apply to the decisions to open specific chapters in the negotiations: the number of different negotiating chapters to be opened with each candidate would depend on its level of preparedness. The Commission also reaffirmed that it was important "to ensure that candidate countries fulfill all Copenhagen criteria before being admitted as member states to the EU." These recommendations were accepted by the Helsinki European Council in December 1999; in its Conclusions the European Council explicitly puts the decision to open negotiations with the remaining candidate states (except Turkey) in the context of the broader political situation in Europe:

Determined to lend a positive contribution to security and stability on the European continent and in the light of recent developments as well as the Commission's reports, the European Council has decided to convene bilateral intergovernmental conferences in February 2000 to begin negotiations with Romania, Slovakia, Latvia, Lithuania, Bulgaria and Malta⁵⁵

Although Turkey was still excluded from the negotiations, on the basis of its continued failure to satisfy the political criteria in spite of "recent positive developments," its status with respect to the EU was also modified. It was declared for the first time to be a "candidate state," and would henceforth participate in the accession process, including the adoption of an Accession Partnership, a national programme for the adoption of the *acquis*, and screening.⁵⁶ The Copenhagen conditions are thus now being used to differentiate between applicant states, candidate states, and states with whom negotia-

⁵⁵ Helsinki European Council, December 1999, para. 10.

⁵⁶ Smith is critical of the way in which conditionality has been used in relation to both Cyprus and Turkey, Smith: "The Conditional Offer of Membership as an Instrument of EU Foreign Policy: Reshaping Europe in the EU's Image," 8 *Marmara Journal of European Studies* (2000), p. 33.

tions have been opened (and the specific chapters to be opened), as well as at the final stage of closing the negotiations and agreeing the treaty of accession.

The shift of approach demonstrated here underlines the informal nature of the Copenhagen conditions, as well as unilateral nature of their application. The political criteria, which were said to have "absolute priority" by the Commission,⁵⁷ reflect the Treaty-based conditions in Article 49 TEU and derive their legitimacy from that source. The other conditions may be said to represent a pragmatic reflection of the viability of membership of the open-ended project which is the European Union. As such, their legitimacy must derive from their necessity, and they are thus open to changes of emphasis, and to development.

5. Membership Conditionality in a Wider Context

The Copenhagen criteria were drawn up with respect to the central and eastern European States which then had concluded Europe Agreements with the Community. It was clear from the Essen European Council in December 1994 that they would also be applied to those states that were to conclude Europe Agreements after Copenhagen (the three Baltic states and Slovenia). They have since been applied to the other candidates, Turkey, Malta and Cyprus,⁵⁸ and there is no doubt that they would be applied to applicants from south-east Europe. The possible application of the Copenhagen criteria to the countries of south-east Europe reminds us that these membership conditions are one, rather special, application of a wider principle of conditionality applied by the Union in its relations with third countries.⁵⁹

In fact, as far as these latter potential applicants are concerned, the Commission has suggested that further conditions may be added. In its progress report of October 1999, the Commission discusses the effect of enlargement on neighbouring countries and concludes:

the EU . . . should confirm that the countries of the former Yugoslavia and Albania have the ultimate vocation to become members of the European Union. It should further develop accession criteria, building on those defined at Copenhagen, which would make Union membership conditional not only upon the principles of Article 6 TEU, but upon

⁵⁷ Commission Progress Report of October 1999, Composite Paper, p. 31.

⁵⁸ For a discussion of membership conditionality as regards Cyprus and Turkey, see van Westering: "Conditionality and EU Membership: The Cases of Turkey and Cyprus" 5 *European Foreign Affairs Rev.* (2000), p. 95. See also Smith: "The Conditional Offer of Membership as an Instrument of EU Foreign Policy: Reshaping Europe in the EU's Image," 8 *Marmara Journal of European Studies* (2000), p. 33.

⁵⁹ For a discussion of conditionality in relation to south-east Europe, see Cremona: "Creating the New Europe: The Stability Pact for South-Eastern Europe in the Context of EU-SEE Relations," *Cambridge Yearbook of European Legal Studies*, Volume II 1999 (2000) p. 463. For a wider discussion of conditionality, see Smith: "The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?," 3 *European Foreign Affairs Rev.* (1998), p. 253; Ward: "Frameworks for Cooperation between the European Union and Third States: a Viable Matrix for Uniform Human Rights Standards?," 3 *European Foreign Affairs Rev.* (1998), p. 505; Cremona: "Flexible Models: External Policy and the European Economic Constitution," in: de Búrca, Scott (eds.): *Constitutional Change in the EU: From Uniformity to Flexibility?* (2000).

- mutual recognition of each other's borders;
- settlement of all outstanding issues relating to the treatment of national minorities;
- establishment of a regional organisation for free trade and economic cooperation as a basis for closer integration into the Union.⁶⁰

These are Commission recommendations contained in a Report on enlargement progress – not even a formal Commission proposal, still less a European Council statement; the stress on regional integration as a pre-condition for accession is nevertheless striking.⁶¹ In June 2000 the European Council affirmed that all the states of this region (Albania, Bosnia-Herzegovina, Croatia, Federal Republic of Yugoslavia and Former Yugoslav Republic of Macedonia) were “potential candidates for membership”⁶² and at Nice in December 2000 the European Council referred to their “clear prospect of accession, indissolubly linked to progress in regional cooperation.”⁶³ In its Report on the Stabilisation and Association Process in June 2001, the Council refers to the application of Article 49 TEU and the Copenhagen criteria to the potential applicants from south-east Europe.⁶⁴ There is no indication that additional conditions may be added; nevertheless, we have seen that regional cooperation and good neighbourliness have already emerged as one aspect of membership conditionality, and it seems clear that this dimension would be of great importance in the application of the Copenhagen criteria to these countries.

We have here perhaps the essence of membership conditionality. If enlargement is to be used as an instrument of Union policy, designed to stabilize and restructure Europe, then conditionality is a key to its success.⁶⁵ In particular, in a Union which cannot function without a high degree of mutual trust, heavy demands will be made on incoming Members. Somewhat paradoxically, if the Union is to develop the flexibility it needs to cope with new international agendas and ambitious integration policies while maintaining a position of openness to possible new members, it needs to ensure at least a minimum degree of convergence between its existing and future membership. Meanwhile, the effectiveness of membership conditionality as a mechanism for encouraging other European states to achieve political and economic reform will depend on the realistic and consistent application of the Copenhagen criteria to the current candidates.

⁶⁰ Commission 2nd Report on Progress towards Accession by each of the candidate countries, 13 October 1999, Composite Paper Part V.2.

⁶¹ For further discussion of the regional dimension in the Stabilisation and Association Process with South-East Europe, see the Council Report to the European Council “Review of the Stabilisation and Association Process,” 11 June 2001.

⁶² European Council, Santa Maria da Feira, June 2000, para. 67.

⁶³ European Council, Nice, December 2001, para. 62.

⁶⁴ Council Report to the European Council: “Review of the Stabilisation and Association Process,” 11 June 2001.

⁶⁵ The “if” here begs some large questions. While it is not certain that widening Union membership will have a stabilising effect, it is clear that this is currently part of Union/Member State thinking: see for example, the Commission’s Progress Report of 8 November 2000, sect. I: The Overall Context.

Different European Union Approaches to Immigration: Privileged Immigrants in the European Union?

NATIVIDAD FERNÁNDEZ SOLA

Introduction

When we speak about immigration and European Union (EU) regulations, we are referring to different realities which, consequently, have different legal considerations.

The first kind of movement across national borders is that of European Union citizens, moving from one Member State to another, using their freedom of movement as European workers, or freedom of provision of services, or their right to settle in another EU country. This does not mean *immigration* in the EU sense.

The second possibility of movement across national borders is that of third-country citizens who, legally or illegally, enter a EU Member State, as tourists, workers, students or refugees.

We will exclude from this paper the situation of European citizens (nationals of a Member State) who enjoy a legal regime similar to citizens of this Member State. We will also exclude the private and privileged situation of family members of EU citizens.

We will study only the situation of third-country citizens in the European Community (EC) and the rights and freedoms that Community law gives them. We will not take into account the different legal treatment that national legal orders offer these people.

We will try to establish the Community standards that presumably should be respected by Member States when they design national policies on immigration. We will also compare the situation of Eastern European and Mediterranean citizens for their entry and residence in EU territory.

I. The Impact of Integration on the Classical Distinction between Citizens and Aliens

One of the consequences of membership of an integration-oriented international organisation like the European Community is the rise of a new legal category apart from the traditional citizens/aliens dichotomy.¹

¹ R.A. Carrión: *Lecciones de Derecho internacional público*, 4th ed. (1998), pp. 416-417.

The legal regulations applying to citizens, EU citizens and third country nationals differs, EU citizens being a legal category between the other two in rights and duties, one closer to EU citizens. This situation is more evident since the entry into force of the Treaty of Maastricht on 1 November 1993. The Treaty on European Union (TEU) introduced the concept of European citizenship. Previously, workers and self-employed persons were the only beneficiaries of free movement, except for jobs in the public service which imply the exercise of *public potestas*, reserved to citizens. Some provisional measures were possible against these European citizens on grounds of public order, public security or health.²

By contrast, EU citizenship is an absolute concept that allows free movement and residence in all Member States, subject to the limitations contained in the Treaty and its implementing regulations (Article 18 TEC). So it is a freedom that does not depend on economic reasons.

Rights of political participation in municipal and European elections are recognised for European citizens.³ Citizens from EEA countries are placed in Spanish law⁴ and other Member States' legal orders on the same footing as EU citizens.

II. Emergence of a EU Foreign Nationals Regime and Its Content

First, we will describe the Community regulations governing the situation of third-country nationals, their rights and any limits to these.

First, we have to indicate that the European Union does not have a full set of legal regulations on the entry, residence and movement of aliens, nor an immigration and asylum policy. The reason for this situation is evident: traditionally, Member States have had exclusive jurisdiction over these issues.⁵ Nevertheless, some advances have been made possible by successive modifications of the constituent Treaties in the course of political integration.

In particular, the gradual achievement of free movement of persons in Community space has created a need for common regulation of aliens' entry and residence requirements in EU territory.

Implementation of the internal market and the elimination of internal borders necessitated establishing common rules in order to guarantee security within this common space.

The problematic full implementation of free movement of persons meant that such issues were discussed in a non-Community framework, i. e., on an intergovern-

² Ley 17/1993, 23 December and RD 800/1995, 19 May, refers to the access of EC citizens from another Member State to some areas of the public service.

³ Article 8.B TEU. Spanish Law adapted to this regulation by LO 1/1997, 30 May, on transposition of Directive 94/80/EC.

⁴ RD 766/1992, of 26 June, modified by RD 737/1995, of 5 May.

⁵ H.C. Escobar: "Extranjería y ciudadanía de la Unión Europea," *Extranjería e inmigración en España y en la Unión Europea*, Colección Escuela Diplomática No. 3, 1998, p. 105. In Spain, Ley Orgánica 1/2000 superseded the previous regulation on the rights of aliens of 1985. Now in force is LO 4/2000 which has superseded LO 1/2000.

mental basis (Trevi Group, *ad hoc* immigration group, Schengen group). In 1992, under the Treaty of Maastricht, questions related to treatment of aliens started to be considered as questions of common interest.⁶ A partial immigration regime was thereby established on a double basis: Community and intergovernmental, representing a compromise between principles of intergovernmentalism and supranationalism. Thus the Treaty transferred new legal competences on immigration issues to the Community (Article K.3) and allowed some policy fields to be transferred to the Community pillar (article K.9), but respected the authority of national governments.

This dual regulation implicated a tortuous legal situation that to some extent explains the attitudes of member governments today.

The Treaty of Amsterdam, effective from May 1999, clearly established a connection between free movement of persons within the common space of freedom, justice and security on the one hand and control of external border measures, asylum, immigration and crime prevention on the other (Article 2 TEU⁷). In this Treaty, articles concerning visas, asylum, immigration and other policies related to free movement of persons became Community matters embodied in a new Title IV in the European Community Treaty. This constitutes the new, explicit legal basis for policy on immigration into the European Union.

The "communitarization" of these issues is noteworthy for several reasons. First, because some intergovernmental elements are present. Second, because of the limitation of democratic and judicial control. It therefore seems impossible to hold that this nascent European immigration regime compromises the commitment of EU Member States to "subsidiarity" because a Community measure is adopted only when necessary and if it is more effective than a national isolated one.

In fact, Member States retain certain rights that normally belong to the European Community under common policies. Perhaps the most important of these rights or privileges is the unanimity required for decision-making on immigration issues with several exceptions. We can also be surprised by the conferment on Member States' of powers of decision proposal for the first five years after the entry into force of the Amsterdam Treaty, powers that normally belong to the Commission. On the other hand, they keep their decision-making powers in this area if public order or internal security might be affected.⁸ All measures have to be taken unanimously but as from fifth year of the Treaty of Amsterdam (i. e. in 2004) rules on procedures and conditions for visas and on a uniform visa, can be adopted by a co-decision procedure. Since the Treaty took effect

⁶ See H. Escobar, *op. cit.*, *supra*, n. 5, p. 110.

⁷ On the objectives of the EU, Article 2 TEU is explicit: "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders controls, asylum, immigration and the prevention and combating of crime." See H. Labayle: "Un espace de liberté, sécurité et justice," *RTDE* (1998), p. 813.

⁸ See Communication of the Commission to the Council and European Parliament concerning special measures for movement and residence of aliens on grounds of public order, security and public health, COM (99) 372 final. D. Kostalopoulou took a critical view of the introduction of the security paradigm characteristic of third pillar in the legal system of European Community ("The Protective Union: Change and Continuity in European Migration Law and Policy," *ECSA, Conference Papers* (1999)).

decisions on the list of third countries whose citizens are required to have visas and on a uniform model of visa can be adopted by majority vote.

The other atypical element in the Community treatment of aliens policy is the limitation of control by the Council.

Democratic control is limited because only the participation of European Parliament is the answer to consultations by the Council. However, after a period of five years, a unanimous decision by this institution would change this procedure into a co-decision one by majority vote.

The judicial control required by immigration measures is waived for external border-crossing measures adopted on public order or internal security grounds (Article 68.2 TEC).

Submission of pre-judicial question, by way of which individuals can apply to the Court of Justice for interpretation or applicability of a Community rule, is formally limited; only courts of last instance are entitled to file

The interpretation given by the Luxembourg Court on a submission by the Council, the Commission or a Member State will not apply to national proceedings until it becomes final (Article 68.2 and 3 TEC).

As some scholars have noted,⁹ the European Community is confronted with a tridimensional challenge to implementing the space of freedom, security and justice: material, personal and geographical.

The first dimension is a material one and implicates the removal of all obstacles at internal borders. The second dimension is a personal one and consists in assuring freedom of movement to every person, citizen or alien, from a Member State. Finally, the last dimension is geographical as the rights recognised within this space must be guaranteed on the same terms to citizens of every new Member State.

Related to the geographical framework of the Community policy on immigration, we have to remember the opt-outs of the United Kingdom, Ireland and, under different conditions, Denmark in line with the fourth and fifth protocols to the Treaty of Amsterdam, even though they can join this policy or apply some of its measures at any time they choose.

On the other hand, non-Community countries like Norway or Iceland have been fully associated with the space and have no internal border controls.¹⁰

a) Rules on Entry and Movement of Aliens within the European Union

Articles 62 and 63 give the Council a time limit of five years to adopt the necessary measures for removal of internal frontier checks on aliens as well as European citizens and to harmonise asylum and immigration regulations; to be more precise,

⁹ R. Trotta: "La dimension extérieure de la circulation des personnes après Amsterdam," *L'Union européenne et le monde après Amsterdam*, (1999) in: M. Dony (ed.), p. 131.

¹⁰ An agreement signed on 18 May 1999 (OJ no "L 176/99) allows this participation. See Declaration 47 concerning integration of the Schengen acquis into the Treaties and Council Decision of 1 December 2000 on the application of the Schengen acquis in Denmark, Finland, Sweden, and in Iceland and Norway (OJ L 309, 9.12.2000, p. 24).

the Council has to adopt measures on crossing of external borders and travel and residence requirements for citizens of third countries on the territory of a Member State.

Article 61 TEC complements the aforementioned Article 2 TEU conferring on the Council the power to take measures for the protection of the rights of third-country immigrants.

When those measures have been adopted, Member States should continue carrying out the appropriate frontier checks on s their external borders but respecting the rules and procedures set up at European Community level.

The aim of these rules is to have the same conditions for crossing external borders whatever the Member State chosen for entry in the common internal space. Thus citizens of third countries will not be able to choose a State for entry in the internal space by reason of lower requirements at frontier checkpoints, and all Member States will have to accept the controls in force in every other Member State as equivalent to its own.¹¹ As a result the custom of *visa-shopping* by citizens from third countries should disappear. Both three-month and longer term visas should be issued by national authorities but according to a uniform procedure, in a uniform document and, more important, on similar terms.

It can be predicted that European institutions will transform the common consular instruction¹² applicable in the Schengen framework into Community law.

Free movement of persons and freedom of travel within internal borders is guaranteed by the Schengen implementation agreement applicable between the Member States that have ratified it as well as in the Nordic non-member countries.¹³

The European Community has partially developed a common visa policy by setting up a uniform model¹⁴ and specifying the third countries whose citizens will be asked for this document when crossing external borders.¹⁵

¹¹ However, Member States could sign more favourable agreements with third States on crossing of external borders as foreseen by Additional Protocol 31 to the Treaty of Amsterdam.

¹² P.J. K u i j p e r: "Some Legal Problems associated with the communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and incorporation of the Schengen Acquis," 37 *CMLR* (2000), p. 358.

¹³ Council Decision adopted on 1 December 2000 concerning the full application of the Schengen Agreement to Nordic countries; removal of internal border controls between the Schengen area and Nordic countries will take effect from 25 March 2001 (*Bul.* 12-2000).

¹⁴ Regulation (EC) 1683/95, of 29 Mai, OJ L 164, 14.07.1995.

¹⁵ Regulation (EC) 2317/95, of 25 September, OJ L 234, 3.10.1995 superseded by Regulation (EC) 574/99, of 12 March, OJ L 72, 18.03.1999 after judgement of the Court of Justice on June 10th, 1997, *Parliament v Council*, Case C-392/85, *Rec.* p. I-3213. This Regulation was recently superseded by Regulation (EC) 539/2001, of 15 March, OJ L 81, 21.03.2001 (see COM (2000) 27 final, 26 January 2000, and COM (2000) 577 final) where 135 countries and territorial entities have been included whose nationals need a visa to enter Community territory, not 99 as before. The aim of this Regulation is complete harmonisation through removal of possibility of some Member States deciding unilaterally on visa requirements or exemptions for a visa for certain third countries. Free movement in Community space without a visa is allowed for up to three months with the possibility of extension for a further three. Issuance of visas for stays in Community territory of more than 90 days and for transit through airports is not covered by this new Regulation.

The proposed convention on crossing of external borders has not been adopted. It would regulate visits of up to three months, so visas for longer stays in the EC do not come within the scope. However, Articles 3 to 7 of the Schengen implementation agreement which contain the rules on this matter have become secondary European law for the signatories of the Schengen agreement.¹⁶

The Treaty of Amsterdam (Article 63.3) requires the Council to take measures on entry residence and procedures for issuing visas that permit aliens to remain in a country for more than 90 days and for residence permits. None of these measures has yet been taken. Only a number of complementary measures has been adopted within the framework of the third pillar concerning airport transit,¹⁷ consular business related to visas¹⁸ and co-operation between national authorities.

On entry of aliens the French Presidency, trying to harmonise the conditions for issue of visas, proposed making it contingent on possession of travel insurance and sufficient funds for the planned period of residence, equivalent to forty Euros per day.

b) Immigration Policy Rules

Full implementation of free movement of persons has been hindered by differences between Member States which considered this freedom had to be enjoyed by every person in the Community space and those that preferred to keep internal controls on non-Community citizens. This implied the distortion *de facto* of this freedom. The Amsterdam Treaty dispels any doubts on this point in Article 62.1, even though it allows this freedom to be limited to a maximum term of three months.

In Article K.1 of the Treaty of Maastricht, the European Union tried to harmonise the most important aspects of national immigration policies. Consequently, several resolutions were adopted on the right of aliens to engage in economic activities in a Member State¹⁹ and on prevention of illegal immigration and employment.²⁰ With respect to the residence of aliens, the only point taken into account for harmonisation was a standard residence permit,²¹ leaving Member States with the decision-making power on other aspects of this issue.

¹⁶ Among these States is Denmark which under Protocol 5 to the Treaty of Amsterdam, accepts these obligations as a matter of international, not Community law.

¹⁷ The European Parliament has suggested substitution of a common action proposal on this issue, presented on 16 July 1998, by a Community Regulation after the coming into effect of the Amsterdam Treaty (OJ C 379, 7.12.1998).

¹⁸ Council Recommendation, 4 March 1996, concerning consular local cooperation in visa matters, OJ C 80, 18.03.1996.

¹⁹ Council Resolution on abode of students and limits for admission of dependent workers and independent workers, 30 November and 20 June 1994, respectively (OJ C 274, 19.09.1996). These resolutions were the subject of a Convention proposal presented on 30 July 1997 concerning residence requirements for uniting of families and for individuals setting permanently in the EC.

²⁰ Control of Council acts concerning illegal immigration and exchange of information on assistance for the voluntary return of immigrants is envisaged under by several 1996 and 1997 Council Decisions. The Tampere European Council (October 1999) established as a Union political priority management of migration flows in order to fight illegal immigration and exploitation of human beings.

²¹ Common Action of 16 December 1996, OJ L 7, 7.01.1997.

Under the Treaty of Amsterdam the Council is required to adopt measures on the residence requirements for aliens in the European Union, making a distinction between stays of under three months or over (e.g. for uniting families or regular residents) and the situation of illegal immigrants to whom no residence rights are extended.

The Council has also to define the rights and conditions under which third-country nationals can reside in a Member State other than the country of entry into EC territory; the latest provisions constitute a real innovation introduced by the Treaty of Amsterdam without any precedent in European law or in the Schengen acquis. The signatories of the Schengen agreement guarantee free movement of persons within the Schengen territory but subject to certain conditions for aliens; thus they have to report to a competent national authority when entering the territory of a Schengen State.²²

Two directives have been proposed but not yet adopted on the right of third country citizens right to travel within the European Community and on elimination of checks on individuals at internal borders.²³

A proposal for a third pillar convention on admission of citizens of third countries to Member States has been presented. This proposal could have been easily converted into a first pillar regulation.²⁴ Nevertheless, it gave rise to a lot of suspicions among Member States who thought that they would lose the possibility of according citizens from certain third countries privileged admission and residence treatment. Another source of the controversies was the aforementioned project proposed that in accordance with the prevision of the new Article 63.4 TEC that long-term residents also had a right of stay in other Member States.

Taking into account the divergent attitudes of Member States and the lack of explicit support from the European Parliament, the European Commission has split off the different proposals from the different parties of the Convention draft. It has done so, for example with uniting families . On this, after approval by the European Parliament in September 2000 of a Directive concerning the uniting of families of third county citizens legally resident in a Member State and citizens enjoying the right of free movement, the European Commission has modified its original proposal.²⁵ Under the new text, this right applies also to a resident's spouse or *de facto* partner, to his/her dependants , including foster children and elder relatives in his/her charge, as well as adult children unable to provide for their own needs for health reasons. The right to education, to employment and to vocational training is guaranteed to members of reunited families . Refusal of the right of o entry or residence to a relative can be the subject of a judicial appeal.

²² Article 22, Supplementary Convention of Schengen Agreement. Similar provision are to be found in Directive proposal, OJ C 289, 31.10.1995.

²³ COM (95) 346 final, modified by COM (97) 106 final, 20 March 1997, finally retired, and COM (95) 347 final, respectively, both of 12 July 1995.

²⁴ COM (97) 387 final, 30 July 1997.

²⁵ COM (99) 638 final, 1 December 1999, modified by COM (2000) 624 final, 10 October 2000.

With respect to the problematic issue of resident's rights to move or to apply for residence in another Member State, the French Presidency proposed a regulation to improve the living conditions of holders of long-term visas.²⁶ Even if the proposal did not harmonise the conditions for visa issue, it proposed recognition by Member States of visas allowing residence in a Member State as a short term visa permitting entry into another Member State without the previous authorisation of that State, as actually happens.

We should not forget that Tampere European Council, in October 1999, established as a political priority the guarantee of equal treatment and a more clear integration policy towards citizens of third countries legally resident in a Member State.

Apart from these proposals, the content of future regulations on entry and residence requirements for students or unpaid activities, as well as for workers and professional or self-employed activities is now being studied.

A proposed Directive on the legal status of third-country citizens long resident in a Member State is being studied and other proposals are being prepared for measures against traffic in human beings and economic exploitation immigrants.²⁷

Finally, some measures have been adopted on expulsion of aliens relating to co-operation techniques and the travel documents required for expulsion and on conclusion of treaties with third countries on readmission of aliens.

In this way, step by step, the large legal loopholes due to national differences could be plugged. These differences can be seen in criteria for admission, implementation of the principle of uniting families, or definition of a labour or social protection system for immigrant workers.

c) Asylum Rules

The biggest legal development in this area came with the Dublin Convention²⁸ on determination of the state responsible for consideration of asylum requests, in force since 1 September 1997, which superseded implementation of the Schengen Convention. This system has put an end to multiple requests and "refugees in orbit" and obliged States to modify their national rules and to strengthen co-operation.

Since the entry into force of the Amsterdam Treaty, Article 63 TEC is the legal basis for asylum measures and for harmonisation of the whole body of procedural and substantive rules not yet adopted.²⁹ The same could be said concerning determination of a minimum standard for acceptance of asylum seekers.

There is a proposed regulation relating to Eurodac, a system for comparison of asylum seekers' fingerprints³⁰ which should resolve the problems caused when these people have no identification.

²⁶ CNS/2000/810.

²⁷ COM (2000) 167 final, 24.03.2000, p.12.

²⁸ DOCE No. C 254, of 1997.

²⁹ Council Directive proposal concerning minimum rules for proceedings by Member States on recognition or denial of refugee status, COM (2000) 578 final, 20.09.2000.

³⁰ COM (99) 260 final.

Behind the guidance and political priorities for an effective common EU asylum and migration policy laid down by Tampere European Council was the will to establish an European asylum system, and a uniform status for people to whom asylum has been granted .

Finally, concerning the mass displaced persons, the EU has not framed a general regime; it has only solved this exceptional problem by establishment of a burden sharing system between Member States.³¹

In short, the adopted measures are not a complete and uniform set of legislation. It cannot be said that the existing rules are enough to assure entry, residence and freedom of movement across the whole EU territory to citizens of third countries , given that there are no uniform controls on external borders, nor harmonisation of all aspects of visa policy.

It would be desirable – but is not probable – to have all these migration policy measures adopted within five years of the entry into force of the Amsterdam Treaty term, i. e., before May 2004, so that they would be effective by the time of EU enlargement by new Member States.

Once we have seen the differences between Member States we can ask why, if they are reluctant to forge and implement a comprehensive immigration policy, they continue to cooperate in this policy area. The answer is to be found in the specific national interests and political pressures acting on each EU Member State. The common objective has been and continues to be restricting the flow of third-country immigrants. As they cannot achieve their restrictionist policy objectives by acting unilaterally, they have adopted collective measures to diminish the flow of persons entering their respective territories. Apart from this realistic approach, the neofunctionalist paradigm, based on *spillover* theory, has resulted in their initial efforts at co-operation on the internal market and free movement of persons, as well as intergovernmental co-operation producing further co-operative initiatives and the corresponding institutionalisation.³² In terms of the globalisation paradigm, States are compelled to co-operate if they want to keep any power in a global world to regulate immigration matters effectively.³³

Putting together all these theoretical explanations, we are able to understand the situation of immigration EU policy at the moment.

III. Community Conventional Treatment of Third Country Citizens

In spite of this general regime of autonomous European Community rules, various treaties, mainly bilateral and mixed, concluded by the EC with third countries

³¹ Council resolution of 25 September 1995 concerning distribution of the costs of reception and temporary residence, DOCE No. C 262, 7 October 1995 and Council Declaration of 4 March 1996 about alert and urgency proceeding for burden, OJ C 63, 13.03.1996.

