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

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

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

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

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

[23] Agreement Establishing an Association between the European Economic Community ant Turkey, done at Ankara 12 September 1963 (Council Decision 64/732 0f 23 December 1963 in Official Journal 217 of 29 December 1964); see also Decision No. 1/80 of the Association Council of 19 September 1980 on the Development of the Association.

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

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

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

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

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

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

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

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

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

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

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

4. Exporting the Community *Acquis* by Means of the Legal Instruments Described Above: Between a Guiding Function and a Takeover

4.1. Foreword

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

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

[28] See *op. cit.*, n. 5.

[29] Blecher, *op. cit*, n. 9, p. 8.

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

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

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

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

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

[30] Lauso Zagato, "I contratti di distribuzione nel recente codice civile albanese: suggestioni comunitarie," *Rivista di Diritto Civile*, XLII (1996), pp. 537–558.

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

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

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

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

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

decisions *in subiecta materia*.[32] The telecommunications sector is an exception and in fact this is the sector most clearly regulated at Community level.

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

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

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

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

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

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

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

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

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

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

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

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

[39] On the historical reasons leading to this situation, and in particular the "partitioning powers" policy of not allowing the development of an organized Polish "folklore", Kępinski, above, n. 37, p. 751.

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

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

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

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

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

[41] Decision 2/1996, in Hungarian Official Gazette, 1996/120.

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

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

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

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

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42 Tatham, above n. 40, p. 917.

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

44 Kühn, above n. 43, p. 553.

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

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

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

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

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

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

[45] As provided in Opinion 1/91: above n. 35.

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

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

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

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

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

[46] Blecher, above n. 9, p. 14.
[47] See above n. 15.