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the Acquis Communautaire

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Abstract

The aim of this article is to study the concept of the acquis communautaire in the domain of EU external relations. It is argued that the acquis communautaire varies according to the specific aims of its internal and external applications. The main objective of the acquis communautaire in its internal dimension is to enable the consistent development of the EU while preserving EC/EU patrimony by Member States. The objective of the acquis communautaire application in its external dimension is to push third countries to the forefront of the acquired level of economic, political and legal cooperation achieved by the EU. It is argued that the acquis communautaire is applied consistently in its external dimension, but mirrors the specific objectives of each new application. In order to comprehend the full scope of the application of the acquis communautaire, one must take into consideration both the general objectives of EU external policy towards third countries

Keywords

Legal issues:
Acquis communautaire – European law – fundamental/human rights - harmonisation – international agreements

External relations:
EU-East-Central Europe – security/external

Treaty reform:
Enlargement – founding Treaties

The External Dimension of the Acquis Communautaire[*]

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Introduction

Sooner or later, every novice in the field of European integration encounters the puzzle that is the "acquis communautaire". Indeed, this elegant-sounding French phrase has become common parlance, without anyone appearing to know its exact definition and scope.

Unquestionably, "acquis communautaire" has become a seminal concept in the process of European integration, especially at a time of global EU constitutional reform and enlargement towards the East. The successful outcome of these processes requires a homogeneous understanding of the concept of "acquis communautaire". For instance, the Laeken Declaration on the Future of the European Union acknowledges the importance of the acquis communautaire in revising the delimitation of competences between the EU and its Member States.[1] The EU Constitutional Treaty emphasises the need for the "continuity of the Community acquis".[2] Furthermore, a uniform understanding of the acquis communautaire is imperative for the forthcoming simplification and codification of EU legislation.[3]

[*] I would like to thank Prof. Marise Cremona for her assistance and many useful comments on the draft of this paper. However, all mistakes and omissions are solely of mine.
[1] Laeken Declaration, SN 273/01 (15 December 2001).
[2] Treaty establishing the Constitution for Europe (O.J. 2004 C310).
[3] Commission Communication "Updating and simplifying the Community acquis" (COM(2003) 71 final).

Nevertheless, these tasks are not easy to achieve, since the nature and scope of the acquis communautaire are not yet fixed. One can easily question the uniformity of the manner in which the acquis communautaire is applied throughout the EU and abroad. This situation is aggravated by the fact that the scope of the acquis communautaire is not identical for all EU Member States and third countries. In the former case, the acquis communautaire appears to be an *ex post* label mirroring EU achievements. Consequently, EU Member States are bound to follow and accept the specific legal heritage to fulfill their membership commitments. In the latter case, the acquis communautaire has more of a constitutive/dynamic nature. Candidate countries are expected to adhere to the acquis communautaire which is not yet binding for the present EU Member States. Besides, the scope of the acquis communautaire within an EC/EU external agreement[4] can be revisited by either of the parties at any time to reflect a change in bilateral relations. Subsequently, one may argue that the EU acquis within the EU external agreements is a dynamic category that directly depends not only on the objectives of these agreements, but on the general political climate between the parties as well.

The Member States and certain third countries thus face the reality of being bound by a category which is neither precise in nature nor scope. Undeniably, candidate country negotiators ought to possess negotiating skills when discussing the acquis communautaire so that effective bargaining power is maintained during accession talks. Much could be gained by the EU and candidate countries, if both sides competently applied elements of the acquis communautaire, an event which could potentially see the applicant country being awarded with a temporary or even permanent exemption. Conversely, much time would be wasted if the parties argued over elements of the "fundamental acquis" which need to be accepted without question by candidate countries. Furthermore, third countries willing to enhance their partnership with the EU need to possess a clear idea about the nature and scope of the acquis communautaire in order to pursue the "voluntary harmonisation" of their national legislation to EU law standards, and thereby to enhance their level of co-operation with the EU.

This is why the conceptual focus in this article is placed upon the consideration of the nature and an analysis of the scope of the acquis communautaire as it is applied in relations with third countries either through their accession process or through their bilateral agreements with the EU.

The main hypothesis put forward in this paper supports the proposition that the acquis communautaire is a concept of variable nature. It is argued that the nature and scope of the acquis communautaire varies depending on the aim of its application. In this respect, we suggest that two dimensions in the application of the acquis communautaire be identified. The first dimension is the internal application of the acquis communautaire by the present Member States. This dimension is brought into existence by the acceptance of the acquis communautaire in the Treaty on European Union (TEU) as an untouchable category 'to maintain in full the acquis communautaire

[4] Hereinafter, in a general context we refer to "EU external agreements". However, in specific contexts we refer to "EC external agreements" to emphasise where the EC has concluded an agreement with a third country, either within its exclusive or its shared competence. On the EC competence to conclude external agreements with third countries see D. O'Keeffe, "Exclusive, concurrent and shared competence' in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet & Maxwell 2000), chap 12 and A. Rosas, "The European Union and Mixed Agreements" in the same book.

and build on it'.[5] The second dimension is the external application of the acquis communautaire in agreements with the candidate countries or other third countries.

We believe that the scope of the acquis communautaire in its internal and external dimension is not identical insofar as the acquis communautaire varies according to the specific aims and objectives of each application. That is to say, the aim of the acquis communautaire in its internal dimension is to enable the consistent development of the EU while preserving EC/EU legal patrimony. Conversely, the aim of the acquis communautaire application in its external dimension is twofold: 1) to achieve specific objectives of the EU external policy towards third countries (mainly through EU external agreements); 2) to promote economic, political and legal reforms in third countries which are interested in close cooperation with the EU.

The first part of this article focuses on the internal dimension of the acquis communautaire and scrutinises its major elements. The second part of this article analyses the application of the acquis communautaire in its external dimension wherein the dynamic nature of the acquis communautaire in the process of enlargement is emphasised. The final part of the article briefly examines further implications of the acquis communautaire in EU external agreements. In conclusion, we endeavour to highlight the major characteristics of the external dimension of the acquis communautaire and to speculate on the logic behind its further application in the realm of EU external relations.

The internal dimension of the acquis communautaire

Article 2(4) TEU and Article 3(1) TEU incorporate the original supranational Community patrimony into the three-pillar EU structure, thereby introducing the internal dimension of the acquis communautaire. The evolutionary character of the EU is made explicit in the TEU's objective *"to maintain in full* the acquis communautaire and *build on it*" [emphasis added], which, in perspective, foresees the potential "communitarisation" of the two intergovernmental EU pillars and the subsequent creation of a single, hierarchically coherent EU legal order as envisaged in the EU Constitutional Treaty.

We propose to start from the point that the "acquis communautaire" in its internal dimension is applicable within the three-pillar EC/EU structure among the present Member States. Therefore, the acquis communautaire can be seen in its widest scope as a patrimony of binding and non-binding rules, principles and practices that distinguish the EC supranational and the EU intergovernmental legal order(s) from other international and national legal systems. Furthermore, the acquis communautaire can be regarded as an interdisciplinary category which embraces a shared common legal, political, economic and historical heritage of all Member States. Despite the fact that the acquis communautaire was engendered by the Member States themselves, in the end, it has become an independent category, which needs to be shared by all the Member States. To ensure that the Member States perform their duty of loyal cooperation, the EU institutions have undertaken the obligation to preserve the acquis communautaire and to guarantee its unity and coherence within the EU and beyond.

Elements of the acquis communautaire in its internal dimension produce, or intend to produce, a legal effect. Firstly, the "acquis communautaire" is based on the "fundamental acquis", i.e. the sum of objectives, policies, general principles and rules,

[5] Article 2 TEU (O.J. 2002 C 325).

which constitute the core of the supranational EC legal order. These elements comprise the skeleton of the whole "acquis communautaire" and therefore cannot be altered or repealed without destroying the unique nature of the EC. We suggest associating the "fundamental acquis" with the EC legal order, which is a body of laws and practices comprising the transferred sovereign rights of the Member States. The norms which form EC supranational competence are accumulated in the EC founding Treaties and extensive European Court of Justice (ECJ) and Court of First Instance (CFI) case law.[6] Thus, the "fundamental acquis" enshrines the achievements of the EC legal order in a unique framework to be preserved at all costs and which consequently distinguishes the supranational EC legal order from the legal order of other international organisations. If this were not the case, the supranational nature of the EC legal order would run the risk of disappearing.[7] Rules that regulate the two remaining pillars of the EU belong to the acquis communautaire, but owing to their inter-governmental nature they cannot be regarded as part of the "fundamental acquis". The concept of the "fundamental acquis" is inherent to the new EU legal order envisaged in the EU Constitutional Treaty. The Preamble of the EU Constitutional Treaty states that the new EU is "determined to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on the European Union, by ensuring the continuity of the Community *acquis*". In other words it implies that the "post-EU Constitution acquis" will be built on the "fundamental acquis" of the EC supranational pillar. However, the EU Constitutional Treaty significantly enhances the scope of the "fundamental acquis" by erecting a coherent edifice of common principles, objectives, and values on which the EU is based[8] and establishes a new identity for the EU, which "will be promoted to its citizens and to the outside world".[9] Most of the elements of the "fundamental acquis" enshrined in the EC Treaty and the ECJ/CFI case law have been transposed into the EU Constitutional Treaty.[10]

