



FACULTY OF LAW
University of Lund

Linnea Carlqvist

The European Union and Turkey
The conditions of accession and the
challenge of future enlargement

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Supervisor: Xavier Groussot

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Summary

This master thesis examines different legal aspects of the enlargement of the European Union and the relations between the EU and Turkey. As a preliminary remark, it is established that only two articles of the EU-Treaty address the question of enlargement. The first one, article 49 states that the applicant country has to respect the principles set out in article 6(1), i.e. liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. In reality, these articles entail a long and complicated process, where the Commission is particularly involved. There is a difference between when an entity can qualify as a European state, a prerequisite for the acceptance of the application, and that a state later on will be accepted as a Member State. This hierarchy will be highlighted and further discussed.

Compliance with the Copenhagen Criteria is of vital importance before a state is recognized as a candidate state. However, total compliance does not seem to be necessary. In connection to this, the body of EU-law, the so-called *acquis communautaire*, is discussed. All new Member States have to implement and comply with the *acquis*. The political trend within the EU is moving towards a constantly deepening cooperation. The European Union of today is more of a political Union than an economical Union, which means that a constantly evolving EU legislation renders accession to the Union increasingly difficult. The issue of human rights is of importance during the candidacy process, since it forms a part of the Copenhagen Criteria and EU legislation. The jurisprudence of the ECJ has varied during the years, but the ECHR is often mentioned as an important source of inspiration. Formally, a higher standard in this area is required from candidate states than from Member States. This might be counterbalanced if the Charter of Fundamental Rights would become a legally binding instrument.

The free movement of workers is an important part of EU legislation as well. The Commission considers that transitional measures will be necessary if Turkey would join the EU, in order to prevent disturbance on the internal market. The EU has gained significant knowledge in this area after the enlargement in 2004, and it is possible that the European citizenship is a more of a challenge in this case.

Institutional changes are essential before any further enlargement takes place. The Lisbon Treaty contains a few changes, mostly relating to the size of the institutions. Another interesting aspect is the fact that the Lisbon Treaty further stresses the importance of the human rights conditionality.

The lack of respect for human rights is also a reoccurring problem in Turkey's negotiations for membership, even though improvements have been made during the last years. The country has an extensive record of

convictions by the ECtHR. Turkey rests its current practice towards minorities on the Lausanne Treaty of 1923, which means that problems concerning the Kurdish population remain. Turkey has also been convicted for violations of the ECHR in connection with the Cyprus conflict. The conflict is an impediment for a Turkish membership of the EU, since it causes Turkey to violate its obligations under the current association agreement.

The concluding remarks of this thesis establish that the candidate state's possibility to foresee any legal conditions is limited during the process of accession. The wording of the articles deliberately leave considerable space for political concerns and there is no guarantee that membership negotiations will result in full membership of the Union. This implies that the question of human rights is of considerable importance for Turkey. The human rights conditionality may be used to advocate against a Turkish membership of the EU on a political level, and what is more important in a legal context, the respect for human rights is one of very few accession conditions explicitly mentioned in the Treaties. The legal trend within the EU also implies that the ECHR and the Charter of fundamental rights will gain importance in EU-law, especially if the Lisbon Treaty enters into force.

Sammanfattning

Detta examensarbete behandlar juridiska frågor kring EU:s utvidgning och relationerna mellan EU och Turkiet. Först konstateras att ansökan om medlemskap i Europeiska Unionen endast behandlas i två artiklar i EU-fördraget. Den första, artikel 49, hänvisar till att ansökarlandet måste respektera principerna i artikel 6.1, d.v.s. frihet, demokrati och respekt för de mänskliga rättigheterna och de grundläggande friheterna samt rättsstatsprincipen. I verkligheten innebär dessa artiklar en lång och komplicerad process där framförallt kommissionen är verksam. Här uppmärksammas också att det finns en skillnad mellan att en enhet räknas som en stat och dessutom som en europeisk sådan, vilket är grundförutsättningen för att en ansökan om medlemskap skall accepteras, och att en stat senare tillåts att gå med i Unionen därför att den uppfyller kriterierna för medlemskap.

Efterlevnaden av Köpenhamnskriterierna är av stor betydelse för att ett land vars ansökan har accepterats skall få status som kandidatland. Det rör sig emellertid inte om en hundra procentig efterlevnad. I detta sammanhang tas även *acquis communautaire* upp, d.v.s. den EU-rättsliga lagstiftningen i sin helhet. Denna skall implementeras och efterlevas av varje ny medlemsstat. Den politiska trenden inom EU går mot ett allt mer fördjupat samarbete och man talar idag om en politisk union istället för en ekonomisk. Detta innebär att omfattningen av EU:s lagstiftning växer kontinuerligt så att det successivt blir allt svårare att gå med i Unionen. Frågan om respekt för mänskliga rättigheter återkommer under kandidatprocessen, dels som en del av EU:s lagstiftning och dels som en del av Köpenhamnskriterierna. EG-domstolens praxis på området har varierat under åren, men generellt framhålls Europakonventionen som en viktig inspirationskälla. Formellt krävs en högre standard av kandidatländerna än av medlemsstaterna på området. Eventuellt kan detta balanseras ifall Europeiska Unionens stadga om de mänskliga rättigheterna ges en tydlig juridisk status.

Den fria rörligheten för arbetstagare är en viktig del av den gemenskapsrättsliga lagstiftningen. Kommissionen anser att övergångsåtgärder kommer att vara nödvändiga för att förhindra störningar på den inre marknaden ifall Turkiet går med. EU är en erfarenhet rikare efter utvidgningen 2004 och det kan diskuteras ifall inte unionsmedborgarskapet är en större utmaning för Unionen och enskilda medlemsstater i detta fall.

Institutionella förändringar är nödvändiga ifall ytterligare utvidgning skall kunna ske. Lissabonfördraget innehåller vissa ändringar som framförallt begränsar institutionernas storlek. Det är även intressant att Lissabonfördraget sätter ytterligare fokus på respekten för mänskliga rättigheter för länder som vill gå med i EU.

Den bristande respekten för mänskliga rättigheter är också ett återkommande problem i Turkiets medlemskapsförhandlingar, även om förbättringar har skett under de senaste åren. Landet har, i en mycket stor omfattning, dömts för brott mot Europakonventionen. Då Turkiet fortsätter att hävda sin rätt att tolka internationella konventioner om minoriteters rättigheter enligt 1923 års Lausannefördrag finns fortsatta problem kring frågor som rör kurdernas rättigheter. Även i samband med Cypernkonflikten har Turkiet fällts för brott mot Europakonventionen. Konflikten är ett hinder för Turkiets medlemskap i EU då den medför att Turkiet inte lever upp till sina förpliktelser enligt nuvarande associationsavtal.

Slutsatser som kan dras av detta arbete är bl.a. att den juridiska förutsebarheten för ett kandidatland är liten. Bestämmelserna i fördraget har utformats så att politiska hänsyn spelar en avgörande roll och det finns ingen garanti för att medlemskapsförhandlingar skall utmynna i medlemskap. Detta torde innebära att den bristande respekten för mänskliga rättigheter är av stor betydelse i Turkiets medlemskapsförhandlingar. Dels då de kan användas på ett politiskt plan för att argumentera mot ett turkiskt medlemskap och dels då de faktiskt är ett av få utskrivna krav i fördragen. Den juridiska trenden inom EU pekar dessutom på att Europakonventionen och Stadgan om de grundläggande rättigheterna kommer att få allt större inflytande i Unionen, framför allt om Lissabonfördraget träder i kraft.

Abbreviations

CAP	Common Agricultural Policy
CEE	Central and Eastern Europe
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CSDP	Common Defence and Security Policy
EC	European Community
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Community
EU	European Union
GAERC	General Affairs and External Relations Council
IPA	Instrument for Pre-Accession Assistance
JHA	Justice and Home Affairs
MP	Member of Parliament
TAIEX	Technical Assistance and Information Exchange Instrument
TEC	Treaty establishing the European Community
TEU	Treaty establishing the European Union
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations

1 Introduction

The European Union has continuously expanded during its existence. The constantly ongoing enlargement is an important part of the Union itself and its history, since it was one of the principal aims of the founding fathers of the European Coal and Steel Community.¹ With a legal system that is becoming increasingly deepened and therefore more demanding for countries wishing to accede to the EU, I was particularly interested in the question of what can be legally foreseen by those countries. I also wanted to know more about the actual process that takes place once a country has handed in its application for membership.

A student of EU law often has to study detailed legislation in different matters, such as directives and regulations on competition, equality and social benefits. This master thesis is an attempt to go back to basics and to investigate the foundations of membership. Does Europe have any legal limits?

1.1 Purpose and disposition

This master thesis aims to examine the ongoing enlargement of the EU, with special focus on the challenges ahead and Turkey's accession to the Union. The main purpose is to examine the conditions of accession and problems faced by Turkey in the accession process and not to establish whether Turkey should join the EU or not.

The thesis will be divided into two main parts. The first part is an examination of the present situation and questions concerning the legal criteria that exist when a state wishes to join the EU. Are they fixed or not? Special focus will be on the *acquis communautaire*, the body of EU law, and how the obligation of its implementation prior to accession is used towards candidate countries. The legal rules on application for membership are set out in a few articles in the Treaties and my aim has been to investigate what these provisions will entail in practice and how they affect both the candidate state and the work within different institutions of the EU. I also wanted to explore the possible impact of the newly agreed Lisbon Treaty in order to keep a future perspective.