³² An approach of this nature can be found in Chen-Yi Lu: "Harmonization of Migration Policies in the European Union: A State-Centric or institutionalist explanation," *ECSA Conference Papers* (1999).

³³ A.M. Messina, C.V. Thouez: "The Logic and Politics of a European Immigration Regime," *ECSA Conference Papers* (1999), pp. 2, 17–18.

will influence the determination of the legal status of non-Community citizens in the same way as happens at national level.

Whereas Secondary Community Law implicates uniformisation of the legal regime applied to aliens, these conventional rules produce diversification and introduce an important heterogeneity factor that allows us to speak of "different categories of aliens" in the European Community.

This preferential regime for citizens of third countries with which the EC has concluded an association agreement, with supplementary rights, will remain even if a Community migration policy, for which Amsterdam Treaty laid the foundations in Articles 62 and 63 TEC, is put in place. Citizens from these associated countries have in effect to work in an EU country according to national rules.

For this reason, one can differentiate the situation of the two main migration groups in the Union: Eastern European and Mediterranean citizens. In some ways, both are privileged compared with South American or Asian citizens, but they also differ from each other.

Traditionally, the European Community has maintained privileged relations with Maghreb countries which are perceived as a geostrategic space requiring support, not only economic. The main examples of this approach are the co-operation agreements concluded in the 1970s and the new Mediterranean policy introduced in the 1990s. The Euro-Mediterranean partnership developed since 1995 encompasses political, security, economic, financial, social, cultural and human aspects.³⁴ Only Cyprus, Malta and perhaps Turkey which have earlier associations agreements³⁵ have chances of joining the EU.

By contrast, relations with Eastern European countries (CEECs) were almost non-existent until the 1990s but, since then have become privileged ones, threatening to put an end to the special link with Mediterranean countries as most of those States are candidates for accession to the Union, their situation governed by European Agreements.³⁶ The CEECs enjoy Community preference in economic aid, investment and legal harmonisation.

This different approach suffers from the risk of a political and cultural break with Southern countries. In this context, some Western politicians take a different view of migrations from the South to North than migrations from East to West. To this must be added a collective subconscious that considers people coming from the South as

³⁴ See E. Bribosia, A. Weyembergh: "L'Union européenne face aux migrations. Concurrence entre les ressortissants de l'Est et du Sud?", in: M. Dony (ed.), *op. cit.*, *supra*, n. 9, p. 163. See Euromediterranean Agreements with Tunisia 17 July 1995 (OJ L 97/98), Morocco 26 February 1996 (OJ L 70/00), Israel (20 November 1995), Jordania (24 November 1997), Egypt (2000) and Interim Association Agreement on trade and cooperation with the OLP (24 February 1997, OJ L 187/97).

³⁵ Association Agreement with Turkey, 12 September 1963 (OJ L 217/64), Cyprus, 19 December 1972 (OJ L 133/73) and Malta, 5 December 1970 (OJ L 61/71).

³⁶ European Agreements with Hungary (16 December 1991, OJ L 347/93), Poland (16 December 1991, OJ L 348/93), Czech Republic (23 June 1993, OJ L 360/94), Romania (1 February 1993, OJ L 357/94), Bulgaria (8 March 1993, OJ L 358/94), Slovakia (4 October 1993, OJ L 359/94), Slovenia (10 June 1996, OJ L 51/99) and Baltic countries (Latvia, OJ L 26/98, Lithuania, OJ L 51/98, Estonia, OJ L 68/98).

a demographic and politic-cultural threat. While attitudes to Eastern Europeans are more fraternal and solidary, in the case of Southern peoples they are essentially defensive and – related.³⁷ We can ask if this situation is reflected in European Law.

To give an answer to this question we have to analyse the legal provisions on free movement of persons in the European and Europe Agreements and see if EU or Member States' immigration policy privilege one group of citizens over another. As a point of departure we can underline that none of those Community conventional agreements provide for total free movement of persons, as the EES agreement does, but only for some rights.

a) European Agreements³⁸

Concerning rules on free movement of workers, the European Agreements establish national treatment with respect to working conditions, remuneration and dismissal, but not social security conditions. For example, in the European Agreement with Poland, co-ordination of social security systems is envisaged under Article 38 so that all periods of employment or residence are to be added together for the purpose of old age and other pensions of medical care; the amounts due are freely transferable at the rate applied under the law of the debtor Member State and Polish workers receive family allowances for members of their families residing with them. This Article has no direct effect as Article 39 delegates to the Association Council the adoption of provisions to implement those objectives. On the other hand, any improvement in access to employment is contingent on the labour market situation in Member States.

Member States may grant work permits to Polish nationals who already have residence permits. Later we will see that Turkish workers have a more privileged situation than Polish ones. Obviously, immigration in the 1960s was a solution and in the 1990s a problem for an EC labour market unable to reduce unemployment.

EC workers in Poland are entitled to the same treatment that their States extend to Polish workers as a consequence of the reciprocity clause.

In general, European Agreements recognise freedom of establishment for associated country companies and nationals and require the granting of treatment no less favourable than that accorded to Community companies or nationals. Continuing with the exempla of the European Agreement with Poland, during the transitional period it requires Poland to facilitate the setting up of operations on its territory by Community companies and nationals as from the entry into force of the Agreement in some sectors,³⁹ gradually in others.⁴⁰ Several limitations are listed in Articles 50 to 54.

³⁷ Bribosia, Weyembergh, *op. cit.*, *supra*, n. 34, p. 166.

³⁸ M. Maresceau, E. Montaguti: "The Relations between the EU & Central & Eastern Europe: A Legal Appraisal," 32 *CMLR* (1995), p. 1327.

³⁹ Manufacturing, metallurgy, electro-engineering, transport equipment, chemical, construction materials, wood and paper, textile, leather and apparel, and food processing industries

⁴⁰ Mining, processing of precious metals and stones, production of explosives, ammunition and weaponry, pharmaceutical industry, production of poisonous substances or distilled alcohols, financial services, activities related to real property, legal services, high voltage power lines, pipe-line transportation and acquisition or sale of natural resources or agricultural land and forests.

Each Member State is required to grant, from entry into force of the Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Polish companies and nationals.

An exception to this rule is founded in agreements with Baltic countries and Slovenia in which only companies enjoy this freedom till the end of the transitional period.

With respect to social security of services, the aforementioned agreements only contain a vague commitment to adopting the necessary measures for their progressive liberalisation pending which the parties are to permit the temporary movement of natural persons providing the service or who are employed by the service provider as key personnel. What does this mean? *De facto*, these rules will apply to companies and their workers and it will be mainly Community companies that provide services in Eastern countries and not Eastern companies that provide services in Community countries. Thus there is no foundation here for privileged treatment of entry of CEEC citizens into Community territory. To make the situation more complex, these Articles are considered as not having a direct effect as the Association Council shall take the measures necessary to implement progressively these provisions; so individuals will be unable to invoke them in national Courts and will need their implementation by different Association Councils.

b) Euro-Mediterranean Agreements

It is paradoxical that, when regulating free movement of workers, both the agreement with Morocco and with Tunisia establish national treatment for workers and their families for working conditions, remuneration and dismissal, as well as for social security benefits, articles which have direct effect according to analogous interpretation by the Court of Justice.⁴¹ Why are Poles not treated like Community citizens as regards social security benefits as Moroccans are? Does the European Community privilege Moroccans for accepting low-skilled jobs that do not damage native workers?. Might this be the most suitable way to prepare the accession of candidate countries?

The right of establishment is more restrictively regulated than in European Agreements and is extended only to companies, not individuals. "The Parties agree to widen the scope of this Agreement to cover the right of establishment of one Party's firms on the territory of the other and liberalisation of the provision of services by one Party's firms to consumers of services in the other," says the Agreement with Morocco.

These provisions do not have direct effect as Association Councils have to take the appropriate measures for their implementation. Only the Euro-Mediterranean

⁴¹ Articles 64 and 65 of the Euromediterranean Agreements with Tunisia and Morocco. The Court declared in a judgement of 31 January 1991 (Case C-18/90, *Kziber*, Rec. p. I-221) the direct effect of a similar article in the previous Co-operation Agreement; the same applies to the Co-operation Agreement with Algeria, Judgement of 5 April 1995, Af-C-103/94, *Krid*, Rec. p. I-736

Agreement with Jordan is similar to the European Agreements with Baltic countries and national treatment is reciprocally extended to Jordanian and Community companies respectively. This means that they can engage workers of their own nationality as basic staff, and that these will have residence and work permits valid for the period of their employment (Article 34).

As regards social security of services, the provisions of Euro-Mediterranean Agreements are similar to those of European Agreements, providing for a progressive liberalisation process. Measures aiming at mutual recognition of professional qualifications are to be taken by Association Councils, as in the Association Agreement with Jordan under Article 35.

In view of the accession of this country to the WTO (effective from 11 April 2000), cross-border provision of services will be progressively authorised. In our opinion this will of more benefit to Community companies which are more competitive in all fields of services (financial, insurance, telecommunications, etc.).

c) Turkey Agreement

This was the first Association Agreement that provided for free movement of nationals from a third country. Article 12 says that "The Contracting Parties agree to use Articles 48, 49 and 50 TEC to implement between themselves, gradually, the free movement of workers." Today the reference has to be made to Articles 39 to 41 TEC.

An Additional Protocol signed on 23 November 1970⁴² relating to measures to be taken for its enforcement stated that free movement of workers would be implemented between the 12th and 22nd year after the agreement's coming into effect (Article 36 ü), and that it would be the Association Council which would decide the means. Every Member State undertook to accord national treatment to Turkish workers employed in the Community in terms of working conditions and pay. The Association Council was similarly charged with preparing rules on social security for Turkish workers and their families that would allow them to add together all periods of insurance or employment in different Member States for the purpose of pension (old age, disability and death), medical care and family allowances for dependants resident in the Community).⁴³

The Association Council has contributed to clarifying the rights of Turkish workers in the European Community through interpretation and development of the agreement rules. In this respect, the most important Association Council Decisions are 1/80 and 3/80.

Decision 1/80 grant a Turkish worker, after four years of legal employment in a Member State, access to any gainful employment of his choice. Also, it recognises the right of any Turk working in a Member State for a year to renewal of his work permit. Three years of regular employment gives them the right to accept offers for

⁴² OJ L 293/72.

⁴³ OJ L 293, 29.12.1972.

the same job made by another employer. Member States are not permitted to restrict the residence and employment conditions of Turkish workers.

The application of Member States' social security systems to Turkish workers was provided for by Decision 3/80. There is a conditional relationship between residence and regular employment as the first is not possible without legal employment and the latter is contingent on regular residence. In this context, the European Court of Justice held that both are complementary and that employment implies necessarily the right of residence.⁴⁴ The right to residence remain valid even during breaks in employment but not after leaving the labour market.

The Association Agreement with Turkey as well as Association Council decisions have direct effect as their provisions are unqualified and precise.⁴⁵

d) Aspects not Regulated by External Agreements

We have described the provisions relating to workers, establishment and provision of services in the most important categories of agreements concluded by the EC. However, the right of entry and freedom of movement for nationals from third countries in Community territory are not regulated in these agreements, so we need to refer to common immigration policy rules and to the national law of Member States.

We have mentioned the Council regulation listing the third countries whose citizens need a visa. Whilst citizens of CEECs are exempt from this requirement because their accession to the EU is imminent,⁴⁶ most Mediterranean countries appear on the "black list," the exceptions being Israel, Cyprus and Malta. Citizens from third countries not included in the list could be subject to visa requirements by a Member State; this possibility, left to States in the previous Council regulation, was eliminated by Regulation 539/2001 which only allows Member States to make an exception in the case of persons undertaking gainful employment during their stay in EC territory.

The elimination of visa requirement for Eastern citizens is counterbalanced by the conclusion of readmission agreements which require CEECs to readmit their own citizens or ones from third countries coming from their territory who entered EU territory illegally. In this way, Central and Eastern European countries have been forced to control illegal immigration and asylum seeker flow on the basis of similar criteria to EU Member States. As the European Community is not empowered to conclude such bilateral agreements, they have taken the form of mixed agreements (i.e. concluded by the EC and Member States on the one side and a third country on the other). The Treaty of Amsterdam provides the necessary legal basis for these agreements in Articles 63.3 TEC and 24 and 30 TEU.

⁴⁴ ECJ Judgement 6 June 1995, C-434/93, *Bozkurt*, Rec. p. I-1504.

⁴⁵ *Demirel* Judgement, 30 September 1987, Case 12/86, Rec. p. 3752. See also Judgements of 20 April 1994, Case C-58/93, *Yousfi*, Rec. p. I-1368; 20 September 1990, Case C-192/89, *Sevince*, Rec. p. I-3501; 16 December 1992, Case C-237/91, *Kus*, Rec. p. I-6818 and 10 September 1996, Case C-277/94, *Taşlan-Met*, Rec.

⁴⁶ The new Regulation 539/2001, superseding Regulation 574/99 exempts citizens of Bulgaria and Romania from the visa requirement.

These agreements have been criticised because their practical implementation could presume a violation of the 1951 Geneva Convention on Refugee Status. In particular, all asylum seekers coming from a CEEC are automatically returned because they are considered to have come from a safe third country. If they are citizens of third countries, the CEEC concerned can, on the grounds of lacking the necessary technical, administrative and financial resources refuse entry to these persons and send them back to their country of origin.⁴⁷

Apart from visa exemptions for their citizens, Eastern European governments have negotiated and concluded bilateral treaties with Member States facilitating temporary immigration for the purpose of contracts for services, internships seasonal employment local cross-border work. Thus there is a clear immigration preference in favour of citizens of Eastern candidate States.

As candidates for European Union membership, the CEECs have to accept, as stated by the Tampere European Council, the Schengen acquis. Obviously, the South Mediterranean countries do not have this obligation.

Other circumstances explain the absence of a uniform status for third-country citizens, except in the two conventional categories analysed: relation to a Community citizen and employment by a Community citizen exercising his/her freedom of establishment, provision of services, etc.

Conclusion

Today European Union is adopting a more global, and not only the traditionally defensive, approach to the migration problem. This implies dialogue and co-operation with countries of origin in restraining and avoiding the causes of migration movements.

This approach was adopted by the Edinburgh European Council in 1992 which declared: the maintenance of peace and termination of all armed conflicts, respect for human rights, the creation of democratic societies, the appropriate social conditions and a liberal commercial policy should improve the economic situation in immigration-generation countries.⁴⁸

The European Union appears therefore to be conscious of the need to attack the causes of migration movements and only secondarily to control entry and to take measures for the social integration of legal migrants.

The inclusion of articles on visas, asylum and immigration in the chapter devoted to implementation of free movement of persons within the Union has led some scholars⁴⁹ to ponder the difficulties of developing an effective immigration policy that addresses its root causes and forestalls their consequences.

⁴⁷ Bribosia, Weyembergh, *op. cit.*, *supra*, n. 34, pp. 178–179.

⁴⁸ Similar to the opinion of the Commission (COM (94), 23 final).

⁴⁹ J. Monar: "EU Justice and Home Affairs after the Reform: an Assessment of the Treaty of Amsterdam provisions," *Le Traité d'Amsterdam* (1997). Another expert in the field of migration studies who is sceptical because of diverging national interests is H. Overbeek: "Towards a New International Migration Regime: Globalization, Migration and the Internationalization of the State," in: Miles, Thräumjardt (eds.): *Migration and European Integration: the Dynamics of Inclusion and Exclusion* (1995).

The new approach can be perceived in relations not only with Central and Eastern European countries but also the Mediterraneans, as the Barcelona Declaration reveals. In this Declaration both sides confirmed their will to increase their co-operation in order to reduce migratory pressures and to respect all the legal rights of legal immigrants. This approach is also explicitly evident in Euro-Mediterranean Agreements, which provide for social co-operation, job creation and development of training in migration areas. This constitutes a short- and medium-term solution that will not in any case impinge on other third-country citizens coming from places with less advantageous economic and social conditions.

The Presidency Conclusions of the Tampere European Council reaffirmed commitment to developing negotiations with countries of origin in analysing the causes of immigration, preventing them, offering technical assistance and informing people about the actual conditions of immigration to EU countries in order to avoid economic exploitation of human beings.

Nevertheless, one can have misgivings about the ultimate intention of EU and Member States which have recently reduced official development aid and are tightening controls on external borders.

The European Agreements provide for structured dialogue on issues of common interest (which also applies to Cyprus and Malta). Meetings within this framework are of a consultative character and only the biannual meetings between home affairs and justice ministers address the operative aspects. Since the adoption of an enhanced pre-accession strategy by the Luxembourg European Council (1997), joint meetings of home affairs and justice ministers are taking place within this framework. The European Conference, a forum for bringing together the Member States and the eleven candidate countries, meets once a year for political consultation, mainly in home affairs and justice issues.

There are also worries about relations with Mediterranean countries. The Cannes European Council (1995) recognised the need for increasing co-operation in the home affairs and justice area where immigration constitutes a priority issue. In similar terms, Barcelona Conference declared the countries responsibility for readmission of illegal migrants. In spite of this compromise, the Mediterranean countries failed to obtain from the EU abolition of visa requirements for their citizens, but only generic development aid.

The Economic and Social Committee has issued an opinion on the relationship between migration and establishment of a free trade zone in the Euro-Mediterranean area⁵⁰ which clearly states that trade liberalisation alone will not change the conditions for stemming migrations. A Commission communication to the Council and European Parliament⁵¹ submitted to the partners a proposal for specific measures to develop co-operation between politicians charged with this responsibility.

Thus we can conclude saying that privileged treatment of Eastern citizens, has not in practice been prejudicial to Southern citizens as both areas are seen, since the

⁵⁰ Avis CES (595/96 fin) "Migration et création d'une zone de libre échange."

⁵¹ COM (97) 68 final.

Essen European Council (1994) as priority areas of strategic importance for the European Union.

It is not easy imagine an open space with free movement of goods, capital and services coexisting with barriers to free movement of persons since genuine free movement of persons, as someone has said,⁵² consists in freedom to choose between migration or remaining in one's own country. Such free choice will not be possible if immigration is not taken seriously as an issue of prime political importance and a part of development, foreign and security policies.

⁵² C.V. Marie: "L'Union européenne face aux déplacements de populations. Logiques d'Etat face aux droits des personnes," *Rev. Eur. des migrations intenationales* (1996), pp. 206–207; G. Callovi: "A Reshaped European Community and Migration Issues," *Recent Migration Trends in Europe. Europe's New Architecture* (1993), p. 41. Progress in establishment of a freedom, security and justice space in the EU has been measured (COM (2000) 167 final, de 24 de marzo de 2000) and a global approach to immigration is needed that considers politics, human rights and development in countries of origin and that contributes to their development.

International and European Law Aspects of the Eastern Enlargement of the European Union

STEPHAN HOBE, SANDRA BARTELT

I. Introduction

The current negotiations about the eastern enlargement of the European Union (EU) are nothing less than the realisation of a dream: The dream of reinstalling Europe after the fall of the iron curtain a decade ago.¹ For this reason, a general consensus among member states of the European Union can be observed that the eastern enlargement is both useful and desirable. But it is already more difficult to find such far reaching consensus when it comes to the details that have to be negotiated in order to ensure that all the necessary requirements for the accession of new members are fulfilled. These requirements and the perspectives of European integration with regard to eastern enlargement will be discussed in the following article. But before the discussion of all these details can begin, it is necessary to get a concise understanding of the organisational framework of the EU to which, as indicated in Article 49 of the Treaty on the European Union (TEU), the accession of the eastern European countries shall take place.

Indeed, Article 49 TEU is the only provision outlining the requirements for an accession of new member states. At first sight that seems to be remarkable because, according to rules of general public international law, an accession of a new member is only possible to an existing international organisation. And although some authors in legal literature hold that already by now the European Union has acquired the legal status of an international organisation² such conclusion seems to be at least doubtful. If one looks into the structure of the European Union it becomes apparent that the Union, that was created by the Treaty of Maastricht of 1992 consists of the three pre-existing communities, the European Community on Coal and Steel, the European Atomic Community and the European Economic Community, adding to these three communities two further policy fields, namely a common security and foreign policy in pillar two

¹ See for a description of early conceptions of european integration, Th. Oppermann: *Europarecht*, 2nd ed. (1999), p. 8.

² See e.g. G. Ress: "Die Europäische Union und die neue juristische Qualität der Beziehungen zu den Europäischen Gemeinschaften," *Juristische Schulung (JuS)* (1992), p. 986; A. v. Bogdandy, M. Nettesheim: "Die Verschmelzung der Europäischen Gemeinschaften in der Europäischen Union," *Neue Juristische Wochenschrift (NJW)* (1995), p. 2327.

and in the third pillar cooperation on police and criminal matters.³ Only in the first pillar, where undoubtedly international organisations play the crucial role we speak of integration, whereas the latter two pillars are characterized by intergovernmental cooperation and thus differ fundamentally from the first pillar. These structural differences make it at the moment impossible to regard the European Union as a single international organisation.⁴ On the other hand, Article 49 TEU speaks of an application for membership to the Union. In a legal perspective, this provision must therefore be interpreted as meaning that any new member applies for membership to the three European Communities and does commit itself at the same time to actively participate in the fields of intergovernmental cooperation of the second and third pillar.⁵ This interpretation is supported by the fact that any acceding state must participate in all pillars of the Union and may not restrict its participation to the three Communities.

With this legal clarification in mind, the following study will first recapitulate previous accession rounds before the procedure of accession is examined and the legal requirements for accession are discussed particularly against the background of the European Summit of Nice of December 2000. Furthermore, the study takes a look at the current status of the negotiations with eastern European countries, before selected policy fields will specifically be considered. This shall finally allow for an assessment of the perspectives of European integration in the light of the current move to the east.

II. An Overview on Previous Accession Rounds

The foundation of the European Communities (EC) started in the 1950s with only six members: France, Germany, Italy, Belgium, The Netherlands and Luxembourg. Afterwards, three main rounds of accession took place thus enlarging the EC up to fifteen member states: The so called northern enlargement of 1973, bringing the United Kingdom, Denmark and Ireland into the Communities. The southern enlargement of 1981 and 1986, making Greece as well as Spain and Portugal new members of the European Communities and finally the so called EFTA-enlargement of 1994 which led to the accession of Austria, Finland and Sweden. Before having a closer look at the process of accession two preliminary remarks have to be made.

First, it is worth mentioning that even before the first enlargement round in the early 1960s took place first attempts to bring the United Kingdom into the European Communities had failed.⁶ The negotiations with the UK started in late 1961 and, after sixteen months of negotiations, a preliminary agreement was achieved. The French president General *De Gaulle* indicated his serious doubts on whether the UK would accept the *acquis communautaire*. One part of the problem were the still existing ties

³ For an account of this structure see M. Pechstein, Ch. Koenig: *Die Europäische Union*, 3rd ed. (2000), passim.

⁴ *Ibid.*, p. 27.

⁵ See Ch. Vedder in: E. Hilf, M. Grabitz (eds.): *Commentary on the TEU*, Art. 0, p. 3 at 1; W. Meng in: H. v.d. Groeben, J. Thiesing, C.-D. Ehlermann: *Commentary on the TEU*, Art. 0, p. 1143 at 1.

⁶ See for a description of these negotiations, P.J.G. Kapteyn, P. VerLoren van Themaat: *Introduction to the Law of the European Communities* (1998), p. 17.

of the UK with the EFTA, the other the French concern that the UK's ties with the United States of America were too strong. After this failure, new attempts to achieve a northern enlargement of the European Communities started only in the second half of the 1960s and led to the signing of the Final Act by the six member states as well as the UK, Ireland, Denmark and Norway in January 1972.⁷ Only three of these four countries became eventually members of the European Communities. Norway did not join because, as again later in 1993, the Norwegian population rejected the accession of the country in a referendum that was part of the Norwegian constitutional requirement for ratification.⁸

Second, it is remarkable, that in the process of German unification, no separate accession of the new "Länder" was required. As is well known, by way of the Unification Treaty⁹ between the then existing Federal Republic of Germany and the German Democratic Republic the German reunification was completed and internationally assured by the "Two plus Four"-Agreement.¹⁰ The Unification Treaty expressed that the new "Länder" Mecklenburg-West Pomerania, Brandenburg, Berlin, Saxony-Anhalt, Thuringia and Saxony acceded to the Federal Republic of Germany and thus automatically also to the European Communities.¹¹ It is worth mentioning in that respect that the entire process of reunification was put under the political condition of Germany remaining member of the European Communities.¹² Particularly Article 10 of the Unification Treaty deals with this problem: in section one it is determined that the Treaty establishing the European Communities, amendments and additions thereto and international agreements, treaties and decisions which have been brought into effect in connection with these treaties would apply in the territory of the former GDR including East-Berlin. Furthermore, in Article 10 sec. (d) it is stated that all acts of secondary legislation shall apply in this territory as of 3 October 1990 and in sec. (c) the new "Länder" are obligated to transpose or implement all those acts of secondary legislation the transposition or implementation of which falls under their jurisdiction.¹³

All the accession or enlargement rounds just previously mentioned followed a specific procedure. They start with the formal application for accession by the respective country, followed by sometimes very long lasting accession negotiations, the

⁷ Final Act of 22 January 1972, OJ L 73/1, 1972.

⁸ See Oppermann, *op. cit.*, *supra*, n. 1, p. 18; Kapteyn, VerLoren van Themaat, *op. cit.*, *supra*, n. 6, p. 20.

⁹ "Unification Treaty of 31 August 1990," *Federal Law Gazette (BGBl.)*, part II, p. 889.

¹⁰ "'Two plus Four' - Agreement of 12 September 1990," *Federal Law Gazette (BGBl.)*, part II, p. 1318.

¹¹ See on this automatic accession, C.W.A. Timmermans: "German Unification and Community Law," 27 *Common Market Law Review (CMLR)* (1990), p. 440; T. Giegerich: "The European Dimension of German Reunification: East-Germany's integration into the European Communities," 26 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (1991), p. 418.

¹² I. Pernice: "Deutschland in der Europäischen Union," in: Isensee, Kirchhof (eds.): *Handbuch des Staatsrechts VII* (1995), p. 228; "Presidency Conclusions of the European Council Straßbourg 8/9 December 1989," 2 *Europa Archiv* (1990), D 5(14); Timmermans, *op. cit.*, *supra*, n. 11, p. 437.

¹³ See T. Giegerich, *op. cit.*, *supra*, n. 11, p. 384; R. Priebe, "Die Beschlüsse des Rates zur Eingliederung der neuen deutschen Bundesländer in die Europäischen Gemeinschaften," 113 *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (1991).

signing of the treaties of accession and their eventual ratification due to national constitutional requirements. As has been mentioned with respect to Norway, the constitutions of some countries even require a specific referendum for accession.¹⁴ But it is not only this procedure which is laid down in Article 49 TEU and has also partially developed in the practise of these enlargement rounds but also certain criteria of the European Communities imposed upon any candidate for accession and commonly addressed as *acquis communautaire* that form the procedural and material requirements for any accession and shall therefore be investigated more closely in the following section.

III. The Requirements for Accession

1. Accession to General International Organisations

Any international organisation that is open to new members may specifically lay down the procedure that a willing new member has to pursue in order to acquire membership. The United Nations Organisation can serve as an example in this respect: Article 4 of the United Nations Charter opens the organisation to all "peace loving" states that accept the Charter obligations. For admission upon a recommendation of the Security Council a 2/3-majority in the General Assembly is required, the latter including the concurring vote of the permanent members. It can clearly be seen that the procedural hurdles as being based on the consensus of the permanent members are much higher than the material requirements that only include the criterion of "peace loving" in the sense of accepting the principles of the United Nations Charter.¹⁵

2. Accession to the European Union

It has already been indicated above that the new Article 49 of the Amsterdam Treaty on the EU (ex-Article O) lays down the requirements for admission to the Communities resp. the Union, whereby this provision basically reflects the current practice of the Communities that is derived from previous admission rounds. And, as has already been indicated in the introductory remarks, admission to the Union means, on the one hand, accession to the three Communities as well as, on the other hand, subscribing to the common foreign and security and the common judicial policy of the second and third pillar. The requirements for admission can only be understood properly if first the procedure for admission is laid down. This procedure reflects to a relatively large extent the previous practice of the communities¹⁶ and is, therefore,

¹⁴ See Art 20 of the Constitution of the Kingdom of Denmark, 5 June 1953; Art 27, 47 of the Constitution of Ireland, 29th December 1937; Art 11 of the French Constitution, 4 October 1958, all printed in: A.P. Blaustein, G.H. Flanz (eds.): *Constitutions of the World*.