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[6] Founding treaties comprise: 1) the treaties establishing each of the three Communities (EC Treaty, ECSC Treaty, Euratom Treaty); 2) the treaties that amend and supplement them (Convention on Certain Institutions Common to the European Communities, Merger Treaty, First Budgetary Treaty, Second Budgetary Treaty, Single European Act, TEU, Treaty of Amsterdam); 3) Acts of Accession of the new Member States. Annexes and Protocols form an integral part of the founding Treaties. The status of joint declarations is not yet clear since some of them are purely political whereas others have a legal effect. Though all three Communities are independent they could be perceived as forming a "functional unity" and therefore they constitute the single legal system. T. Hartley refers to them as 'constitutive treaties' and considers the EEA Agreement as belonging to the founding treaties. T. C. Hartley, *The Foundations of European Community Law* (4th Ed. Oxford University Press 1998), at 91.

[7] In Wyatt's opinion, the following facts highlight the unique nature of the EC legal order: 1) the EC Treaty has modified the legal position of individuals in their national legal systems, 2) EC law is supreme over Member State laws, 3) the courts of Member States are under a duty to give direct effect to clearly defined and unconditional obligations in the EC Treaty, 4) the techniques of interpretation by the ECJ differ from current international practice, *inter alia* the ECJ is inclined to apply the teleological interpretation of EC laws. D. Wyatt, "New Legal Order or Old?" 7 ELRev 147-148 (1982).

[8] Articles I-2 and I-3 EU Constitution.

[9] M. Cremona, "The Draft Constitutional Treaty: External Relations and External Action" 40 CMLRev. 1347-1366 (2003) at 1348.

10 For example, the following rules have appeared as a result in the context of the transfer of sovereign rights of the Member States to the supranational EC legal order and constitute the "fundamental acquis" which has been transposed to the EU Constitutional Treaty: a) the EC shall act within the limits of the powers conferred by the EC Treaty and of the objectives assigned (Article 5 EC, Article I-11(2) of the EU Constitutional Treaty – principle of conferral); b) Member States shall take all appropriate measures to ensure the fulfilment of the obligations arising from the EC Treaty and resulting from action taken by the institutions of the EC (Article 10 EC, Article I-5(2) of the EU Constitutional Treaty – principle of sincere

Secondly, the "acquis communautaire" embraces various international law provisions that bind the EC and its Member States. Hartley regards international law as an "anomalous source of Community law" owing to its origin outside the EC/EU legal order.[11] Nevertheless, the ECJ has explicitly accepted that certain provisions and rules of international law compose an "integral part of Community law".[12] The EU Constitutional Treaty confirms the EU's strong commitment to contribute to "the strict observance and the development of international law, including respect for the principles of the United Nations Charter".[13]

International peremptory norms *jus cogens* and general principles of international public law have always been respected in EU external policy and in the foreign policy of Member States. However, the acceptance of international peremptory norms and general principles of international law as part of the acquis communautaire has neither been enunciated nor rejected by the EU institutions.[14]

The Member States are bound by the commitments in EU external agreements with third countries. In accordance with Article 300(7) EC "agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community

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cooperation); c) all discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation is prohibited in the EC (Article 12, 13 EC, Article I-4(2) of the EU Constitutional Treaty); d) a guarantee of the rights of citizenship that provides the right to move and reside freely within the EU (Article 18 EC, Article I-4(1) of the EU Constitutional Treaty); e) the abolition of customs duties and all charges of equivalent effect on exports and imports between Member States, and the functioning of the custom union by adopting a common customs tariff in relations with third countries (Articles 23-25 EC, Article III-151(1),(4) of the EU Constitutional Treaty); f) abolition of all measures which could lead to quantitative restrictions on imports and exports to and from Member States (Articles 28-30 EC, Article III-153 of the EU Constitutional Treaty); g) no restrictions/discrimination by monopolies of a commercial character regarding conditions under which goods are procured and marketed in the Member States (Article 31 EC, Article III-155 of the EU Constitutional Treaty); h) free movement of workers and self-employed that entail the abolition of any discrimination based on the nationality of workers and self-employed from the Member States as regards employment, remuneration and other conditions of work and employment (Article 39-47 EC, Article III-133 of the EU Constitutional Treaty); i) the right of establishment of companies and firms formed in accordance with the law of a Member State and operating there (Article 48 EC, Article III-137 of the EU Constitutional Treaty); j) the freedom to provide services envisages the abolition of any discrimination in respect of nationals of the Member States who are already established (Article 49-55 EC, Articles III-144-146 of the EU Constitutional Treaty); k) the free movement of capital (Article 56 EC, Article III-156 of the EU Constitutional Treaty); l) no measures that distort competition (Article 86 EC, Articles III-161-162 of the EU Constitutional Treaty); m) no aid incompatible with the common market (Article 87-89 EC, Article III-167 of the EU Constitutional Treaty); n) no discriminatory taxes (Article 90 EC, Article III-170 of the EU Constitutional Treaty); o) environmental protection (Article 174 EC, Article II-97 of the EU Constitutional Treaty); p) consumer protection (Article 153 EC, Article II-98 of the EU Constitutional Treaty); r) no excessive government deficits (Article 104 EC, Article III-184 of the EU Constitutional Treaty). Some general principles of EC law (the principle of legal certainty, the principle of Member States' liability in damages? for breach of EC law) have not been included in the EU Constitution, but they are still of utmost importance for the whole EU legal order and, therefore, need to be regarded as part of the "fundamental acquis".

[11] T. C. Hartley, *The Foundations of European Community Law* (4th Ed. Oxford University Press 1998), at 155.

[12] Case 181/73 *Haegeman v. Belgium* [1974] ECR 449, at 5.

[13] Articles I-3(4) and III-292(1) EU Constitutional Treaty. On the fact that the EU is bound by the UN Charter, see Case T-306/01 *Yusuf and Al Barakaat International Foundation* v *Council and Commission* [2005] ECR II-0000.

[14] On the acceptance of international customary law by the ECJ see C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655.

and on Member States". Thus, an international treaty, duly concluded by one of the Communities, becomes "an integral part of community law" and "community legal system" from the date of its entry into force. Consequently, directly effective provisions of those agreements override any conflicting EC measure.[15] Mixed agreements constitute part of the EC legal order only with reference to those provisions of agreements which are within the competence of the EC or within the scope of EC law.

Thirdly, the "acquis communautaire" covers a quite distinctive patrimony of what had been acquired within the two intergovernmental EU pillars. The "fundamental acquis" within the two intergovernmental EU pillars comprises the EU objectives enshrined in Article 2 TEU. These objectives, omitting those transferred to the first supranational pillar, determine the legality and boundaries of EU acts and Member State actions within intergovernmental cooperation. The TEU emphasises the need to assert EU identity internationally, in particular through the implementation of a common foreign and security policy.

Fourthly, EC/EU "soft law" provisions have to be respected by the present Member States and therefore belong to the acquis communautaire. EC/EU "soft law" provisions concern all those non-binding rules of conduct and which, according to the intention of their drafters, are entitled to legal effect.[16] The legal effect of EC/EU soft-law provisions is considered on a case-by-case basis in accordance with the ECJ's interpretation. To decide if non-binding EC/EU "soft-law" sources may be regarded as having a certain legal effect, the ECJ usually analyses their contents and the intention of the drafters.[17] Indeed, the ECJ has already ruled on the legal effect on certain "soft-law" sources.[18]

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[15] Case 21-4/72 *International Fruit Co NV v Produktaschap voor Groenten en Fruit (№ 3)* [1972] ECR 1219. Case C-280/93, *Germany v. Council (Banana Case)* [1994] ECR I-4973. This rule is applied unless the EC act was intended to give effect to an obligation under an international agreement (Case C-69/89 *Nakajima v Council* [1991] ECR I-2069) and where the EC act already expressly refers to the international agreement (Case 70/87, *Fediol v. Commission* [1989] ECR 1781).Furthermore, the ECJ ruled in the Case 12/86 *Demirel v. Stadt Schwäbisch Güdn* [1987] ECR 3719 that Article 310 EC empowered the EC to guarantee commitments towards third countries in all fields covered by the EC Treaty.