The second part of the essay will examine the relations between Turkey and the EU: What difficulties must be solved before Turkey can be considered as country that aligns with the *acquis*? How would Turkey's entry into the EU affect the country's legal order and how would it affect the Union and its institutions? Since there are many topics that could be examined and

¹ Declaration of 9 May 1950 made by the French foreign minister Robert Schuman, http://europa.eu/abc/symbols/9-may/decl_en.htm

discussed, I have chosen to limit myself to the questions of human rights and the rights of minorities. I will also investigate the question of free movement of persons in this section, since I found it interesting due to today's political debate. Finally, I will highlight some issues in Turkey-Cyprus relations that are connected to the matters of human rights and the free movement of persons.

I have chosen to focus on possible aspects of Turkey's entry into the EU since that is the most challenging enlargement in a relatively near future. The country has a large population and would considerably change the power balance in the European institutions. The issue of massive immigration due to an enlargement has once again been debated. Approximately three million Turks live in the EU today, which makes them by far the biggest group of immigrants in the EU. Is there a need to restrain two of the fundamental rights granted to Europeans, the free movement and the European citizenship, in order to prevent a flood of immigration?

Turkey has been repeatedly convicted by the ECtHR for violations of human and fundamental rights. How can this affect the country's EU aspirations and what is done to improve the situation?

I have tried to bring the first and second part of the essay together by mentioning practical examples using Turkey and Cyprus in my descriptions of different agreements and negotiations in the first part of the essay.

1.2 Method and Material

This thesis is written in accordance with the classical Swedish legal methodology. I have used both current legal rules, such as the EC and EU Treaties and the Accession Treaties and Agreements. Since my aim is to look at the challenges ahead as well, I have also studied the possible impact of the Lisbon Treaty on enlargement issues. I have also studied Turkish legislation and case law from the ECHR and the ECJ.

The homepage of the European Union and especially the Commission's website on the current development of the enlargement have been valuable sources of information as well.

1.3 Delimitations

I have tried only to cover the legal aspects of the enlargement and in particular Turkey's entry in this thesis. Since the subject is rather complex, this thesis cannot deal with all of those aspects. That is why I have chosen not to focus on more political issues, such as EU foreign and security politics issues related to Turkey and the European neighbour policy, even though they are interesting topics as well.

I have also chosen not to write about social and economical issues, such as the CAP and the structural funds since that would have demanded knowledge of economics, and this is after all a legal essay.

This essay will only cover one aspect of the free movement, since I found the free movement of persons to be the most interesting one. No other areas within the internal market will be covered, such as areas relating to competition law and intellectual property issues, even though they also may present a significant challenge for Turkey in order to align with the *acquis*.

2 The legal regime for joining the European Union

2.1 Introduction

The rules that control how a state joins the EU are a part of a constantly evolving system that is becoming more and more complex. It includes the legal requirements set out in article 49 and 6 TEU, as well as the political declarations made by the European Council, in particular the declaration made in Copenhagen in 1993.

The process of joining the EU is divided into two phases; the process of controlling the admissibility of the application and then the process of negotiating the conditions for accession and an eventual adaptation of the Treaties.

The first step is thus to apply for membership. If the application is accepted by the Council, the next step is the proposal of a road map to the candidate state. The candidate is then the subject of a screening procedure and a process of control of its ability to assume the obligations for EU membership. This is a unilateral process, imposed by the institutions of the Union. The candidate then enters into multilateral negotiations with the Member States and the representatives of the Union about the exact conditions for its membership.² However, as I will describe further in this chapter, the candidate's ability to change any conditions is limited.

2.2 Some general remarks on the law and nature of international Treaties

Treaties are one of the most important sources of international law, since they are the only way through which states may create legally binding obligations towards other states or an organisation. A treaty is, like a contract, a legally binding agreement deliberately created by two or more subjects of international law. The subjects in question should have treaty-making capacity, for example by being recognised as states. There are no mandatory formal requirements that must be satisfied; a Treaty could be valid in both written and oral form. This means that under international law, treaties can also arise from deliberations of an international conference, direct bilateral negotiations and informal governmental discussions.

² Soldatos, *Le régime juridique d'admission dans l'Union Européenne : sa construction évolutive, son application pragmatique, parfois laxiste, et sa portée dans la définition des frontières de l'Union Européenne*, in *L'Union européenne élargie aux nouvelles frontières et à la recherche d'une politique de voisinage*, Bruylant, Brussels, Belgium, 2006, 1st edition, p. 65

However, the Vienna Convention on the law of Treaties applies only to written treaties. There is not any set nomenclature for a treaty. The *Charter* of the UN and the single European *Act* are both treaties under international law, despite their names.³

Hence, treaties constitute the foundation in the process of accession to the EU. The main conditions for accession are found in the TEU and different treaties in the form of agreements are established between the Union and the candidate or between Member States and the candidate.

2.3 The conditions of accession

The preamble of the TEC establishes the determination of the Member States to “lay the foundations of an ever closer union among the peoples of Europe”. It also states that the contracting parties are “resolved, by thus pooling their resources to preserve and strengthen peace and liberty” and that they are inviting likeminded countries by “calling upon the other peoples of Europe who share their ideal to join in their efforts”.

The fact that the Treaties are open is based on three essential elements; they contain, as shown above, an invitation to other European states. They also contain articles with provisions on how to apply for membership. Lastly, there are criteria that control that the application of a state is acceptable and that the state is eligible for membership as well as establishing structures of approval of its admission.⁴

The term of eligibility is based on the fulfilment of the constitutional requirement and the fact that the country should be a European country, both set out in article 49 TEU. The admissibility depends on the fulfilment of the economical and the political criteria. The admission of a country takes place after finishing successful negotiations with the candidate and when the accession treaty is signed and ratified by the current Member States and the acceding state.⁵

Article 49 of the TEU states that “Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union”. Article 6 (1) states “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

According to Hillion, the European Council has confirmed that the political criterion rather determines the admissibility of a candidate, and not no much its eligibility. In other words, there might be a hierarchy between the two

³ Dixon, *Textbook on international law*, Oxford University Press, Oxford, United Kingdom, 2005, 5th edition pp. 49-50

⁴ Soldatos, *supra* note 2, pp. 63-64

⁵ Hillion, *The Copenhagen Criteria and their Progeny*, in *EU enlargement – a legal approach*, Hart publishing, Oxford, Oregon, USA, 2004, 1st edition pp. 19-20

conditions set out in article 49(1) TEU. The European Council still refers to the Copenhagen political criteria when it comes to the requirements of admission of the candidate countries, rather than the political condition set out in article 49(1) TEU with its reference to article 6(1) TEU. There is also a widespread view, according to which there are two standards that apply; the stricter Copenhagen Criteria applies for the candidate countries, which also includes the protections of minorities. The less demanding standards set out in article 6(1) TEU apply for member states.⁶

Another important aspect of the use of a strict accession criterion is that it has enabled the Union and its Member States to heavily influence the candidate state before its accession to the Union, which will be discussed further on.

2.3.1 The condition of being a European state

2.3.1.1 A Union of states

The applicant for EU membership has to be a sovereign state, according both to its internal law and to public international law, since the Union is a Union of states. The main criteria of statehood are found in article 1 of the Montevideo Convention on Rights and Duties of States, signed at Montevideo 26 December 1933. This article establishes that the state, in order to be considered as a person of international law, should possess the following qualifications: a permanent population, a defined territory, a government and the capacity to enter into relations with other states. The criterion for a permanent population does not mean that there cannot be migration within the state. It more likely suggests that there must be some population linked to a specific territory on permanent basis, which can be regarded as its inhabitants in general terms.⁷

The principle of having a defined territory is essential; a state must have physical borders that mark it out from its neighbours. However, these borders do not have to be exact, there are numerous border disputes going on today without the statehood of the concerned states being called into question.⁸

The government of the state must then be effective within the defined territory and exercise control over the permanent population. The government should also be responsible for the international rights and duties of the state. According to Dixon, this does not mean that the government must be in a totally dominating position within the territory, but it should be capable of controlling the affairs of the state in the international community. As for the capacity of the state to enter into legal relations, Dixon considers this criterion to be quite problematic, but suggests that it means that the state

⁶ Hillion, *supra* note 5 p. 21

⁷ Dixon, *supra* note 3 p. 106

⁸ *Ibid*, p. 107

has legal independence and not factual autonomy, since many states are in a position of e.g. financial dependence upon other states.⁹

These issues were debated when Cyprus applied for membership of the formerly EC, as the Greek Cypriot authority did not control the northern part of the island.¹⁰ The government of the Republic of Cyprus, in Greek-Cypriot hands, was recognized as the legitimate government of the island and thus gained the advantages of international legitimacy.¹¹ The Turkish Cypriot administration did not receive the same support from the international community. Its statehood had been denied by Security Council Resolutions 541(1983) and 550(1984).

The European Commission concluded in 1993 that the Republic of Cyprus' application for EU membership was made in the name of the whole island. This led to an angry reaction of the Turkish-Cypriot leadership, which claimed that the government of the Republic of Cyprus did not have the right to apply for membership without consulting it.¹² The General Affairs Council had confirmed the island's suitability in 1995 and established that accession negotiations with Cyprus could start in a near future. In 1997, the European Council in Luxembourg confirmed that accession negotiations would begin in the spring of 1998. The Turkish Cypriot side refused to take any part in the negotiations, but the country could finally enter the Union in 2004. A helping factor was the European Council meeting in Helsinki in December 1999, which recognized Turkey as a candidate for membership (with the support of Greece).¹³

2.3.1.2 The meaning of “European” in article 49 TEU

The preamble of the EC Treaty aims at founding an ever closer Union between the people of *Europe* and the description of the conditions of application in article 49(1) TEU explicitly refers to “Any European state...”