¹⁵ See K. Gintner: "Art. 4 UNCh," in: B. Simma et al. (eds.): *UN Charter. Commentary* (1994), p. 120 at 19 ff.

¹⁶ Vedder, *op. cit.*, *supra*, n. 5, Art. 0 TEU, p. 3 at 2.

only partially laid down in Article 49 TEU. It may be divided into three phases: an initial phase, a negotiation phase and a final phase. The entire procedure requires actions both by the Union and by the member states. Article 49 para. 2 TEU states that the accession treaty is concluded between the member states and the acceding countries. Therefore it is an international agreement concluded between states modifying the existing primary law. Thus, neither the EU nor the Communities conclude this international agreement.¹⁷

a) Initial Phase

According to Article 49 para. 1 TEU the country willing to accede to the Communities has to direct the respective unilateral declaration of its will to accede to the Communities to the Council. With this, the initial phase of the application procedure starts. After a brief examination the Council will ask the Commission to give its preliminary opinion on the note of application.¹⁸ For its preliminary statement the Commission will investigate the legal, political and economic situation of the country willing to accede to the Communities; furthermore specific issues of the accession negotiations will be identified.

Without being bound to this preliminary statement of the Commission, the Council will then officially decide on the opening of negotiations.¹⁹ It is worth mentioning that such decision of the Council does not lead to any kind of obligation on the side of the member states or of the Community to finally admit those countries; the only obligation is to conduct the negotiations in good faith.²⁰

b) The Second Phase (Negotiation Phase)

Since 1970, all accession negotiations are undertaken by the Council. It is the Council which basically decides on the position of the communities, resp. the Union. In order to take that decision the Commission makes proposals to the Council concerning all points important for the negotiations. It becomes clear that, because of this dominant position of the Council during the accession negotiations, the member states have still the decisive say. At the end of the negotiations, those are formally completed and the results formally confirmed by the European Council.²¹

¹⁷ Thus, Art 49 TEU can be regarded as *lex specialis* to Art 300 TEC because it leaves the conclusion of the admission agreements with the member states rather than with the communities; see Vedder, *op. cit.*, *supra*, n. 5, p. 12 at 26.

¹⁸ See as an example of such statement of Commission to the applications of Hungary, Poland, Romania, Slovakia, Lithuania, Estonia, Latvia, Bulgaria, the Czech Republic and Slovenia of 16.07.1997, *Bull. EU* 5-1997, p. 15.

¹⁹ See decision of the European Council of 12/13 December 1997, in: Presidency Conclusions of the Luxembourg European Council 1997 to start negotiations with Cyprus, Hungary, Poland, Estonia, the Czech Republic and Slovenia.

²⁰ Vedder, *op. cit.*, *supra*, n. 5, Art. 0 TEU, p. 4 at 8.

²¹ Pechstein, Koenig, *op. cit.*, *supra*, n. 3, p. 224.

c) Final Phase

Only for the final phase the procedure as laid down in Article 49 para. 1, s. 2 and para. 2 TEU is actually followed.

First, the Council will hear the Commission that has to give its final statement as to the fulfillment of the requirements for an accession of a country. Second, the European Parliament has to give its consent with the absolute majority of its members. This is however not the only possibility for the Parliament to take note of the ongoing negotiations. In practice, it will consecutively be informed and get the opportunity to give statements which mostly represent the interests of the European Union. Its agreement is a necessary requirement and a case of co-decision (Article 251 TEC) between Council and Parliament.²²

Finally, the Council decides on the application by unanimous vote. Its decision is a definite decision; in case of a negative decision the door for new negotiations is only opened if this negative vote of the Council was not made unanimously. Furthermore, the accession agreements require ratification in all member states.

3. The Material Requirements for Accession

First, according to Article 49 TEU only *states* as defined by public international law²³ are allowed to apply for membership; those states must be geographically situated *in Europe*.²⁴

Second, the *Copenhagen criteria* of the European Council of 1993 must be fulfilled.²⁵ According to this Council decision, the following criteria must be met: There must be an institutional stability as a guarantee for a democratic order under the rule of law. Human rights must be protected and respect for minorities must be guaranteed. In this respect one could briefly speak of the constitutionality of the new member state.²⁶ Moreover, the functioning of a market economy as well as the capacity of competitiveness within the Union (so called *capacity of the internal market*) is required.²⁷

Third, a candidate must be capable and willing to accept all obligations of its membership and to subscribe to the aims of the political as of the Economic and Currency Union (so called *capacity of integration*).²⁸

²² Vedder, *op. cit.*, *supra*, n. 5, Art. 0 TEU, p. 14 at 33.

²³ See eg. O. Kimminich, St. Hobe: *Einführung in das Völkerrecht* (7th ed., 2000), p. 74.

²⁴ See as to interpretative problems Vedder, *op. cit.*, *supra*, n. 5, Art. 0 TEU, p. 5 at 10; P. Richter: *Die Erweiterung der Europäischen Union* (1997), p. 24 ff.; C. Dorau: "Die Öffnung der Europäischen Union für europäische Staaten," *Europarecht (EuR)* (1999), p. 736.

²⁵ See Bull. EC 6-1993, p. 13.; G. Burghardt: "Rechtliche und institutionelle Voraussetzungen: Chancen der Beitrittsverhandlungen aus der Sicht der Europäischen Union," in: Klopfer, Pernice (eds.): *Entwicklungsperspektiven der europäischen Verfassung* (1999), p. 141 ff.; M. Maresceau, E. Montagutti: "The Relations between the EU and Central and Eastern Europe," 32 *CMLR* (1995), p. 1332.

²⁶ See Richter, *op. cit.*, *supra*, n. 24, p. 28 ff.

²⁷ See on this criterion Richter, *op. cit.*, *supra*, n. 24, p. 102; Vedder, *op. cit.*, *supra*, n. 5, Art. 0 TEU, p. 8 at 16, p. 10 at 21.

²⁸ Richter, *op. cit.*, *supra*, n. 24, p. 129.

Fourth, the *enlargement capacity* that is the capacity of the Union to sustain its stability even with new members must be guaranteed.²⁹

In order to reach all these goals the European Council decided on 10 December 1994 in Essen on an all encompassing pre-accession strategy.³⁰ This strategy encompasses the political dialogue, the conclusion of so called Europe Agreements, the establishment of the so called Phare-programme and a European Conference. Finally, a partnership for admission has been established. All these requirements will be discussed in more detail with respect to eastern and central European states in a later section of the study (see *infra* V.).

Fifth, any successful application must convincingly prove that the principles laid down in Article 6 para. 1 TEU are respected. According to this provision „the Union is founded on the principles of liberty, democracy, the respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states”.

Concerning the respect for human rights, the European Convention on the Protection of Human Rights and Fundamental Freedoms³¹ is generally taken as a minimum standard. Moreover, the demand for democracy can support the maintenance of a parliamentary democracy, which is an essential requirement for the membership in the Union. The Copenhagen criteria had confirmed that all central and eastern European countries must have fulfilled institutional stability as a precondition for accession in order to guarantee in the long run the existence of stable and strong democracies governed by the rule of law.³²

Moreover all acceding countries must accept the *acquis communautaire*.³³ According to a definition of the Commission of 1992, *acquis communautaire* means all the contents, the principles and political goals of the treaties including the Treaties of Maastricht, Amsterdam and Nice; furthermore the secondary law of the Union as well as the jurisprudence of the European Court of Justice, declarations and decisions of the Union, international agreements and agreements among member states concerning actions of the Union.³⁴

With this, the *acquis communautaire* is a mix of law, declarations and principles as well as of common standpoints which the European Court of Justice has developed in its jurisprudence. It must be taken into consideration that the common Economic and Currency Union as well as the development of the common foreign and security policy and the common policy in criminal matters with regard to the abolition of borders in Europe are also important parts of the *acquis communautaire*. In principle, through the acceptance of the *acquis communautaire* it shall be made sure that the

²⁹ See, “Copenhagen Criteria,” *Bull. EU* 6-1993, p. 13.

³⁰ See Presidency Conclusions of the Essen European Council 9 December 1994, Annex IV; *V e d d e r, op. cit., supra*, n. 5, Art. 0 TEU, p. 10 at 20.

³¹ European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, UNTS 213, p. 221.

³² *Bull. EU* 6-1993, p. 13.

³³ See thereto P. R i c h t e r, *op. cit.*, n. 24, p. 41 et seq.

³⁴ See EC-Commission: “The Enlargement of Europe: A new challenge,” *Bull. EU* 3-1992, p. 12.

current general conditions of cooperation and integration in Europe will not be changed after the accession of new member states.³⁵

Finally any new member must declare that it respects the principles of international law and make a commitment to the settlement of any territorial disputes by peaceful means, in particular through the jurisdiction of the International Court of Justice.³⁶

IV. The Input of the Nice Conference to Eastern Enlargement

Against this background of traditional requirements for admission of new members to the Communities/the Union the question must be asked on whether the results of the Nice Council of the Union have brought about considerable changes. This is insofar important as this Council Meeting had on its agenda as one of its primary goals the creation of conditions facilitating the accession of new member states of eastern and central Europe. These high goals were based on the political decision that a necessary requirement for any enlargement of the Union would be the deepening of integration.³⁷

Therefore, a reform of the institutional framework of the Union was the main topic at the Intergovernmental Conference in Nice. It was feared that the amount of newly acceding states would disturb the balance within the respective organs as well as among the organs of the European Communities/the European Union.

Protocol No. 7, annexed to the TEU, links the eastern enlargement to the reform of the institutions of the EC/EU. According to Article 1 of the Protocol, the Commission shall in the future consist of only one national of each of the member states by the time of the first enlargement of the Union.

Moreover, the reweighing of the votes (346 in total, based on 27 member states) in the Council grants Poland a very strong position as being ranked within the second group of states with 27 votes behind Germany, France, Italy and the United Kingdom with 29 votes. The voting power for other candidates for accession are: 12 for the Czech Republic and Hungary, 7 for Slovakia and Lithuania and 4 for Latvia, Estonia and Slovenia each.

In sum, Nice led to a rather ambiguous result.³⁸ On the one hand, a clearer call for strengthening the existing capacity of the Union was expected, making the Commission an even smaller and more efficient working unit. Moreover, some countries had hoped that the demographic factor were observed more closely. But again the experience was made, on the other hand, that a Council Summit is a highly politicised meeting that rarely favours clear decisions for Europe rather than protecting the inter-

³⁵ Vedder, *op. cit.*, *supra*, n. 5, Art. 0 TEU, p. 7 at 14.

³⁶ See Presidency Conclusions of the Luxembourg European Council 12/13 December 1997, pt. 5.

³⁷ See also the fourth point of the Copenhagen Criteria 1993 which requires as well, that the enlargement process may not endanger the integration, *Bull. EC* 6-1993, p. 13.

³⁸ See for an assessment W. Wessels: "Die Vertragsreform von Nizza – zur institutionellen Erweiterungsreife," *Integration* (2001), p. 8.

ests of the member states. In this perspective not even the approach of a closer cooperation among certain European states was clearly favoured by the Nice Meeting of the Council. It may, however, be observed whether the so called Post-Nice-Process as mentioned in Declaration 23, annexed to the Treaty and demanding a facilitation of the treaties as well as a profound consideration of the distribution of competencies, will lead to institutional reforms that would obviously affect the candidates' conditions for accession. Therefore the candidates should necessarily be included in this Post-Nice-Process.

V. The Current Status of Negotiations with the Candidates for Accession

The formerly concluded trade and cooperation agreements between the Countries of Central and Eastern Europe (CEECs) and the European Community were transformed into the so called Europe Agreements after the reforms in the Central and Eastern European countries had proven to be of a permanent character. Thus, since the beginning of the nineties Europe Agreements pursuant to the former Article 238 TEC (Article 310 TEC) have been concluded with countries such as Hungary, Poland, the Czech Republic, Slovakia, Romania, Bulgaria and the Baltic states.³⁹ These agreements are backed up by a system of economic assistance and a political dialogue which is expected to lead to a gradual integration of the CEECs into the Community.

1. The Association with Third States and International Organisations Pursuant to Art. 310 TEC

The Europe Agreements are international treaties as laid down in Article 310 TEC. They regulate the association of non-member states or international organisations with the Community. If the agreements are concluded with the Community and the member states, they are referred to as so called mixed agreements.⁴⁰ Characteristics of an Association Agreement based on Article 310 TEC are the reciprocal rights and obligations, joint actions and special procedures.⁴¹ Association Agreements are not only used to give aid to developing countries, but also as a preliminary step to accession or as a substitute for accession. In the latter case, they constitute only an intensified relationship with the EC.⁴²

³⁹ Europe Agreement with Hungary OJ L 347/1, 1993; Poland OJ L 348/1, 1993; Czech Republic OJ L 360/2, 1994; Slovakia OJ L 359/2, 1994; Slovenia, *Bull. EU* 4-1997, pt. 1.4.62; Romania OJ L 357/1, 1994; Bulgaria OJ L 358/1, 1994; Latvia OJ L 26/3, 1998; Lithuania OJ L 51/3, 1998; Estonia OJ L 68/3, 1998.

⁴⁰ Schmalenbach in: M. Ruffert, Chr. Callies (eds.): *Commentary on the TEU/TEC*, Art. 310 TEC, p. 2215 at 13.

⁴¹ ECJ Reports, Demirel, 1987, p. 3719; G. Hirsch: "Die Rechtsprechung des Europäischen Gerichtshofs zu Assoziierungsabkommen," *Bayerisches Verwaltungsblatt (Bay VBl.)* (1997), p. 449.

⁴² Oppermann, *op. cit.*, *supra*, n. 1, p. 798; Kapteyn, VerLoren van Themaat, *op. cit.*, *supra*, n. 6, p. 1337

2. The Associations with the CEECs Established by the Europe Agreements

Association Agreements with the candidate countries are mostly concluded as mixed agreements; only those with Cyprus and Malta were concluded solely with the Community.⁴³ The Europe Agreements with the CEECs therefore constitute the legal framework for the association with the EC and the member states and comprise political as well as economic relations.

Since the EC was reluctant to commit itself to the concrete perspective of accession, it merely accepted the unilateral wish of the candidate country for accession to the Community.⁴⁴ Instead of a concrete option for accession, Article 2 of the Polish Agreement, which is typical of the Europe Agreements, provides a political dialogue between the EC and the candidate country. The Europe Agreements are intended to establish a free trade area over a period of ten years, whereby the EU reduces trade barriers asymmetrically to the advantage of the CEECs.⁴⁵ Although the Europe Agreements aim at establishing a common market between the associated countries and the EC, the only sector which is subject to substantial liberalisation is trade in goods (industrial goods and textile products and to a lesser extent agricultural products and fisheries).⁴⁶ Furthermore, with respect to trade in goods, the Europe Agreements authorise several trade defence measures to protect the Community market against cheaper products from the CEECs. First, Article 30 of the Polish Europe Agreement entails a safeguard clause which allows the EU member states to reduce the import of eastern European products, if they are imported under such conditions that would disturb the internal market to the disadvantage of manufacturers in the EU.⁴⁷ Second, the Europe Agreements authorise the parties to counter dumping in accordance with GATT rules, and establish a prior information and consultation system on trade practices affecting bilateral trade.⁴⁸

Regarding the institutional structure, an Association Council at ministerial level and a Joint Parliamentary Committee are established by the Agreements.⁴⁹ The establishment of a common market with Poland and other accession candidates will finally depend on the capability of the Association Council to monitor the approximation of the legislation which is indispensable for the establishment of an internal market com-

⁴³ Kapteyn, VerLoren van Themaat, *op. cit.*, *supra*, n. 6, p. 1330.

⁴⁴ See as an example for the other Europe Agreements the Agreement with Poland, para. 15 Preamble, OJ L 348/3, 1993; with special reference to Poland, Krenzler in: Groeben, Thiesing, Ehlermann-Krenzler, *op. cit.*, *supra*, n. 5, Vol. 5: *Die Architektur Europas*, p. 1218 at 78 ff.

⁴⁵ See Art 7 ff. of the Polish Agreement; M.A. D a u s e s: "Osterweiterung der EU: MOE-Staaten ante portas," *EuZW* (1996), p. 353; K.E. J a c o b s e n: "The social construction of the *Acquis Communautaire*," *1 European integration Online Papers (EiOP)* (1997), p. 6.

⁴⁶ See Art 18–23 of the Polish Agreement for Agriculture and Fisheries; M a r e s c e a u, M o n t a g u t i, *op. cit.*, *supra*, n. 25, p. 1331.

⁴⁷ P e c h s t e i n, K o e n i g, *op. cit.*, *supra*, n. 3, p. 238 at 470.

⁴⁸ See Art 6 of the Polish Europe Agreement; Art. VI GATT defines dumping in terms of introducing the products of one country „into the commerce of another country at less than its normal value,” which is, as a rule, “the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”

⁴⁹ See Art. 3 para. 2 (Association Council), Art. 5 (Joint Parliamentary Committee) of the Polish Agreement.

parable to the freedoms enjoyed by the citizens of the Union.⁵⁰ The alignment of the Europe Agreement countries' legislation with EC rules comprises a large field of legislative activities such as competition law,⁵¹ environment and consumer protection, customs law, intellectual property, protection of workers and financial services.⁵² In total, 31 fields are subject to fundamental legislative changes, whereby the negotiations of transitional arrangements turned out to be particularly problematic.⁵³

3. PHARE-Programme

The PHARE-Programme, which was initiated in 1989, is an autonomous system concerning pre-accession assistance in order to promote economic and social reforms.⁵⁴ One goal is to support the aims of the Europe Agreements by strengthening democratic institutions through a facilitation of the adoption of the *acquis communautaire*, thereby using one third of the funds. The remaining two thirds are used to finance investment aimed at helping the CEECs to meet the economic conditions of the internal market, particularly in fields where the adoption of the *acquis communautaire* is becoming increasingly demanding: environment, product quality, working conditions etc.⁵⁵

4. The Enhanced Pre-accession Strategy

Since the member states have agreed to the future accession of the CEECs in the Copenhagen Declaration 1993,⁵⁶ the PHARE-Programme merged into the so called pre-accession strategy which was adopted by the European Council in its Essen Declaration in 1994.⁵⁷ This strategy is intended to enable all the applicant CEECs to eventually become member of the European Union and to adopt the *acquis communautaire* prior to accession.⁵⁸ Therefore, the Commission has published a White Paper on the "Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union".⁵⁹ This Paper does not focus on

⁵⁰ A. Evans: "Voluntary harmonisation in integration between the European Community and Eastern Europe," 22 *European Law Review (ELRev.)* (1997) 203; Kapteyn, VerLoren van Themaat, *op. cit.*, *supra*, n. 6, p. 1336.

⁵¹ See in particular for competition law, P. Böhnle: "Auswirkungen der Europa Abkommen auf das Wettbewerbsrecht der Staaten Mittel- und Osteuropas," *EuZW* 111 (1998).

⁵² Maresceau, Montaguti, *op. cit.*, *supra*, n. 25, p. 1335.

⁵³ After the 11th negotiation round, especially Poland appeared to be reluctant to search for compromises, see FAZ, 31 March 2001, p. 6.

⁵⁴ EEC Regulation No 3906/89 on economic aid to support the process of economic and social reforms in certain countries of Central and Eastern Europe (PHARE-Programme), OJ L 375, 1989, at last amended by EC Regulation No. 753/96, OJ L 103, 1996.

⁵⁵ *New Guidelines of the Commission (COM (97) 112)*, see *Bull. EU* 3-1997, pt. 1.4.53.

⁵⁶ *Presidency Conclusions of the Copenhagen European Council*, *Bull. EU* 6-1993, p. 13.

⁵⁷ *Presidency Conclusions of the Essen European Council 1994*, Annex IV.

⁵⁸ *Presidency Conclusions of the Luxembourg European Council 1997*, pt. 13.

⁵⁹ The Summary of the White Paper is available under: <http://europa.eu.int/en/agenda/peco-w/en.html> of 7 February 2001.

the whole *acquis communautaire*, but merely on the need to create the conditions that will allow the internal market to function properly after enlargement. In this respect, the legal approximation is particularly important for preparing the associated countries for accession. Although the Paper does not contain any legally binding goals, it still has an important political impact on the CEECs since it cannot be denied that approximation creates an irreversible legal framework for integration.⁶⁰

Moreover, the pre-accession strategy comprises a „structured dialogue”. In contrast to the political dialogue as laid down in the Europe Agreements that deals with the „if” of accession, the structured dialogue goes one step further by dealing with the modalities of “how” to accede.

This dialogue entails meetings of ministers as well as meetings of the heads of state that take place once a year.⁶¹

5. Accession Negotiations

The first wave of accession negotiations started on 31 March 1998 with Hungary, Poland, Estonia, the Czech Republic, Slovenia and Cyprus.⁶² Malta, which desired to proceed straight to accession, suspended its application in October 1996.⁶³

In order to support the negotiations, a specific European Conference was established in March 1998. It serves as a multilateral forum for political consultation, intended to address questions of general concern to the participants and to broaden and deepen their cooperation in matters of foreign and security policy, justice and home affairs, and other areas of common concern, particularly economic matters and regional cooperation.⁶⁴

At the same time, preparation of accession negotiations with Bulgaria, Romania, Latvia, Lithuania and Slovakia shall be speeded up.⁶⁵

VI. The Effects of Enlargement: Selected Fields

1. 1st Pillar of the EU

Although primary Community law has still to be defined formally as a part of international law and is now moving towards an autonomous legal order *sui generis*,⁶⁶ aspects of international law can hardly be found in the first pillar, which deals mostly with the liberalisation of the internal market.

⁶⁰ D a u s e s, *op. cit.*, *supra*, n. 45, p. 353.

⁶¹ K r e n z l e r, *op. cit.*, *supra*, n. 5, Vol. 5, Die Architektur Europas, p. 1284 at 88.

⁶² K a p t e y n, V e r L o r e n v a n T h e m a a t, *op. cit.*, *supra*, n. 6, p. 1336.

⁶³ Bull. EU 5-1997, pt. 1.4.65; Bull. EU 6-1997, pt. 2.5.1.

⁶⁴ Presidency Conclusions of the Luxembourg European Council 1997, pt. 4 ff.

⁶⁵ *Ibid.*, pt. 27.

⁶⁶ G. B u r g h a r d t, G. T e b b e in: G r o e b e n, T h i e r s i n g, E h l e r m a n, *op. cit.*, *supra*, n. 5, before Art. J TEU, p. 911 at 24.

⁶⁷ Art. 37 ff. of the Polish Europe Agreement.

As discussed above, the Europe Agreements liberalise the internal market only with regard to the trade in goods. Particularly the free movement of workers is restricted according to Title IV of the Europe Agreements.⁶⁷ Currently the free movement of workers is allowed only on the basis of bilateral treaties, because the Community is afraid that otherwise a large migration to the western member states of the EU would take place.⁶⁸

Therefore, according to Article 37 of the Polish Europe Agreement, the principle of non-discrimination applies only with regard to working conditions, wage and dismissal. Moreover, it cannot be interpreted in a way as to embrace measures which do not distinguish between migrant workers and those of the host member state. Whereas the members of a worker's family are subject to considerable protection under Community law,⁶⁹ they only have access to the labour market as long as, according to the Europe Agreements, the migrant worker's working permit is valid.⁷⁰ Even after the formal accession of the CEECs, a complete liberalisation does not seem to be very likely; currently, transitional arrangements concerning the free movement of workers are negotiated.⁷¹

Another highly sensitive field is the Title on Agriculture (Article 32 et seq. TEC), because with respect to agricultural goods the internal market is not liberalised but subject to state-subsidies, characterised by a system of purchasing guarantees. When carrying out the eastern enlargement the Community will face enormous costs, if it does not manage the necessary change to a system of direct income support.⁷² The latter system would not be as expensive for the Community, since the cost of living is comparably low in the CEECs.

2. 2nd Pillar of the EU: The Common Foreign and Security Policy (CFSP)

The current debate on the accession of new members to the Union tends to focus primarily on economic aspects. However, other political and security implications should be taken into account as well. Since the entering into force of the Amsterdam Treaty,⁷³ the CFSP includes for the first time the progressive framing of a common defence policy, which entails the so called Petersberg tasks according to Article 17 para. 2 TEU: humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management.⁷⁴

⁶⁸ P. Becker: "Der Nutzen der Osterweiterung für die Europäische Union," *Integration* 1998, p. 233.

⁶⁹ See Regulation 1612/ 68 of the Council of the EC.

⁷⁰ Art. 37 Polish Europe Agreement; Brechmann in: Calliess, Ruffert, *op. cit., supra*, n. 40, Art. 39 TEC, p. 612 at 39.

⁷¹ While the EC offers a transitional period of 5 years, Poland prefers an immediate liberalization, see *FAZ*, 31 March 2001, p. 6; *FAZ*, 12 April 2001, p. 1.

⁷² M. Pechstein: "Osterweiterung und Zukunftsperspektiven der Europäischen Union," *Zeitschrift für Rechtsvergleichung* (1996), p. 110.

⁷³ Treaty of Amsterdam signed the 2 October 1997, entered into force the 1 May 1999.

⁷⁴ For the progressive framing of a common defence policy see Art. 17 para. 1 TEU.

In order to implement actions that have defence implications, the Union avails itself of the Western European Union (WEU).⁷⁵ The WEU is therefore built up in stages as the defence component of the EU. According to its double functional nature, the WEU shall be developed as a means to strengthen the European pillar of the Atlantic Alliance at the same time.⁷⁶ Moreover, the WEU has to use NATO's collective assets and capabilities if it wishes to implement the Petersberg tasks.

Consequently, the CFSP comprises complex institutional arrangements with other security organisations within the framework of the new operational capacity of the EU.

If the CEECs want to fulfill their obligations under Title V of the TEU, the question arises whether the CEECs have to accede to the WEU or to NATO. In anticipation of this problem, NATO and WEU have not only broadened their mandate but as a reaction to the end of the Cold War have also changed their institutional structure. Following a more flexible approach they allow various degrees of association up to full membership for the CEECs in order to overcome old antagonisms.⁷⁷

a. The CEECs and WEU/ EU-led Operations

The WEU for its part has created the status of Associate Partners for the same CEECs that are associated with the European Union through the Europe Agreements.⁷⁸ These countries have a voice but no vote in the meetings of the WEU Council and may – already by now – associate themselves with member states in decisions concerning the implementation of the Petersberg tasks.⁷⁹ These developments have been confirmed by the European Council at its meeting in Feira on 20 June 2000. The Feira Council decisions allow other countries which are candidates for accession to the European Union to contribute to the military crisis management of the EU and invite them to take part in EU-led operations.⁸⁰

As a consequence, special access is offered to the CEECs to associate themselves with many positions and actions adopted by EU-member states.⁸¹ The sanction policy against the former Yugoslavia has, for instance, been supported by the CEECs.

In sum, these developments show that a political pre-accession strategy comparable to the economic pre-accession strategy outlined above exists also within the framework of the CFSP.

⁷⁵ See Art 17 para. 3 subpara. 3 TEU.

⁷⁶ J.I. Coffey: "WEU after the Second Maastricht," in: P.H. Laurent, M. Maresceau (eds.): *The State of the European Union*, Vol. 4 (1998), p. 116.

⁷⁷ J. Wright: "Trusting flexible friends: the dangers of flexibility in NATO and the Western European Union/European Union," 20 *Contemporary Security Policy* (1999), p. 125.