[16] K. C. Wellens and G. M. Borchardt, "Soft Law in European Community Law" 14 ELRev 267-321 (1989) at 285. The authors highlight the following sources of EC/EU soft law: 1) interinstitutional agreements that display a practical manifestation of sincere cooperation between the EU institutions; 2) non-binding recommendations and opinions as provided in Article 249 EC (Article I-33(1) of the EU Constitution); 3) conclusions and resolutions of the EU institutions or the Member States or the two of them together; 4) published or unpublished declarations of EU institutions or the Member States or the two of them together; 4) programmes that indicate a future policy to be pursued by EU institutions or the Member States; 5) communiqués (press releases, declarations, conclusions and resolutions, non-binding acts with further impulses for development) and conclusions of the institutions or of the Member States in which the result of the meeting is provided.

[17] *Ibid,* at 285.

[18] For example, see Case 44/84*, Hurd v. Jones* [1986] 46 CMLR 2, 42 where the ECJ stated that Article 3 of the Act of Accession of the UK, Denmark and Ireland (on observation of the principles and guidelines deriving from declarations, resolutions and other positions) 'does not attach any additional legal effect' to these acts. In addition, the ECJ stated that certain resolutions of the Member States merely express their political desirability without any legal effect (Cases 90 and 91/63, *Commission v. Luxemburg and Belgium* [1964] ECR 625, Case 10/73, *Rewe Central v. Hauptozollant Kehl* [1973] ECR 1175; Case 59/75, *Pubblico Ministero v Flavia Manghera and others* [1976] 17 CMLR 557) but that certain resolutions of the European Parliament have legal consequences and possible treaty violations could flow from them (Case 230/81, *Luxemburg v. Parliament* [1983] ECR 255, Case 294/83 *"les Verts" v European Parliament* [1986] ECR 1339; Case 34/86, *Council v. European Parliament* [1986] ECR 2155).

EC/EU soft laws that are entitled to a legal effect can serve as the legal basis for the enactment of the legislation of Member States to implement rules of conduct; they provide the legal framework for future discussions and negotiations between Member States, third states and international organisations. Furthermore, EC/EU soft law can also be used as a means of interpretation with respect to hard-law provisions of either a treaty or a customary law.[19] Intrinsically, EC/EU soft law creates an expectation (not a commitment) that the conduct of the Member States, as well as that of legal and physical persons, will be in conformity with EU non-binding rules of conduct.

External dimension of the acquis communautaire

The notion "acquis communautaire" appears to be frequently applied in EC/EU external policy. In the past, EU official documents tended to stick to a narrow equivalent of the "acquis communautaire" - the "Community acquis". For instance, the European Commission (Commission) Strategy Paper "Towards the Enlarged Union" applies the term "Community acquis" and "acquis" interchangeably throughout the text.[20] However, more recent documents tend to refer to the notion of "acquis" either with extremely broad or extremely narrow meanings. In the former case, EU external documents refer to the "acquis" as a universal concept embracing the whole three pillar structure of the EU. For instance, the so called "safeguard clause" in the Protocol on the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the EU calls for the "clear evidence ….. for adoption and implementation of the acquis in Bulgaria and Romania" without which the date of accession of these countries could end up being postponed by one year.[21] In the latter case, EU external documents refer to the acquis either in relation to the regulation of specific relations within the EU, like the "Schengen acquis" or in relation to achievements within outcomes of particular EU external initiatives, as in the case of the "Barcelona Process acquis" or the "acquis of the Euro-Mediterranean Partnership".[22] Besides, the EU external agreements frequently refer to the acquis communautaire in so called "approximation clauses". These clauses specify that third countries are expected to approximate their own legislation to selected areas of the acquis communautaire in order to enhance long term relations with the EU.[23]

These observations make any effort to systemise the scope of the acquis communautaire in its external dimension almost impossible. We shall not endeavour to do this here. However, we shall concentrate on the logic behind the application of the acquis communautaire in selected areas of EU external relations. In the first case, we

[19] With regard to the application of the Joint Declaration on Human Rights within the EC legal order, see Case 44/79, *Hauer v. Land Rheihland-Pfalz* [1979] ECR 3727.

[20] "Towards the Enlarged Union" Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries (COM (2002) 700 final).

[21] Article 39 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the EU, O.J. L 157, vol 48, 21 June 2005. For a preference for the term "acquis" see also Communication from the Commission "Monitoring Report on the state of preparedness for EU membership of Bulgaria and Romania" (COM (2006) 214 final), Communication from the Commission "2005 Enlargement Strategy Paper" (COM (2005) 561 final).

[22] European Neighbourhood Strategy Paper, Communication from the Commission, COM (2004) 373 final.

[23] For example, Article 69 of the EU-Croatia Stabilisation and Association Agreement provides that: "The Parties recognise the importance of the approximation of Croatia's existing legislation to that of the Community. Croatia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community acquis."

look at the so called "acquis criterion"[24] or "accession acquis"[25] in the context of the accession of new Member States. In the second case, we look at the scope of the acquis communautaire in some EU external agreements and attempt to analyse the scope of the acquis communautaire within certain sectors of EC/EU legislation. Henceforth, for the purpose of legal clarity, this paper will refer to the acquis communautaire in the context of accession as the "accession acquis", thereby distinguishing it from the acquis applied in the EC agreements with third countries.

The "accession acquis"

The notion of "accession acquis" is a legal and political category of a distinctive nature and scope. The "accession acquis" or, in the Commission's words, the "acquis criterion",[26] is one of the intrinsic elements of the Copenhagen Criteria, and includes *inter alia* the "ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union". The scope of the "accession acquis" corresponds to Wiener's idea of the "embedded acquis",[27] since it embraces not just the whole acquis communautaire/"Union acquis",[28] but all that has been accumulated under the three EU pillars, including "the real and potential rights" and the "political objectives of the treaties".[29] In short, the "accession acquis" is a "snapshot" of the situation existing at the moment of accession of new Member States[30] which comprises the entirety of rules, judicial decisions, and objectives of the EU external policy to be accepted by new Member States. Beyond that, candidate countries are expected to ensure the effective application of the "accession acquis" through their appropriate administrative and judicial structures.[31]

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[24] Curti Gialdino regarded this phenomenon as the "criterion of global integration" (C. Gialdino, "Some reflections on the acquis communautaire", 32 CMLRev. 1089-1121 (1995), at 1091).

[25] C. Delcourt, "The *Acquis Communautaire:* Has the Concept Had Its Day?" 38 CMLRev, 829-870 (2001), at 837, 869.

[26] *Supra note 20,* at 1.4.

[27] A. Wiener, "The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance", 3 ELJ 294-315 (1998).

[28] Regular report of the Commission on progress towards accession by Poland (COM (1998) 712 final of 17 Dec 1998). However some of the Commission's official documents circumscribe the acquis communautaire in the context of accession solely by EC primary and secondary legislation (COM (1998) 745 final of 11 Dec 1998).

[29] Bull EC, suppl 3/92, at 12.

[30] Articles 32, 69, 84 and 112 of the Act concerning the conditions of accession of Austria, Finland, and Sweden (O.J. 1994, C241/22). See also the Resolution on the environmental aspects of the enlargement of the Community to include Sweden, Austria, Finland and Norway, adopted by the European Parliament on 18 January 1994 (O.J. 1994. C44, 49).

[31] The European Commission Directorate General on Enlargement clarifies, that "the acquis is constantly evolving and includes: the content, principles and political objectives of the Treaties on which the Union is founded; legislation and decisions adopted pursuant to the Treaties, and the case law of the Court of Justice; other acts, legally binding or not, adopted within the Union framework, such as interinstitutional agreements, resolutions, statements, recommendations, guidelines; joint actions, common positions, declarations, conclusions and other acts within the framework of the common foreign and security policy; joint actions, joint positions, conventions signed, resolutions, statements and other acts agreed within the framework of justice and home affairs; international agreements concluded by the Communities, the Communities jointly with their Member States, the Union, and those concluded by the Member States among themselves with regard to Union activities". In order to become a Member State, a candidate country will have to accept the acquis of the Union. As in all previous accession negotiations, specific arrangements may be agreed upon. In all areas of the acquis, the candidate countries must bring their institutions, management capacity and administrative and judicial systems up to EU standards, both at a

The "accession acquis" would appear thus to exceed the scope of the "acquis communautaire" in its internal dimension, because the fulfilment of the "acquis criterion" is not only limited by the implementation of the "acquis communautaire", but envisages the candidate countries' adherence to EU present and even future political actions. The "accession acquis" emerges before the formal accession of a candidate country to the EU (for example, if the EU imposes economic sanctions or visa controls on certain third countries). In addition, the accomplishment of the "acquis criterion" requires candidate countries to pursue various legal and political reforms as to ensure not only the implementation, but also the effective application of the acquis communautaire, through appropriately functioning national administrative and judicial structures.[32] On the whole, the objective of the "accession acquis" adoption is to fulfil the Copenhagen Criteria and subsequently to qualify for EU membership.