According to the Commission, the provision in article 49 TEU does not mean that all European countries must apply for membership, or that the EU must accept all applications. The Commission thinks that the European Union is primarily defined by its values.¹⁴

Bearing in mind the other formulations of the TEC, such as “an ever closer Union”, the founding fathers of the Union wanted to exclude non-European from the possibility of applying for membership.¹⁵ The exact limits of

⁹ Dixon, *supra* note 3, pp. 107-108

¹⁰ Soldatos, *supra* note 2, p. 71

¹¹ Yiangou, *The accession of Cyprus to the EU: Challenges and opportunities for the New European regional order*, JEMIE, Issue 2/2002, published by University of Cambridge, United Kingdom, p. 2

¹² *Ibid*, pp. 2-3

¹³ *Ibid*, p. 4

¹⁴ COM (2006) 649 final *Enlargement Strategy and Main Challenges 2006 – 2007*, including annexed special report on the EU's capacity to integrate new members, p. 18

¹⁵ Soldatos, *supra* note 2, p. 65

Europe remain to be debated, since Turkey's application to start membership negotiations eventually has been accepted, but not Morocco's, and the main reason was said to be that Morocco was not a European state.¹⁶ It is also a fact that the geographical borders of Europe may differ from the borders of the EU and that cultural and constitutional traditions as well as political and economic aspects form a part of the complex criteria of being a European state.¹⁷ The Commission considered in its special report on the Union's capacity to integrate new members that the term "European" combines geographical, historical and cultural elements which all contribute to European identity.¹⁸

2.3.2 Fulfilling the Copenhagen Criteria

The Copenhagen Criteria was at first a declaration made by the European Council in June 1993.¹⁹ The declaration contains political and economic conditions and was made with the then future entry of the central and eastern European countries in mind.²⁰ The European Council in Copenhagen took a decisive step towards the fifth enlargement, agreeing that "the associated countries in Central and Eastern Europe that so desire shall become members of the European Union."²¹

The declaration states that membership requires the following from a candidate country:

- Stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities; the political criteria.
- The existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; the economic criteria.
- The ability to take on the obligations of membership, including adherence to the aims of the political, economic and monetary union.²² (This criterion refers to the ability to take on EU legislation, the *acquis communautaire*, which will be described in the next chapter.)

¹⁶ Both countries applied for membership of the EC in 1987

¹⁷ For a more detailed discussion on the complexity of the criterion of being a European state, see e.g. Soldatos *supra* note 2, pp. 71-76

¹⁸ COM (2006) 649 final, *supra* note 14, p. 18

¹⁹ *Conclusions of the presidency*, European Council in Copenhagen, 21-22 June 1993, p.13

²⁰ On the 1st of May 2004, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia acceded to the EU

²¹ http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm

²² *Conclusions of the presidency*, European Council in Copenhagen, 21-22 June 1993, p. 14

Ever since, the declaration is known as the Copenhagen Criteria and used as a standard frame in order to measure a country's ability to meet the requirements to join the Union.²³

The European Council had previously stressed the importance of pluralist democracy and respect for human rights, e.g. during its meeting in Copenhagen in April 1978, where it stated that they were essential elements of membership of the European Communities.²⁴ With the coming enlargement of Greece, Spain and Portugal in mind, the Commission also made similar declarations.²⁵ In Agenda 2000, the Commission states that it considers that the "respect of the political conditions defined by the European Council in Copenhagen by an applicant country, is a necessary, but not a sufficient, condition for opening accession negotiations."²⁶

The Copenhagen Criteria was further developed by the European Council in Madrid in 1995. The Madrid European Council established that membership required that the candidate country must have created the conditions for its integration through the adjustment of its administrative structures. The Council held that the mutual trust required by EU membership demanded that EU legislation was being implemented effectively through appropriate administrative and judicial structures.²⁷

According to article 4 TEU, the European Council shall consist of heads of state or government of the Member States. The European Council is not an institution of the Union and the same article states that its mission is to provide the Union with the necessary impetus for its development and to define the general political guidelines thereof. However, this declaration, even though political, has legal consequences for aspiring member countries. On the other hand, one could claim that most conditions set out in the Copenhagen Criteria have deep roots in previous institutional practice, as mentioned above. Soldatos argues that the declaration is made with the spirit of the Amsterdam Treaty in mind and thus does not modify the meaning of the Treaties.²⁸ However, the matters of democracy, the rule of law and human rights were never included in a formal set of criteria for previous applicant countries before 1993. The contrast between the rules for existing members and the admission criteria for newcomers became evident.²⁹ On the other hand, the Treaty of Amsterdam added article 6(1) TEU, which reduced the difference, even though the Copenhagen criteria is more extensive, as it also requires the protection of minorities. Together with

²³ Hillion, *supra* note 5, p. 2

²⁴ *Ibid* p. 5

²⁵ *Ibid*, p. 5

²⁶ COM 2000(97) final *Agenda 2000: For a stronger and wider Union* p. 40

²⁷ http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm

²⁸ Soldatos, *supra* note 2, p. 77

²⁹ Sadurski, *EU enlargement and human rights*, in Neuwahl, *European Union enlargement, Law and socio-economic changes*, Les editions thémis, Montreal, Quebec, Canada, 2004, 1st edition, p. 183

article 7 TEU, which makes it possible to suspend the rights of a Member State in breach with the principles of article 6, the gap may have become smaller. Nevertheless, the indisputable fact that none of the member states that entered prior to the CEE countries faced these requirements at the point of their admission remains. According to Sadurski, this could be explained by a suspicion within the Western European countries concerning the trustworthiness of the democratic reforms of the CEE countries. When Spain, Portugal and Greece were about to join the EC, their previous lack of democratic rule was seen as a temporary aberration. For the CEE countries, it was seen as a chronic state of affairs.³⁰

2.3.3 Acquis Communautaire

According to the last part of the Copenhagen Criteria, (and especially as it was developed further by the European Council in Madrid) the applicant country has to show its ability to take on the obligations of membership. This means accepting and observing the Acquis Communautaire, i.e. the European Union's rules and objectives, translated into a body of EU law.

The EU legal order is constantly developing due to the ongoing process of deepening European integration and the enhancing legislative activity of the institutions. The *acquis* is therefore an increasingly demanding criterion for the latest candidates.³¹ When the ten CEE countries were about to join the EU, the *acquis* had expanded to include the common foreign and security policy, as well as justice and home affairs and the realization of the political, economical and monetary Union.³² In general terms, the *acquis* includes:

- The content, principles and political objectives of the founding Treaties
- Legislation and decisions adopted pursuant to the Treaties, and the case law of the ECJ
- Other acts, legally binding or not, adopted within the Union framework, such as interinstitutional agreements, resolutions, statements, recommendations and guidelines
- Joint actions, common positions, declarations, conclusions and other acts within the framework of the CFSP and JHA.
- 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.

It is the candidate's duty to adapt its legal order to make it compatible with EU law.³³ In order to fully align with the EU legislation and to implement

³⁰ Sadurski, *supra* note 29 p. 184.

³¹ Hillion, *supra* note 5, p. 11

³² COM 2000(97) *supra* note 26 p. 39

³³ Hillion, *supra* note 5, p. 9

the *acquis* efficiently, the applicant country must bring its institutions, management capacity and administrative and judicial systems up to Union standards. This primarily requires a well-functioning and stable public administration and an independent judicial system.³⁴ For example, the applicant's courts should be able to operate efficiently in cases concerning EU law. They must be able to recognize fundamental principles of EU law, such as the supremacy of EU law³⁵ and the direct effect of some legislation.³⁶ The national courts must also be able to cooperate with the ECJ and to make use of the preliminary ruling procedure in article 234 TEC.³⁷ To put it short, it is not sufficient with constitutional changes, since it is the capacity of the administration to apply them that is essential.³⁸

If a candidate has difficulties to approximate its legal order to that of the Union, the problem should rather be solved with the establishment of transitional measures than by changing or reforming the law of the EU. This principle was established by the Council of Ministers of the EC in 1970.³⁹ The negotiations that take place between the Union and the candidate country are very much take-it-or-leave-it negotiations, since the candidate country is not in a position to renegotiate the content of the *acquis* with the member states, an idea that constantly has been out ruled by the European Council.⁴⁰ Even though article 49 of the TEU states that “The conditions of admission and the *adjustments* to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State”. The adjustments mentioned in the article are interpreted as minor technical changes, e.g. the candidate's number of seats in a committee, not fundamental institutional changes.⁴¹

Hillion therefore argues that the level of required adaptation is higher for the newest Member States and the candidates, since the *acquis* has developed to encompass the Schengen cooperation and the EMU as well, which are excluded for some member states today.⁴² A different approach was adopted during the southern enlargement, as the Commission then recommended the use of transitional periods in order to help the candidates' legal adaptation after accession.⁴³

³⁴ COM (2002)700 *Towards the enlarged Union, Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries*, p. 10

³⁵ This was established by the court in the judgment Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR p. 01141