⁷⁸ Thus, Associate Partners of the WEU are, the Czech Republic, Hungary, Poland, Slovakia, Bulgaria, Romania, Estonia, Latvia and Lithuania, see Coffey, *op. cit.*, *supra*, n. 76, p. 130, footnote 3.

⁷⁹ A.J.K. Bailes: "European Defence and Security," 27 *Security Dialogue* (1996), p. 80; Coffey, *op. cit.*, *supra*, n. 76, p. 130.

⁸⁰ See Appendix I of the Presidency Conclusions of the Feira European Council 20 June 2000.

⁸¹ Bailes, *op. cit.*, *supra*, n. 79, p. 60.

b. The CEECs and NATO

The expansion of the Alliance membership towards the eastern European and former Soviet bloc countries has also been an important element of the NATO agenda since the January 1994 NATO Summit, where the Partnership for Peace (PfP) initiative was adopted. It is the aim of this Partnership to enhance stability and security in Europe through joint planning and training. This shall increase the inter-operability of the Partner country's military forces with those of NATO.⁸² But it does neither offer the partner states the collective security guarantee set out by Article 5 North Atlantic Treaty nor eventual admission to NATO membership.⁸³

It is worth noting, that the same CEECs which are associated with the European Union through the Europe Agreements, namely the Czech Republic, Hungary and Poland, either take part in the PfP-programme⁸⁴ or have acceded as full members to NATO.⁸⁵

The differentiated memberships with other security organisations have important implications on the CFSP of the Union, since all decisions with military implications within the framework of the CSFP require unanimity. Therefore, it is important that none of the CEECs applying for accession to the Union has a neutral status. They are even associated with or full members of NATO and WEU. This guarantees that they are willing to take part in the new operational capacity of the Union and will not block decisions with defence implications. Since the new operational capacity of the Union is based on the support of the alliance and the WEU, it seems to be ensured that CEECs, which are also embedded in the security structures of these organisations, are able to take part in the Petersberg tasks.

3. The 3rd Pillar

The third pillar of the European Union entails provisions on police and judicial cooperation in criminal matters. Within its framework, the member states coordinate their national positions on an inter-governmental platform. After the entry into force of the Treaty of Amsterdam a part of the Schengen *acquis* which was formerly laid down in the third pillar of the Union was integrated into the framework of the first pillar, namely in Title IV TEC. Therefore, the Schengen Accord has to be accepted by the acceding countries as part of the *acquis communautaire*.⁸⁶

⁸² *NATO Handbook*, 2nd ed. (1999), p. 86 f.

⁸³ H. Mc Coubrey, J.C. Morris: "International law, international relations and the development of European collective security," 4 *Journal of Armed Conflict Law* (1999), p. 211.

⁸⁴ Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia and Slovenia are associated with NATO through the PfP, see *NATO Handbook*, *op. cit.*, *supra*, n. 82, p. 86.

⁸⁵ On 12 March 1999, the Czech Republic, Hungary and Poland formally became members of NATO, see *NATO Handbook*, *op. cit.*, *supra*, n. 82, p. 3.

⁸⁶ Art. 8 Schengen Protocol; Røben in: Grabitz, Hilf, *op. cit.*, *supra*, n. 5, before Art. 61 TEC, p. 2 at 7.

VII. The Implications of the Eastern Enlargement on Other European International Organisations

An enlarged Union will play an even more important role on the international scene than before. The Union has already a great influence in international organisations and international conferences. The European Community (EC) is, for example, a formal member in the World Trade Organisation (WTO).⁸⁷ Moreover, it has been discussed, whether the EC was legally entitled to accede to the European Convention of Human Rights and Fundamental Freedoms (ECHR).⁸⁸ For these reasons, the appearance of the Union in international organisations leads to interactions between Community Law and public international law.⁸⁹ By acceding to the Union the CEECs also have to face the international legal obligations of the Union with regard to other international organisations. The willingness to cooperate is moreover emphasised in Article 11 para. 1 TEU where the Union commits itself to the preservation of peace and the strengthening of international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter.

Furthermore, the member states are obliged to coordinate their action in international organisations and conferences and to uphold the common positions in such fora according to Article 19 para. 1 TEU.

1. Organisation for Security and Cooperation in Europe (OSCE)

The Organisation for Security and Cooperation in Europe (OSCE), formerly known as the Conference on Security and Cooperation in Europe (CSCE), was initially a political consultative process involving states from Europe, Central Asia and North America.⁹⁰ Its particular importance arises from the fact that the OSCE is the only regional organisation in the security field where all European countries are assembled. Especially with regard to the CEECs the OSCE plays an important role because in March 1995 a Pact on Stability for the Central and Eastern European Countries was adopted, which is currently implemented in the framework of the OSCE.⁹¹ This Pact on Stability is based on an initiative of the member states of the European Union

⁸⁷ See for a discussion of problems of this membership, W. Meng: "Das Verhältnis der Vereinten Nationen und ihrer Sonderorganisationen zur Europäischen Union im Bereich der Wirtschaft," in: St. Hobe (ed.): *Kooperation oder Konkurrenz internationaler Organisationen* (2001), p. 49 ff.

⁸⁸ The ECJ ruled that Art. 308 TEC does not provide a competence of the EC to accede to the ECHR; "Accession would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order (para. 34). Such a modification with equally fundamental institutional implications for the Community and for the Member States would be of constitutional significance and would therefore be such as to go beyond the scope of article 235 (308) TEC". Opinion 2/94, *Europäische Grundrechtszeitschrift (EuGRZ)* (1996), p. 197.

⁸⁹ C. Vedder: "Die EU und Internationale Organisationen-Perspektiven nach dem Vertrag von Amsterdam," in: W. Benedek, H. Isak, R. Kicker (eds.): *Essays in Honour of K. Ginther* (1999), p. 510.

⁹⁰ The CSCE became an organisation in 1995, see *NATO Handbook*, op. cit., supra, n. 82, p. 316.

⁹¹ Pact on Stability adopted on the 20th of March 1995, see G. Burghardt: "Early warning and conflict prevention as tasks of the European Union and EU-OSCE-cooperation," 5 *OSCE YB* (1999), p. 427.

that have a vital interest in security and stability in eastern Europe because of the Union's planned eastern enlargement.⁹² It aims at developing friendly relations among nations and at promoting regional cooperation in central and eastern Europe by strengthening the process of democratisation. To implement the Pact on Stability the OSCE might call on the WEU/ EU or NATO, all of which have repeatedly declared their willingness to support the tasks of the OSCE.⁹³

2. United Nations

In the Treaty on the European Union the Union obliges itself to respect the principles of the United Nations. Its participation in this organisation has therefore a particular impact on the Union. The member states of the EU contribute approximately 40% to the budget of the United Nations. Furthermore, they are the largest donor of humanitarian and development aid within the framework of the UN. As, pursuant to Art. 4 UNCh, only states can become members of the UN, the EC cannot accede to the United Nations Charter. However, the potential of a Union of 15 and in the future of up to 27 members should not be underestimated; the vote of a Europe of 27 will have considerable weight in General Assembly meetings, all the more if all member states vote in accordance with a previously adopted common position on this matter.

In addition, the member states, according to Art. 48 para. 2 UNCh, use the European Union as an international agency in order to carry out their obligations under the UN-Charter. Particularly economic sanctions adopted by the Security Council under Article 41 UNCh are preferably implemented within the framework of the Union, since collective sanctions put a higher pressure on the state that shall be punished. This procedure does, moreover, not impose any legally binding obligations on the European Community to implement the sanctions of the UN; merely the member states are bound according to Article 25 UNCh.⁹⁴

3. Council of Europe

The Council of Europe and the European Union share the same values. As pointed out above, the accession to the European Union requires at the same time that the candidate country has ratified the European Convention of Human Rights and Fundamental Freedoms. Since, according to Article 6 TEU, the respect for the ECHR's fundamental freedoms belongs to the guiding principles of the Union a member state which infringes upon these rights can be subject to sanctions pursuant to Article 7

⁹² Art. 1 of the common action of 20 December 1993 93/728/CFSP, *Bull. EC* (1993) L 339/1; amended by 94/367/CFSP, *Bull. EC* (1994) L 165/2.

⁹³ *Bailes*, *op. cit.*, *supra*, n. 79, p. 62.

⁹⁴ S. Böhre: "Sanctions by the United Nations Council and the European Community," 4 *European Journal of International Law (EJIL)* (1993), pp. 263, 267; K. Osteneck: "Die völkerrechtliche Verpflichtung der EG zur Umsetzung von UN-Sanktionen," *Zeitschrift für europarechtliche Studien (ZeuS)* (1998), p. 129.

TEU.⁹⁵ Moreover, the claim for the accession of the European Community to the ECHR arose from this particular relationship.⁹⁶

Finally, after the end of the Cold War, special programmes between the Council of Europe and the Union aim at promoting democracy and the rule of law in the CEECs which acceded to the Council of Europe and consequently, to the ECHR.⁹⁷

VIII. Conclusion

The current move of the EU to the east must become a success. Despite current difficulties and fears on either side of the negotiation table it is clear, on the one hand, that the Union cannot afford a failure of this enlargement round. On the other hand, those countries willing to accede to the Union should (more) clearly indicate their intention to either stick or even live up to the present *acquis communautaire*. European integration cannot, however, become a success without the clear will to compromise of all countries involved in that process. This is probably the most important lesson to be learned by each partner of the current negotiations.

⁹⁵ Kluth in: Calliess, Ruffert, *op. cit.*, *supra*, n. 40, Art. 7 TEU, p. 121 at 5.

⁹⁶ See J. Kokott: "Der Grundrechtsschutz im europäischen Gemeinschaftsrecht," 121 *Archiv des öffentlichen Rechts (AöR)* (1996), p. 634.

⁹⁷ Burghardt, *op. cit.*, *supra*, n. 91, p. 426.

The Treaty of Nice and Enlargement of the EU – with Special Regard to Enhanced Cooperation

TORSTEN STEIN

I. Introduction

Political agreement on the Treaty of Nice was reached at 4:30 a.m. on Monday, 11 December 2000, after a Marathon summit, lasting four days, the longest in history. At various moments during that summit, failure of the entire Intergovernmental Conference was palpable. The compromise reached in the last moment was such that legal experts needed two more months to iron out ambiguities and inconsistencies in the text, which was then officially signed on 26 February 2001.¹

One, if not the main, reason for the rather poor result of the Intergovernmental Conference which led to the Nice Treaty was a shift in the traditional coalitions within the EU: the Franco-German axis, already shaky in Amsterdam, was no longer working. At a time at which France and Germany still had political leaders which were aware of the importance of pre-conference agreements on the major issues between both countries, the negotiations during the Conference were firmly anchored in those agreements and dealt at best with details.² The fact that France and Germany entered the final round of the Intergovernmental Conference 2000 in almost complete disagreement over most of the major issues, immediately gave rise to a rebellion of the smaller, medium-size and want-to-be-big Member States. The traditionally sceptical attitude of the U.K., shared by the Scandinavian countries, vis-à-vis too much supranational integration, was this time supported paradoxically by Spain, which has apparently exhausted the benefits of the cohesion policy. Spain's only concern seemed to be to maintain and secure its preferential treatment as far as regional aids and the structural funds are concerned. It looked for future allies among the applicant countries, was proud to be instrumental in securing Poland as much weighted votes in the

¹ For more details on the legislative history and in particular on the positions of the institutions, Member States and applicant countries published before the Intergovernmental Conference, see X.A. Y a t a g a n a s: *The Treaty of Nice, The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective* (2001), <http://www.Jeanmonnetprogram.org/papers>. Cf. also the Memorandum to the Members of the Commission from the Secretary General of the Commission of the European Communities of 18 January 2001, 99 SEC (2001), <http://europa.eu.int/igc2000/>.

² Cf. also E. B e s t: "Crossing the Bridge of Size: Reaching a Deal at Nice," ³ *EIPASCOPE* (2000), p. 2 f. ("Leadership by larger Member States has always been an essential element in the process of integration and will remain so in the future").

Council as for itself, and set a dangerous example for the applicant countries in the second round, as well as for those in the first round: If those who are in, defend at any price their privileges, because they do have a veto in any future accession round, the Union and its actual Member States may become very reluctant to accept new members in small packages or even individually, even if they are individually fit for accession. The existing member States, in particular those who contribute more than others to the Union's budget, will quickly realize that every individual accession of a new member State, or the accession of a few, will for them raise the price to pay for subsequent enlargements. And that might lead to postponing early individual accessions in order to limit veto-based bargaining (or blocking) positions.

The public reaction to the Nice Treaty was mostly negative; the Press described it as a horse-trading exercise which failed to achieve what it should have achieved, and pointed to the fact that immediately after the end of the Nice summit the "post-Nice-process" was announced, i.e. a new Intergovernmental Conference in 2004.³ The applicant countries were at least relieved that the Conference had not failed all together.

But indeed, the expiry dates for revision treaties in the EU are becoming shorter and shorter: Since the Single European Act, which came into force in 1987, there has been a revision of the treaties roughly every three years, the Treaty of Nice being the fourth one in 13 years. With respect to the debate on whether Europe has or is in need of a "constitution" (which is not our subject here), one might indeed doubt whether a text, that is changed not only superficially every three years could or should qualify as constitution. The Treaty of Nice comes less than two years after the entry into force of its predecessor, the Treaty of Amsterdam.

The Intergovernmental Conference of Amsterdam, which was already meant to make the European Union fit for entry into the 21st century and for enlargement did not, as everybody knows, complete that job. What has become known as the "Amsterdam-left-overs" was the extension of the co-decision procedure and of qualified-majority voting, thus reducing decisions taken by unanimity, the future weighting of votes in the Council, and the composition of the Commission. The Treaty of Amsterdam itself recognizes this by including in the "Protocol on the Institutions with the prospect of enlargement of the EU" a provision for a further institutional reform in two stages:

- "At the date of entry into force of the first enlargement of the Union . . . the Commission shall comprise one national of each of the Member States, provided that, by that date, the weighting of votes in the Council has been modified" and
- "at least one year before the membership of the European Union exceeds twenty . . . (a new IGC shall be convened to) . . . carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions."

³ The Treaty will have to be ratified in all Member States and requires the consent of the European Parliament. Critical statements came also from the Parliament; the Report on the Treaty by the Committee on Constitutional Questions (A 5-0168/2001) of 4 May 2001 leaves, however, little doubt that the Parliament will finally approve the Treaty of Nice, even if the Report makes the consent conditional upon progress achieved in the preparation of the 2004 Intergovernmental Conference.

Belgium, France and Italy had added a specific declaration to the effect that the reinforcement of the institutions was "an indispensable condition for the conclusion of the first accession negotiations." Since this declaration does not specify what is exactly needed in order to "reinforce the institutions," the results of the Nice summit may suffice, although the decision on the future composition of the Commission has been again postponed. The (Amsterdam) Protocol on the institutions with the prospect of enlargement has been repealed by a new "Protocol on the enlargement of the European Union," annexed to the Nice Treaty.

II. Institutional Reform

What are now the results achieved during the Nice summit? First of all it is important to understand that, because it is not yet known exactly when and in what order the applicant countries will join the EU, the new definition of qualified majority within the Council, as well as the new composition of the Commission and the future distribution of seats in the European Parliament are determined by the Treaty of Nice itself still for a Union of 15 Member States. The Treaty restricts itself to setting out the principles and methods for changing this system as the EU grows: These principles and methods are listed in the new Protocol on Enlargement and attached declarations, which are, through the final act, part of the Treaty, but which only establish a gentlemen's agreement between the current Member States for their common position during the ongoing and coming negotiations with applicant countries. The real number of seats in the European Parliament for the new Member States, the number of votes allocated to them within the Council, and in particular the qualified majority threshold applicable in the future, will all be legally determined in the subsequent accession treaties. And it is not totally excluded that changes to the now agreed figures will be the result of the negotiations.

As for the total membership in the European Parliament, the ceiling of 700, introduced in Art. 189 sect. 2 EC-Treaty only by the Amsterdam Treaty, was given up, although in the beginning of the Conference all member States and the institutions wanted to maintain it.⁴ To keep all sides happy, it was raised to 732, Germany and Luxembourg retaining their present numbers (99 and 6 respectively), all others losing seats with each newly acceding State. That Germany will keep her present 99 deputies shall obviously ease the ongoing – and serious – constitutional debate in Germany on adequate representation of its people in a legislative process that creates up to 60 or more percent of the rules applicable to day-to-day economic and trade activities. In the present European Parliament 1 German deputy represents roughly 800.000 people, 1 deputy from Luxembourg 70.000 people. Since Art. 23 of the German Constitution (the "integration article") enables the Federal Republic only to participate in a "democratic" European Union, the question discussed is whether that precondition

⁴ The European Parliament criticized in its Report (*supra*, n. 3) the "uncertainty" about its future composition (Draft Decision, No. 14).

is met in view of such a disproportionate representation of the German people. Luxembourg was successful in retaining her 6 deputies with the argument that it would make no sense to hold nation-wide elections for only 4, which would have been the number reduced in proportion to the losses of others.

The composition of the European Parliament will change from the next European elections in June 2004. As it is likely that new Members will enter the EU during the 2004 to 2009 term of office, and that as a result additional MEP's will be elected in these countries, it is anticipated that the maximum number of seats (732) may be temporarily exceeded. This means that an additional arrangement will be necessary after the termination of the enlargement process, if the ceiling of 732 is to be respected. It will, in all likelihood, not be respected, because already now some of the candidate countries claim equal treatment with the actual Member States,⁵ and the situation will again be different if further States, emerging from the reorganization in the Balkans, will knock on the door of the EU. One has to remind that all the numbers now foreseen for the known candidates are fixed only in a Declaration on the common position to be adopted by the Member States at the accession conferences.

A much more controversial issue was the composition of the Commission. Its size can be changed by unanimous decision of the Member States without convening a new IGC. With each previous enlargement, the composition of the Commission has been altered by the act of accession; it has now 20 Members.

For reasons which are not entirely clear to me, there was a widespread feeling among the actual Members of the EU that a Commission with clearly more than 20 Members would be deadlocked, unable to act. The problem which is seen here is not easy to understand, because even some individual Member States, and not necessarily the big ones, have well above 20 Members in their government with cabinet rank. The Commission decides by simple majority, so that the danger of 25 or 30 vetos does not exist. Maybe the problem is that the Commission does not have enough portfolios or jobs for much more than 20 Commissioners, and that the number of Commissioners may one day exceed the number of directorate generals. From the very beginning it was clear that in particular the smaller and the candidate states would insist on having a Commissioner of its own.

Art. 4 of the Protocol on enlargement has postponed the final solution. It does provide, however, that the first Commission which takes up duties after 1 January 2005, will have not more than one member per Member State. It further provides that from the day on at which the Union consists of 27 Member States (i.e. if the last one from the envisaged second enlargement round has joined the Union), the number of members of the Commission shall be less than the number of Member States, and that a rotation system will be introduced, based on the principle of equality, which means

⁵ The European Parliament already requested in its Report (note 3) to raise the number of seats for the Czech Republic and Hungary from 20 to 22, thus bringing them to the same level as Belgium and Portugal (Draft Decision, No. 15). Originally Belgium was accorded 22 seats during the Intergovernmental Conference, and this was only in the last minute extended to Greece and Portugal (cf. *Agence Europe, Daily Bulletin* No. 7870 of 23 December 2000, p. 3).

that all member States will take part in that rotation system. Under this so-called "rendevous-clause," the Commission will grow to 27 members, because the new regime will apply only to the Commission which takes up duties after the 27th Member State has acceded.⁶ And it will then be up to the Council to decide unanimously how many members the Commission will have in the future, and how the rotation system shall be implemented. I personally would not bet much money on that this provision of the Protocol on enlargement will survive the forthcoming enlargement negotiations. And it would indeed be problematic if one of the most important institutions of the Union would not have a representative of every Member State, while all the others, including the judicial organs, for good reasons do have.

A United States of Europe, if it ever sees the light of the day, would indeed not need a representative of all component units (states) in its government. Neither the U.S. nor Germany as a federal state know such a rule. But as long as the Union is composed of sovereign nations, it is hardly imaginable that the Commission will not have one Member of each nation. And one may have doubts as to whether "Junior-Commissioners" will be an acceptable solution.

As to the future distribution (weighting) of votes in the Council, it was clear from the beginning that this would be the thorniest issue in the whole negotiations. Successive enlargements to include countries with a small or medium-sized population have over the years increased the relative weight of smaller Member States to the detriment of those with larger populations. Simply extrapolating the present system during the next enlargements seemed to be unacceptable.

It was probably never more than a bargaining position that Germany requested more votes than all the other "big" Member States in the beginning. The 1, 2 or 3 votes that could at best have resulted from that claim would not have made much difference. But it was also clear from the outset that this was unacceptable for France. At the end of the day a compromise was found in a kind of triple majority with all four "big" Member States having the same number of votes (29): for a decision taken by qualified majority it must have the agreement of the majority of all Member States, between 71 and 74 percent of the weighted votes which, if a Member State so requests, must represent 62 percent of the total EU population. It may well be that the EU will have to hold a regular census in all Member States in the future much more often than at present.

Although the votes foreseen for the candidate countries for majority voting are again not more than a common bargaining position for the existing Member States, the candidates seemed to be happy with the result. It can not be denied, however, that the decision – making process has now become more complicated and more cumbersome, opening the possibility for many different alliances, in particular if a Member State raises the "62 percent population question."

⁶ Since it may take quite a number of years until the Union will actually reach 27 members, a "Maxi-Commission" with 24, 25 or 26 members might last for a long time. The problem then will be that the influence of larger Member States (6, Poland included) will disappear. Under that aspect it would have been even better to retain the second commissioner for larger Member States until the day when a real reform is adopted.

If one groups theoretically possible alliances in a Union of 27 Member States, it shows a growing inability to act. Not sufficient for a qualified majority decision would be: the 13 biggest Member States, representing more or less 88% of the population; the actual 15 Member States; the 12 members of the EURO group; 23 Member States with small or medium-size population; the less wealthy States ("cohesion-fund States"). On the other hand would dispose of a blocking minority: 14 States with the smallest population (together 11,6%); the middle-east european States and – accordingly – the actual candidate countries; the less wealthy States; Germany and two other big States with together more than 38% of the population. These are theoretical, but not entirely impossible constellations.⁷

If the next Intergovernmental Conference foreseen in the "Declaration on the future of the Union" will not shift additional cases from unanimity to qualified-majority decision, new Members will find sufficient opportunity to cast their veto. At the beginning of the Nice summit, unanimity was required in still 75 cases, 25 of which should remain, as all Member States agreed, in that category, the rest of 50 could have been transferred to majority voting, but in the end only 27 – of varying degrees of significance – were, and only 7 of them were also transferred to the co-decision procedure.

Not among the "Amsterdam-left-overs," and therefore not part of the original mandate of the IGC which led to the Treaty of Nice, was "enhanced cooperation." But this issue was the one where most progress was made during the negotiations.

III. Enhanced Cooperation

1. The Past

What is called "enhanced cooperation" in the Treaty of Nice, and which for the first time became part of the European Union Treaty in its Amsterdam version as "closer cooperation," was already debated in the early and mid-nineties under the heading of "Europe à la carte," "Europe at two speeds," "géometrie variable."⁸

While some were of the opinion that a certain "flexibility" would be the only means to prevent that the slowest would dictate the speed of the convoy, and thus produce a standstill in the integration process of a constantly enlarged and growing Union, others denounced "flexibility" as high treason against the main dogma of integration, i.e. the uniform application of each and every community rule in all member States; it was said that those who could not stand the heat should stay out of the kitchen, i.e. remain at best associates.

The truth is that the European Communities, and later on the European Union, at most times knew different speeds, had full members with less rights (and less obligations) than others.

⁷ See for more details W. Wessels: "Die Vertragsreform von Nizza – Zur institutionellen Entscheidungsreife," 1 *Integration* 2001, p. 13.

⁸ Cf. C.D. Ehlermann: "Differentiation, flexibilité, coopération renforcée: les nouvelles dispositions du traité d'Amsterdam," *Revue du Marché Unique Européen* (1997), p. 51 f.

Every enlargement round provided for longer or shorter transitional periods. Article 15 of the EC-Treaty, introduced as Article 8c by the single European Act 1986, allows for derogations of a temporary nature from secondary legislation, taking into account the extent of the effort that certain economies showing differences in development will have to sustain during the period of establishment of the internal market.

The famous section 4 of Article 95 EC-Treaty (introduced as Article 100a by the Single European Act) allows member States to maintain certain national provisions on grounds of major needs, even after the adoption of a harmonization measure.

When, drafting the Maastricht Treaty, 11 Member States were ready to accept a closer integration in the field of social policy, Great Britain was not. The matter was solved by way of a special protocol and a special agreement. Great Britain joined the others only in the Treaty of Amsterdam.

A special protocol to the Maastricht Treaty allowed Great Britain and Denmark to stay out of the Monetary Union even though they did meet the so-called convergence criteria.

The Schengen-Agreements on the abolition of border controls and the necessary compensatory measures were agreements between only some of the Member States and was incorporated into the Treaties only (and again with exceptions for Great Britain and Ireland), when the Treaty of Amsterdam entered into force.

Article 168 EC-Treaty (on Research and Technological Development) allows, in the multiannual framework programme, for supplementary programmes involving the participation of certain Member States only.

The Benelux-States, Denmark and Germany in 1994 entered into a separate agreement on uniform road tolls for heavy trucks, while a Community Directive of 1993 allowed for a highly differentiated system.

These are some, but by no means all examples for the fact that a certain flexibility was at all times possible in Europe's integration. But all these exceptions were agreed upon for specific and limited areas, and in the need of the moment.

It is quite a different question whether an enlarged European Union could or should be divided into "core" and "periphery," accepting different rights and obligations of its Member States not only in some, but in practically all areas, and if not for ever, then at least for a longer period of time. It was the Amsterdam Treaty which opened a theoretical possibility in this respect.

2. Closer Cooperation under the Amsterdam Treaty

In the months before the beginning of the 1996 Intergovernmental Conference which led to the Amsterdam Treaty, the Franco-German "tandem" still worked in some, although not in all, important matters. Had it worked also with respect to the institutional reform, there would have been no "Amsterdam left-overs" and not the necessity for a Nice Treaty. But in the subject of enhanced cooperation, the two countries worked together from day one until the Amsterdam European Council.

At that time political as well as academic circles debated the question of "deepening or widening," or "deepening and widening," and which first. The concern that

both would not necessarily go together was first expressed in the famous "Lamers-Schäuble" Paper of 1994, named after the chairman of the majority group in the German parliament and its spokesman for foreign affairs. The authors suggested that already there was a dangerous and growing divergence of interests in the EU and that the existing institutions did not function properly. They also claimed that this Europe was unsustainable once monetary union and enlargement happened. Some supranationalism had to be preserved in the new Europe, as a guarantee that re-unified Germany would remain firmly anchored in the project of European integration. To solve the dilemma, the document proposed setting strict limits on the scope of EU powers and launching a hard core Europe. The authors went on to name the actual Member States that would form part of the more exclusive Euro-club (all the EC founding members except Italy).

The somewhat simplistic explanation for the need for a core Europe was:

Monetary Union will create a two speed Europe. The "in" countries will need to harmonize specific policies, and "out" countries should not be forced to accept these new European norms and should not be able to prevent "in" countries from passing them. Enhanced cooperations is the solution.

Enlargement will bring inside the Union a group of countries with a very different social and economic situation from the "core" EU member states. Through enhanced cooperations, integration can proceed speedily for those ready for it, avoiding both the risk of a fortress Europe (the Eastern countries will be inside the Union) and the perils of not deepening enough European integration when Europe becomes larger and much more heterogeneous.

France and Germany introduced the concept of closer cooperation in a joint letter from Kohl and Chirac to the Madrid European Council in December 1995, presenting enhanced cooperation as inevitable: "If we don't do it inside the EU, we will do it outside." And they had done it before with the Schengen agreements.

French President Chirac declared in March 1996: "France proposes that the States that have the will and the capacity be allowed to develop closer cooperation among themselves . . .," and shortly before his Prime Minister Juppé had said in the National Assembly: "Let us have the courage to state that tomorrow's Union will be composed of two distinct levels: a common law or *de jure* Union, with its present 15 States plus those who will join us; in the core of this Union, of its first circle, there will be a second one, more limited but adaptable, with a small number of States working with France and Germany, ready to go further and faster than others, in areas such as money or defence."