The minimum threshold of the "accession acquis" can be associated with the minimum requirement for membership enshrined in Article 49 TEU. This provision of the TEU does not require candidate countries to accept the whole of the acquis communautaire, but solely to comply with the "political" conditions for accession. It states that "any European State which respects the principles set out in Article 6(1) [liberty, democracy, respect for human rights and fundamental freedoms and the rule of law] may apply to become a member of the Union". The EU Constitutional Treaty maintains this approach by confirming that EU membership is open to "all European States which respect the values referred to in Article I-2, and are committed to promoting them together". The values listed in the EU Constitutional Treaty are almost identical to those in Article 49 of the TEU. A more explicit scope for the "accession acquis" may be drawn from the Acts of Accession and respective annexes that formulate in detail what is to be adopted by a new Member State in the course of accession.[33] In this sense, the "accession acquis" displays a comprehensive "snapshot" of what has been achieved in the EU framework at the moment of the accession. However, in general, the "accession acquis" is not a static but rather a dynamic concept, since it changes its scope with every wave of EU enlargement. For example, the 1994 "accession acquis" of Austria, Sweden and Finland is not identical to the "accession acquis" of the ten countries of Central, Eastern and Southern Europe, which joined the

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national and regional level. This will allow them to implement the acquis effectively upon accession and, where necessary, to be able to implement it effectively in good time before accession. At the general level, this requires a well-functioning and stable public administration built on an efficient and impartial civil service, and an independent and efficient judicial system. Detailed indications for each specific area of the acquis are given in the guide to the main administrative structures required for implementing the EU acquis.
<http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm#acquis>, last visited 6 February 2007.

[32] *Supra note 20,* at 1.4.

[33] For example, see the Joint Declaration on Common Foreign and Security Policy (O.J. 1994, C 241/381), annexed to the Act on the conditions of accession of Austria, Sweden, Finland and Norway. It states that the Parties agreed to the "full acceptance of the rights and obligations attaching to the Union and its institutional framework, known at the acquis communautaire, as it applies to present Member States. This includes in particular the content, principles and political objectives of the Treaties, including those of the TEU". See also the Act on the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (O.J. 2003, L 236) and the Act on the conditions of accession of the Republic of Bulgaria and Romania to the European Union (O.J. 2005, L 157).

EU in 2003. Consequently, the "accession acquis" of Bulgaria and Romania differs from the "accession acquis" of' candidate countries, which joined the EU in 2003. Furthermore, even within the same wave of accession, the scope of the "accession acquis" may vary, thereby reflecting the gains and losses of a particular candidate country in the course of accession negotiations. For example, Poland was allowed to maintain in force national rules on acquisition of agricultural lands and forests by foreigners for twelve years from the date of the accession.[34] Other candidate countries which acceded to the EU together with Poland were given a seven-year transition period in which national restrictions on the acquisition of agricultural lands and forests by foreigners were allowed to be maintained.[35]

The scope of the "accession acquis" differs either within the pre-accession or the entry stages of the whole accession process.[36] The objective of the pre-accession stage is merely to prepare a candidate country for eventual EU membership. In other words, the EU does not require that candidate countries adopt the whole scope of the "accession acquis" within the pre-accession stage, but assists them in the consistent selection of intermediate acquis priorities that would lead to the eventual accomplishment of the Copenhagen Criteria. These priorities, intermediate objectives and conditions are enshrined in the individual candidate country Accession Partnership, issued by the Council of Ministers (Council) through qualified majority vote following a proposal from the Commission.[37] Thereupon, on the basis of the Accession Partnership and annual Commission Regular Reports on the progress towards accession, every candidate country issues a National Programme for Adoption of the Acquis (NPAA) which sets up a detailed adaptation action plan in accordance with national specifics. In general, the pre-accession stage has a tendency to prioritise issues concerning the legal regulation of the EC internal market over other elements of the "accession acquis". For instance, the White Paper entitled "Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union" (Approximation White Paper) highlights specific areas of EC internal market legislation to be considered as priorities in the adoption of the acquis.[38] Furthermore, Agenda 2000 states that "new Member States will be expected to apply, implement and enforce the acquis upon accession; in particular, the measures necessary for the extension of the single market

[34] Article 4(2) of Annex XII to the Act on the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (O.J. 2003, L 236).

[35] For example, Article 3(2) of Annex X to Act on the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (O.J. 2003, L 236).

[36] In the opinion of P. Nicolaides, S. R. Boean, F. Bellon and P. Pezaros, the pre-accession strategy for the applicant country consists of the following: 1) implementation of the association agreement; 2) support from the EU for the transition process through the Phare programme; 3) alignment with the single market legislation; 4) structured dialogue at the level of heads of government/state and ministers; 5) gradual involvement of the applicant country in EU programmes and the establishment of administrative cooperation. See P. Nicolaides / S *the Process, Negotiations, Policy Reforms and Enforcement Capacity*, (Maastricht, European Institute of . R. Boean / F. Bellon / P. Pezaros, *A Guide to the Enlargement of the European Union (ii). A Review of* Public Administration. 1999), at 47.

[37] Regulation 622/98 (O.J. L 85, 1998).

[38] White Paper "Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union" (COM (95) 163).

should be *applied immediately* [emphasis added]".[39] The scope of the "accession acquis" within the pre-accession stage may not be identical for all third countries who wish to join the EU, since their state of readiness to absorb the whole acquis communautaire may not be the same. Thus, a certain degree of flexibility among candidate countries in designing an individual pattern of adoption of the "accession acquis" within the "pre-accession" stage can be acknowledged and occurs within the guidelines of EU institutions. This flexibility envisages initial scrutiny of every candidate country's level of economic, political and legal readiness, and subsequently requires the identification of particular national priorities to be fulfilled. For example, in the case of Latvia one of key concerns of the "pre-accession" stage was the issue of minority rights and protection of minorities.[40] In the case of Bulgaria, it was the reform of the judiciary and the development of anti-corruption measures.[41]

Eventually, the "pre-accession acquis" moves towards full compliance with the acquis communautaire. This means that in order to fulfil the "acquis criterion", a candidate country is expected to implement the whole scope of the acquis communautaire within the single package of 31 "negotiation chapters".[42] The subsequent results of the negotiations are fixed in the Acts of Accession - constitutional treaties of equal status to the founding Treaties ratified by all Member States. As mentioned above, the scope of the "accession acquis" is not static and tends to expand with every subsequent enlargement to cover all that has been acquired by the EC/EU at the moment of accession of a candidate country. In general, the following elements belong to the "accession acquis":

a) New Member States must adhere to the "fundamental acquis" including the founding treaties, amendments, annexes and protocols as a whole which came into force before the accession. Acts enacted by the EU institutions (regulations, directives, decisions, recommendations, opinions) are binding on new Member States and apply under the conditions laid down in the founding Treaties and the respective Act of Accession. One may argue that new candidate countries should be ready to adhere to the new "Union acquis" in the EU Constitutional Treaty, insofar as it represents the most recent political and legal consensus of the political elite in the enlarged EU. Unequivocally, the "judicial acquis" must be accepted by candidate countries in the course of accession since this constitutes the core of the "fundamental acquis" and consequently enshrines the fundamental tenets and general principles of the EC legal order.[43] Acceptance of the principles

[39] Agenda 2000 (Suppl. 5/97 – Bull. EU, at 52).
[40] 2001 Regular Report on Latvia's Progress towards Accession, SEC(2001) 1749.
[41] 2001 Regular Report on Bulgaria's Progress towards Accession, SEC(2001) 1744.
[42] These chapters are: 1) free movement of goods; 2) free movement of persons; 3) free movement of services; 4) free movement of capital; 5) company law; 6) competition policy; 7) agriculture; 8) fisheries; 9) transport policy; 10) taxation; 11) Economic and Monetary Union; 12) statistics; 13) social policy; 14) energy; 15) industrial policy; 16) small and medium-sized undertakings; 17) science and research; 18) education and training; 19) telecommunications and information; 20) culture and audio-visual policy; 21) regional policy and co-ordination; 22) environment; 23) consumers and health protection; 24) cooperation in the fields of justice and home affairs; 25) customs union; 26) external relations; 27) common foreign and security policy; 28) financial control; 29) finance and budgetary provisions; 30) institutions; 31) other.
[43] The Approximation White Paper refers to ECJ case law as part of the acquis to be adopted by the candidate countries. Furthermore, it is stated in the Joint Declaration on the ownership of fishing vessels

laid down in ECJ/CFI case law derives automatically from the EU membership. Therefore, candidate countries are expected to adopt not only the general principles laid down by the ECJ/CFI but also the whole "judicial acquis" which is binding on the existing Member States., Indeed, a refusal to acknowledge the ECJ/CFI "judicial acquis" would undermine the unity and identity of the EC/EU legal order.