³⁶ This doctrine was established by the Court in one of its most famous cases, Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. [1963] ECR p. 00003

³⁷ COM 2000(97) final, *supra* note 26 p. 46

³⁸ Soldatos, *supra* note 2, p. 79

³⁹ Hillion, *supra* note 5 p. 9

⁴⁰ COM 2000(97) final *supra* note 26, p. 44

⁴¹ Hillion, *supra* note 5, pp. 10-11

⁴² Denmark and the UK do not participate in the EMU cooperation, Ireland and the UK do not participate in the Schengen cooperation

⁴³ Hillion, *supra* note 5, p. 15

In practice, the *acquis* is divided into different chapters, each a subject for negotiations between the Union and the candidate country. In the negotiations between the EU and Turkey, the *acquis* is divided into 33 chapters, which will entail approximately 815 changes in primary and secondary legislation between 2007 and 2013.⁴⁴

The progress made by the candidate in adopting the legislation to meet the *acquis* is monitored by the Commission in so-called progress reports.⁴⁵ The Commission analyses to which extent legislative measures have been taken to enable implementation of the *acquis* in each chapter, and if any further measures need to be taken. The Commission also assesses if the candidate country has established administrative structures required to implement the *acquis*.⁴⁶

2.3.4 The free movement of workers and the European Citizenship

2.3.4.1 Introduction

The free movement has been an important part of the deepening integration of Europe ever since the Rome Treaty was signed in 1957. The concept has constantly developed, but the free movement has always been a cornerstone of the *acquis communautaire*. At first, workers were only considered in their economical dimension, as a part of the economic integration within the EEC. This has gradually developed into a broader recognition of migrating workers' rights, which mostly originates from the jurisprudence of the ECJ.

The Treaty of Maastricht, signed in 1992, involved significant changes. The Community then went beyond its original economic objective and its political objectives came into force. The Treaty also established the European citizenship.⁴⁷

There continues to be some opposition between the different views on workers in the EU. In one way, they are (still) mobile units of production contributing to the economy of the Union, and on the other hand, they have social rights and should not suffer discrimination from the receiving Member State.⁴⁸

⁴⁴ Turkey's national program for implementing the *acquis*, available at <http://www.abgs.gov.tr/>

⁴⁵ COM (2002)700 *Towards the enlarged Union, Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries*, p. 9

⁴⁶ *Ibid* p. 10

⁴⁷ http://europa.eu/scadplus/treaties/maastricht_en.htm

⁴⁸ Craig and de Búrca, *EU law: texts, cases and materials*, Oxford University Press, Oxford, United Kingdom, 2003, 1st edition, p. 743

The main provision is found in article 39 TEC, which states that the freedom of movement of workers shall be secured within the Community. Furthermore, this freedom of movement shall entail the abolition of any discrimination based on nationality. The concept of discrimination has been broadly interpreted by the ECJ and can be said to cover most obstacles that could impede the free movement of workers. The concept of worker is equally given a broad interpretation by the Court, which will be shown further on in this chapter.

Article 40 TEC provides for the Council to adopt secondary legislation in order to assure the freedoms set out in article 39. Two of the most important acts issued under this provision are the Directive 2004/38 on the free movement and residence of EU citizens and their families and Regulation 1612/68 on freedom of movement for workers within the Community.

2.3.4.2 Central case law and recent legal developments

The case law on the interpretation of the concept of worker and the EU citizenship is vast. I will therefore limit this section by describing the development in the jurisprudence of the ECJ and focus on some of the case law that could be interesting in the context of future enlargement to more economically challenged candidate countries.

One of the first important cases in this field was the case of *Hoekstra*,⁴⁹ where the ECJ established that the meaning of the concept of worker should be decided by the Community legal order and not by the Member States. The ECJ has also ruled on several other conditions required to be considered as a worker in the case of *Levin*.⁵⁰ The Court developed its previous statements about the interpretation of the concept of worker and established that it should not be interpreted in a narrow way. The ECJ also ruled that the motives which may have prompted the worker to seek employment in another Member State are of no importance when it comes to the right of that worker to enter and reside in the territory of that Member State. The only condition is that the worker should pursue or wish to pursue an effective and genuine activity. The Court then established that the income of the worker is of less significance if the worker pursues an activity as an employed person, which is effective and genuine. The approach to include part time workers in the concept of workers as in the *Levin* case, was further developed by the Court in the *Kempf*⁵¹ case. The case concerned a German national residing in the Netherlands. He worked about twelve hours per week and therefore claimed social benefits from the Netherlands to supplement his income. According to the ECJ, the fact that he claimed social benefits could not exclude him from the status of worker deriving from Community law. The Netherlands had thus no right to deny him rights

⁴⁹ Case 75-63. *Mrs M.K.H. Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (Netherlands) [1964] ECR p. 00347

⁵⁰ Case 53/81 *D.M. Levin v Staatssecretaris van Justitie*. [1982] ECR p. 01035

⁵¹ Case 139/85 *R. H. Kempf v Staatssecretaris van Justitie*. [1986] ECR p. 01741

deriving from the provisions of Community law relating to the free movement of workers.

These cases show that the definition of ‘worker’ shall be interpreted extensively. A person can qualify as a worker even though he or she works part time, earns below the established minimum wage of the host state and is dependent on social benefits. The motives that may have prompted the person to search for employment in another Member State are of less significance.

The status of European citizenship is another important aspect of the free movement of persons. Founded by the Maastricht Treaty, it contributes to the symbolic move from the European Economic Community to the European Community and the political integration of the EU. The first step away from the necessity of carrying out an economical activity, in order to be able to benefit from the rules governing the free movement, was made by the Commission in 1979. The Commission suggested that the freedom of movement should be extended to those not economically active. The proposal was later withdrawn, and it was the signature of the Single European Act in February 1986 that made the adoption of directives on the right of residence for economically non-active persons possible.⁵²

One of the first steps towards recognizing some kind of status besides the ordinary citizenship for nationals of Member States was taken by the ECJ in 1979 in the case of *Knoors*.⁵³ In this case, the Court stated that nationals of a Member State could invoke the rights guaranteed by the Community system against all Member States, even against the state whose nationality they possess. However, this was long before the actual provisions on European citizenship in articles 17-22 TEC came into force.

One of the first cases in which the ECJ examined both the European citizenship and the free movement for workers was the case of *Martinez Sala*.⁵⁴ The case concerned a Spanish national residing in Germany. She had previously worked in Germany, but was now relying on social assistance. When she applied for a child-raising allowance, it was refused on the ground that she did not have German citizenship or a residence permit in Germany. The Court decided that the order for reference did not provide sufficient information to enable it to take account of all the circumstances that could have been relevant in this case, in order to decide whether Mrs. Martinez Sala could be considered a worker within the meaning of regulation 1408/71. The ECJ then went on to examine the situation based on the provisions on European citizenship in articles 17-22 TEC in connection with article 6 (now article 12 TEC), which prohibits discrimination. The ECJ found that a an EU-national, lawfully residing in another Member

⁵² Rogers and Scanell, *Free movement of persons in the Enlarged European Union*, Sweet & Maxwell Ltd, London, 2005, 1st edition p. 46

⁵³ Case 115/78 *J. Knoors v Staatssecretaris van Economische Zaken*. [1979] ECR p. 00399, Paragraphs 17-19 of the judgement

⁵⁴ Case C-85/96 *María Martínez Sala v Freistaat Bayern*. [1998] ECR p. I-02691

State, should be able to rely on the general principle of non-discrimination on the basis of his/her EU citizenship. This would also entail the right to a benefit normally granted to all persons lawfully residing in that state.⁵⁵

Another interesting aspect of this case is that the Court pointed out that there is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied. In this case, the ECJ established that there is one definition used in context of Article 48 of the EC Treaty and Regulation No 1612/68 and another used in relation to Article 51 of the EC Treaty and Regulation No 1408/71.⁵⁶ (Today articles 39 and 42 TEC.) The first provision relates solely to workers, i.e. a person performing a genuine economic activity. The second Article provides for the Council to be able to adopt measures in the field of social security that are necessary to provide freedom of movement for workers, i.e. workers in a social context.

A similar interpretation was done by the Court in the case of *Grzelczyk*.⁵⁷ The case concerned a French national studying in Belgium. When he applied for a minimum subsistence allowance, the Belgian authorities refused this because he was not of Belgian nationality. This was not approved by the ECJ, who once again interpreted articles 17 and 12 together. Since the only reason for the refusal by Belgian authorities was the fact that Mr. Grzelczyk was not a Belgian national, there was undoubtedly discrimination on the base of nationality.⁵⁸ The Court then went on to state that “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.”⁵⁹

Article 18(1) TEC establishes that “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.” Does this mean that article 18 introduces a directly effective right to move and reside in a Member State, without having to belong to any other category of persons whose status is protected by EU law? Article 18(1) TEC relates to the limitations and conditions laid down in the TEC and by the measures adopted to give it effect. This could mean that Member States can adopt restrictive measures on grounds of public policy, security and health, e.g. as established in article 39 TEC.

⁵⁵ Para 63 of the *Martinez Sala* judgment

⁵⁶ Para. 31 of the *Martinez Sala* judgment

⁵⁷ Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*. [2001] ECR p. I-06193

⁵⁸ Para. 29 of the judgment in *Grzelczyk*

⁵⁹ Para. 31 of the judgment in *Grzelczyk*

The secondary legislation adopted, primarily Directive 2004/38⁶⁰, contains limitations as well, both concerning the beneficiaries' financial and health insurance situation⁶¹ and repealing the conditions laid down in article 39 TEC.⁶² Article 3 of Directive 2004/38 states that it applies to "all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them." (According to article 2(2), family members are spouses, registered partners, children under the age of 21 or older if they are directly dependant on the Union citizen and ascendant family members being directly dependant on the Union citizen.)