One has to know, however, that whenever a French politician spoke about closer European cooperation in defence matters, the idea was to reduce the American influence in Europe and NATO, hence something that Germany was not ready to accept.

However that may be, the concept of closer cooperation provoked immediate controversy: viewed by some as a fragmentation bomb, by others as essential to the survival of a cohesive Europe, it was discussed on numerous occasions. For a long time it looked as if the profound hostility which it aroused would prevent it ever getting off the ground; it would either be hedged around with so many conditions that it would

be stripped of any real content or a majority would insist that it would require unanimity to be triggered. Moreover – and this was perhaps one of its attractions – its supporters had never specified exactly what they intended to use it for.

Anyway, in the spring of 1997, the Dutch Presidency included enhanced cooperations in the first draft of the treaty, with the hope of selling France and Germany the idea of a new Treaty concluded in Amsterdam.⁹ These countries had voiced their preference for intergovernmental decision-making inside the cooperations. But the Benelux countries insisted that treaty rules had to apply inside cooperations, so that the Commission, the Parliament and the Court could play a similar role than in normal Community situations (only similar, given that enhanced cooperation norms would only apply in participating member states). The Benelux countries defended such an ad hoc supranational structure inside cooperations because of the benefits smaller countries have traditionally obtained when the Commission or the Court has been involved, by comparison with an international situation.

The European Commission was initially against enhanced cooperations, specially in majority voting areas. Enhanced cooperations were not really needed when you could adopt EU legislation by majority voting. In these situations, the resort to an enhanced cooperations would be a break with a great political achievement of the Union, majority voting, based on a principle of democracy and solidarity. The Commission was also afraid of not having an important role to play inside cooperations and in their launching. In addition, it could foresee many technical problems in the management of different communities, which would increase the complexity and the lack of transparency of the Union.

Most non-founding Member States actually did not like the idea of enhanced cooperations, at least not in the Community pillar. The UK was clearly against this type of flexibility, very different in its political effects from opt-outs and opt-ins. The integrity of the internal market was at stake. Moreover, the UK was seriously concerned about the idea of signing a blank check and not being able to control the results of the ensuing enhanced cooperation. For the UK, an authorization to act in the name of the EU without the consent of other Member States was an invitation to those States to act against their wishes. The UK repeatedly demanded an unanimous decision to launch an enhanced cooperation. The newly elected labour government finally accepted a compromise.

Spain, Greece and Portugal were very reluctant to accept enhanced cooperations in the Community pillar. They knew that participation in some of these cooperations could increase their production costs and decrease their competitive edge in the internal market, because of the new norms they would have to apply, i.e. norms with higher standards of consumer and environmental protection. They also disliked the idea of remaining outside cooperations and not being able to influence rules that, sooner or later, they might have to apply. These countries were also concerned with

⁹ For the following see J.M. de Areilza: *Enhanced Cooperation in the Treaty of Amsterdam: Some Critical Remarks* (1998).

the future of regional policies if enhanced cooperations ever took place in this area. Spain's strategy was to try to limit as much as possible the Community's areas where enhanced cooperations could be launched.

In spite of the opposition of many Member States, Germany, France and the Benelux were able to turn the issue of enhanced cooperations from a question of principle to a practical problem, a technical discussion on how to do it. Enhanced cooperations became more important to them because of the lack of progress in many areas of the IGC. A modest outcome of the Conference was less worrying if enhanced cooperations were codified: they would facilitate agreement in the future among member states with similar social and economic interests.

The Amsterdam Council devoted almost no time to the negotiation of enhanced cooperations rules. It was the last issue on the summit agenda. The deadlock over institutional reform and the impossible task of having the heads of Government and State review all the contents of the new Treaty in less than two days, explain the fact that enhanced cooperations were born not with a bang, but with a whisper.

The main features of the concept of closer cooperation in the Amsterdam Treaty are as follows:

It applies to the first and third pillars. In the case of the Common Foreign and Security Policy (CFSP), the "constructive abstention" facility was thought adequate to meet requirements. In the case of CFSP decisions, flexibility is required not as regards policy but for specific measures dictated by the constantly moving target of international events. The possibility of acting with the abstention of some Member States is a response to this.

It is, by the way, rather doubtful whether the "constructive abstention" will really work in practice. An abstaining Member State shall not be obliged to apply the decision taken by the Council, if the abstention is qualified by a formal declaration. Article 23 sec. 1 of the Union Treaty gives no indication as to the content of such a formal declaration, which certainly does not require what a member State has to declare under Article 23 sec. 2 (important and stated reasons of national policy). So all that is required under sec. 1 is to say "we formally abstain." On the other hand the abstaining State shall refrain from any action likely to conflict with or impede Union action based on the Council's decision. If we assume that the Council's decision is a total trade ban on a third State for whatever reason, a ban that comes as a Community regulation under Article 301 EC-Treaty, adopted by qualified majority, but binding for all Member States: What about the Member State that "formally" abstained in the Council? Can it go on "trading with the enemy"? If not, what was the abstention good for?¹⁰ But this is a different problem that leads us away from our subject. I will come

¹⁰ Had the Amsterdam Treaty already been in force, Council Regulation (EC) No. 1901/98, OJ L 248/1 of 8 September 1998 (denying landing rights for the Yugoslav Airline) would have been a practical example, because Greece and the UK opposed that Regulation in the beginning. Cf. also J. M o n a r: "The European Union's Foreign Affairs System after the Treaty of Amsterdam: A Strengthened Capacity for External Action?," 2 *European Affairs Review* (1997), p. 413 f., 430.

back to CFSP and enhanced cooperation, because the Nice Treaty did extend that cooperation to the CFSP.

Coming back to the Amsterdam Treaty, the concept of closer cooperation consists of certain provisions common to pillar 1 and 3, i.e. Articles. 43 and 44 of the Union Treaty, and of provisions specific to each of the pillars (Article 11 EC-Treaty for the Community and Article 40 EU-Treaty for the third Pillar).¹¹

Closer cooperation in the Amsterdam Treaty is governed by strict conditions. If they are really workable, is open to doubts. The treaty does not list areas where closer cooperation is authorised or ruled out, but lays down a number of principles, some of which are subjective (closer cooperation must be aimed at furthering the objectives of the Union and must only be used if these objectives cannot be attained by applying the normal procedures), others objective (at least a majority of Member States must be involved, closer cooperation must not affect areas of exclusive Community competence or citizenship, nor may it result in discrimination or affect Community policies, actions or programmes).

In community matters, the Commission ensures compliance with these criteria, which are subject to review by the Court. When presented with a request for closer cooperation, the Commission will submit a proposal only if it believes all the conditions – including those requiring a subjective opinion – are met (Article 11(2)). In matters relating to the third pillar, the Commission must present an opinion to the Council (Article 40 sec. 2 EU-Treaty). In both cases the European Parliament is consulted.

The decision to trigger the process of closer cooperation is taken in the Council by qualified majority. This is certainly essential to the credibility of the entire concept; had it required unanimity, its purely theoretical character would have been obvious. However, the price for qualified majority was the introduction of the same veto system as applies to the CFSP under Article 23 sec. 2 of the EU-Treaty, a veto system which, by the way, is nothing else but the first codification of the “Luxembourg compromise” of 1966.

A basic principle underlying the system is that enhanced cooperation arrangements are open to any Member State wishing to participate. The details are as follows:

- in the case of Community matters, a Member State wishing to participate in an existing closer cooperation arrangement must notify its intention to the Council and the Commission, which must issue an opinion within three months. A month later the Commission must reach its decision, including any additional measures it deems necessary (Article 11(3));
- the procedure for the third pillar is the same up to the point where the Commission issues its opinion. One month later, the Council is deemed to have authorised the participation request unless it decides by qualified majority to hold it in abeyance, in

¹¹ See M. Ruffert, in: Ch. Calliess, M. Ruffert (eds.): *EUV/EGV* (1999), Art. 11: Hatje, in: J. Schwarze (ed.), *EU-Kommentar* (2000), Art. 11 EGV.

which case it must give the grounds for its decision and set a date for the request to be reexamined (Article 40(3)).

Not one initiative for closer cooperation has become known since the Amsterdam Treaty entered into force on 1 May 1999. Time might have been simply too short, given the fact that the next Intergovernmental Conference started already in early 2000. But a more credible explanation could be that closer cooperation was not a concept that the existing Union desired, but rather a concept for the time when enlargement would begin.

3. Enhanced Cooperation under the Nice Treaty

Originally, a revision of the articles on closer cooperation was not part of the agenda for the Intergovernmental Conference 2000, since this was not part of the "Amsterdam-left-overs." But after the European Council Summit in Feira (Portugal), closer (now "enhanced") cooperation became part of the mandate of the Conference. And soon this issue became the one where most progress was made during the negotiations. A gradual easing of attitudes that were at first hesitant or downright hostile led to a broad consensus, marking clear progress over the achievements at Amsterdam (Articles 40 and 43–45 TEU).

A number of smaller and medium-sized Member States that were initially suspicious of an initiative emanating essentially from their larger counterparts – followed by the founding members of the Union – were gradually won over to the movement in the hope that it might help them consolidate a relative advantage over the applicant countries, which would in any case be relegated to a second or third "division" for an indeterminate period after accession. "Since we are heading for a less homogenous Community, let's at least be in the leading group" seems to have been the argument that won the day. This shows the different paths that lead to closer cooperation and also highlights the inherent difficulties in applying the arrangements in practice.

Nevertheless, the step was taken, with fewer problems than might have been expected at the start of the negotiations, enabling the French Presidency to redraft in November the relevant provisions of the Amsterdam Treaty in sixteen clauses, divided into four categories: 1. The general principles governing the whole mechanism, 2. Clauses applicable in the context of the EC Treaty, 3. Clauses applicable under Title VI of the EC Treaty and 4. Clauses which may be applicable under Title V of the Union Treaty (CFSP).

However, during the endgame of the negotiations, Tony Blair persuaded the French Presidency to remove defense from proposals on enhanced cooperation. This question formed part of the final compromise, but was also the subject of deep disagreement during discussions on the independence of Europe's military capabilities vis-à-vis NATO, with France and Germany pleading in favour of an independent European military force, in opposition to the UK. As a result, clauses for Title V apply only to the other fields falling under the second pillar, i.e. for the implementation of a joint action or a common position. Consequently, enhanced cooperation of this kind can-

not be used for issues that have military implications or which affect defense matters. The authorisation for enhanced cooperation in these areas is given by the Council after receiving the opinion of the Commission, particularly on their consistency with the EU's policies. In spite of the fact that the Council decides by qualified majority, each Member State may ask that the matter to be referred to the European Council, who could stop the process only by a unanimous decision, the so-called emergency brake clause.

In the general clauses, it is worth pinpointing two important developments: the minimum number of Member States required to instigate enhanced cooperation is established at eight, and unanimity is no longer necessary for the mechanism to be set in motion. Other provisions stipulate that the *acquis communautaire* must be respected, that areas where the Community has exclusive powers must be preserved, that the internal market must not be affected, and that the mechanism must be open to all Member States. The other clauses lay down that enhanced cooperation may be engaged only when it has been established that it is impossible to follow the normal procedures provided for in the Treaty, that the participation of the greatest possible number of Member States must be encouraged, that the relevant operational expenditures should in principle be borne by the participating countries, and that consistency with union policies must be guaranteed.

As regards enhanced cooperation under the EC Treaty, the transition to majority voting is offset by the possibility for any Member States to refer a question to the European Council before the Council of Ministers takes a decision. Furthermore, when enhanced cooperation concerns an area that comes under the co-decision procedure, the assent of the European Parliament is required.

Extending the mechanism to the second and third pillars was more problematic, in particular its introduction to matters falling under the common foreign and security policy, which was eventually dropped as far as defense matters are concerned.

Two other points were discussed at the summit: the possible exclusion of certain matters from the scope of enhanced cooperation (e.g. internal market and cohesion policy issues), and the role of the Commission and Parliament when enhanced cooperation is triggered or non-participating Member States seek to join it. Enhanced cooperation must undermine neither the internal market nor economic and social cohesion. The Commission's right of proposal and Parliament's right to be consulted is guaranteed, although in matters relating to the second pillar, the Commission merely gives an opinion, while Parliament is simply informed.

In the end, the "enhanced cooperation package" appears to be fairly well balanced. It ensures that the EU will not stagnate by, on the one hand, allowing Member States who so wish to advance, subject to certain conditions, while guaranteeing the others the right to be able to join the leading group. By preserving the Community framework and the cohesion effort, the enhanced cooperation mechanism appear capable of keeping Europe on track towards ever-tighter integration, while allowing each country to go along this route according to its own rhythm and special needs.

It is true the closer cooperation mechanisms will usher in what has variously been termed a two-speed, *à la carte* or “variable geometry” Europe. It is also true that such arrangements may affect the Community method, which until recently was based on the need for everyone to go down the same road together. We might say that the old argument over “widening versus deepening” has been decided, with enlargement taking priority and concerns about the perfect cohesion of the whole edifice being left aside – at least for the moment. We may fear that in so doing the Community is heading towards a free trade area rather than a political Union. This is plausible, but we should not rule out a certain degree of optimism: the same fears were voiced when the first opt-ins and opt-outs were introduced, but were not borne out by the facts. In the end, these mechanisms operated like a locomotive pulling the latecomers in the desired direction, and may be that enhanced cooperation will have the same effect. The institutional framework offers the necessary guarantees, and the change of mind of several small Member States points in that direction.

Only the future can answer this question. In any event, given the political necessity of eastward enlargement and doubts over the long-term goals of European integration, enhanced cooperation appears as a more reasonable and calculated risk than as a retrograde step in that process. Furthermore, enhanced cooperation could be considered a materialization of the constitutional tolerance principle.

With the revision in the Treaty of Nice, enhanced cooperation has become workable, mainly because the veto has been abolished. Raising the matter before the European Council (Heads of State and Government) might postpone the process, but will not prohibit it. The detailed conditions laid down in Art. 43 are reasonable, but do not erect an insurmountable barrier in front of a serious plan for enhanced cooperation. And the fact that all Council Members may take part in respective deliberations, but that only those participating in enhanced cooperation shall take part in the adoption of decisions will prevent situations as the recent one in which Denmark’s vote was decisive for electing a Finnish general (and not one from Italy) as chairman of the European Union’s Military Committee, although Denmark had opted out of all defense matters.¹²

The fact that enhanced cooperation has become workable does not necessarily mean that it has to be applied. The weekly journal “Economist” wrote during the last stage of the Intergovernmental Conference 2000: “An enlarged European Union must learn to accommodate different ideas of what ‘Europe’ should be. If that means ‘two systems,’ so be it.”¹³ It is up to the future new members to prevent that at the end of the day we will have “two systems” and thus loose what we have until now, and notwithstanding transitional periods: One European Union.

IV. Conclusion

Did “Nice” make the Union fit for enlargement? In a technical way perhaps yes: there are – with the exception of the future composition of the Commission – no “left-

¹² Cf. *Agence Europe, Daily Bulletin* No. 7849 of 21 April 2001, p. 3.

¹³ *The Economist*, 2 December 2000, p. 22.

overs.” But the amendments adopted or envisaged are just enough to cover the new Member States, and this at the price of a much more complicated decision-making process, hardly adequate for a Union of 27.

Much will depend upon the 2004 IGC, which, according to the Declaration on the future of the Union, will “not constitute any form of obstacle or precondition to the enlargement process.” And those applicant countries which have concluded accession negotiations, will be invited to participate fully in that Conference, others will take part as observers. How many will be in the first and how many in the second group, depends upon the candidates themselves. Because one thing becomes clearer and clearer: the date of accession will depend upon the progress made in the candidate countries. Mere political decisions, as in the case of the accession of Ireland, Greece, Spain and Portugal, are not to be expected this time.¹⁴

¹⁴ See the analysis by G. Sege11: “The Eastward Enlargement of the EU: A New Economic Diplomacy for a United Europe?,” *European Foreign Affairs Review* (2000), p. 63 f.

Police Co-operation in the European Union: An Update of Events

MONICA DEN BOER

Introduction

Law enforcement cooperation in the European Union (EU) can be viewed as a multi-layered pattern. First, at the supranational or intergovernmental level between the member states of the EU, we find the European police office Europol, the Anti Fraud Office (OLAF¹) of the European Commission, and the Schengen framework. The range has recently been expanded by the Task Force of Chiefs of Police and pro-Eurojust, while the creation of Joint Investigation Teams and a European Police College are under preparation. Second, at the national level we find several national law enforcement facilities that are meant to improve the national coordination of cross-border information exchange, international mutual (legal) assistance, and cross-border operational activities. Important in this regard are the Europol National Units (ENU's), the Interpol National Central Bureaux (NCB's) and the national SIRENE² offices, which function as 24-hour facilities for the verification of SIS³-alerts. Third, on the sub-central and trans-regional level we find several cooperative ventures between police forces and/or judicial organisations across national borders. These forms of cooperation often have a semi-formal character, to the extent that they can be based on a memorandum of understanding or function on the basis of a semi-permanent secretariat. Examples of this kind of cooperation are the Cross Channel Intelligence Conference (Kent County Constabulary, France-in particular the Pas de Calais area, and Belgium – in particular the Judiciary Police of the Ghent region); NEBEDEACPOL, which is a longstanding cooperative venture between chiefs of police in the Netherlands, Belgium and Germany, particularly in the Aachen–Liège–Maastricht area; and the Nordic cooperation which encapsulates all Scandinavian states that are a member of the Nordic Union.

Notwithstanding the importance of the latter two layers of cooperation, this article merely focuses on the supranational level. The article concludes with a brief exposé about the consequences of EU-enlargement for international law enforcement cooperation.

¹ OLAF = Office de la Lutte Anti-Fraude.

² SIRENE = Supplementary Information Request at the National Entry.

³ SIS = Schengen Information System.

Supranational and Intergovernmental Police Cooperation in the EU

Police Cooperation in the Treaty on European Union: An Evolution

The Treaty on European Union (TEU), which was concluded in Maastricht and entered into force in 1993, marked the formal introduction of police cooperation as one of the policies to be furthered by the EU. The domain of police cooperation was integrated in Title VI (the 'Third Pillar'), which remained an intergovernmental area of policy-making. Together with policy issues such as migration, asylum, external borders, visa policy, customs cooperation, judicial cooperation in civil and criminal matters, and the fight against fraud and drug trafficking, police cooperation was regarded as a sovereignty-sensitive issue. Hence, it was subjected to a decision-making process strongly dominated by the dynamics between the Member States within the Justice and Home Affairs (JHA) Council, which hardly allowed any scrutiny or active intervention from the European Commission or the European Parliament. This situation was slightly altered when, after the Intergovernmental Conference (IGC) leading up to the Amsterdam summit, the TEU was revised. In particular Title VI underwent considerable changes, first because it was renamed "Police and Judicial Cooperation in Criminal Matters," and second because some policy issues were 'communitarised' and hence moved to the First Pillar.⁴ The linkage between these policy issues was preserved through the introduction of an 'Area of Freedom, Security and Justice' (AFSJ). Meanwhile, action plans have been developed and adopted in order to progressively establish the AFSJ. Except for the Vienna Action Plan, which was devised under the Austrian Presidency of the EU, it was the Tampere Summit which marked a significant momentum in the consolidation of the AFSJ.

The Tampere Document: Further Institutionalisation

The Tampere Summit, which was held on 15 and 16 October 1999 during the Finnish Presidency of the EU, resulted in several measures pertaining to police cooperation. The "crime-fighting-chapter" of the Tampere document reveals a strong institutionalisation trend.⁵

The first and most significant decision concerns the creation of Eurojust, which will differ from the currently existing European Judicial Network (EJN).⁶ From the

⁴ Asylum, immigration, external border control, visa policy and judicial cooperation in civil matters moved to Title VI. The Council will decide 5 years after the entry into force of the 'Treaty of Amsterdam' (which will be on 1 May 2004) whether these will be subject of qualified majority voting.

⁵ Commission of the European Communities, Secretariat General: *European Council – Tampere – Presidency Conclusions*, Brussels, 16 October 1999 (SI (1999) 800).

⁶ EJN has contact points in every Member State and meets twice a year. It has its own telecommunications network and has been given a permanent secretariat. The contact points expedite requests for assistance in criminal investigations or prosecutions and the network provides up-to-date information on the different procedures and laws in the member states. (Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (98/428/JHA). See also: 10 *Statewatch* (June–August 2000); <http://ue.eu.int/ejn/index.htm>.

proposals⁷ it is clear that Eurojust will become an institutional entity, consisting of national prosecutors-general, magistrates or police officers with similar competencies. Its tasks will comprise the facilitation of an adequate co-ordination of national law enforcement authorities and the support of criminal investigations into organised crime, in particular on the basis of Europol analyses. The legal basis for Eurojust was laid at the Nice summit, and meanwhile a pro-Eurojust has been created. It looks very unlikely that Eurojust will be given the mandate to control, supervise or check Europol activities. The European Commission regretted that no consensus could be reached in Tampere about the creation of a European Public Prosecutor.⁸ The (current) Belgian Presidency of the EU has made the formal adoption of a legal instrument establishing Eurojust one of its first priorities in the field of JHA-cooperation.⁹

Another fortification of institutional capacity in the field of transnational police cooperation emerging from the Tampere-document is the creation of joint investigation teams for the fight against drugs, man-smuggling and terrorism. In particular joint investigation teams were to be created without delay. This was formalised on the basis of Article 13 of the Mutual Legal Assistance Convention, which was adopted and signed by the justice and home affairs ministers within the JHA-Council on 29–30 May 2000.¹⁰ This article provides that “by mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and for a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team.” Moreover, the Tampere programme demanded that rules had to be drafted to facilitate secondment of Europol representatives to these joint investigation teams. In the meantime, the Council has adopted a recommendation concerning the support of Europol to these joint investigation teams.¹¹ One of the chief trends that can be spooned out from the Tampere document is the repetitive call for a consolidation of Europol. In line with Article 30-2(b) of the Treaty on European Union, Europol has acquired the competence to ask Member States to conduct a (criminal) investigation.¹² The (current) Belgian Presidency of the

⁷ E.g. “Initiative of the Federal Republic of Germany with a view to adoption of a Council Decision regarding the creation of a Eurojust-team” (2000/C 206/01), OJ C 19.7.2000; Initiative of the Portuguese Republic, the French Republic, the Kingdom of Sweden and the Kingdom of Belgium with a view to adoption of a Council Decision setting up EUROJUST with a view to reinforcing the fight against serious organised crime,” 10357, Brussels, 20 July 2000 (EUROJUST 8); “Décision du Conseil instituant une unité provisoire de coopération judiciaire (AL + D),” Brussels, 29 November 2000.

⁸ The Commission subsequently adopted a proposal for the creation of a European Prosecutor to protect the Communities’ financial interests (DOC/00/27). It sent the proposal to the (Nice) Intergovernmental Conference as an additional contribution. It was not adopted, however. See: Commission of the European Communities: *Communication from the Commission. Additional Commission contribution to the Intergovernmental Conference on institutional reforms. The criminal protection of the Community’s financial interests: a European Prosecutor*, Brussels, 29.09.2000 (Com (2000) 608 final).

⁹ <http://www.eu2001.be/Main/FrameSet.asp?reference=01-01&lang=en&sess=445390284&>.

¹⁰ OJ C 197, 12.07.2000, p. 1.

¹¹ “Projet de recommandation du Conseil concernant l’appui d’Europol aux équipes communes d’enquête,” 30.11.00, C 357, 13.12.00, p. 7.

¹² “Possibilités pour Europol de demander aux Etats membres de demander une enquête,” 28.09.00, C 289, 12.10.00.

EU investigates the possibility of a review of the Europol Convention, subsequent to the extension of its mandate and its competence for all forms of serious international crime which are listed in the annex of its Convention.¹³

Third, an operational Task Force of European Chiefs of Police has been established, which – in co-operation with Europol – exchanges experience, best practices and information about trends in cross-border crime, and contributes in the planning of operational measures. Not without cynicism, some observers have remarked that the Task Force represents the rebirth of the Trevi-era, which was characteristic because of its strong executive culture and its lack of transparency about what had been decided. During the Swedish EU Presidency in the first half of 2001, the Task Force reported about strategies against man-smuggling, and it will also make a final assessment of the security measures that are crucial for the changeover to the euro.

Last but not least, the Tampere Summit resulted in a decision that national police academies have to establish a network that – in time – can mature into a European Police College (EPC) for senior law enforcement officials.¹⁴ Under the French Presidency it was agreed that a network between national police academies would be created on 1 January 2001. Such a network was effectively already in place and supported by the AEPC (Association of European Police Colleges).

The Incorporation of the Schengen *Acquis* into the TEU

The incorporation of the Schengen *acquis* into the TEU is based on Article 2(1) of the Protocol annexed to the TEU and the Treaty establishing the European Community, often referred to as the “Schengen Protocol.” The integration process, which was concluded in the early days of May 1999, entailed a definition of the *acquis*¹⁵ and the determination of a legal basis in the TEU.¹⁶ The choice was one between EC (communitarian basis), Title VI TEU (intergovernmental basis), EC/Title VI (dual basis) or no legal basis at all (residue). The determination of the legal basis for the Schengen Information System (SIS) proved to be a particularly difficult exercise, as it bears relevance both to the control of the movement of people (which has become communitarian law by virtue of the Amsterdam Treaty), and to aspects of law enforcement co-operation (which has remained intergovernmental).

¹³ ST9093/1/01REV1, 31/07/01, Initiative of the Kingdom of Belgium and the Kingdom of Sweden with a view to adopting a Council Decision extending Europol’s mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention.

¹⁴ Council Decision establishing the EPC, OJ C 206, 19.7.00.

¹⁵ Council Decision of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis of each of the provisions or decisions which constitute the *acquis* (1999/435/EC), OJ L 176, 10.7.1999.

¹⁶ Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (1999/436/EC), OJ L 176, 10.7.1999.

The Schengen provisions on police co-operation are affected by the incorporation into the EU at three different levels.¹⁷ The first level concerns *administrative adaptation*: the Schengen structures have been strongly enmeshed with national administrative structures, and the implementation of Schengen has been noticeable in a number of ways: the creation of mobile patrols along the internal borders, de-centralised information centres that are connected with the SIS, direct access to the SIS by different law enforcement agencies,¹⁸ new passenger infrastructures at airports and other external border crossings, the development of radio- and telecommunication infrastructures in border areas, the introduction of new identity cards, etc. At the national level, these implementation effects have forged new co-operative ventures between different law enforcement agencies and new inter-institutional relationships with government.

The second level is that of *institutional adaptation*: former Schengen working groups had to be integrated into the Council Working Group structure. The structure has preserved the status of some of these expert Schengen groups, such as the Schengen Evaluation Party (senior civil servants), and the three Working Parties on Information System (SIS), Information System (SIS) Technology and SIRENE. All of them reside under the "Police and Customs cooperation" structure. The Schengen Executive Committee has merged with the JHA Council, and the Central Group has merged with the Article 36 Committee.¹⁹ Moreover, the Schengen Secretariat has been integrated into the General Secretariat of the Council.²⁰

The third level is that of *legal adaptation*. In a material sense, the Schengen provisions have been integrated into the different Titles of the TEU, but in a procedural sense, the Schengen "law-making-engine" is now subjected to communitarian and intergovernmental decision-making procedures. Some observers expressed concern about a possible legal contamination, as most Schengen provisions were adopted without national or European parliamentary scrutiny and integrated into the TEU

¹⁷ See also: M. den Boer, L. Corrado: "For the Record or Off the Record: Comments About the Incorporation of Schengen into the EU," 1 *European Journal of Migration and Law* (1999), pp. 397–418; M. den Boer: "The Incorporation of Schengen into the TEU: A Bridge Too Far?," in: J. Monar, W. Wessels (eds.): *The Treaty of Amsterdam: Challenges and Opportunities for the European Union* (2001), pp. 296–318.