b) The acquis of the two intergovernmental pillars have to be accepted by new Member States in its entirety. This includes in particular the content, principles and political objectives of the founding Treaties. Therefore, new Member States are expected to participate fully and actively in the Common Foreign and Security Policy (CFSP) from the time of their accession into the EU as well as to support the specific policies of the EU in force at the time of accession. In the field of Justice and Home Affairs (JHA), new Member States must accede to those conventions and instruments which are inseparable from the attainment of the objectives of the TEU. By the date of accession those acts must be signed by the present and new Member States. Besides, new Member States are also obliged to implement non-adopted acts which have been drawn up by the Council and recommended to the Member States (in accordance with the requirements of Title VI of the TEU). Furthermore, new Member States are obliged to introduce administrative measures and other arrangements already adopted by the date of accession by the present Member States or the Council, so as to facilitate practical cooperation between the Member States in the field of the JHA[44].

c) The "accession acquis" covers agreements concluded by the present Member States in relation to the functioning of the EU.[45] New Member States have to accede to conventions adopted in accordance with Article 293 EC, which are inseparable from the attainment of the EC Treaty objectives, as well as to the protocols on interpretation of those conventions by the ECJ.[46]

d) New Member States are expected to accede to EU external agreements (concluded within the EU-Member States mixed competences) with third states, international organisations or with a national of a third state,[47] including measures adopted by organs of these agreements. EC exclusive agreements are binding on new Member States from the date of accession. In the case of EC mixed agreements and other related agreements, new Member States "undertake to accede" to them in due course in accordance with the conditions in their respective Act of Accession and national constitutional procedures.[48] New Member States must take appropriate measures where necessary to adjust their position in international

(concerning Norway) that 'the Contracting Parties take note of the rulings of the Court of Justice of the European Communities' (O.J. 1994, C241/387).

[44] See the Joint Declaration on Common Foreign and Security Policy annexed to the Final Act of the Meeting at Corfu on 24 June 1994 (O.J. 1994, C241/381). See also the Declaration by the new Member States on Articles 3 and 4 of the Act of Accession (O.J. 1994, C 241/398).

[45] Article 4(1) of the Declaration by the new Member States on Articles 3 and 4 of the Act of Accession (O.J. 1994, C 241/398).

[46] *Ibid,* Article 4(2).

[47] *Ibid,* Article 5(1).

[48] *Ibid,* Article 5(2).

organisations that have agreements with the EC or the present Member States in accordance with their new EU Member State rights and obligations.[49] Moreover, new Member States shall "undertake all necessary steps" to eliminate incompatibilities of their international agreements concluded before accession into the EU.[50] The Acts of Accession urge new Member States to "undertake to accede" to all other agreements concluded by the present Member States and related to the functioning of the Communities.[51] In this case, the "accession acquis" encompasses conventions and agreements inseparable from the attainment of the objectives of the founding treaties adopted in accordance with Article 293 EC and 34(2)(d) TEU (including the protocols on interpretation of those conventions by the ECJ).[52]. Furthermore, the Commission frequently emphasises the necessity for the candidate countries to ratify international and regional conventions which explicitly refer to the functioning of the Common Market or the whole EU, and/or these conventions are aimed at the establishment of uniform rules throughout the EU. For instance, the 2002 Regular Reports on the candidate countries' progress towards accession consider it necessary for new Member States to accede to the Convention on the Customs Treatment of Pool Containers, the Convention on Mutual Assistance and Co-operation between Customs Administrations, the Convention on Civil Aspects of International Child Abduction and the Rome Convention on the law applicable to contractual obligations.[53] Since the European Convention on Human Rights is already considered as part of the acquis communautaire, candidate countries are expected to accede to a variety of other Council of Europe conventions which more or less fall within EU objectives.[54] Besides, the EU may expect a candidate country either to accede to an international organisation (World Trade Organisation (WTO)), or to enhance co-operation with international (North Atlantic Treaty Organisation (NATO)) or regional (Council of Europe, European Patent Office) organisations, and even with some international agencies (the International Organisation of Supreme Audit Institutions, the Lisbon European Monitoring Agency on Drugs and Drug Addiction).

e) Candidate countries are expected to adhere to the EU "political acquis". The objective of "an ever closer union among the peoples of Europe"[55] entails that new Member States "assume in every respect the same obligations and responsibilities"[56] as those undertaken by the present Member States in the

[49] *Ibid,* Article 5(4).
[50] *Ibid,* Article 6. This should be done in accordance with procedure as stated in Article 307 EC.
[51] *Ibid,* Article 4(1).
[52] For example, the Brussels Convention on the jurisdiction and enforcement of decisions in civil and commercial matters (O.J. 1972, L 299/32).
[53] For example, see the 2002 Regular Report on Bulgaria's Porgress towards accession (COM (2002) 700 final).
[54] For instance, the Council of Europe Civil Law Convention on Corruption, Council of Europe Criminal Law Convention, the Council of Europe Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data, the Council of Europe Convention on Cybercrime, the Convention against Torture, the Convention on Elimination of all forms of Racial Discrimination.
[55] Article 1 TEU.
[56] EC Bull, 1961, 7-8, 41.

ongoing process of political integration within the EU. Firstly, new Member States must accede to decisions and agreements adopted by the Representatives of the Governments of the Member States meetings within the Council. It is presumed that these sources cover non-binding decisions and agreements taken by representatives of the Member States. Secondly, new Member States are considered to be in the same situation as the present Member States with regard to 'declarations or resolutions or other positions taken up by the European Council or the Council' or to the positions adopted "by common agreement of the Member States".[57] Subsequently, new Member States are expected to observe and ensure implementation of the principles and guidelines deriving from those declarations, resolutions or other positions.[58]

f) The "accession acquis" covers EC/EU "soft law" provisions[59] that concern all those non-binding and/or non-adopted rules of conduct which, according to the intention of their drafters, may or may not be entitled to produce legal effect.[60] However, these provisions need to be aimed at supporting either existing objectives of the founding Treaties or at justifying recent/future political arrangements between the present Member States which have not yet been formalised.

The scope of the "accession acquis" reflects not only the consistent expansion of the EC/EU patrimony but also indicates the state of a candidate country's bargaining power at the time of accession negotiations. Formally, every new Member State must accept the whole acquis communautaire without exemption.[61] However, the EU may potentially grant permanent exemptions, which would imply a change to the entire acquis communautaire, or temporary exemptions from the "accession acquis" to a particular new Member State upon mutual consensus reached at accession negotiations.[62] As a rule, the EU is inclined to grant exemptions only if they do not undermine the fundamental principles of the founding Treaties. Furthermore, these exemptions may be justified by the need to protect a candidate country's essential characteristics or preferences (agriculture, environment), or to safeguard seminal national economic or social interests (e.g. fishing rights, access to oil reserves, alcohol monopoly).[63] For instance, Sweden was granted permanent permission to market

[57] Article 4(3) of the Act of Accession of Austria, Finland and Sweden (O.J. 1994, C241/22).
[58] *Ibid,* Article 4(3).
[59] K. C. Wellens and G. M. Borchardt, "Soft Law in European Community Law" 14 ELRev 267-321 (1989), at p. 285.
[60] 'The fact that the Community has adopted these measures or will only adopt them at a relatively late stage in the evolution of the internal market does not necessarily reduce their importance for the CEE countries. Measures in the process of being adopted are likely to form part of the "acquis" to be accepted by future Member States". (O.J. 1994, C241/387, at 3.19).
[61] "Adoption of only part of the *acquis communautaire* might seem an attractive solution. In practice, this option could, without settling the basic problem, the solution of which would merely be deferred, give rise to even greater new difficulties" (EC Bull. EC Suppl. 8/82, p.7).
[62] Article 2 of the Act of Accession of Austria, Finland and Sweden (O.J. 1994, C241/22). "Towards the Enlarged Union" Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries (COM (2002) 700 final).
[63] P. Nicolaides / S. R. Boean / 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*, (Maastricht, European Institute of Public Administration. 1999) at 38. For the full permanent exemptions list see Table 12 at 42.

traditional moist tobacco which is prohibited in the rest of the EU. Finland has acquired privileged treatment for indigenous people (reindeer husbandry), and above its autonomous regions (Svalbard Islands, Aland Islands). Austria, Sweden and Finland obtained significant transitional periods for the opening up of access to the acquisition of secondary houses, agricultural lands and forests by non-resident Member State nationals.[64] In total, Austria, Sweden and Finland have negotiated more than 209 derogations lasting from one to ten years in duration. Candidate countries of the subsequent wave of accession negotiated much fewer derogations. For example, Poland obtained more than forty derogations lasting from one to twelve years versus the Czech Republic which was granted fewer than twenty derogations from the "accession acquis". Subsequently, the number of derogations from the "accession acquis" for Romania almost doubles the number of derogations for Bulgaria. Agriculture and taxation have proved to be the areas which attract most derogations. Usually, no time limit is envisaged for permanent exemptions, except when the Commission considers that such provisions are no longer justified, particularly in terms of fair competition.[65] The Member States and EU institutions must interpret exemptions with "regard to the foundations and the system of the Community as established by the Treaty",[66] and "in such a way as to facilitate the achievement of the objectives of the Treaty and the application of all its rules".[67]