The ECJ also provided an answer to the question in the *Baumbast*⁶³ case. The case concerned a German national who lived in the United Kingdom together with his wife, a Colombian national and their two children. Baumbast worked in the United Kingdom for a few years, and then went on to work for German companies based outside the Union. The Baumbast family was then refused a renewal of its residence permit, based on the fact that Mr Baumbast no longer could enjoy the rights granted to migrant workers within EC law. The ECJ ruled that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State could, as a citizen of the Union, enjoy a right of residence by direct application of Article 18(1) TEC. Furthermore, the Court also pointed out that the exercise of this right is subject to the limitations and conditions referred to in the article, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and the principle of proportionality.⁶⁴ This could mean that the interpretation done by authorities concerning secondary legislation might require a change in order not to interfere with rights guaranteed by the Treaty. If these rights are disproportionately restricted, there should be adjustment.⁶⁵ The judgment in *Baumbast* has also been seen by some scholars as meaning that the ECJ acknowledges that the right of residence could be subject to limitations and conditions.⁶⁶

In a recent case, *Ioannis Ioannidis v Office national de l'emploi*⁶⁷, the ECJ seemed to think that article 39 should be interpreted in the light of the provisions on European citizenship in Articles 17 and 18 and the prohibition of discrimination in article 12 TEC. The case concerned Greek national who was refused a tide over allowance, normally granted to young people searching for employment, by Belgian authorities on the ground that he had

⁶⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*

⁶¹ Article 14 of Directive 2004/38/EC

⁶² Article 27 of Directive 2004/38/EC

⁶³ Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*. [2002] ECR p. I-07091

⁶⁴ Para. 94 of the judgment in *Baumbast*

⁶⁵ Craig and de Búrca, *supra* note 48, p. 853

⁶⁶ Rogers and Scanell, *supra* note 52, p. 57

⁶⁷ Case C-258/04, *Ioannis Ioannidis v Office national de l'emploi*. [2005] ECR p. I-08275

completed his secondary education in another Member State. The Court pointed out that in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, a benefit of a financial nature that intended to facilitate access to employment in the labour market of a Member State could not be excluded from the scope of Article 39(2) TEC.⁶⁸ The tide over allowance could therefore be considered as a social advantage within the meaning of Regulation 1612/68.⁶⁹ Considering this, the ECJ did not find it necessary to rule on the actual interpretation of Articles 12, 17 and 18 TEC.

The interpretation of the provisions on European citizenship in connection with the right to social benefits takes place in recent jurisprudence as well, e.g. in the case of *Tas-Hagen and Tas*⁷⁰ which concerned the right to a Dutch benefit awarded to civilian war victims.

The free movement of nationals of new Member States is often a subject to transitional measures. The scope of these measures has been examined by the ECJ in several cases. One example is the *Lopes da Veiga*⁷¹ case, which concerned transitional measures taken due to Portugal's entry in the EC. Article 216(1) of the Portuguese act of accession delayed the application of articles 1-6 of regulation 1612/68 in Portugal with regard to nationals of other Member States and in the other Member States with regard to Portuguese nationals. These articles lay down the right of access to the labour market in other Member States for workers exercising their free movement rights. The ECJ stated in its judgment that nevertheless, a Portuguese national that had been working in another Member State prior to the accession of Portugal, could rely on the provisions in article 7 et seq. of the Regulation, relating to the holding of employment and the equal treatment.⁷² The Court also established that this person could rely on Article 4 of Council Directive 68/360/EEC of 15 October 1968 concerning the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.⁷³

2.3.5 The status of Human Rights in the EC/EU and the impact of the Charter of Fundamental rights

The status of human rights *within* the EC and the EU has been quite complicated and ambiguous during the development of community and EU law. The community legal system is a system of limited legal competence:

⁶⁸ Para. 22 of the judgment in *Ioannis Ioannidis v Office national de l'emploi*

⁶⁹ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community

⁷⁰ Case C-192/05 *Tas-Hagen and Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR p. I- 10451

⁷¹ Case 9/88 *Mário Lopes da Veiga v Staatssecretaris van Justitie*. [1989] ECR p. 02989

⁷² Para. 19 of the judgment in *Lopes da Veiga*

⁷³ Para. 22 of the judgment in *Lopes da Veiga*

the Community only has the powers explicitly conferred to it by the Treaties. When the Community exercises its legal powers, these powers must derive from the specific provisions of a Treaty. The Treaties actually contain few provisions on human rights and there is no direct claim for general competence within this field.⁷⁴ Then there is the tension between the different views on community law. What should it be? What is now the European Union has been developed from a purely economical cooperation, that in the beginning had very little to do with human rights. Today the cooperation within the European Union encompasses all kinds of political areas and the Union even tries to promote some of the externally. The role of human and fundamental rights is debated when it comes to the question of enlargement. Do they function as device to prevent candidate states from joining the Union, or do they function as a tool of motivation?

The ECJ has established jurisprudence through which it considers that the protection of human rights is included in the general principles of EC law and the Charter of fundamental rights has during the latest years been referred to by legal actors of the EU, as would it be a legally binding document.

There are not many provisions in the Treaties that deal with human and fundamental rights. There is article 6 and 7 of the TEU, as well as the fact that article 49 TEU refers to article 6 when it comes to application of membership of the EU. There is also article 177 of the TEC, which states that Community Policy in development cooperation shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to respecting human rights and fundamental freedoms. For a more detailed set of laws, article 6(2) TEU refers to the ECHR. According to this article, the *Union* shall respect fundamental rights, as guaranteed by the Convention.

2.3.5.1 Human rights and EC-case law

The ECJ has during the development of Community law gradually created a place for fundamental and human rights within the legal foundations of Community law. The first recognition of their existence within Community law was made in the case of *Stauder*⁷⁵ in 1969. In this case, the Court declared that the obligation to show some kind of identification in order to obtain butter at a reduced price, did not prejudice the fundamental human rights, which were enshrined in the general principles of Community law and protected by the Court. The Court continued this development in 1970, in the case *Internationale Handelsgesellschaft*,⁷⁶ where the court stated that the fundamental rights are a part of the common constitutional traditions of the member states.

⁷⁴ Sadurski, *supra* note 29, p. 179

⁷⁵ Case 29-69 *Erich Stauder v City of Ulm - Sozialamt*. [1969] ECR p. 00419

⁷⁶ Case 11-70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. [1970] ECR p. 01125

In the jurisprudence of *Nold*⁷⁷, the Court referred for the first time to an international treaty, to which all member states of the Community were signatory states. The treaty referred to was the European Convention on Human Rights (ECHR) and its provisions on the right to property. The Court took this even further in the *Hauer* case⁷⁸, where it decided that the ECHR should be a privileged instrument of reference. In its judgement *Hoechst*⁷⁹, the ECJ increased the connection between community law and the ECHR by referring to the jurisprudence of the ECtHR. At this level, the ECHR seemed to be implemented in EC-law, even though it did actually not constitute a part of the material Community law, since the Community was not a part to the Convention. Two years after the *Hauer* case, the ECJ examined the *Rutili*⁸⁰ case, which concerned a restriction of the right of residence imposed on an Italian citizen by French authorities. The Italian citizen in question invoked his right to free movement according to article 39 TEC. (Then article 48.) In order to rule on the case, the ECJ directly referred to articles 8-11 in the ECHR, that concern the right of states to restrain the rights guaranteed by the ECHR. Even though the right invoked actually derived from the TEC, the ECJ still linked it to the provisions of the ECHR.⁸¹

This development led to a discussion whether the Court had actually implemented the ECHR into Community law as a source of formal law.⁸² This was however contradicted by the Advocate General Trabucchi in the case of *Watson and Belmann*.⁸³ He argued that it was clear that the spirit of the judgment did not involve any substantive reference to the provisions themselves but only to the general principles that are common to Member States and deriving from international obligations.

However, in the case of *ERT*⁸⁴, which concerned limitations of rights conferred by the Treaties, the Court established that such limitations must be interpreted in the light of the fundamental freedoms. The ECJ held that if a Member State seeks to derogate from one of the four fundamental freedoms, in this case the freedom of establishment and the freedom to provide services, its justification for doing so must be compatible with the general principles of EU law, which in this case was the freedom of expression, established in article 10 of the ECHR.