¹⁸ According to a report issued by the British human rights organisation JUSTICE, SIS has a dual purpose: on the one hand, a policing role to maintain public order and security, and, on the other, an immigration role to support enforcement measures to compensate for the free movement of persons. It currently holds around 9.7 million files: of these 1.3 million relate to individuals who are either 'unwanted aliens,' wanted for extradition, missing persons or suspected criminals under surveillance (an overwhelming majority of these data – namely 89% – are for immigration purposes). The rest of the files – some 8.4 million – relate to stolen objects such as stolen vehicles and documents. The system can be consulted from over 50,000 terminals (police, immigration officials, embassy staff responsible for issuing visas). From: M. Colvin, M. Spencer, with the assistance of P. Noorlander: *The Schengen Information System. A Human Rights Audit* (2000), pp. 7–8. No doubt the number of terminals has risen considerably with the latest operationalisation of SIS in Finland, Sweden, Denmark, Norway and Iceland.

¹⁹ Previously called the "K4" committee.

²⁰ Council Decision of 1 May 1999 laying down detailed arrangements for the integration of the Schengen Secretariat into the General Secretariat of the Council (1999/307/EC), OJ L 119, 7.5.1999.

without further judicial screening. Even though the legal basis has now been determined, legal obligations under the 1990 Schengen Implementing Convention have continued until today.

Several provisions in the Schengen *acquis* apply to the field of police co-operation: relevant articles in the Schengen Implementing Convention, decisions of the Executive Committee and the Central Group, and the Declarations of the Central Group. The elements of the Schengen *acquis* which are most relevant for police co-operation have been identified below. The new legal basis in the TEU²¹ for each of these is as follows:

SCHENGEN ACQUIS	TEU and TEC
Article 39 (Mutual Assistance and Direct Information Exchange)	Articles 34 and 30
Article 40 (Cross-Border Surveillance)	Articles 34 and 32
Article 41 (Cross-Border Pursuit)	Articles 34 and 32
Article 44 (Communication Links)	Articles 34 and 30(1)
Article 46 (Information Exchange via Central Law Enforcement Authorities)	Articles 34 and 30(1)
Article 47 (Liaison Officers)	Articles 34 and 30(1)
Article 73 (Controlled Delivery)	Articles 34 and 30(1)
SCH/Com-ex (97) 6 Rev 2, 24.6.1997 (Schengen Manual on police co-operation in the field of public order and security)	Article 30(1)
SCH/Com-ex (98) 35 Rev 2, 16.9.1998 (Forwarding the Common Manual to EU Applicant States)	Article 41 TEU, Article 207 TEC
SCH/Com-ex (98) 51 Rev 3, 16.12.1998 (Cross-border police cooperation in the area of crime prevention and detection when requested)	Article 30 TEU
SCH/Com-ex (98) 52, 16.12.1998 (Handbook on cross-border police co-operation)	Article 30 TEU
SCH/Com-ex (99) 6, 28.4.1999 (Telecommunications situation)	Article 30 TEU
SCH/Com-ex (99) 7 Rev 2, 28. 4 1999 (Liaison officers)	Article 30 TEU

²¹ A more elaborate discussion about the transfer of Schengen provisions on police cooperation to the TEU can be found in: M. den Boer: "Not Merely a Matter of Moving House. Police co-operation from Schengen to the TEU," 7 *Maastricht Journal of European and Comparative Law* (2000), pp. 336–357.

SCH/com-ex (99) 25, 22.3.1999 (General Principles governing the payment of informers)	(...) ²²
SCH/Com-ex (99) 8 Rev 2, 28.4.1999 (General Principles governing the payment of informers)	Article 30 TEU
SCH/Com-ex (99) 18, 28.4.1999 (Improvement of police co-operation in preventing and detecting offences)	Article 30 TEU

In general, most of the provisions of the Schengen *acquis* on police co-operation have effectively been integrated into Title VI, with the exception of the Executive Committee's decision on forwarding the Common Manual to the Applicant States, which has a dual legal basis in the TEC and the TEU. Most provisions and decisions, notably those with an operational character, will merge with Article 30 TEU (direct information exchange, communication links, information exchange through central authorities, liaison officers, controlled delivery, cross-border police co-operation in detection and prevention, handbook on police co-operation, payment of informers).

Other provisions will be integrated into Article 32 (cross-border surveillance and cross-border pursuit), Article 34 (mutual assistance/direct information-exchange, cross-border surveillance, cross-border pursuit, information exchange through central authorities, communications links, controlled delivery, liaison officers) and Article 41 TEU (forwarding the Manual to applicant states).

The logic of the "ventilation"-process is hard to understand. The reference to Article 34 (as a legal basis for mutual assistance, cross-border surveillance, cross-border pursuit, communication links, information exchange via central law enforcement authorities, liaison officers and controlled delivery) means that a Title VI instrument will have to be designed to rename them as EU-instruments. The secondary legal basis for cross-border surveillance and hot pursuit is not Article 30 TEU, but Article 32 (which says that the Council shall lay down conditions and limitations under which the competent authorities may operate in the territory of another Member State).

Moreover, there are apparent overlaps between the substance of some Title VI instruments and the SIC. For instance, the information exchange between police services in the Schengen Implementing Convention shows some similarities with Article 7, para. 1 of the Mutual Assistance Convention, which rules that "(T)he competent authorities of the Member States may, within the limits of their national law and without a request to that effect, exchange information relating to criminal offences (...)." Furthermore, the Convention on mutual assistance permits requests wrapped up in (authentic) written or e-mail documents to be made directly between the *judicial authorities* with territorial competence for their service and execution,

²² Although included in the Council Secretariat's publication of the Schengen *acquis*, no official legal basis was determined for this decision, presumably because of its resemblance to SCH/Com-ex (99) 8 Rev 2, 28.4.1999.

and returned through the same channels. This provision does not preclude, in specific cases, the possibility of requests being sent or returned between central authorities of Member States. Although this provision does not apply to police services as such, it also opens up a possibility for autonomous information exchange at a sub-central level.

Another example of overlap concerns the Schengen provision on information exchange²³ via central law enforcement authorities. The coverage of Article 46 SIC is (the prevention of) public order problems. Central authorities may communicate and receive important information with regard to the prevention of offences or threats to public order and security. Co-operation flowing from this article mainly concerns situations whereby many people from different countries come together (soccer, pop concerts, demonstrations,²⁴ blockades), and therefore pertains to groups of people which – irrespective of their size – may constitute a danger to public order. The co-operation, alias information-exchange, is not restricted to Schengen countries with immediate borders, but also to transit Schengen states and Schengen states that are not neighbours.

This article may be read in conjunction with the EU Action Plan on organised crime,²⁵ which recommends EU Member States to create centralised contact points to enhance international co-operation (recommendation No. 1).²⁶ Centrally guided information can be related to specific events.

“Schengenland” – which now covers a substantial part of Europe – accommodates a dense web of liaison officers.²⁷ They are seconded by or at different institutions (Interpol, Europol), in the context of different frameworks (Schengen, bilateral agreements), by non-European institutions (Federal Bureau of Investigation, Drug Enforcement Agency, etc.), by different law enforcement agencies (police, customs, immigration services, secret service), at different institutions (Europol, embassies,

²³ Also based on Article 7 SIC, which provides for an exchange of all relevant and important information relating to checks and surveillance at external borders, with the exception of data on named individuals.

²⁴ This may be considered a very actual topic because Austria and Italy suspended the Schengen agreement due to anti-globalisation protests. In: M. den Boer: *Mirror, Mirror on the Wall... Who's the Fairest of them All? The Double Logic in the Imposition of JHA Instruments of Control on Candidate Countries*, Paper for Reflection Group on Diversity and Unity in the Enlarged European Union: What Influences the Process of Transition and Adaptation in Central and East Europe?, Chaired by Jean-Luc Dehaene, 21–22 June, Brussels, forthcoming as EUI Working Paper, Robert Schuman Institute, Florence 2001.

²⁵ Action Plan to Combat Organized Crime, Adopted by the Council on 28 April 1997, OJ C 251, 15.8.97 (97/C 251/01). See also the follow-up plan: “The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium,” OJ C 124, 3.5.2000.

²⁶ See also Recommendation 19 of the Action Plan to Combat Organized Crime: “Central national contact points, where they do not already exist, should be designated, while fully respecting the constitutional structure of each Member State, in order to speed up the exchange of information and the completion of application procedures for law enforcement cooperation, wherever a national authority in a Member State considers that it would be more efficient to direct itself to a central contact point instead of making direct contact with the authority in another Member State It is advisable that existing contact points, such as the Interpol NCB, Sirene bureaux, etc. should be brought together in this central contact point, or at least, that close relations between such units should be established.”

²⁷ See e.g. D. B i g o: *Polices en Réseaux, l'expérience européenne* (1996); E.A. N a d e l m a n n: *Cops Across Borders, The Internationalization of U.S. Criminal Law Enforcement* (1993).

consulates, central co-ordination centres, etc.). Hence, the secondment of Schengen liaison officers is only one layer in a much larger constellation. The secondment of liaison officers is experienced as “extremely efficient and useful for daily police practice,”²⁸ mainly because it contributes to confidence-building and to the acceleration of co-operation between police forces.

Article 7, 47 and 125 SIC provide for the possibility of seconding liaison officers to the police or customs authorities of another State. Bilateral agreements can be concluded between Schengen states concerning the secondment of liaison officers from one police service to the other. Liaison officers are mandated with providing assistance and advice, but they have no operational competences. In a bilateral or multilateral framework, liaison officers can also represent the interest of one or more other Contracting Parties. The Contracting Parties must inform each other of any liaison officers seconded to third countries.²⁹ Interestingly, the Convention on Mutual Assistance in Criminal Matters does not contain a provision on liaison officers, perhaps because they have already been taken account of in Article 5 of the Europol Convention.³⁰

Deliveries of drugs and psychotropic substances are covered by Article 73 SIC, and each case shall be weighed separately by the national authorities of a Schengen state. Article 12 of the Mutual Assistance Convention also provides that each EU Member State shall undertake to ensure that, at the request of another Member State, controlled deliveries may be permitted on its territory in the framework of criminal investigations into extraditable offences. It is clear that the scope of application of the Convention is much wider than the SIC in this regard; interestingly, the Convention does not make explicit reference to the normative basis for “extraditable offences” (neither does it contain a reference to the EU Extradition Convention, nor to the extraditable offences mentioned in the SIC). In concrete terms, this means that the scope of the Mutual Assistance Convention is widened to other crimes than drugs offences.

Finally, as law enforcement co-operation within the Schengen framework is concerned, attention may be drawn to the special facultative arrangements that were drawn up for the United Kingdom and Ireland.³¹ Article 4 of the Schengen Protocol deter-

²⁸ Doc. 10846/1/99, Brussels 5 November 1999: *1998 Annual Report on the Implementation of the Schengen Convention*.

²⁹ No research has been done as to whether the Schengen and Europol Liaison Officers represent a completely different network, or act in tandem with each other. What has become clear, however, is that – except for the Nordic countries – the joint secondment of liaison officers by two or more Schengen Member States has hardly come off the ground; even a longstanding multilateral agreement like BeNeLux does not seem to have resulted in the secondment of joint liaison officers.

³⁰ Article 5 of the Europol Convention provides that: “1. Each national unit shall second at least one liaison officer to Europol. The number of liaison officers who may be sent by Member States to Europol shall be laid down by unanimous decision of the Management Board; the decision may be altered at any time by unanimous decision of the Management Board. Except as otherwise stipulated in specific provisions of this Convention, liaison officers shall be subject to the national law of the seconding Member State.”

³¹ M. H e d e m a n n - R o b i n s o n: “The Area of Freedom, Security and Justice with regard to the UK, Ireland and Denmark: The ‘Opt-in Opt-outs’ under the Treaty of Amsterdam,” in: D. O’K e e f f e, P. T w o m e y (eds.): *Legal Issues of the Amsterdam Treaty* (1999), pp. 289–302.

mines that the UK or Ireland can submit a special request to participate in some of the provisions of the Schengen *acquis*.³² In the meantime, the Council has made a positive decision about the participation of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (in particular the SIS). The UK will mainly participate in aspects of mutual legal assistance and police co-operation, and not in aspects of immigration control.³³ On 16 June 2000, Ireland also submitted its application to be part of the Title VI TEU Schengen *acquis*.

Norway and Iceland, who are not members of the European Union, but who take part in the Nordic Union, became associated with the implementation, application and development of the Schengen *acquis*.³⁴ The Association Agreement applies to the following areas: checks at external borders, short-stay visas, free movement of nationals of third countries, settlement of disputes between states about residence permits, penalties against carriers, protection of personal data, SIS and SIRENE, police co-operation (Articles 39 to 43, 46, 47, 73 and 126 to 130 SIC) and judicial co-operation in criminal matters. At the institutional level, a so-called Mixed Committee was created (Article 3 of the Agreement), consisting of representatives of the governments of Iceland and Norway, the EU members and the European Commission, which is another telling example of institutional complexity. It should be noted that the participation of Norway and Iceland in the Schengen *acquis* is wider than that foreseen in the decision concerning participation by the UK. The Schengen Agreement became fully operational in Denmark, Finland, Sweden, Iceland and Norway on 25 March 2001.³⁵

To conclude, with the incorporation of Schengen into the EU, many bilateral and multilateral arrangements have been brought within the scope of the EU.³⁶ It is not

³² Article 4 of the Schengen Protocol: "Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen *acquis*, may at any time request to take part in some or all provisions of this *acquis*. The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned;" Council decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis*; OJ L 131, 1.6.2000, pp 43–47.

³³ Report of the 2229th Council Meeting – Justice and Home Affairs, Brussels, 2 December 1999, 1346/99 (Presse 386), p. 20. An area which falls beyond police co-operation, but which is illustrative for the complexity of opt-out positions, is the Eurodac Regulation on the comparison of fingerprints of asylum applicants and certain other aliens: this Regulation will apply both to Ireland and the UK on the basis of their respective Protocols to the Amsterdam Treaty, and they wish to take part in the adoption and application of this Regulation. Denmark was excluded because according to its Protocol, it had no possibility to sign up to a single act in the area of asylum and migration when it was not Schengen-related, unless it concluded an intergovernmental agreement with the Community. Meanwhile, Denmark has expressed its will to take part in the Eurodac system. See also: Doc 11177/2/99, Rev 2, Schengen 74, Brussels, 29 October 1999.

³⁴ Council Decision of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (1999/437/EC, OJ L 176, 10.7.1999).

³⁵ *Application de l'acquis de Schengen dans les pays nordiques à partir du 25 mars 2001*, doc. 6229/01 SCH/EVAL 11 COMIX 121, 26.02.01, Conseil AG (2331^{ème}) pt. A14.

³⁶ An inventory was made of all the bilateral arrangements and agreements concerning police and customs cooperation (former Section 7: Art. 39 (4-5) SIC), Brussels, 27 November 2000.

unlikely that this will result in a linkage between the formal "vertical" information-exchange through national co-ordination points, and "horizontal" information-exchange in police border regions, which generally tends to carry a more informal, autonomous and spontaneous character.

Furthermore, police co-operation currently within the remit of the EU is increasingly acquiring an operational character following the integration of cross-border competencies of the SIC into Title VI TEU. This "operational" expansion is strengthened by parallel developments, e.g. the "operative" character of Europol,³⁷ and the Convention on Mutual Assistance in Criminal Matters.³⁸ Moreover, the Amsterdam Treaty³⁹ and the Action Plan against Organised Crime encouraged the acquisition of a more multidisciplinary character through interagency co-operation between police, customs, immigration and other specialised law enforcement agencies.

EU Police Cooperation before and after Enlargement

The European Union is expanding relatively fast. Within a few years time, it may include 25 Member States. This will add significant pressure on the intergovernmental decision-making which has hitherto applied to police cooperation. In particular the demanding combination between the unanimity requirement and the ratification procedure within the Member States. With a hint of anticipation at the enlargement process, the Amsterdam Treaty has been furnished with numerous provisions that allow flexibility and multi-speed integration, particularly in the AFSJ.⁴⁰ Examples of flexibility notions are: time-clauses, facultative arrangements (e.g. concerning the European Court of Justice), "rolling ratification,"⁴¹ tolerance of bilateral application and development, reinforced co-operation and opt-ins. It remains yet to be seen whether the introduction of flexibility clauses has made decision-making in the Third Pillar more efficient, and what their effect will be when the JHA Council welcomes the candidate countries.

³⁷ Article 30, para. 2 (a).

³⁸ In particular through the creation of joint investigation teams. Report of the 2229th Council Meeting – Justice and Home Affairs, Brussels, 2 December 1999, 1346/99 (Presse 386), p. 8.

³⁹ Article 30, para. 1(a).

⁴⁰ G. de Kerchove: "Un espace de liberté, de sécurité et de justice aux dimensions incertaines: Quelques réflexions sur le recours aux coopérations renforcées en matière de justice et d'affaires intérieures," in: M. den Boer, A. Guggenbühl, S. Vanhoonaeker (eds.): *Coping with Flexibility and Legitimacy after Amsterdam* (1998), pp. 197–204.

⁴¹ "Before the Convention has entered into force pursuant to para. 3, any Member State may, when giving the notification referred to in paragraph 2 or at any time thereafter, declare that it will apply this Convention in its relations with Member States which have made the same declaration. Such declarations shall take effect 90 days after the date of deposit thereof." Doc. 1286/99 contains a note which says that the Council Legal Service has expressed doubts as to the inclusion of a provision on the anticipated application of the Convention. This arrangement also applies to the Convention on Mutual Assistance in Criminal Matters (Art. 23, para. 2) "This Convention shall, 90 days after the notification referred to in paragraph 2 by the State, member of the European Union at the time of adoption by the Council of the Act establishing this Convention, which is the eighth to be complete this formality, enter into force for the eight Member States concerned."

The Integration of Schengen by the Candidate States

The applicant states will have to integrate the full Schengen *acquis* upon accession to the European Union. They are not allowed to re-negotiate the contents of the *acquis*, they have to adhere to the procedures, and they are not allowed to gradually phase in (i.e. the opt-in arrangement is not applicable to them). Article 8 of the Schengen Protocol provides that: "For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an *acquis* which must be accepted in full by all States candidates for admission." In a recently published chapter on enlargement, Saryusz-Wolski – characterises the opt-in clauses of the Schengen Protocol as "preposterously framed derogations" for some EU members.⁴² He argues that some flexibility should be granted by the EU, but that a strict application of the Schengen Protocol in principle would not allow for keeping the special arrangements that some of the candidate countries have with their neighbours. His argument mainly refers to the sensitivity of creating a new 'hard border' between the EU and neighbouring countries in East Europe.

Several security aspects are related to the accession of new member states to the European Union. First, there has been considerable discussion about the risks posed by illegal immigration, organised crime and illegal drugs from areas around the European Union.⁴³ Second, most EU Member States have drawn up bilateral security arrangements with the country on the other side of the external border, either on the readmission of unwanted aliens, or on the quality of border controls and related law enforcement aspects.⁴⁴ Germany gave a strong financial injection to Poland provided it would readmit Germany's unwanted aliens and it would co-operate on the improvement of the external border controls (more border patrol officers, technical equipment such as infrared cameras). Third, in the context of the pre-accession negotiations, assistance is given to applicant states in a variety of ways (e.g. seminars, language-training, knowledge about new investigation methods). The pre-accession pact on organised crime⁴⁵ is an example of a Title VI instrument that seeks to encourage and formalise law enforcement co-operation with applicant states. Finally, the decision on Europol's information exchange with third states⁴⁶ and the Convention on Mutual Assistance in Criminal Matters (which is open to accession by any State

⁴² J. Saryusz-Wolski: "The Reformed European Union and the Challenge of Enlargement," in: J. Monar, W. Wessels: *The European Union after the Treaty of Amsterdam* (2000), p. 63.

⁴³ M. den Boer, G. de Kerchove: "A Hurdled Admission: The Integration of the Candidate Countries into an Area of Freedom, Security and Justice," in: V. Kronenberger (ed.): *The European Union and the International Legal Order – Discord and Harmony* (2001), pp. 315–329.

⁴⁴ As for developments in *Mittleuropa*, see the discussion in E. Bort: "Introduction: Security and Co-operation at the Eastern Frontier of the European Union," in: M. Anderson, E. Bort (eds.): *Schengen & EU Enlargement. Security & Co-operation at the Eastern Frontier of the European Union* (1997), p. 11.

⁴⁵ "Pre-Accession Pact on Organised Crime between the Member States of the European Union and the Applicant Countries of Central and Eastern Europe and Cyprus," OJ C 220, 15.7.98 (98/C 220/01).

⁴⁶ Council Decision, 12 March 1999 (1999/C 88/01), OJ C 88, 30.3.1999.

which becomes a member of the EU⁴⁷) signal a strong willingness by the current Member States to involve applicant states at an early stage in joint intelligence and operations against organised crime.

Conclusion

Internal security in the EU is becoming an increasingly complex issue. One important reason for this is that law enforcement cooperation is not restricted to one supranational venue, but to many forums and frameworks that are situated at numerous levels of governance and administration. Even when we narrow our focus to events at EU-level, a colourful image of interrelated trends seems to emerge. In this chapter, we have singled out four trends that seem to be pointers for the future. First, with the Tampere summit, an undeniable impulse has been given to bolster the EU institutional law enforcement capacity. Second, with the incorporation of the Schengen *acquis*, the EU has absorbed 'horizontal' processes of interregional cooperation and has opened up the road for operational cross-border police cooperation. Third, with the incumbent creation of Eurojust, police cooperation and judicial co-operation in criminal matters will become inseparable processes. The improvement of judicial control and democratic control⁴⁸ on law enforcement cooperation can be considered as pertinent questions on the JHA agenda in the near future. Fourth, the accession of the candidate countries will soon put additional strain on the JHA-decision-making machinery, and more importantly, throws a challengingly new perspective on the internal security situation in Europe.

⁴⁷ The Convention applies ninety days after deposit of its instrument of accession (Article 24).

⁴⁸ See the proposal of Commissioner Antonio Vitorino to establish an institutionalised information exchange between the national parliaments of the EU member states and the European Parliament concerning control on Europol, followed by the establishment of a joint committee; Speech by António Vitorino European Commissioner for Justice and Home Affairs, *Democratic Control of Europol*, Europol Conference organised by the Senate and House of Representatives of the Dutch States General The Hague, 8 June 2001 (http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/274/0|RAPID&lg=EN).

Ireland and the Internal Market

PATRICIA CONLAN

Introduction

The Single European Act, 1986 (SEA) was the first targeted amendment to the founding treaties.¹ It was a response to the stagnation² of the European (Economic) Community³ in the previous ten years or so, and an alternative to the completely new Treaty proposed by the European Parliament.⁴ The Commission's *White Paper on Completing the Internal Market*⁵ presented to the European Council in Milan in June 1985 identified barriers under three headings:⁶ 1. Physical, 2. Technical and 3. Fiscal. It also included a timetable for completing the internal market by 1992.⁷

In addition to establishing the internal market, an area in which goods, persons, services and capital would move freely without internal barriers,⁸ the SEA provided for the extension of qualified majority voting in relation to measures for the establishment and functioning of the internal market.⁹ It also introduced a number of other institutional¹⁰ and substantive amendments to the treaties, some of which complemented the internal market.¹¹ Independently of the amendments to the founding treaties, the SEA for the first time, gave treaty recognition to the European Council,¹²

¹ European Coal and Steel Community (ECSC) – 1951, European Atomic Energy Community (EURATOM) – 1957, European Economic Community (EEC) – 1957, Treaties.

² The Fourth Joint Committee Report No. 29 *Completing the Internal Market* para 12 refers to (the fact that) “for several years past, the Community has been drifting:” see paras. 12–14 for wider criticisms.

³ Replaced by European Community (EC), article G.A.(1) Treaty on European Union (TEU–Maastricht).

⁴ National Economic and Social Council (NESC): *Ireland in the European Community: Performance, Prospects and Strategy*, No. 88, p. 9, NESC, Dublin, 1989 (NESC 88). For an Irish parliamentary view on this draft treaty see the Fourth Joint Committee's Report No. 14 - *European Parliament Draft Treaty establishing the European Union*.

⁵ COM (85) 310 final.

⁶ NESC 88, p. 227 “categorisation of the 300 proposals under these three headings is somewhat artificial.” This view arises from the use of the third category (“technical”) to cover all non physical/fiscal barriers.

⁷ Although see Declaration No. 3 on “Article 8A of the EEC Treaty” on the legal status of this deadline

⁸ Now article 14 ECT.

⁹ Now article 95.1 ECT – excluding fiscal provisions, free movement of persons and provisions relating to the rights and interests of employed persons (now article 95.2).

¹⁰ The Court of First Instance for example – now article 225 ECT.

¹¹ *I.a.* Economic and monetary union, Economic and social cohesion, Working environment, Research and technological development, Environment: discussed below. See too 1985 *White Paper*, para. 20 for other areas of Community policy that interact with the internal market.

¹² Article 2 SEA, repealed by article P.2 TEU-Maastricht, now article 4 TEU

formally acknowledged the European Parliament as the title of what hitherto had been formally termed the Assembly, albeit in a roundabout way¹³ it must be said. Finally, it gave the first treaty base to European cooperation in the sphere of foreign policy,¹⁴ within the context of what has been described as the threshold leading from what had hitherto been essentially an economic Community to what was becoming also a political Community.¹⁵

The introduction of the concept of the internal market did not find universal favour at the time.¹⁶ However, with the benefit of hindsight, one can point to the impetus it gave for the elimination of existing barriers and the prevention of new barriers.¹⁷ Ireland had acceded to the European Communities thirteen years prior to the drafting of the SEA. The intervening years had been a period of adaptation and change in Ireland.¹⁸ The SEA was the first opportunity for Irish input into the founding treaties and into long term Community goals.

This contribution seeks to present an overview of the (Irish) political evaluation of the opportunities provided by the internal market in so far as it can be discerned from the public records as well as some practical examples of the Irish response to the concept of the internal market. This is done in the first instance by identifying the Irish contribution to the drafting of the SEA. This largely reflected Irish concerns regarding the balance between the centre and the periphery as well as some specifically Irish concerns. Parliamentary scrutiny provides an overview of political thinking on the SEA in general, and the internal market project in particular. This is done by reviewing *Oireachtas* (Parliament) Debates and the regular¹⁹ reports on developments in the European Communities/Union by *An Taoiseach* (Prime Minister) to the *Dáil* (lower house) as well as reports by the (relevant) Select Committee of the *Oireachtas*.²⁰ In order to facilitate an appreciation of the changed and changing economic context, expert economic comment is referred to.²¹ However, it should be noted

¹³ Article 3.1 SEA.

¹⁴ Title III, article 30 SEA (repealed by article P.2 TEU (Maastricht): now Title V TEU).

¹⁵ Crotty v *An Taoiseach* 2 *CMLR* (1987), pp. 666, 725.

¹⁶ See *i.a.* P. Pescatore: "Some critical remarks on the 'Single European Act,'" 24 *CMLR* (1987), p. 9.

¹⁷ The Commission's 1985 'new approach,' namely that of mutual recognition of standards rather than complete harmonisation has been described as an important innovation. In addition, there was acknowledgement of the linkage of the suspension of internal borders with strengthening of the research and technological base of the Community's industry and the co-ordination of economic policies and the EMS and the enhancing of the Structural Funds, see *i.a.* NESC 88, pp. 6–11.

¹⁸ NESC 88 – terms of reference.

¹⁹ *European Communities Act*, 1972, s. 5 provides that the Government shall make a report twice yearly to each House of the *Oireachtas* on developments in the European Communities. They are indicated here as the Twenty-Seventh, Thirty-First etc. Report (on the Developments in the European Communities/Union)

²⁰ Formerly the Joint *Oireachtas* Committee on the Secondary Legislation of the European Communities, now the Joint *Oireachtas* Committee on European Affairs (see below for current situation) – indicated here as *Joint Committee Report* No. 29 or 34 as appropriate. For an overview of the role, genesis of this Committee see the (dated but valuable) insight offered by M.T.W. Robinson: "Irish Parliamentary Scrutiny of European Community Legislation," 16 *CMLR* (1979), p. 6.