Nicolaides, Boean, Bollen, Pezaros highlight other accustomed ways of limiting the application of the acquis communautaire during the accession process.[68] Thus, candidate countries may be allowed to preserve higher national standards, for example in areas of safety and health control. These standards may be preserved for a fixed period of time, thereby allowing the EU to review its own standards in accordance with higher standards in individual Member States. Furthermore, the EU may allow flexible discretion to a particular candidate country in the interpretation of certain provisions of EC legislation. For instance, Austria was permitted to apply its own interpretation of Article 28(2) of the Sixth Council Directive 77/388 on value added tax until final interpretation by the ECJ. Besides, the correct interpretation of the acquis may be postponed until the completion of approved scientific studies (sustainability of fishing stock in Norway and the degree of environmental pollution caused by the transit of heavy vehicles through Austria). The application of the acquis communautaire may be limited geographically to selected areas within new Member States. Hence, the acquis communautaire does not apply fully in the Svalbard area, which enjoys special international law status, on the Aland Islands, or in traditional Sami areas.

It is worth noting that the EU is keen to balance candidate countries' bargaining power by applying an "economic safeguard clause" in the Acts of Accession. This enables the Commission and the present Member States to apply "necessary protective measures" in situations where 'difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the

[64] Poland obtained a 12-year transition period and other CEE countries negotiated from 7 to 5 years transitional periods.
[65] *Ibid* at 65, see also tables 12-14 of the same text.
[66] Case 231/78, *Commission v. United Kingdom,* [1979] ECR 1447.
[67] Joined Cases 194 and 241/85, *Commission v. Greece* [988] ECR 1037.
[68] P. Nicolaides / S. R. Boean / 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*, (Maastricht, European Institute of Public Administration. 1999) at 39.

economic situation of a given area'.[69] A one-year safeguard clause has been applied in the Acts of Accession of Austria, Sweden and Finland.[70] In the case of the latest accession of ten Central and Eastern European (CEE) countries, the duration of application of the economic safeguard clause has been extended to three years with the possibility of a further extension. These most recent Acts of Accession also impose so called "specific safeguard clauses", which concern potential violations by new Member States of policies within the fields of the internal market and justice and home affairs. For example, the Acts of Accession with Central and Eastern European countries envisage temporary derogations in the functioning of the Area of Freedom, Security and Justice. These derogations lead to the temporary suspension of the judicial cooperation between the EU Member States and new Member States in case of serious shortcoming in transposition, the state of implementation and application of the framework decisions and other legal instruments under Title VI of the TEU. Hillion argues that these safeguard clauses establish a system of monitoring imported from the EU pre-accession strategy, which undermine the internal EU compliance principles applicable to the "old" Member States.[71]

We attach significance to the application of exemptions and other limitations of the acquis communautaire resulting from accession negotiations, as well as to the application of the "safeguard clause", and suggest that they should be considered part of the "accession acquis". Examining this pattern, we sustain that no new Member State has fully complied with the acquis communautaire at the time of its entry, despite the requirement that "EC acquis will be applicable to the new Member States under the same conditions as in the present Member States".[72] Indeed, once a candidate country accumulates strong bargaining power or provides sufficient evidence of its need to protect indispensable national economic and/or social interests, the limitation of the acquis communautaire becomes possible as long as it does not undermine the EC/EU acquis' intrinsic foundations. Therefore, the scope of the "accession acquis" must always be scrutinised individually from one candidate country to another.

The fulfilment of the "acquis criterion" envisages not only the implementation of the acquis communautaire but also the effective capacity to enforce it within a candidate country's domestic legal system. The significance of this element of the "acquis criterion" has repeatedly been highlighted by the European Councils. For instance, the Madrid European Council of 1995 emphasised the importance of adjusting candidate countries' administrative structures for the purpose of integration. The Fiera European Council of 2000 stressed that 'progress in the negotiations depends on the incorporation by the candidate countries of the acquis in their national legislation and especially on their capacity to effectively implement and enforce it' by strengthening their administrative and judicial structures. Furthermore, the Göteborg European Council of 2001 reiterated the need for candidate countries to pay particular attention to the establishment of adequate administrative structures, and to the reform of their judicial systems and civil service. The Approximation White Paper stresses that approximation of CEECs national laws to EC law not only requires the implementation of EC "right"

[69] Article 3.4 of the Strategy Paper and Report of the European Commission "Towards the Enlarged Union" on the progress towards accession by each of the candidate countries (COM (2002) 700 final).
[70] Article 152 of the Act of Accession of Austria, Finland and Sweden (O.J. 1994, C241/22).
[71] C. Hillion, "The European Union is Dead. Long Live the European Union…A Commentary on the Treaty of Accession 2003", 29(5) ELRev. 583-612 (2004).
[72] *Supra note 70*, Article 32(3).

legislation, but also "the full framework of technical and other structures necessary to ensure the effective implementation of such legislation".[73]

Until recently, there was no explicit list of measures to guarantee effective implementation of the acquis communautaire. In 2005, the Commission issued an informal but comprehensive "Guide to the main administrative structures required for implementation of the acquis", which provides "a set of standards, on the basis of which an assessment can be made of the administrative capacity of each country for each chapter of the *acquis*, including the performance of the relevant administrative structures".[74] As well as providing an overview of EU official documents on accession, this document also draws our attention to the variety of actions that need to be taken by candidate countries. In general, candidate countries are expected to pursue radical domestic institutional reforms to ensure the sustainable functioning of their own administrative and judicial structures in accordance with the principles of rule of law and justice. For this purpose, appropriate educational and training programmes for public servants must be undertaken and efficiently working infrastructure management and regulatory bodies must be set up. The independence of certain public institutions (Central Bank, Supreme Court, and Audit Office) must be ensured, and suitable regulatory frameworks to enable the proper functioning of the EC internal market freedoms should be established. Candidate countries must pursue effective anti-corruption policies. Public offices, especially police and custom services, are expected to be provided with modern facilities, equipment and access to sustainable information technology. Subsequently, computerisation must take place at all levels of the public service, including connections to major EU computer databases. The process of due enforcement of the acquis goes beyond actions of the government and administration, but envisages the active involvement of the whole of civil society, in particular local government, business structures and professional organisations.[75]

On the whole, the "accession acquis"/the "acquis criterion" is a dynamic category which clearly exceeds the scope of the "acquis communautaire" in its internal dimension.[76] In general, the "accession acquis" consists of the whole "fundamental acquis" and the "normative" "acquis communautaire" which result from the accession negotiations, and which are consequently fixed in the Acts of Accession. Besides, the "accession acquis" encompasses various non-binding political measures within the scope of the EC/EU actual and potential objectives and priorities. New Member States are expected to adhere to these before acquiring EU membership so as to avoid undermining the pace of integration and political unification within the EU. Consequently, the adoption of the "accession acquis" can neither be fulfilled without its

[73] White Paper "Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union"(COM (95) 163, Article 2.20).

[74] The text of the "Guide to the main administrative structures required for implementation of the acquis" can be found at <http://ec.europa.eu/enlargement/pdf/enlargement_process/accession_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/adminstructures_version_may05_35_ch_public_en.pdf>, last visited 6 February 2007.

[75] For a more comprehensive picture of what has to be done in the course of effective implementation of the acquis communautaire see "Making a success of enlargement", Strategy Paper and Report of the Commission on the progress towards accession by each of the candidate countries (COM (2001) 700 final at 3(a)) and the regular Commission's accession reports for each candidate country.

[76] C. Delcourt argues that the scope of the "accession acquis" is understood in an "excessive" manner. See C. Delcourt, "The *Acquis Communautaire:* Has the Concept Had Its Day?" 38 CMLRev. 829-870 (2001), at 861.

due implementation within the legal systems of the candidate countries, nor without the effective functioning of their administrative and judicial structures. Therefore, the "accession acquis" does not cover mere legal rules and practices, but requires that candidate countries ensure the proper functioning of their national economic, political and judicial systems as envisaged by the Copenhagen Criteria. On the whole, the "accession acquis" provides a "snapshot" of the EC/EU economic, political and legal achievements that have been acquired at the moment of accession. Nevertheless, we suggest that the "accession acquis" may also be regarded as a result of a political compromise which is reached in the course of accession negotiations. Therefore, each new Member State is characterised by a distinctive individual "accession acquis" that is balanced by acquired permanent/transitional arrangements, as well as by safeguard clauses to be applied by the EU to restore any potential damage to present Member States' interests. This does not mean that such balance exists in reality. In practice, one can see that every wave of enlargement makes the accession requirements towards candidate countries more stringent, and therefore jeopardises the bargaining power of future candidate countries.