⁷⁷ Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*. [1974] ECR p. 00491

⁷⁸ Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz*. [1979] ECR p. 03727

⁷⁹ Joined cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities*. [1989] ECR p. 02859

⁸⁰ Case 36-75 *Roland Rutili v Ministre de l'intérieur*. [1975] ECR p. 01219

⁸¹ See para. 32 of the judgment in Case 36-75, *Rutili*

⁸² Craig and de Búrca, *supra* note 48, p. 324

⁸³ Case 118-75 *Lynne Watson and Alessandro Belmann*. [1976] ECR p. 01185

⁸⁴ Case C-260/89. *Elliniki Radiophonia Tiléorassi AE (ERT) and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECR [1991] p. I-02925

In a more recent case, one of the many cases concerning the French company *Roquette Frères*,⁸⁵ the ECJ established that fundamental rights form an integral part of the general principles of law observance of which the Court ensures. The ECJ then continued by saying that it draws inspiration “from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.” The Court then established that the ECHR has special significance in that respect, even though it is not the only external source of interpretation.⁸⁶

The approach of the ECJ can be seen as stressing the importance of other international conventions on human rights. The ECHR is not a direct source of Community law, but it represents important principles and values that are common to the Member States, since all Member States are signatory states of the Convention. This way, the Court can maintain the autonomy and supremacy of EC law and point to a consensus among Member States regarding the foundations of the general principles of Community law.⁸⁷

The implementation of the ECHR and the protection of fundamental rights within EC law in a more general context have actually been examined by the ECtHR in the *Bosphorus*⁸⁸ case. The ECtHR then found that the protection of fundamental rights in the Community legal order in the particular case could be found to be equivalent to that of the Convention system. The case had previously been examined by the ECJ⁸⁹. It concerned an aircraft targeted by sanctions taken against the Federal Republic of Yugoslavia issued by the Security Council of the UN and the right the peaceful enjoyment of property, protected by the ECHR and thus made to a general principle of Community law.

The abovementioned jurisprudence of the ECJ has made its way into the Treaties in the shape of article 6 TEU, which states that the Union is founded on respect for human rights and fundamental freedoms. Article 6(2) contains a reference to the ECHR and provides for the Union to respect the principles established by the Convention as a general principle of Community law. Article 46 TEU gives the ECJ the power to ensure respect of fundamental rights and freedoms by the European institutions. Article 46(d) TEU provides that Article 6(2) EU falls within the jurisdiction of the ECJ in so far as the Court has jurisdiction under the TEC and the TEU.

⁸⁵ Case C-94/00 *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*. [2002] ECR p. I-09011

⁸⁶ Para. 23 of the judgment in C-94/00, *Roquette*

⁸⁷ Craig and de Búrca, *supra* note 48, p. 324

⁸⁸ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (45036/98)[2005]

⁸⁹ Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*. (Ireland). [1996] ECR p. I-03953

2.3.5.2 The Charter of Fundamental Rights

The Charter of Fundamental Rights is a “Solemn Proclamation” about the fundamental rights of the European Union, made by the Commission, the Council and the European Parliament.⁹⁰

The conclusions of the European Council in Cologne in 1999 launched the Charter’s drafting process. The Council of Cologne thought that there was a need to establish a Charter of fundamental rights in order to make their importance and relevance more visible to the Union’s citizens.⁹¹ The European Council referred in its conclusions to the development of the fundamental rights that had taken place in the jurisprudence of the ECJ. The Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the ECHR. The European Council also cited the constitutional traditions common to the Member States and considered them be a part of the general principles of Community law, thus making a very clear reference to the abovementioned jurisprudence of the ECJ.

The Charter is not yet elevated to the status of a legally binding instrument. It is a declaration and has no clear legal standing.⁹² Nevertheless, one could argue that it is more than a political declaration, since some of the legal actors within the Community treat it as would it be a legal document. The Court of First instance referred to the Charter in its judgement *Max.mobil Telekommunikation Service GmbH v Commission of the European Communities*.⁹³ The Court declared that “the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States.” The CFI then referred to article 41(1) of the Charter. This article states that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. The issue at stake was the power of investigation given to the Commission in the case of a suspected infringement of the Treaties’ provisions on competition. The Court also referred to article 47 of the Charter, which establishes that any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.⁹⁴

The Advocates General also make significant use of the Charter and use it quite often as a instrument of reference. In the beginning of 2002, the Advocates General had referred to the Charter in 14 of the 23 cases they handled concerning human rights.⁹⁵ The Advocate General Mischo has

⁹⁰ Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1)

⁹¹ *Conclusions of the presidency*, Cologne 3-4 June 1999, Annex IV

⁹² Sadurski, *supra* note 29, p. 180

⁹³ Case T-54/99 *Max.mobil Telekommunikation Service GmbH v Commission of the European Communities*. [2002] ECR p. II-00313

⁹⁴ Paragraphs 48 and 57 of the judgment in *Max.Mobil*

⁹⁵ http://ec.europa.eu/justice_home/unit/charte/en/european-context-reference.html

stated that “the Charter has undeniably placed the rights which form its subject matter at the highest level of values common to the Member States”, even though he also expressed his awareness of the fact that the Charter was not a legally binding document.⁹⁶

The ECJ did not refer to the Charter until 2006, in the case of *Parliament v Council*,⁹⁷ where the Court drew inspiration from two articles of the Charter, articles 7 and 24, together with relevant provisions in international law, such as the Convention on the rights of the child and the ECHR.⁹⁸ The ECJ stated in paragraph 38 of the judgment “While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter.” (The Directive in question was Directive 2003/86/EC of 22 September 2003 *on the right to family reunification*, which the European Parliament considered to be contrary to the fundamental rights.)

The ECJ recently used the Charter in the *Unibet* case.⁹⁹ In this case, the Court referred to article 47 of the Charter. The reference was made in the context of the principle of effective judicial protection, which the Court held as a general principle of Community law, stemming from the constitutional traditions common to the Member States. Another reference was made in the *Laval* case¹⁰⁰ in December 2007.

The provisions of the Charter were also noted by the ECtHR in the judgement *Christine Goodwin v the United Kingdom*.¹⁰¹ The case concerned the right to marriage of a post-operational person with transsexual identity. The Court concluded that there had been a violation of article 12 of the ECHR. In its judgement, the Court took notice of article 9 of the Charter, stating the right to marry and to found a family. The ECtHR also took notice of the fact that the provision in article 9 of the Charter is different from the wording of article 12 of the ECHR. Article 9 of the Charter does not contain any provisions about the sex of those desiring to marry, as it states that “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” Article 12 of the ECHR states “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” The court was not convinced that in

⁹⁶ Opinion of Mr Advocate General Mischo delivered on 20 September 2001. Joined cases C-20/00 and C-64/00 *Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers*. [2003] ECR p. I-07411. Para. 126

⁹⁷ Case C-540/03. *European Parliament v Council of the European Union*. ECR [2006] p. I-05769

⁹⁸ Para. 58 of *European Parliament v Council of the European Union*

⁹⁹ Para. 37 of *European Parliament v Council of the European Union*

¹⁰⁰ Case C-341/05. *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*. ECR[2007] p. 00000, Para. 90

¹⁰¹ Para. 100, *Christine Goodwin v the United Kingdom* (28957/95) [2002]

2002 this should constitute a determination of gender by purely biological criteria and considered the wording of the Charter to be deliberate departure from the wording of article 12 ECHR.

2.3.5.3 The Charter and the enlargement

If there has been one set of standards concerning the obligations of Member States and another set of standards for the acceding countries, this might be balanced by the gaining importance of the Charter. The Commission argues in its communication from 2000 that “the adoption of a catalogue of rights will make it possible to give a clear response to those who accuse the Union of employing one set of standards at external level and another internally.”¹⁰²

According to the Commission, the Charter imposes no additional conditions on applicant countries, but sets out clear rules regarding fundamental rights, thereby providing the applicant countries and citizens in general with legal certainty. Hence, there is no need to fear the impact of the Charter in the opinion of the Commission.¹⁰³

If the Charter would apply to Member States, it would only do so when they are applying EU law, under article 51(1) of the Charter. Nonetheless, the Commission has a different perception of the human rights conditionality in its annual progress reports of the candidate countries. These reports cover a broad spectrum of political and legal matters in the candidate state and not all of them can be said to have anything to do with the implementation of EU law.¹⁰⁴

Turkey is currently referring to the Charter in its program for the implementation of the *acquis*. In chapter 23, which concerns judiciary and fundamental rights, the Charter is referred to as EU legislation that should be complied with.¹⁰⁵

2.4 The main legal instruments for accession

The Accession Partnerships and European Partnerships are the central elements of the pre-accession strategy. They are entered into on the basis of article 308 TEC. The partnerships are based on the findings of the Commission’s progress reports on each country, and they will then set out

¹⁰² COM (2000) 559 final *Commission Communication on the Charter of fundamental rights of the European Union*, Para. 12

¹⁰³ *Ibid*, Para 13

¹⁰⁴ Sadurski, *supra* note 29, p. 187

¹⁰⁵ The Law on Assistance to Children Aggrieved by Crimes of Violence should be reformed to comply with the Charter of Fundamental Rights. *Turkey’s program for implementing the acquis* p. 296

the priorities for these countries. They also provide a framework for EU assistance towards achieving the objective of membership. The partnerships are decided by the Council and reviewed by the Commission.¹⁰⁶

The applicant country then enters into bilateral agreements, which are the main instruments in the relation between the EU and the applicant. These Association Agreements cover economical progress, trade and political dialogue and have to be ratified by the applicant and by the EU member states.¹⁰⁷

The Council Regulation 1085/2006/EC establishes an Instrument for Pre-Accession Assistance (IPA). The aim of the IPA is to provide assistance to candidate countries (Croatia, Turkey and the Former Yugoslav Republic of Macedonia) as well as to potential candidates (Albania, Bosnia, Montenegro and Serbia. The regulation also includes Kosovo.) Among other things, the assistance should serve to strengthen the democratic institutions, the rule of law and its enforcement. The assistance should also aim to promote and protect human rights and fundamental freedoms and enhanced respect for minority rights.¹⁰⁸