²¹ For in-depth economic analysis pre-internal market see *i.a.* NESC 88. This is a study of Ireland's comparative performance in the EC, incorporating an assessment of the impact on Ireland of EC membership, an assessment of the problems and opportunities arising from the internal market as well as policy options to

that the economic debate remains outside this personal contribution. Finally, some practical aspects of implementation are offered, drawing on contact with the relevant co-ordinating Government Department²² and on the memoirs of the *Taoiseach* of the time.²³ The main timeframe is that set out in the *White Paper*, namely from 1985–1992. However, as this timeframe represents only the initial response to the barriers identified and adoption of internal market measures have continued apace since then²⁴ (as can be seen from the official publications consulted), the post-1992 period will be outlined in so far as it is practicable. Other areas covered by the Single European Act (SEA) but falling outside the internal market measures *per se* will not be dealt with here other than by brief reference.

Irish Response to the Internal Market

Background

Ireland is a small, open economy.²⁵ Accession to the European Communities in 1973 has been described as the logical outcome of the economic and political policies pursued domestically since the 1950s.²⁶ At the time of accession the main trading partner was the UK.²⁷ By the time the SEA was adopted (1986) trading patterns had changed²⁸ but with no diminution in the importance of trade. The reliance on trade, as well as the opportunity presented to address regional disparities, influenced the Government's response to the concept of the internal market and the accompanying complementing measures.²⁹

address these. A useful but more limited view is R. O'Donnell: "The Internal Market," in: P. Keatinge (ed.): *Ireland and EC Membership Evaluated* (1991), pp. 7–41. For a post internal market analysis see R. O'Donnell (ed.): *Europe. The Irish Experience* (2000) which explores the impact of 25 years of EC/U membership on Irish politics, society and culture, economy and public administration.

²² Department of Industry and Commerce at the time of the SEA, now renamed Department of Enterprise, Trade and Employment. I am grateful to Mr Michael Greene of the Internal Market Unit for his very practical help.

²³ G. FitzGerald: *All in a Life* (1992). Dr FitzGerald was *Taoiseach* during the drafting and signing of the SEA.

²⁴ However, while adoption of internal market measures at EC level has continued apace, there have been delays in corresponding transposition at national level. See *i.a.* European Commission – Commission Staff Working Paper – http://europa.eu.int/comm/internal_market/Internal_Market_Scoreboard (No. 8 (May 2001) for most up to date situation.

²⁵ See O'Donnell: "The Internal Market," *op. cit.*, *supra*, n. 21, pp. 15–32.

²⁶ NESC 88, pp. 61–82.

²⁷ D. McAleese: "Twenty-five Years 'A-Growing,'" in: O'Donnell (ed.): *Europe. The Irish Experience*, *op. cit.*, *supra*, n. 21, pp. 82–83, Table 2.

²⁸ R. O'Donnell: "External Trade Policy" – which concluded that EC membership has been beneficial for Ireland's external trade regime. For the changing geographical structure of Irish exports see Table 16.1 and for imports see Table 16.2 (1955–1989). The lessening of the trade relationship with the UK and concurrent increase in trade with the other EC member states can be seen.

²⁹ See *i.a.* *Twenty-Seventh Report*, p. 99. For an economic analysis of the threats and opportunities for the Irish economy, as well as the overall regional dimension, presented by the completion of the internal market, see NESC 88, pp. 225–394.

Reflecting on the overall impact on the economy, the view has been offered that more than just trade orientation and the Irish economic structures have been affected by membership of the European Community. Considerable benefit has flowed from a combination of negative and positive integration measures originally arising from the internal market project, coupled with financial transfers and capital mobility.³⁰ The future presents a different challenge to that offered by the immediate post-accession period or the opportunities presented by the internal market and the accompanying complementing measures successfully argued for (by Ireland) on behalf of the peripheral regions during the SEA negotiating period. The effects of European integration – including the changes ‘primarily connected with the Single Market programme’ have been described as a ‘surprise’ in that they were a) not anticipated at the time of accession and b) they were to be enormously beneficial for the Irish economy.³¹ Accession of the candidate countries will undoubtedly impact on the existing and new Member States – including Ireland.³² It remains to be seen to what extent this impact will also fall to be described as a “surprise.”

Inter-governmental Conference

Reference has been made to the Commission’s *White Paper* and the impetus it gave to the internal market. While there was not unanimity, following the Milan summit and the Commission’s *White Paper*, in the (initial) response to convening an Inter-governmental Conference (IGC),³³ Ireland was among those Member States which supported the idea in order to examine ways of achieving the full potential of the European Communities and with a view to achieving concrete progress on European Union (*sic*). Five³⁴ aspects were seen as relevant to this task:

- an improvement in the decision-making procedures of the Council of Ministers;
- an enlargement of the European Parliament’s role;
- better administrative arrangements and powers for the Commission;
- the extension of Community activities into new areas and
- the strengthening of political co-operation.

There was subsequent extensive Irish participation in the drafting of proposed texts at both ministerial and official levels of the IGC. A number³⁵ of major themes

³⁰ See Mc Aleese, *op. cit.*, *supra*, n. 21, p. 89 in which the profound changes experienced by the Irish economy since 1972 are discussed

³¹ See Mc Aleese, *op. cit.*, *supra*, n. 21.

³² See NESC, European Union: Integration and Enlargement, No. 101, March 1997 (NESC 101) for an assessment of the extent to which the changing situation and the challenges presented will require a deviation from Ireland’s existing policy or alter its balance of interest in European integration. An appropriate strategy is outlined.

³³ See *i.a.* Fitz Gerald, *op. cit.*, *supra*, n. 23, pp. 595–597. For an indication of the contribution of Professor Dooge (former Irish Minister for Foreign Affairs/Senator) Chair of the *ad hoc* group established by the European Council in 1984 to examine institutional reform and whose recommendations included calling IGC, see *Seanad Debates*, Vol. 146, 28.3.1996 available at www.oireachtas.ie.

³⁴ See *Twenty-Seventh Report*, Stationery Office, Dublin, January 1986, p. 94.

³⁵ See *i.a. ibid.*, pp. 94–95.

emerged from this process and were reported on to the Luxembourg European Council in December 1985. These were:

- the internal market;
- the monetary capacity of the Community;
- the increase in the economic and social cohesion of the Community;³⁶
- the powers of the European Parliament;
- the Commission's implementing powers;
- research and technological development;
- the environment and
- social policy.

These formed the contents of the subsequent Single European Act.

Support for the SEA/Internal Market Project

In the main, the Irish (political) response to the major themes which emerged from the IGC report to the Luxembourg European Council in December 1985 was positive. The outcome was seen as fully reflecting the Irish concerns – on the imbalance between the centre and the periphery – as advanced. In addition, specifically on the internal market, in view of the importance of trade for Ireland as an exporting country, the Irish input was seen as having achieved a modest degree of success.³⁷

The *Dáil* (Lower House) was informed by the *Taoiseach* (Prime Minister) and the Minister for Foreign Affairs on a number of occasions of the progress of the Single European Act.³⁸ Subsequent to it being signed but prior to it being formally presented to the *Dáil* for debate, questions were raised concerning its anticipated impact in Ireland. To a large extent³⁹ attention focused on the political aspects of Title III of the SEA which, given the subsequent *Crotty*⁴⁰ successful Supreme Court challenge – does raise the question why the Government did not see fit to anticipate the need for a referendum.⁴¹

The internal market *per se* was less contentious although there were concerns expressed.⁴² The extension of QMV to “several economic areas”⁴³ and fears about the impact of the removal of all barriers in the internal market on the Irish economy

³⁶ Of particular concern to the less developed regions, including Ireland, see *ibidem*, pp. 97–98.

³⁷ See *i.a. ibid.*, p. 99.

³⁸ *The Single European Act – An Explanatory Guide*, The Stationery Office, Dublin, para. 1.6

³⁹ See for example *Dáil Debates*, Vol. 365, 30.4.1986, SEA, available at www.oireachtas.ie.

⁴⁰ *Crotty v An Taoiseach* 1987 2 CMLR 666 – see below.

⁴¹ See FitzGerald, *op. cit.*, *supra*, n. 23, pp. 600–601 for his views on the necessity for a referendum.

⁴² See *Thirty-Second Report*, pp. 78–79 regarding the “elimination of internal frontiers and the effects of the new and tighter budgetary disciplines” as they (affect) agriculture, and the ongoing concern about the central vs periphery (im)balance, *Thirty-Second Report*, p. 84. The concern in this instance related to indirect taxation and the consequent loss to the Irish Exchequer “running into hundreds of millions. With the public finances in their present state this is not a situation we could contemplate with equanimity.”

⁴³ Michael Bell, TD, (Labour party) see *Dáil Debates*, Vol. 365, 30.04.1986, SEA, available at www.oireachtas.ie.

and the need for compensation to offset this⁴⁴ were addressed by the Minister for Foreign Affairs.⁴⁵ It is interesting to note that he expressly raised the retention of the “veto in (other areas such as) the harmonisation of taxes and other sensitive areas.” The retention of national competence for taxation remains of prime concern to Ireland.⁴⁶

This is not to say that there was not opposition to the SEA, for example among the trade union movement. Given the contribution of EC measures – not least the usage of article 118A⁴⁷ ECT introduced by the SEA – to improving the situation of the worker, the subsequent *volte face*⁴⁸ may be seen to some extent as recognition of this. The attitude in political circles was also somewhat ambiguous. The Government at the time was a coalition made up of two parties, *Fine Gael* and the Labour Party. Some indication of the lack of warmth⁴⁹ with which the Labour Party members were seen to view developments in the European Communities can be inferred from the fact that the legislative process to enable the SEA to be ratified was delayed at the request of the Leader of the Labour Party. The delay was to allow the Labour Party conference to be held prior to ratification in order to “minimise problems the Labour Party might face in mobilising support by its deputies for ratification in the Dáil.”⁵⁰ This delay was exacerbated when Mr Crotty launched his successful challenge to the SEA thus delaying the coming into force as provided.⁵¹

However, while concerns were expressed the overwhelming official response was to welcome the internal market concept. In the first place for the benefits envisaged as ensuing from the consequent “huge market” for the Community as a trading bloc allowing it to compete more effectively with its major competitors.⁵² Specifically for Ireland, there was a welcome for the anticipated increased opportunities for Irish exports and the enhanced attractiveness of Ireland as a location for mobile industrial investment. Finally, the benefits flowing to the Community (from the internal market) were seen as strengthening the Community’s regional development policies,⁵³ and thereby Ireland as a beneficiary of Community financing of these policies. In fact the analysis went so far as to state baldly that it was “clearly in Ireland’s national interest

⁴⁴ C.J. Haughey: TD – Leader of *Fianna Fáil* (then Opposition) see *Dáil Debates*, Vol. 365, col. 2181, 2.05.1986.

⁴⁵ *Dáil Debates*, Vol. 365, 30.04.1986, SEA, available at www.oireachtas.ie.

⁴⁶ Government of Ireland: *Treaty of Nice White Paper*, paras. 2.26/2.27 (dealing with QMV extension) (2001). M. McDowell (Attorney General): *Speech to Lawyers’ Group*, Institute of European Affairs, Dublin, 18th June 2001, available at <http://www.ireland.com>.

⁴⁷ Now article 137 ECT on which several health and safety directives have been based: see for selection, P. Conlan: *EC Labour Legislation in Ireland* (1996).

⁴⁸ O’Donnell, *op. cit.*, *supra*, n. 21, pp. 181–182 points out that the Irish Congress of Trade Unions had been opposed to accession in 1972 and also to the SEA, but by 1989 was promoting integration “in a campaign entitled ‘Make Europe Work for Us.’”

⁴⁹ There has been a change in attitude in the intervening period.

⁵⁰ FitzGerald, *op. cit.*, *supra*, n. 23, p. 600.

⁵¹ *Crotty v An Taoiseach* 1987 2 CMLR 666. See FitzGerald, *op. cit.*, *supra*, n. 23, pp. 600–601 for a response to this challenge

⁵² *The Single European Act – An Explanatory Guide*, The Stationery Office, Dublin, para. 2.28.

⁵³ Now articles 158–162 ECT (Economic and Social Cohesion).

that the Community's internal market be fully achieved."⁵⁴ The relevant provisions of the SEA were seen as leading to this achievement.

Input into Drafting of the Single European Act

The Irish contribution to the drafting of the SEA can be traced to a number of formal proposals to the IGC. While our focus remains the internal market, before turning to the internal market *per se*, it will be recalled that in addition (to establishing the internal market) the SEA achieved a number of things. While some of these additional achievements can be regarded as complementing the internal market, others can be regarded as balancing the anticipated effects of the removal of barriers and the consequent increase in competition. Ireland, as a peripheral region of the EC, stood to be adversely affected by a totally integrated market.⁵⁵ The Irish articulated the needs of the least favoured regions and emphasised the necessity for measures to counter the potential threat posed by the internal market to these regions. The inclusion in the body of the EEC treaty – as opposed to “just” the preamble – of reference to the needs of the least favoured regions, specifically the need to promote harmonious development, to strengthen economic and social cohesion in the Community, and to reduce disparities between the various regions can be seen as a response to the concerns articulated.⁵⁶

In addition, there were a number of substantive areas⁵⁷ of considerable concern to Ireland specifically – the insurance industry⁵⁸ and capital mobility,⁵⁹ for example, which were given a sympathetic hearing and response. As regards the adoption of measures to “approximate” the laws, regulations and administrative actions in the Member States in order to achieve the internal market, the SEA extended the qualified majority voting procedure⁶⁰ to the adoption of measures which have as their object the establishment and functioning of the internal market – but with some ex-

⁵⁴ *The Single European Act*, *op. cit.*, *supra*, n. 52, para. 2.26.

⁵⁵ The then leader of *Fianna Fáil*, subsequent *Taoiseach*, expressed concerns about the impact of internal market measures and the extension of QMV to their adoption: the Foreign Minister confirmed that for “taxes and other sensitive areas veto remains.” The Foreign Minister also referred to the inclusion of “cohesion” at the insistence of Greece and Ireland. See *Dáil Debates*, Vol. 365, col. 2181, 2.05.1986.

⁵⁶ Now article 158–162 ECT. See FitzGerald, *op. cit.*, *supra*, n. 23, pp. 599–600 “... (we) achieved a very considerable measure of success, most of our proposals being eventually adopted. The provisions on economic and social cohesion that emerged from this debate thus represented a breakthrough from the point of view of Ireland and the other peripheral countries.” See also *Twenty-Seventh Report*, *op. cit.*, *supra*, n. 34, pp. 97–98. The subsequent change of Government did not result in a changed approach to the relationship between the internal market and the need for economic and social cohesion: see *i.a.* *Thirty-Fourth Report*, p. 79.

⁵⁷ See below “practical examples” for some further examples of favourable treatment specific to Ireland.

⁵⁸ Declaration 5. “Declaration by the Government of Ireland on Article 57(2) of the EEC Treaty” (now article 47.2 EC Treaty) for text see p. Conlan (ed.): *EC/EU Legislation in Ireland* (1994), p. 465.

⁵⁹ *Thirty-First Report*, para. 11.17. Other cohesion countries were also granted an extension.

⁶⁰ Now article 95.1 ECT. In referring to the “veto” or “Luxembourg Compromise” the *Fourth Joint Committee's Report*, No. 34, para. 16 stated that “According to the Department of Foreign Affairs the Government's view that Member States should be free to invoke ‘vital national interests’ in exceptional circumstances and with substantial justification is shared by the majority of [our] Community partners and is not under threat.”

ceptions. The exceptions⁶¹ cover fiscal provisions,⁶² the free movement of persons and the rights and interests of workers.

The new provisions also allow a member state to apply national provisions on grounds of major needs as are referred to in article 30⁶³ or relating to two new areas, the protection of the environment or the working environment,⁶⁴ with the Commission monitoring the situation to ensure that these national measures are not in fact arbitrary discrimination.⁶⁵ The claim has been advanced that the application of national measures as described were included at the request of Ireland.⁶⁶ However, the national needs justifying the application of national measures have been indicated as including "health" – not the working environment which is the phrase actually used in the treaty – and also terrorism and drugs – neither of which find expression in the treaty articles themselves. Leaving this particular claim to one side, this amendment had a relevance for a potentially delicate matter⁶⁷ which required sensitive treatment. The Irish aspect of this was the perception in some quarters (in Ireland) that EC liberalisation of services would lead to abortion. The EC aspect related to the right of Member States to apply national restrictions on specified and justified grounds even where harmonising measures had been adopted within the EC framework.⁶⁸ Rather than provide the anti-European lobby with any potential arguments, support was sought and gained, for the amended wording to reflect the right of application of national measures on a range of grounds – including public morality – rather than on a more restricted range as had been intended.⁶⁹ It is worth noting that the "debate" on the question of EC liberalisation of services leading to abortion in Ireland found further expression in the Treaty on European Union (TEU). This took the form of a Protocol⁷⁰ and subsequent Decla-

⁶¹ Now article 95.2 ECT.

⁶² Direct taxation is a matter of considerable interest to Ireland, not least because of its favourable corporation tax regime. See too *Joint Committee Report*, No. 34, para. 17 regarding the "serious consequences for the budget [the commitment to the harmonisation of indirect taxation, albeit by unanimous vote] could place in jeopardy the continuation of the 10% rate of corporation tax, on which our whole ability to attract industrial investment depends. Such a step could not even be contemplated, unless effective measures had been taken under the heading of cohesion." See too *Thirty-Second report*, p. 84 where Irish concerns (post SEA) on harmonisation of taxation continue to be voiced. It is interesting to note that the change of Government (and thus of *Taoisigh*) did not give rise to change in emphasis, particularly in relation to a) taxation and b) the (im)balance between the centre and the peripheral regions.

⁶³ Previously Article 36 ECT, now Article 30 ECT.

⁶⁴ Now Article 95.4 ECT.

⁶⁵ Now Article 95.6 ECT.

⁶⁶ See *Fourth Joint Committee Report*, No. 34, para. 17.

⁶⁷ See *FitzGerald, op. cit., supra*, n. 23, p. 599 – the delicate matter is that of abortion and the perception that EC measures including internal market measures would lead to abortion being available in Ireland. See below "some practical examples."

⁶⁸ Now Article 95.4.

⁶⁹ *FitzGerald, op. cit., supra*, n. 23, p. 599.

⁷⁰ See text in *Conlan, op. cit., supra*, n. 58, p. 425. This provides that nothing in the TEU or in the ECTs or amending Acts would affect the application in Ireland of Article 40.3.3 of the *Bunreacht*. This article protects the right to life of the unborn and the equal right of the mother. It fell to be considered in AGvX 2 *CMLR* (1992), p. 277 involving a young rape victim. The High Court acknowledged a) supremacy of EC law: b) "service" included termination of pregnancy and c) invoked public policy exception to prevent travel to another jurisdic-

ration⁷¹ agreed some months after the TEU (and Protocol) had been signed. Two amendments to the Irish Constitution providing for the right to travel to receive a service⁷² and to provide and obtain information on services⁷³ lawfully available in another Member State serve to underline the sensitivity of the debate. While the internal market concept is directed at economic integration the response in member states does not necessarily restrict itself to a purely economic analysis – as the Irish response outlined shows.

Single European Act – in General

Mention in Ireland of the Single European Act, 1986 will usually call to mind the challenge mounted by Mr Raymond Crotty, to the ratification of the Treaty by the Irish Government.⁷⁴ Mr Crotty was of the view that the Act in itself was unconstitutional in that it did not come within the constitutional protection offered by the 1972 amendment to the Irish Constitution of 1937.⁷⁵ He was unsuccessful in the High Court but ultimately, albeit in a limited area, successful in the Supreme Court. The limited area successfully challenged as being outside the licence given by the 1972 amendment related to Title III of the Act. The provisions of this Title concerned European cooperation in the sphere of foreign policy. The domestic legislation⁷⁶ giving effect to the Single Act omitted Title III. Nonetheless the court was of the view that although the people conferred full freedom of action on the Government in matters of foreign policy, this did not include the right to abdicate that freedom. Thus any fetter on the freedom to formulate foreign policy – such as envisaged by Title III – required legitimacy from the people.⁷⁷ In the ensuing referendum there was a 70% vote in favour of ratification of the Single European Act, with a participation rate of 45% of the electorate.⁷⁸

Joint Committee Evaluation

The relevant Joint Committee⁷⁹ of the *Oireachtas* (Parliament) gave consideration in the first instance to the Commission's *White Paper on Completing the Internal*

tion to avail of termination of pregnancy lawfully available. The Supreme Court did not address the EC issue in its judgment in favour of the young victim thus avoiding potential conflict with the Constitution.

⁷¹ For text see *Conlan, op. cit., supra*, n. 58, pp. 440–441. This provides that the Protocol (TEU) will not limit travel to receive a service or provide/receive information on service: an amendment to the Protocol will be accommodated if there should be a further constitutional amendment in Ireland.

⁷² For text see *Conlan, op. cit., supra*, n. 58, p. 633: now article 40.3.3 of the Constitution.

⁷³ For text see *ibid.*, p. 634: now Article 40.3.3 of the Constitution.

⁷⁴ *Crotty v An Taoiseach* 2 CMLR (1987), p. 666.

⁷⁵ *Bunreacht na hÉireann* Article 29.4.3.

⁷⁶ *European Communities (Amendment) Act*, 1986.

⁷⁷ *Crotty v An Taoiseach* 2 CMLR (1987), pp. 666, 723.

⁷⁸ See *i.a.* F. Mc Mahon, F. Murphy: *European Community Law in Ireland* (1989), pp. 266–271. It is somewhat ironic to note the hopes of the Fourth Joint Committee for a full discussion in Parliament on the internal market – see *Report*, No. 29 (*Completing the Internal Market*) para. 88 and the reference to “one Member State (which) felt obliged to hold a referendum on the contents of the Act” – in the light of the subsequent need for Ireland to hold a referendum.

⁷⁹ For an outline of the reasons for the establishment of a Joint Committee on the Secondary Legislation of the European Communities, its terms of reference and *modus operandi* see *Robinson, op. cit., supra*, n. 20.

Market. A number of written submissions were received both from the public and private sector, with follow-up consultations. While the public sector contributions⁸⁰ were channelled through the Department of Industry and Commerce⁸¹ – the successor Department of which currently plays a co-ordinating role for all internal market measures – the Department of Health also made a written submission. On foot of this consultative process and of its deliberations the Joint Committee issued a report.⁸²

Some months later the same (Fourth) Joint Committee – having accepted that the SEA fell within its terms of reference, gave the Act itself consideration and issued a report.⁸³ Given the pace of drafting and adoption of secondary legislation by the institutions of the European Communities it is all but inevitable that the Joint Committee's scrutiny of EC secondary legislation will be *post* rather than *ante*. It has been acknowledged that the reports emanating from the Joint Committee play more of a (useful) reference role than one stimulating political debate.⁸⁴ The relevance of this is to note that national input into EC legislation – primary or secondary – cannot depend on lengthy Legislature timetables but will demand well prepared arguments presented at the negotiating table. How this is done and how it reflects a democratic input is a matter for each Member State.⁸⁵ The candidate countries will have to be in a position to adapt to this approach if their needs are to be reflected in measures which will ultimately affect them.

The Joint Committee acknowledged the benefits to be reaped by the removal of remaining barriers and the realisation of free movement, especially for an export ori-

For decision to establish Joint Committee on European Affairs to take over statutory scrutiny role see *Dáil Debates* Vol. 143 26.4.1995 available at www.oireachtas.ie. For criticism of the perceived inadequacy of national scrutiny of EC secondary legislation see speech of Attorney General, Michael McDowell speaking in personal capacity to the Lawyers' Group at the Institute of European Affairs, Dublin 18.6.01 available at www.Ireland.com. See too former AG John Rogers' criticism *i.a.* of parliamentary scrutiny (and Treaty of Nice) in *Irish Times*, 19.5.01, p. 8 also available at www.ireland.com. For response of Government and Opposition to perceived need for "ongoing and effective parliamentary scrutiny" (of EC secondary legislation) see *Dáil Debates*, 26.06.2001.

⁸⁰ There were certain differences in emphasis to be detected between the political and official responses. See Fourth Joint Committee, Report No. 29, *Completing the Internal Market* where a more cautious note is struck by those Government Departments responsible for the implementation of the internal market measures. See in particular paragraphs Nos. 32, 35, 43, 46, 48, 49, 52, 54, 60, 61 where specific difficulties in the areas of national and regional quotas under (then) article 115 EEC: veterinary and phytosanitary controls: mutual recognition of qualifications (general): foreign branches of financial institutions: insurance: transport: capital: company law and taxation including indirect taxation (VAT): foodstuffs, pharmaceuticals and control on illicit trade in drugs are envisaged.

⁸¹ Fourth Joint Committee Report No. 29, *Completing the Internal Market*, para. 2.

⁸² *Ibid.*

⁸³ Fourth Joint Committee Report No. 34, *The Single European Act*, 3.12.1986.

⁸⁴ *M c M a h o n, M u r p h y, op. cit., supra*, n. 78, para. 14.13. For a judicial view on the role of the *Oireachtas* in the implementation of EC legislation (in Ireland) see *Meagher v Minister for Agriculture and Food* [1994] ILRM 1. The High Court found it unconstitutional that a Minister should amend an existing statute (to comply with an EC directive) by devolved legislation. This was reversed by the Supreme Court which *i.a.* examined the 1972 constitutional amendment and the meaning of "necessitated by obligations of membership" in the context of transposing directives. One of the judges described the role of the *Oireachtas* as "sterile" in the light of the "obligations of membership" under now article 249 ECT.

⁸⁵ See *M c D o w e l l, op. cit., supra*, n. 79 available at www.ireland.com for some discussion on the democratic aspect of national scrutiny of EC legislation.

entated country like Ireland.⁸⁶ The fragmentation of the market was seen as one of the main obstacles to economic growth in Europe and of course the internal market would remedy this. At the same time, worries were expressed about Ireland's peripherality and the impact of stiffer competition on one of the weaker and less developed Member States. This forum also articulated the need for a balance to be struck, namely for the inclusion of economic and social cohesion elements within the Treaty. The Committee urged the Government to remind the other Member States of the terms of the special Protocol attached to the Treaty of Accession⁸⁷ which were seen as still relevant. This Protocol linked the objectives of the EEC to the policy of industrialisation being undertaken by the Irish Government, namely to raise the standard of living and to reduce regional differences.

Given the timeframe in which this Committee scrutiny was taking place⁸⁸ one must question the relevance of this urging. Nonetheless it does serve to show the importance of cogently arguing the individual case and in seeking support among the Member States. The importance of Protocol No. 30 for the development of the Irish economy cannot be overstated. The protection it offered for the Irish policy of incentives to attract mobile investment has undoubtedly contributed to the current state of the economy. Whether later accessions can avail of similar provisions is for those candidate countries to explore.

Implementation of Internal Market Approximating Measures

It would not be practicable, in the light of the length constraints available to attempt detailed examination of each and every internal market approximating measure implemented in Ireland. However, even without embarking on a detailed examination there are general observations which can be made.

Transposition into Domestic Law

While the relevant Government Department (depending on the subject matter) is involved in the negotiations in the working groups, leading to the drafting of internal market approximating measures, there is one Government Department responsible for co-ordinating the national position on internal market issues. Each Department is responsible within its own remit⁸⁹ with the Department of Enterprise, Trade and Em-

⁸⁶ "For a country like Ireland that exports 66% of the products of its manufacturing industry – 80% of that to the European Community – the benefits of the freeing of trade are obvious." Report No. 34, para. 88. "From Ireland's point of view the implications for industry, including the financial services sector, are clear. Access to a market of 320m people, without the present obstacles, should provide an opportunity to increase trade significantly." *Fourth Joint Committee Report* No. 34, para. 89.

⁸⁷ For text of the *Treaty of Accession and Protocol* No. 30, see Conlan, *op. cit.*, *supra*, n. 58, pp. 528, 610–611.

⁸⁸ Report No. 29 is dated 4th June 1986 and Report No. 34 is dated 3rd December 1986. The first ratification of the SEA took place on 13th June 1986.