Further implications of the acquis communautaire in its external dimensions

a) The acquis communautaire in EU external agreements

Clearly, not all third countries aim to accede to the EU or, conversely, not all EU external agreements have eventual EU membership of third countries as an objective. Nevertheless, even when there is no clear perspective towards EU membership, third countries deal with the acquis communautaire through various tools employed by the EU in international relations. After the successes of recent enlargements, it has been argued that the EU now perceives itself as a global economic and political player.[77] In order to maintain this role, it aims to create a friendly legal environment for the promotion of its worldwide interests. In this sense, the "export" of the acquis communautaire enables the EU to achieve two objectives. Firstly, it eases market access for EU companies and nationals to regulated markets in third countries. Secondly, it promotes the EU's foreign policy agenda beyond Europe. We would like to emphasise two means through which the EU exports its own acquis communautaire into the legal orders of third countries.

The first and most effective means is the export of the acquis communautaire through so-called "approximation clauses" in EU external agreements. An "approximation clause" imposes a soft-law obligation to "endeavor to ensure" the compatibility of a third country legislation within specified 'priority areas' of EC/EU legislation. As a result, third countries which are willing to enhance their level of partnership with the EU pursue "voluntary harmonisation" of their national laws to EU legal rules which have no binding force in relation to them, and in the framing of which those third countries have no real participation.[78] In this case, a third country can

[77] M. Cremona "The Union as a Global Actor: Roles, Models and Identity", 41 CMLRev. 553-573 (2004).

[78] This process was defined by Andrew Evans as "voluntary harmonisation" in A. Evans, "Voluntary Harmonization in Integration between the European Community and Eastern Europe" 22 ELRev 201-220 (1997). Other authors define it as "autonomous adaptation". For example, see P.-C. Müller-Graff, "The

legitimately avoid the "blind" reception of the whole "Community acquis", but may align national legislation within specified priority areas in accordance with the objectives and aims of an association or partnership agreement. That is to say that there is no need for countries which have signed Partnership and Cooperation Agreements (PCA) with the EU to approximate their legislation to the EC "company law acquis". Instead, a PCA country is expected to concentrate upon the elimination of any obstacles and discriminative measures that impede the national treatment of the Member States' companies, branches and subsidiaries within its territory. This approach to approximation corresponds precisely to the PCA's objectives of mere "economic cooperation" between the parties but not to eventual EU membership of the PCA countries.

The second means refers to the "acquis" third countries deal with within the specific context of their agreements with the EU. This means that the scope of the "acquis communautaire" cannot always be consistent, but varies from one EU external agreement to another. That is to say that the acquis communautaire as referred to by the Lomè and Cotonou Agreements differs from the acquis communautaire in the European Economic Area (EEA) Agreement, which in turn differs from the PCAs. In other words, the scope of the acquis communautaire in association, partnership, trade, and development agreements does not replicate the scope of the EC/EU acquis communautaire, but must be carefully weighed against the objectives of each particular agreement. We argue that the "external" acquis within the specific EU external agreement embraces the totality of legal acts issued by common institutions (Association Councils and Joint Committees). In addition, it encompasses the relevant "acquis" in its internal dimension which is in line with the specific objectives of an EU external agreement (customs union, sectoral cooperation, association), and the international law acquis (conventions, treaties, decisions of international organisations).

For example, the customs union objective implied the need to implement wider scope for the application of the relevant EC external trade acquis into the Turkish legal system. The main objective of the EC-Turkey Association Agreement (so called "Ankara Agreement")[79] – the establishment of a customs union – has been achieved through binding decisions of the EC-Turkey association institutions: *inter alia* Decision 1/95 the EC-Turkey Association Council;[80] Decision 1/96 of the EC-Turkey Customs Cooperation Committee;[81] Decision 2/97 of the EC-Turkey Association Council[82]. These decisions successfully fill the gap left by the Ankara Agreement and its Protocols by identifying the extent of the relevant acquis communautaire to be implemented by Turkey in the course of establishing a customs union with the EC.

In accordance with these decisions, Turkey committed itself to adhere to the EC Common Commercial Policy (CCP) and to apply the substantive EC customs acquis.[83]

Legal Framework for the Enlargement of the Internal Market to Central and Eastern Europe" 6 MJICL 2 (1999) at 196.

[79] O.J. 1973 C 113/2.

[80] O.J. 1996 L 35/1.

[81] "Decision 1/96 of the EC-Turkey Customs Cooperation Committee laying down detailed rules for the application of Decision 1/95" (O.J. 1996 L 200/14).

[82] "Decision 2/97 of the EC-Turkey Association Council establishing the list of Community instruments relating to the removal of technical barriers to trade and the conditions and arrangements governing their implementation by Turkey" (O.J. 1997 L 191/1).

[83] Article 28 of the Decision 1/95.

Furthermore, Turkey committed to 'align itself with the EC preferential customs regime'[84] and to apply 'substantially the same commercial policy as the Community' in the textile sector, including the agreements or arrangements on trade in textiles and clothing.[85] Turkey is bound to implement the relevant acquis communautaire on the removal of technical barriers to trade and fair competition.[86] In the area of competition, Turkey has ensured the application of the principles of relevant EC primary and secondary legislation, as well as the relevant ECJ/CFI case law.[87] In the area of state aid to the textiles and clothing sector, Turkey is even bound to adopt relevant soft law – EC frameworks and guidelines.[88] It is emphasized that 'the Customs Union can function properly only if equivalent levels of effective protection of intellectual property rights are provided in both constituent parts of the Customs Union'. To achieve this objective, Turkey is committed to securing a level of protection of intellectual, industrial and commercial property rights equivalent to that already existing in the EC,[89] and to subscribing to international law standards as laid down in multilateral treaties in the area of intellectual property.[90]

Within the framework of Decision 1/95, Turkey pursues soft commitments in the application of the acquis communautaire by pledging to approximate its own legislation to that of the EC in certain areas: standardization, metrology and calibration, quality, accreditation, testing and certification,[91] and agricultural policy.[92]

Furthermore, Turkey is obliged to interpret the provisions of Decision 1/95 - which are identical in substance to the corresponding provisions of the EC Treaty - in conformity with the relevant ECJ/CFI case law,[93] and to ensure (by the end of the first year following the entry into force of the Customs Union) the application of the principles contained in the EC primary and secondary legislation, as well as those developed by the ECJ/CFI.[94]

In contrast, the scope of the acquis within the PCAs and the Cotonou Agreement differs significantly from the scope of the acquis in the EC-Turkey association. The objectives of the PCAs and the Cotonou Agreement imply that the specific scope of the acquis be implemented by the Parties. The objective of the PCAs is to bring PCA nations into the world market economy. Consequently, the PCAs do not envisage the

[84] Article 13 Decision 1/95.
[85] Article 12 Decision 1/95.
[86] Article 39 Decision 1/95.
[87] Article 39(2)(a) Decision 1/95.
[88] Article 39(2)(c) Decision 1/95.
[89] Article 2 Decision 1/95.
[90] Article 31 Decision 2/97. The list of binding international conventions is provided in Annex 8 of the Ankara Agreement
[91] Article 8(4) Decision 1/95.
[92] Article 25 Decision 1/95 states that "Turkey shall adjust its policy in such a way as to adopt the common agricultural policy measures required to establish freedom of movement of agricultural products".
[93] Article 66 Decision 1/95 provides that "The provisions of this Decision, in so far as they are identical in substance to the corresponding provisions of the Treaty establishing the European Community shall be interpreted for the purposes of their implementation and application to products covered by the Customs Union, in conformity with the relevant decisions of the Court of Justice of the European Communities".
[94] In accordance with Article 42 of Decision 1/95 Turkey is bound to apply "post-signature" ECJ case law: "Application of EC principles and case law follows from the commitment by Turkey to ensure that, by the end of the second year following the entry into force of this Decision, no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of the Member States and of Turkey with regard to State monopolies of a commercial character".

application of the EC acquis within legal orders of PCA countries but broadly cover international law acquis in the area of democratic freedoms and fundamental rights. Principles of liberal trade, reciprocity and fair competitiveness serve as cornerstones in fulfilling the objectives of the agreements. Application of the Most Favoured Nations treatment and the Generalised System of Preferences (GSP)95 regime have significantly liberalised the mutual trade in goods. Furthermore, companies within the PCA countries can rely on non-discriminative treatment once they decide to establish themselves in the EU. PCA countries are encouraged to approximate their laws to the EU, particularly in areas such as competition and the protection of intellectual property. The WTO rules have become applicable in trade relations between the Parties, despite the fact that most PCA nations have not yet acceded to the WTO.