2.4.1 Benchmarks – a tool for measuring the success of each chapter of the acquis

The method of using benchmarks is rather new and was introduced after the fifth enlargement in 2004. The purpose of benchmarks is to improve the quality of the negotiations and to provide incentives for the candidate countries to undertake necessary legal reforms at an early stage. After an acquis chapter has been screened, the Member States decide, upon a recommendation from the Commission, whether the chapter can be opened for negotiations, or if there should be benchmarks to be met by the candidate country before negotiations can be opened.¹⁰⁹

Benchmarks are measurable and linked to key elements of the acquis chapter. They are divided into two kinds; opening and closing benchmarks. Opening benchmarks concern preparatory steps for future alignment with the acquis and the fulfilment of contractual obligations corresponding to acquis requirements. This means that they are negotiated in the beginning of the process. Practical examples of opening benchmarks are strategies and action plans. Closing benchmarks primarily concern legislative measures, administrative or judicial bodies, and a track record of implementation of the acquis.¹¹⁰

¹⁰⁶ COM (2006) 649 final, *supra* note 14, p. 7

¹⁰⁷ COM 2000(97) final, *supra* note 26 p. 39

¹⁰⁸ Article 2 of the IPA regulation

¹⁰⁹ COM (2006) 649 final, *supra* note 14, p. 6

¹¹⁰ *Ibid* p.6

The Commission has the ability to propose that negotiations be suspended on a certain chapter if a candidate country no longer fulfils the opening benchmarks in a chapter that is under negotiation. If a candidate country no longer fulfils the closing benchmarks in a chapter that has been provisionally closed, the Commission may propose to the Member States that accession negotiations on that chapter be re-opened.¹¹¹

According to the current negotiating frameworks, accession negotiations can be suspended in case of serious and persistent breach of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.¹¹² This provision reminds of article 7 TEU, which gives the Council the right to decide upon suspension of Member States' rights deriving from the Treaties. This action could be envisaged against a Member State in persistent breach with the provisions of article 6(1) TEU.

2.4.2 The Treaty of accession

A Treaty of accession is a multilateral agreement between the current Member States and the acceding state. When a country is about to accede to the Union, the first step is to elaborate the legal text of its accession. This text is later signed by the Council after the assent of the Commission and the European Parliament, as provided for in article 49 TEU. The next step is the ratification, which should be done by all Member States and the acceding state. In order for the Treaty to enter into force, all states must deposit their instrument of ratification before a previously fixed date. The procedure of article 49 TEU makes it possible for one Member State to hinder the entrance of an unwanted candidate, since the article requires unanimous action by the Council.

The main principle is that the acceding country should be able to implement the entirety of the *acquis*. However, if transitional agreements have been agreed upon, these shall emerge in the treaty of accession.¹¹³

2.4.3 Transitional agreements

As stated above, the accession negotiations are based on the principle that candidate countries should apply the *acquis*, as it exists at the time, upon accession. Nevertheless, a number of transitional measures can be agreed upon during the negotiations.¹¹⁴ There are certain principles laid down for transitional measures; they have to be limited in time and scope and be accompanied by a plan clearly defining the stages for the application of the *acquis*. There are also rules that establish that transitional measures cannot

¹¹¹ COM (2006) 649 final, *supra* note 14, p. 6

¹¹² *Ibid* p. 6

¹¹³ Proposition 2005/06:106 *Bulgariens och Rumäniens anslutning till Europeiska Unionen*, p. 7

¹¹⁴ COM 2000(97) final, *supra* note 26, p. 52

contain amendments to the rules and policies of the Union or lead to significant distortions of competition.¹¹⁵

Transitional measures requested by candidate countries were agreed during the enlargement in 2004 in areas where the effective application of the *acquis* required substantial prior financial investments, e.g. the construction of wastewater treatment plants. Another example is the free movement of workers coming from the CEE countries, which was restricted by some member states, i.e. transitional measures can work both ways.¹¹⁶ When the CEE states acceded to the EU in 2004, the access of their nationals to the labour markets of the previous Member States depended on the national law and policy of those States, as well as eventual bilateral agreements with the CEE states. Some Member States indicated that they intended to fully open their labour markets to workers from all the new Member States and others that they intended to allow more restrictive access, which could be different depending on the situation of each CEE state. When an enlargement takes place, the existing Member States are free to decide whether they should grant free access to their labour markets or not. They may grant free access to citizens coming from one new Member State and restrict it for those coming from another, since the position of each previous Member State depends entirely on the political decisions of that state.¹¹⁷

Transitional agreements have been incorporated into the accession agreements during all previous enlargements.¹¹⁸ The enlargement in 1973, bringing in the UK, Ireland and Denmark involved a general transitional period of four years. The same transitional period applied for Greece in 1982 and Austria, Finland and Sweden in 1995. The only exemptions were Portugal and Spain, for whom the overall timeframe was seven years.¹¹⁹

Transitional measures were of special importance when the CEE countries joined the EU in 2004, both due to the diversity of the candidates and fact that it was the most ambitious enlargement ever undertaken. The Union had also significantly increased in complexity, since the *acquis* had grown to encompass the Schengen and the EMU cooperation. As Inglis points out, Austria, Finland and Sweden joined the Union just after the entry into force of the Maastricht Treaty and could therefore participate in the elaboration of the two new pillars of CSFP and JHA. The then fifteen Member States participated together in shaping the Amsterdam and Nice Treaties, which amended the Treaties and introduced the common currency.¹²⁰ In other words, a significant development took place during several years, without the accession of any new Member States.

¹¹⁵ COM 2002 (700) Final, Strategy Paper, *Towards the enlarged Union*, p. 12

¹¹⁶ *Ibid.*, p. 12

¹¹⁷ Fact sheet on transitional measures, available at http://ec.europa.eu/employment_social/free_movement/docs/pr_en.pdf

¹¹⁸ Inglis, *The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the New Members of the Union*, in Hillion, *supra* note 5 p. 78

¹¹⁹ *Ibid.* p. 80

¹²⁰ *Ibid.* p. 84

For a future perspective concerning the case of Turkey, the negotiation framework establishes that for areas linked to the extension of the internal market, regulatory measures should be implemented quickly and transition periods should be short and few. If there are areas where considerable adaptations are necessary and if substantial financial efforts are required, appropriate transitional arrangements can be envisaged to make alignment possible. However, transitional arrangements should not involve amendments to the rules or policies of the Union, disrupt their proper functioning, or lead to significant distortions of competition.¹²¹

2.5 The role of the institutions

The main provision of the Treaties stating the role of each institution is to be found in article 49 TEU. According to this article, a state that wishes to join the Union shall address its application to the Council. The Council shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The actual implementation of this article is far more complex, and a range of institutions deal with the issue of enlargement. This section aims to provide a brief description of the work done by the institutions in the field of enlargement, in order to show the complexity of the work that the short description in article 49 TEU has generated.

2.5.1 The Commission

The Commission is the guardian of the Treaties and is responsible for screening the candidates. The main purpose is to make sure that the applicant and candidate states do what they can to align with the *acquis*. The Commission submits regular reports on the candidates' progress to the Council. The Commission applies a "policy of differentiation" in its negotiations, meaning that every candidate proceeds at its own speed. This means that a candidate with whom accession negotiations were opened at a later stage may move ahead of a candidate with whom accession negotiations previously had been opened, depending on its progress.¹²²

On the institutional level, it is the Commission's Directorate-General of enlargement that deals with this questions.¹²³ The Commission is the first institution acting after a country has handed in its application for membership. The Commission will then make a first evaluation of the country, based on the Copenhagen Criteria. If the Commission finds the

¹²¹ Negotiating framework 2005, Para. 12

¹²² Üçer, *Turkey's accession to the European Union*, *Futures* 38 (2006) Pages 197–211, published by Elsevier Ltd. p. 200

¹²³ Website of the Directorate-General, http://ec.europa.eu/dgs/enlargement/index_en.htm

applicant eligible for membership, negotiations may be entered into already at this stage.¹²⁴

The Commission also has an important role in preparing the negotiations between the Member States and the applicant. Each Directorate-General should monitor the progress made by the applicant within their respective area of politics during so-called screenings. The progress is then evaluated and the Commission estimates whether the efforts made by the candidate to implement the *acquis* are sufficient. If further effort is needed, the Commission will inform responsible officials of the applicant state.¹²⁵

The candidate countries may also receive support from TAIEX, which is the Technical Assistance and Information Exchange Instrument. It is an instrument of the Directorate-General Enlargement of the European Commission. The mission of TAIEX is to assist in implementing and enforcing the EU *acquis*, by providing short-term technical assistance and advice on the transposition of EU legislation into the national legislation of beneficiary countries and their administrative system. Examples of some of the main target groups are civil servants working in public administrations and the judiciary and law enforcement authorities. The current candidate countries, Croatia, the Former Yugoslav Republic of Macedonia and Turkey are all benefiting from the help of TAIEX, as well as the 12 newest member states.¹²⁶

2.5.2 The Council

The Council receives the application according to article 49 TEU and gives the Commission a mandate to investigate the progress made by the applicant. The Council addresses the issue of enlargement in a so-called GAERC formation. The Council has two kinds of sessions in this formation; sessions for General Affairs and sessions for External Relations. Negotiations on EU enlargement are discussed during the sessions for General Affairs, since it is in this formation that the Council addresses dossiers that affect more than one of the Union's policies.¹²⁷ The Council also decides on the pace of the negotiations, even though this question is addressed as well during the meetings of the European Council.¹²⁸ When the Council decides upon the approval of a candidate, it shall act unanimously after having consulted the Commission and receiving the assent of the European Parliament according to article 49 TEU.