⁸⁹ Minister for Industry and Commerce (McCreevy) – "As Minister in charge of the internal market, it is the responsibility of my Department to pursue the implementation of (these regulations) by other Departments.

ployment⁹⁰ playing the co-ordinating role in view of the fact that the Internal Market, Consumer Affairs and Tourism Council is the decision-making forum for internal market measures.

There is no evidence discernible to suggest that Ireland pursues any particular strategic approach in its choice of measures transposing internal market measures into Irish Law.⁹¹ The acceptance of the supremacy of EC law ensures that transposition follows as required.⁹² This is not to say that there have not been delays or difficulties.⁹³ Differing reasons for delays have been offered. Some commentators have suggested that the sheer workload – not least the increased regulation in the wake of the SEA and the internal market programme – coupled with national budgetary difficulties resulting in recruitment cutbacks in the early 1990s had a knock-on effect on the level of timely transposition – of internal market measures.⁹⁴ Less objective commentators have suggested that delays have arisen as a result of complexity of subject matter and the time taken for the Parliamentary Draftsman to produce the required measure, or even low priority *vis-à-vis* other tasks.⁹⁵ A further complicating factor which (briefly intervened) was the High Court rejection of the common practice of transposing EC directives by means of devolved legislation. The use of Statutory Instruments when amending existing legislation in order to transpose a Directive was held to be unconstitutional. This was reversed by the Supreme Court.⁹⁶ Had the High Court judgment prevailed, the practical impact would have been (even more) considerable congestion in the legislative programme and all that this entails, arising from the need to transpose EC Directives by means of statutes.

As a general rule, implementation of EC legislation in Ireland takes a number of routes.⁹⁷ Directly applicable measures enter automatically. Those requiring national transposition have been introduced in three ways: by means of an Act of Parliament,

... it is the responsibility of each individual Department to put in train the regulations relating to its specific area of responsibility. I am responsible for other operations of the Single Market and must report thereon to the Government, but thereafter each individual Minister has responsibility." See *Dáil Debates*, Vol. 429, 8.04.1993 available at www.oireachtas.ie

⁹⁰ Formerly the Department of Industry and Commerce (at the time of the SEA).

⁹¹ I am grateful to Mr Michael Green of the Internal Market Unit of the Department of Enterprise, Trade and Employment for his assistance and insightful comments

⁹² See *i.a. Meagher v Minister for Agriculture and Food ILRM* (1994).

⁹³ See European Commission – Commission Staff Working Paper http://europa.eu.int/comm/internal_market/Internal_Market_Scoreboard_May_2001_-_No._8. For reference to Ireland's performance see p. 1: "marginal improvement"; p. 3: Level of transposition; p. 6: "(Ireland) should urgently step up efforts"; p. 7: Delayed transposition of recent directives; p. 8: "(Ireland) preventing completion in several areas"; pp. 9–10: Environmental directives not transposed as due, prior to May 2001: p. 11 Commission infringement proceedings – 119 at the end of March 2001; p. 12: Percentage of cases closed by 31.03.2001 – 37% (as percentage of cases opened 6.1998–2000).

⁹⁴ See B. Laffan: "Rapid Adaptation and Light Co-ordination," in: O'Donnell (ed.), *op. cit.*, *supra*, n. 21, pp. 144–145. R. O'Donnell: "The New Ireland in the New Europe," in: O'Donnell (ed.), *op. cit.*, *supra*, n. 21, p. 185.

⁹⁵ See exchanges on this topic between Co-ordinating Minister and Leader of Opposition (*Fine Gael*), in *Dáil Debates*, Vol. 429, 8.04.1993 available at www.oireachtas.ie.

⁹⁶ *Meagher v Minister for Agriculture and Food ILRM* (1994).

⁹⁷ See European Communities Acts, 1972, s. 3 and 1973 for appropriate mechanism. See McMahon, Murphy, *op. cit.*, *supra*, n. 78, paras. 14.9–14.11 for comment on this legislation.

devolved legislation (Statutory Instruments) or by an administrative measure. Introduction by an Act of Parliament ensures that the measure goes through the open (time-consuming) parliamentary scrutiny process.⁹⁸ Statutory Instruments, by their nature, do not attract debate or attention. Administrative measures can be very difficult to find.

Reviewing the implementation of EC measures in general, and the internal market measures⁹⁹ in particular, it is difficult to determine why one national transposing mechanism is chosen over another.¹⁰⁰ What is clear is that internal market measures are largely transposed into Irish law by the making of Statutory Instruments under section 3.2 of the European Communities Act, 1972. In addition, in some cases sections¹⁰¹ of Acts of Parliament are the transposing mechanism, in some instances, existing legislation – primary and secondary – has been notified (to the Commission) as conforming to the directives to be transposed. In addition, a considerable number of measures have been transposed by non-statutory¹⁰² means. These have been referred to as “Administrative Notices,” “Administrative Decisions,” “Administrative Measures,” “General Orders,” “Circulars.”¹⁰³

The issue of transposition of internal market legislation into national law continues to receive a considerable amount of attention at EU level. The Stockholm European Council highlighted the importance of full transposition of internal market directives and urged a target of 1.5% to be reached by no later than the 2002 Spring European Council meeting. The latest edition¹⁰⁴ of the European Commission’s Internal Market Scoreboard shows that only 3 Member States (Sweden, Denmark and Finland) currently meet this target. Ireland lies in joint 12th position with a non-transposition rate of 3.3%. The Commission has estimated that, at the current rate of improvement, it will take Ireland until 2006 to reach the 1.5% target, and this presupposes that all forthcoming directives will be transposed on time.

⁹⁸ See exchanges on the practicalities of in-depth (prior to adoption) scrutiny of EC measures, between Co-ordinating Minister and members of other parties in *Dáil Debates*, Vol. 429, 8.04.1993 available at www.oireachtas.ie. This exchange is particularly relevant when contrasted with the post Treaty of Nice rejection situation and the perceived need for greater parliamentary scrutiny of EC measures, see *i.a.* McDowell, Rogers, *supra*.

⁹⁹ See for example, *National Implementing Measures to give effect to the White Paper of the Commission on the completion of the internal market (situation at 30 April/31 October 1992)*, Commission of the European Communities (1992).

¹⁰⁰ There have been delays in implementing Internal Market Directives in a number of Member States (including Ireland): see *i.a.* http://europa.eu.int/comm/internal_market/en/update/score/score7.htm for details of Member States’ implementation of Internal Market Directives.

¹⁰¹ “Section” is the unit used in Irish statutes rather than “article.”

¹⁰² Ireland is not the only Member State to use non-statutory mechanisms in this way: in relation to the UK see *i.a.* *National Implementing Measures . . . , op. cit., supra*, n. 99, p. 398. At the time of writing (July 2001), of the relevant Departments’ plans for transposing the 85 Internal Market Directives which need to be transposed by Spring 2001, only in one case is transposition by administrative action envisaged – a Department of Health Directive dealing with medicinal products. I am indebted to Mr Michael Greene of the Single Market Unit for this helpful information.

¹⁰³ See *i.a.* *National Implementing Measures . . . , op. cit., supra*, n. 99, p. 81.

¹⁰⁴ European Commission – Commission Staff Working Paper http://europa.eu.int/comm/internal_market/Internal_Market_Scoreboard_May_2001 – No. 8.

Some Practical Examples of Internal Market Measures Specific to Ireland

Goods

A modest success was scored in relation to the selling of Irish whiskey on the island of Ireland. Whiskey is sold in a number of different sizes, including the 0.071 litre size, known as the "Baby Power."¹⁰⁵ Despite the adoption of a directive¹⁰⁶ providing that prepacked sparkling wines and spirits may be sold only in the volumes laid down in the directive, Ireland succeeded in obtaining an open-ended derogation to continue to sell this size (on the island of Ireland).¹⁰⁷

Services

A recurring theme during debates on EC membership has been the perception that free movement of services will result in abortion services being available. As we have seen above, during the negotiations leading up to the SEA, the then *Taoiseach*, cognisant of how liberalisation of the services sector might be presented, argued for extension of the grounds for the justified use of national restrictions even where harmonisation measures had been adopted.¹⁰⁸ These concerns regarding the perceived relationship between liberalisation of services and abortion were subsequently reflected in a Protocol¹⁰⁹ to the TEU and by it, to the ECTreaties. This Protocol, in turn, was followed¹¹⁰ by a Declaration¹¹¹ and two constitutional amendments.¹¹²

Capital

Although there was support for the principle of full capital liberalisation, there was also concern to ensure that the pace of liberalisation would not endanger the process of adjusting the Irish economy. For its part, the Commission recognised the need for a longer transitional period for a number of countries not in a position to liberalise immediately. The Government therefore sought – and was granted – an additional extension.¹¹³ It is interesting to note that one commentator holds that following on from the internal market exercise, one of the effects of membership has

¹⁰⁵ Power is one of the main brands of Irish whiskey. This term 'Baby Power' has taken on a generic role

¹⁰⁶ 88/316/EEC OJ L 143, 10.06.1988.

¹⁰⁷ *Thirty-Second Report*, para. 1.20.

¹⁰⁸ FitzGerald, *op. cit. supra*, n. 23, p. 599 refers to national restrictions permitted (under then article 36, now 30 ECT) and goes on to say that "(I knew) that extreme right-wing opponents of abortion in Ireland (as distinct from the mass of the population who were opposed to abortion in a rational and measured way) were liable to raise a scare about any European commitment that they could present as in any way endangering our right to legislate against abortion."

¹⁰⁹ Protocol No. 17 – for text see Conlan, *op. cit., supra*, n. 58, p. 425. The heading "Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities" does not convey the contents in a clear fashion.

¹¹⁰ The TEU (including Protocols) had been signed in Maastricht on 7th February 1992.

¹¹¹ Declaration of 1 May 1992, adopted in Guimares (Portugal) – for text see Conlan, *op. cit., supra*, n. 58, p. 440.

¹¹² See above

¹¹³ *Thirty-First Report* para 11.17. See *National Implementing Measures*, *op. cit., supra*, n. 99, p. 405.

been the fact that capital mobility has been enforced in response to the integration of the goods and services markets.¹¹⁴

Persons

The special travel arrangements between Ireland and the UK have been given EC Treaty recognition.¹¹⁵ Removal of barriers to the free movement of persons as required by the internal market provisions are thereby delayed. This agreed delay has arisen because of a number of factors (apart from the special travel arrangements referred to). A former Minister for Justice described the perceived needs against which protection was sought.¹¹⁶ Ireland has experienced an unprecedented increase in asylum seekers – and migrant workers.¹¹⁷ Ireland has a history of emigration – although interestingly this did not influence the Irish approach to EC membership.¹¹⁸ This changed role has not necessarily been an easy one for some sections of the Irish population.¹¹⁹ This new phenomenon has undoubtedly been influenced by the improved economy in Ireland – facilitated by EC membership including the internal market.

Persons (establishment)

One internal market area of considerable concern to Ireland was the insurance industry. This concern was not confined to the competitiveness of the sector in an eventual single market but related to a rescue bid mounted by the Government for one particular insurance company.¹²⁰ This rescue bid had been mounted because of the impact a failed insurance company would have had. A unilateral Declaration,¹²¹ drawing attention to the sensitivity of the insurance sector in Ireland and hoping to be able to rely on a sympathetic was noted by the IGC. This was in the context of Ireland confirming its agreement to the application of QMV to secondary legislation providing for the “taking up and pursuing” of activities as self-employed.

On-going Concerns

The importance of trade (goods and services – and the accompanying mobility of capital) for a small open economy like Ireland cannot be exaggerated. Although su-

¹¹⁴ McAleese, *op. cit.*, *supra*, n. 28, p. 97.

¹¹⁵ See Protocol on the application of certain aspects of article 7A of the Treaty establishing the EC to the UK and to Ireland and Protocol on the position of the UK and Ireland (annexed to the TEU and ECT) by the Amsterdam Treaty – see OJ C 340/97 and 99 of 10.11.1997.

¹¹⁶ *Dáil Debates*, Vol. 432, 17.06.1993 (Relaxation of Passport Controls) available at www.oireachtas.ie.

¹¹⁷ See *Irish Times* coverage of the Irish response to asylum seekers and migrant workers – particularly the lack of an established policy for both categories available at www.ireland.com.

¹¹⁸ For an in-depth study of the role of free movement of workers in Ireland's accession to the EC see P. Conlan: *Die Bedeutung der Freizügigkeit für Irland: Fallstudie Irland-Bundesrepublik Deutschland* (1991).

¹¹⁹ See *Irish Times* coverage of the Irish response to asylum seekers and migrant workers – particularly the lack of an established policy for both categories available at www.ireland.com.

¹²⁰ See FitzGerald, *op. cit.*, *supra*, n. 23, pp. 598–599.

¹²¹ Declaration 5. *Declaration by the Government of Ireland on Article 57(2) of the EEC Treaty* (now article 47.2 EC Treaty) for text see Conlan, *op. cit.*, *supra*, n. 58, p. 465.

perfidiously of more domestic interest, the continuing emphasis on the perceived relationship between the liberalisation of services and the availability of abortion does have a wider implication. This is because the argument continues to intrude into the general debate (in Ireland) on European integration and was undoubtedly one of the factors in the rejection of the Treaty of Nice by the Irish electorate.¹²²

Fiscal barriers were among those identified by the Commission's 1985 *White Paper*. During Accession negotiations Ireland was able to secure a favourable response to the need for attracting mobile investment to Ireland¹²³ to aid industrialisation. The ensuing success of this policy has attracted criticism.¹²⁴ In the event taxes have had to be modified – direct and indirect.¹²⁵ However, as the *Oireachtas* Debates have shown, concern for national retention of competence for taxation has always been a matter of key concern to Ireland. It remains a matter of key concern to this day. The Nice European Council saw a willingness to agree to relinquish the automatic right to a Commissioner while retaining national competence for taxation.¹²⁶ There has been the suggestion that ongoing EC perceived intrusion into this area might be a step too far.¹²⁷

Conclusion

The completion (*sic*) of the internal market has been described as “perhaps the most significant aspect of Ireland's first 25 years in the EC.”¹²⁸ Specifically it has been seen as central to the recovery and reorientation of the Irish economy and as influencing the relationship between the state and the market – including the area of state aids.¹²⁹ It will be remembered that a special Protocol¹³⁰ to the Treaty of Accession facilitated the role of the state in attracting mobile investment to Ireland and the ensuing mobile investment has interacted with the internal market measures and the development of the Irish economy.

As a general approach, the Irish “system” has been described as largely reactive and agenda driven. A key tactic seems to be to concentrate on seeking to influence proposals as they make their way through the drafting and decision-making stages.¹³¹ This means not just the Commission¹³² drafting role but also building liaisons with

¹²² See *Irish Times* for May/June 2001 available at www.ireland.com for an indication of the debate.

¹²³ Protocol 30 referred to *supra*.

¹²⁴ Laffan, *op. cit.*, *supra*, n. 94, pp. 146–147.

¹²⁵ McAleese, *op. cit.*, *supra*, n. 27, p. 92. S. Cromien: “Serving in New Spheres,” in: O'Donnell, *op. cit.*, *supra*, n. 21, p. 149.

¹²⁶ Government of Ireland: *Treaty of Nice White Paper*, paras. 2.26/2.27 (dealing with QMV extension) (2001). See too P. Conlan: *Submission on Treaty of Nice to Joint Oireachtas Committee on European Affairs*, April 2001 (appended to Report – forthcoming).

¹²⁷ M. McDowell, *op. cit.*, *supra*, n. 79.

¹²⁸ R. O'Donnell: “The New Ireland in the New Europe,” p. 180, in: O'Donnell, *op. cit.*, *supra*, n. 21.

¹²⁹ O'Donnell, *op. cit.*, *supra*, n. 23, pp. 182–183.

¹³⁰ Protocol No. 30 attached to the Treaty of Accession – see Conlan, *op. cit.*, *supra*, n. 58, p. 610.

¹³¹ Laffan, *op. cit.*, *supra*, n. 94, p. 135.

¹³² It is a measure of the concern to retain national competence for taxation that the Irish Government was prepared to agree to the loss of a Commissioner as a *quid pro quo* during the Nice European Council (December 2000) – see Conlan, *op. cit.*, *supra*, n. 126. See too *Treaty of Nice White Paper*, pp. 182–183.

fellow Member States. As we have seen¹³³ this tactic was successfully adopted during the drafting of the SEA. This relates not just to the content of the internal market measures and the application of national restrictive measures (where justified), but also the *quid pro quo* – in this case – the introduction of economic and social cohesion to offset the negative aspects of economic integration.

If lessons were to be drawn from the Irish experience on the implementation of the internal market it would be to emphasise the value of being involved in the decision-making process from the outset and in building liaisons with other Member States. As the candidate countries do not enjoy this opportunity to mould the substantive measures of the *acquis communautaire* they will assume, they should lay emphasis on achieving some corresponding balance in the treaties of accession to mitigate the burdens this will impose.

There is also a view that Community membership does not lessen the need for a national ability to identify solutions to national problems even where those solutions require Community policies and action.¹³⁴ As with EU membership in total, the internal market project is a balance of difficulties and benefits. To minimise the difficulties and to maximise the benefits requires:

- A clear national strategy for European integration which will provide a guide to external negotiations and domestic decision-making,
- Consensus among the social partners, both at national and enterprise level, to ensure a swift and flexible response most conducive to the objective of fuller employment, higher living standards and a better social framework,¹³⁵
- A well-trained and numerically adequate administration and strategically aware body politic

In brief, the Irish experience of the internal market shows that strategic planning on relevant issues and active involvement at all levels will facilitate maximising the benefits offered by European integration.

¹³³ See Fitz Gerald, *op. cit.*, *supra*, n. 23, pp. 598–600.

¹³⁴ O'Donnell, *op. cit.*, *supra*, n. 21, p. 180.

¹³⁵ NESC 88, pp. 556–557.

BOOK REVIEWS

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CEZARY MIK, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, C.H.Beck Warszawa 2000, Vol. 1, 831 pp.

The book by Prof. Mik (Warszawa/Toruń), the most outstanding Polish specialist in the European law, is the first genuine Polish manual of that kind. The first part of the system of European law is devoted to the institutional issues. The Author has discussed in 17 chapters theoretical aspects of integration, history, institutional issues, relationship between European law and domestic legal systems of the Member States, fundamental principles and sources of the Community legal order, implementation and control of application, and – finally – some issues dealing with the accession of Poland to the EU. Of course it is hardly possible to present all aspects of the book, we shall mention just several remarks. First, although the title refers to the Community law, the Author presents also the problems of the European Union. Such an approach seems to be a little surprising, taking into account the precision of the language usually used by Prof. Mik. It is unavoidable to discuss the relations between the Union and Communities, both from substantive and institutional point of view. However, under such circumstances the readers could expect a more detailed presentation of the 2nd and 3rd pillars of the Union law. Even if we understand the reasons of the current redaction of the book (the developments in these domains is so extensive that it would require another volume of the same dimensions), the presentation of the said problems is a little superfluous. Second, we are impressed by the rich documentation, jurisprudence of the ECJ and legal writing referred to by the Author. Although certainly not complete (this would be simply impossible taking into account the extensive volume of the doctrine, even in Polish; there are also some gaps in the judicial decisions presented, although of marginal importance), it is fully representative. Third, the Author has presented not only facts, legal regulations and doctrinal opinions on nearly all the issues of EC law, but he also used the opportunity to present his own opinions and solutions on disputable points, proving his high quality as lawyer. Fourth, the work devoted to the preparing of the book has been immense. Notwithstanding the dimensions, the Author has succeeded in presenting his argument with logic and precision, what is not necessarily true in respect of his other writings (it sometimes happen that the richness of details makes the reasoning). It does not mean, however, that the reading of the book is easy; but it is not as difficult as one could expect.

The Publisher, Polish Branch of the renowned German C.H.Beck, continues its policy of editing books presenting the whole scope of respective disciplines of law. The presented book constitutes an important element of this policy and it can be recommended to everyone interested in the European Integration.

Władysław Czapliński

WILHELM KNELANGEN, *Das Politikfeld innere Sicherheit im Integrationsprozess*, Leske & Budrich, Opladen 2001, 382 pp.

The Third Pillar of the European Union is certainly the most rapidly developing field of activity. From the perspective of candidate States it is also of the utmost importance, as an adherence of these States to measures introduced by the Union in the domain of justice and home affairs will probably be the decisive factor in evaluating the readiness to join the Union. The number of publications dealing with the cooperation JHA is still growing but the general books concerning the issue are still not very numerous, in particular in Poland. Every current source of information is therefore of utmost interest. We welcome the book by Dr. Knelangen as the one presenting the development of cooperation. The Author has decided to adopt the chronological approach, concentrating upon new elements brought into this cooperation by consecutive European treaties. So the publication is probably very useful for historians and political analysts then for lawyers. After presenting a theoretical introduction presenting different aspects of integration and feedback between the theory of integration and the JHA cooperation, the Author has discussed the new dimensions of the cooperation introduced by the treaties of Schengen, Maastricht, and Amsterdam. However, there are two issues which have been approached particularly: the police cooperation with special interest for Europol, and the development of the Area of Freedom, Security and Law. Finally, in the framework of the latter the problems of combating of the organised criminality and different plans leading to this target has been largely presented. The reviewed book is a valuable source of information also because of the methodology used by the Author. He not only collected nearly the whole available writing, in particular in German (interestingly, there are some gaps as to the English publications including the model work by S. Peers), but also used the interviews of different officials involved in the cooperation JHA by different bodies, mostly parliamentary. This approach has allowed the Author to show all mechanisms leading to the establishing of the intensive and wide cooperation, but also to show discrepancies and tensions both on national (German) and international levels. There is an important conflict between the growing need for international cooperation in the eliminating of transboundary criminality (especially dangerous in Germany) and the need to protect and guarantee fundamental rights of citizens. Let us finally add that the book contains a lot of interesting statistical materials and schemes enabling the reader to move easier in the complicated area of measures ensuring freedom, security and law. We could perhaps expect more attention given to cooperation between the EU and candidate States, both on multilateral and bilateral level. The role of German-Polish cooperation is model for the future developments.

Władysław Czapliński

CH. PITSCHAS, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, Duncker & Humblot, Berlin 2001, 302 pp.

The responsibility of international organizations for wrongful acts has recently become extremely acute and actual in connection with the actions of NATO against Yugoslavia. Claims brought by the Federal Republic of Yugoslavia against the member States of this organization, as well as claims by a group of Yugoslav nationals against the NATO States presented by the European Court of Human Rights caused a necessity to reformulate (or at least rethink) the relationship between the organization and its member states from the point of view of the responsibility. The Author has approached the issue in two chapters: theory of responsibility of international organizations under international law, and specific problems connected with the responsibility of the EC and its member states. The fundamental reasoning is – correctly – that the principles of responsibility of States for internationally wrongful acts should be applied to international organizations, taking into account differences between the two categories of international subjects (primarily, the composition of organs of the organization, both composed of international servants and representatives of the Member States; furthermore, the accountability of the wrongful acts *ultra vires*, and delicts against the treatment of agents of the organization). We could consider only whether the non-recognition of the organization by third states can be treated as a basis of the international responsibility of the member states; similar remarks relates to the local remedies rule. In our opinion, the responsibility of the member states is acceptable exclusively in cases of *ultra-vires* activities of the organization, in accordance with the principle of functional/derivative personality of the organization. On the other hand, we could probably agree that the liability of the Member States for acts conform to international law is exclusively possible on the basis of treaties, and not of customary law.

The second part of the book is devoted to the issues of international legal personality of the EC, and of its international responsibility. It is interesting that the Author discusses three factors decisive for the international legal personality of the EC: treaty-making power, competence to impose sanctions, and power to adopt different protective measures in the field of common commercial policy. This approach is extremely traditional, even if he presents the recent developments in this field. The third of these factors is only characteristic for the EC because of the Community's exclusive competence. The Author is inclined to accept the responsibility of the EC for acts committed by its institutions acting within their competence. It is particularly visible in the case of mixed agreements which contain special clauses dividing powers and responsibilities of the EC and member states. On the other hand, we agree with the opinion that the member states can be responsible for internationally illegal sanctions imposed by the Council of the EU in the framework of the CFSP. This is correct that such a decision is equivocal to the agreement concluded by the States, and as long as the European Union is not granted with the generally recognized and opposable to all the members of the international community international personality (what is another topic worth discussion in the light of the treaty-making power of the Union in the framework of the 2nd and 3rd pillars).

The monograph is a typical example of German Ph.D. dissertation. It is very solid as to the identification of disputable questions, contains a detailed discussion of specific issues, and proposes solutions of problems by the author. Even if not totally new in argument, it is very valuable in classifying law and legal writing. Last but not least, a complete bibliography will be extremely useful as source of information and reference material.

Władysław Czapliński

N.H.B. JOERGENSEN, *The Responsibility of States for International Crimes*, Oxford University Press 2001.

Frequent violations of international legal norms of fundamental importance for the international community committed in recent years reopened a discussion on the consequences of these acts. An interest of legal writing for the topic corresponded with the works of the ILC on the responsibility of States for internationally wrongful acts, completed in summer 2001. The monograph by Ms. Joergensen is devoted to the responsibility of States for international crimes. The topic itself is not actual any more, as the ILC has decided to replace a notion of international crimes by "grave breaches of peremptory norms," renewing the discussion on the position of *jus cogens* in international law. We are therefore in a privileged position, as we can evaluate the proposals by Ms. Joergensen in the light of the 2001 Draft Articles which do not confirm at least some important opinions presented in her study. Nonetheless, the book deserves attention. The Authoress has attempted to discuss the origins of criminal responsibility in international law starting with the state practice after the 1st World War, and Nuremberg and Tokyo trials. She has described the work of the ILC leading to the introducing of Draft Article 19 by R. Ago. Then she has discussed the issue of the responsibility of corporations under criminal law – the question which is only indirectly relevant to the topic (in fact there is some international practice in this field left apart: let us refer e.g. to the peace treaty with Italy of 1947, interdicting a special treatment to the parastatal organizations including the fascist party). Part III of the book is devoted to the possible criteria of identifying state crimes. Although the study seems to focus on *jus cogens* and obligations *erga omnes* which correspond with the interest of the international community in the observance of these categories of norms (even if their identification is unclear – neither the cases referred to by Ms. Joergensen nor the commentary by the ILC to Draft Articles 40 and 41 on State Responsibility in their current version are convincing in this respect), some other criteria like seriousness of the violation, conscience of mankind, considerations of humanity, possible interactions between obligations in the field of maintaining peace and security, and – finally – relationship between responsibility for state crimes and criminal responsibility of individuals, have been discussed. It seems to us that in particular the last mentioned issue might be very useful in evaluating certain violations of international law as serious crimes, as criminal judges will probably be more inclined to condemn certain activities than politicians. Let us refer here to the discussion on the qualification of the crime of aggression in the framework of the preparatory works on the International Criminal Court. We agree in principle that the tests proposed do not resolve difficulties. The relationship between *jus cogens*, obligations *erga omnes* and international crimes remains unclear; although one could suggest that it would be logical if we transfer the notion of the obligations *erga omnes* into procedural law, taking into account the criterion of the subjects entitled to bring international claims in connection with the violation of norms. We also agree that the hierarchy of norms under contemporary international law is difficult to ascertain; however, the possibility of imposing punitive damages upon the perpetrator of violations of the peremptory norms would be extremely useful in defining this hierarchy. In fact, there are some examples of deciding on this kind of consequences of illegal acts in the practice of international courts and arbitral tribunals. Similar can be correct in respect to reactions by the international community to certain categories of violations of international law. The conclusions of the book are not very optimistic – although there is a certain trend within the international community to introduce an element of morality into international law, and international crimes would be a very good opportunity of doing so., the states are not ready to accept the concept of

the crimes and to accept more severe and far reaching consequences of this kind of violations. Let us finally stress that the study shows certain imprecision and gaps: we would suggest more detailed discussion of the consequences of international crimes (or serious breaches of fundamental obligations, as the ILC wishes) including non-recognition, as well as e.g. some reformulations (Russia is identical with the Soviet Union, and not its successor, etc.).

Władysław Czapliński

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