The aims of the Cotonou Agreement emphasize the need for Africa, the Caribbean, and the Pacific (ACP) countries to implement the principles of EC development policy. Therefore, peace-building and conflict prevention are equally important for the partnership, as well as the observance of the essential, fundamental and important elements of the Agreement. The Cotonou Agreement does not provide any direct references to the relevant acquis communautaire. Instead, it relies heavily on the relevant international law acquis. Thus, it embraces almost all regional conventions on the protection of fundamental human rights. All efforts in the liberalization of trade and services should be made in accordance with the WTO, International Labour Organisation, and basic intellectual property conventions. This approach displays the EU's intention to bring ACP countries into the competitive world market economy, and to create a new market environment compatible with, but not equivalent to, that in the EU.

To summarise, the scope of the acquis communautaire within various EU external agreements varies in accordance with each agreement's aims and objectives, and extends the scope of the acquis communautaire internally.

b) Sectoral acquis communautaire in EU external agreements

Another observation to be made is that the notion "acquis communautaire" can be broken down into other much smaller applications, since even the founding treaties refer to the acquis in specific sectors or policies, such as the "Schengen acquis" or the "social acquis".[96] The Commission's regular reports on accession tend to consider that each area of the "accession acquis" has its own "acquis", such as the "transport acquis" or the "environmental acquis", thereby promulgating the new category of so called "sectoral acquis". This encompasses a whole range of legal rules, principles and other values within a certain EC policy or EU activity as a whole, which has been achieved in the process of European integration within a specific field. Hitherto, the notion of the "sectoral acquis" has not been well defined or classified. However, the Commission has differentiated between the "sectoral acquis" and the "accession acquis" by stating that

[95] In 1968, the United Nations Conference on Trade and Development (UNCTAD) recommended the creation of a "Generalised System of Tariff Preferences" under which industrialised countries would grant trade preferences to all developing countries. This authorises developed countries to establish individual GSP schemes. The European Community was the first to implement a GSP scheme in 1971. More detailed information on the GSP can be found at <http://europa.eu.int/comm/trade/issues/global/gsp/index_en.htm>, last visited 6 February 2007.

[96] See Protocol № 2 integrating the Schengen acquis into the framework of the European Union.

'alignment with the internal market is to be distinguished from accession to the Union which will involve acceptance of the acquis communautaire as a whole'.[97] It is argued that the "sectoral acquis" is a broad category that exceeds the scope of EC "sectoral" legislation. This definition denotes the term "accession acquis" on a lesser scale. The "sectoral acquis" comprises binding and non-binding rules, and other rules, which are still pending its formal adoption by the EU institutions, political principles and judicial decisions that regulate EC competence within a specific policy or activity in the process of accession. Furthermore, it covers actual and potential rights that flow from the founding objectives and further constitutional developments within the EU. Adoption of "sectoral acquis" implies that necessary technical and other measures be fulfilled to ensure the effective implementation of such rules.

Conclusion

Several relevant points emerge from our study of the two dimensions of the acquis communautaire. First, the nature and scope of the acquis communautaire are not identical in their internal and external dimensions. The major factor that justifies such differentiation is the overall aim of the application of the acquis communautaire itself. That is to say, the aim of the acquis communautaire in its internal dimension is to ensure the consistent development of the EU while preserving EC/EU patrimony. Conversely, the objective of the acquis communautaire in its external dimension is to promote the EU's economic, political and legal heritage to the wider world and to fulfil its ambitions as a global "rule generator".[98] Furthermore, other types of acquis communautaire of differing scope may emerge within each of these dimensions. For instance, the external application of the acquis communautaire engenders both the "accession acquis" and the relevant acquis within specific EU external agreements. The former is aimed at preparing a candidate country for membership in the EU, while the latter is targeted merely at maintaining partnership relations between the parties and creating a friendly legal environment for European investments and traders in third countries.

The second area that deserves our consideration is the issue of conceptualising the acquis communautaire. In other words, neither the EU institutions nor EC/EU legislation clearly specify what the "acquis communautaire" is or how it should be applied. For example, the application of the "fundamental acquis" in its internal and external dimensions is not uniform. The EU Constitutional Treaty provides a dignified attempt to systematise the entire acquis communautaire including the "fundamental acquis". In the EU Constitutional Treaty and elsewhere in EU primary legislation and the ECJ/CFI case law, the "fundamental acquis" comprises the transferred sovereign rights and competences of its Member States, which distinguish the supranational nature of the EC legal order (principles of supremacy of EC law and non-discrimination, direct effect, responsibility of the Member States for breach of EC law, freedoms of the EC internal market, etc.). In the end, the "fundamental acquis" has acquired a sacred status as EU patrimony and has become independent from the Member States. The EU institutions have been vigilantly looking after the "fundamental acquis" with the specific purpose of maintaining it at all costs as a type of "all-European ideology". Thus, the "fundamental acquis" should be regarded as an indispensable part of the

[97] COM (95) 163, Article 6.4.

[98] Expression used by M. Cremona in her article "The Union as a Global Actor: Roles, Models and Identity", 41 CMLRev. 553-573 (2004).

acquis communautaire in its internal dimension to be shared by all present and future Member States. In its external dimension, the "fundamental acquis" has been applied in a more complex manner. In general, there are three ways for the EU to export its "fundamental acquis" to legal orders of third countries. First of all, the "fundamental acquis" must be adopted by candidate countries in the course of their accession negotiations. There is a chance for candidate countries to bargain temporary exemptions from the "accession acquis" but rarely any permanent exemptions are allowed. Second, some elements of the "fundamental acquis" can be found in the "essential elements" of EU external agreements with third countries (democracy, rule of law, market economy, and fair competition clauses). Third, EU external actions towards third countries (Stabilisation and Association Partnership, Barcelona Process, European Neighbourhood Policy) contain references to the "fundamental acquis". This is only one example of how a part of the acquis communautaire can acquire a different scope according to the context of its application. Therefore, in considering the growing role of the acquis communautaire in both internal and external dimensions of EU action, it is essential to pay particular attention to the scope of both the entire acquis communautaire and its parts ("fundamental acquis", "international law acquis", "sectoral acquis", etc.) in each particular case of application.

From a broader perspective, we have suggested that the intricate character of the internal and external dimensions of the acquis communautaire can be compared to the religious rules and practices adopted by the monks of a monastery situated in the centre of a beautiful town. In their internal life the monks must follow the religious dogmas and rituals as they were created by the founding fathers of the monastery. Of course, new beliefs and practices might emerge from contemporary monks who are respected by and carry authority over their peers. However, such new beliefs and practices must be shared and respected by all monks in order to avoid heresy. In relations with the outer world the monks apply their religious rules and practices more selectively. First, if someone approaches the monastery with a request to become a monk, this person must accept and abide by all the dogmas and practises already shared by the monks undergoing a prolonged status as a novice. Of course, it might take quite a long time before a novice succeeds in adapting himself to the stringent rules of the monastery and proves his own reliability and strength of belief in their shared values and dogmas. Only after all the monks have accepted the novice's readiness and ability to share their common values can they regard him as a member of their brotherhood. Second, ordinary civilians who would like to come and pray in the beautiful churches of the monastery are not expected to behave like monks but to share their fundamental beliefs and to pursue the same kind of practices in order to be allowed to enter the territory of the monastery. Third, in order to acquire needed items, the monks can go to the town market where traders from various countries and beliefs are present. A monk might prefer to buy something from parish people who share his religious principles. Furthermore, the monk is most likely to remind the parishioner of the basic rules of their religion during a bargain and to warn him that a trader should never prioritise pure benefit over religious standards, otherwise, the monk might pass him by during his next visit to the market. Nevertheless, in the absence of parish people at the market, the monk is most likely to approach traders of other religious beliefs and to purchase needed items without entering into religious disputes.

Such an analogy brings us to another observation, namely that the scope of the acquis communautaire is not static but dynamic. In particular, the acquis

communautaire is closely linked to the progress of European law and integration and to revisions of the EU constitutional foundations. Undoubtedly, the EU Constitutional Treaty has made a significant contribution to the refinement and clarification of the acquis in its internal and external dimensions. Our analogy does not associate the acquis communautaire with a new "all-European ideology" or even a religion. In fact, the acquis communautaire is too dynamic to be regarded in such way. But this analogy displays how the acquis communautaire might be used internally and externally. Also, just as monks in a monastery operate within a wider church, so does the EU encompass within the scope of the acquis communautaire not only EC/EU law but a wider normative framework - international law, human rights, customary law, etc.

In general, the purpose of this article is not to resolve the long-lasting debate on the nature and scope of the acquis communautaire, but to highlight certain significant factors related to acquis communautaire application by the Member States towards third countries. Thus, we conclude by suggesting that the main objective of the external dimension of the acquis communautaire is to enable the EU to promote its own values as far as possible to the wider world and to establish a friendly environment around its "beautiful monastery".