¹²⁴ Proposition 2005/06:106, *supra* note 113, p. 11

¹²⁵ *Ibid* p. 11

¹²⁶ <http://taix.ec.europa.eu/>

¹²⁷ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=388&lang=en

¹²⁸ Hillion, *supra* note 5, p. 14

2.5.3 The European Parliament

The European Parliament is not a party to the negotiations and its main official role is to give its assent before the Treaty is signed, article 49 TEU. This power is exercised only at the final stage, once the negotiations have been completed. Apart from this, the Parliament also adopts resolutions on the enlargement process, the progress of the candidates and the preparation and conclusions of the European Council.¹²⁹

According to the Parliament, its role described in article 49 TEU has made its participation from the beginning important and in the interest of the other institutions. The Parliament also has a role to play with regard to the financial aspects of accession in its capacity as one of the two arms of the budgetary authority of the EU, since the accession of a candidate state has to fit within the budget frame. The parliament takes on other activities in the light of the enlargement as well, such as working in different committees on issues such as human rights. Other activities include meetings with the national parliaments of the candidate countries.¹³⁰

2.5.4 The European Court of Justice

The question of the jurisdiction of the ECJ to rule on the provisions in former article 237 of the EEC Treaty was raised in Case 93/78, *Lothar Mattheus v Doego Fruchtimport und Tiefkühlkost EG*. The provisions of this article remain in article 49 of the TEU, with the addition in the first paragraph that the European Parliament should be consulted and that the applicant state has to respect the conditions set out in article 6(1) TEU.¹³¹

The case concerned an agreement between the contracting undertakings Mattheus and Doego. Mattheus should produce market studies for Doego in respect of certain agricultural products in Spain and Portugal. These events took place prior the entry of these two countries in the Community.

The contract between the undertakings contained the following stipulations: “This agreement is definitively concluded for a period of five years. If the said accession (referring to the then future accession of Spain, Portugal and Greece to the Community) to the EC should in fact or in law prove to be impracticable, the principal (Doego) shall have the right to terminate this agreement. The decisive factor in determining whether the said accession is practicable in law shall be a decision of the Court of Justice of the European Communities. In the event of a justified termination of this agreement the

¹²⁹ DV\492865.EN *The European Parliament in the enlargement process – An overview*, March 2003, p. 3

¹³⁰ *Ibid* pp. 3-4

¹³¹ The first paragraph of the article then stated: “Any European state may apply to become a member of the Community. It shall address its application to the Council, which should act unanimously, after obtaining the opinion of the Commission.”

agent shall lose his right to repayment of his expenses. The Courts in Essen (Germany) should have jurisdiction in matters arising out of this agreement.”

Mattheus sued Doego and demanded repayment of its expenses when Doego chose to terminate the contract in reliance to the provisions mentioned above. The court in Essen referred three questions concerning the interpretation of the former article 237. The questions were designed to find out whether the accession of Spain, Portugal and Greece to the EC would not be possible in the foreseeable future due to reasons of community law.

The Court ruled that it had no jurisdiction to answer the questions referred to it by the German court. The ECJ held that the provisions in article 237 established a precise procedure, encompassed within well defined limits for the admission of member states. During this procedure, the exact conditions of accession are to be drawn up by the authorities indicated in the article itself. The legal conditions for accession should be defined in the context of that procedure according the ECJ. It was not possible to determine the content judicially in advance. In other words, the Court did not consider that it could rule in advance upon the conditions to enter the EC, since these conditions should result from the provisions of article 237.

2.6 The Union’s capacity to absorb new members

The European Council during its meeting in Copenhagen in 1993 did not only establish the Copenhagen Criteria, it also pointed out the Union’s capacity to absorb new members as an important issue. The European Council added to its declaration that “the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.”¹³²

The European Council in its conclusions of December 2005 maintained this approach. The European Council established that the strategy tabled by the Commission during the same year was a good basis for the 2006 enlargement debate.¹³³ This strategy underlines that a carefully managed enlargement can extend and deepen European integration, but the EU's integration capacity must be considered when deciding the pace of enlargement. According to the strategy, the current enlargement should be based on three basic principles: consolidating existing commitments towards countries engaged in the process, applying fair and rigorous

¹³² *Conclusions of the presidency*, European Council in Copenhagen, 21-22 June 1993, p. 13

¹³³ *Conclusions of the presidency*, European Council in Brussels, 15-16 December 2005 p.

conditionality, and intensifying communication with the public on enlargement.¹³⁴

The question of the Union's capacity to absorb new members was also considered in the additional protocol attached to the Amsterdam Treaty. The protocol states that the Union should be "deepened before enlarged." This protocol allows the Union to refuse the candidature of a state if it would menace the necessary balance and interaction between the forces and institutions of the Community. It also provides a basis for the distinction between the borders of Europe and those of the EU by stating that the Union is not required to accept the application of any state situated within the geographical borders of Europe, even though it would fulfil the criteria for acceptance of the application.¹³⁵

The Commission stated in its communication to the Council in 2006 that the EU is cautious about assuming any new commitments, but honours existing commitments towards countries already in the process. This is to avoid an overstretch of commitments.¹³⁶ The Commission also established that the Union's capacity to integrate new members is determined by two factors: The first is the ability to maintain the momentum to reinforce and deepen European integration by ensuring the EU's capacity to function. The second is ensuring that candidate countries are ready to take on the obligations of membership when they join the Union by fulfilling the rigorous conditions set.¹³⁷

For example, the strengthening of the process of continuous creation and integration within the Union is stressed in the negotiation framework between Turkey and the EU. The framework also states that every effort should be made to protect the cohesion and effectiveness of the Union. The Union's capacity to absorb Turkey, while maintaining the momentum of European integration is an important consideration in the general interest of both the Union and Turkey according to the framework. In this respect, the negotiation framework refers to the conclusions of the Copenhagen European Council in 1993.¹³⁸

2.7 Legal developments ahead - possible changes with the Lisbon Treaty

The Commission mentions an institutional reform as something needed in order to improve the effectiveness of the decision-making of an enlarged EU in its communication on the enlargement strategy. The Commission also

¹³⁴ COM (2006) 649 final, *supra* note 14, p. 3

¹³⁵ Soldatos, *supra* note 2, p. 79

¹³⁶ COM (2006) 649 final, *supra* note 14, p. 2

¹³⁷ *Ibid*, p. 15

¹³⁸ *Negotiation framework Turkey - EU*, European Council of Luxembourg 3 October 2005, Para. 3

expects that a new institutional settlement should be reached by the time the next new member is likely to be ready to join the Union.¹³⁹

The protocol on the enlargement of the European Union annexed to the TEU and the TEC provides rules for up to 27 member states, i.e. the enlargement in 2004 and Bulgaria and Romania. The protocol also stipulates that when the Union consists of 27 member states, the number of members of the Commission shall be less than the number of Member States.¹⁴⁰ This rule applies to the first Commission following the entry of the 27th Member State¹⁴¹. The Council shall unanimously decide upon the number of members of the Commission and adopt the arrangements for an equal rotation system.¹⁴² The Nice Treaty neither provides for adaptations to the composition of the European Parliament or the Council for a Union with more than 27 Member States. The Commission therefore believes that the EU will have to decide on the scope and substance of those institutional reforms before any further enlargement, since the Commission thinks that the allocation of seats in the European Parliament and the weighting of votes in the Council are central to the EU's capacity to take decisions.¹⁴³

The Treaty of Lisbon will entail changes regarding the institutions if it enters into force. The Commission should no longer consist of one national from each member state, article 213 TEC, but “a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States”.¹⁴⁴ The same article states; “The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States”.

The Lisbon Treaty also contains new provisions concerning the number of deputies in the European Parliament in article 9A. The deputies “shall not exceed seven hundred and fifty in number, plus the President.” Representation of citizens shall be proportional according to the same article and there should be a minimum threshold of six members per Member State. There is an upper limit as well; no Member State should be allocated more than ninety-six seats.

The Council should consist of one member per member state. The Lisbon Treaty features new rules for qualified majority in article 9 (C) para. 4; as from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and

¹³⁹ COM (2006) 649 final, *supra* note 14, p. 17

¹⁴⁰ Article 4 Para. 2, Protocol on the enlargement of the European Union (attached to the Treaty of Nice)

¹⁴¹ The mandate of the Barroso Commission lasts from 2004 until 2009, http://ec.europa.eu/commission_barroso/index_en.htm

¹⁴² COM (2006) 649 final, *supra* note 14, p. 20

¹⁴³ *Ibid*, p. 20

¹⁴⁴ Consolidated version of the Lisbon treaty, article 9 (D) Para. 5

representing Member States comprising at least 65 % of the population of the Union.

Exempt the institutional changes, most likely made with future enlargements in mind, the Lisbon Treaty also contains some provisions on the values of Europe that might be of political importance for future enlargements. A new article 1 (a) should be inserted into the TEU, stressing human rights and the rights of minorities:

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

This article shall replace the function of article 6(1) TEU and its reference to democracy, rule of law and human rights. The wording in article 49 TEU will be replaced with a reference to this new article and the phrase “which respects the values referred to in Article 1(a) and is committed to promoting them may apply”.

The Lisbon Treaty also contains provisions that will give the Union international legal personality, thus making it possible for the Union to accede to international treaties and conventions. The EC will cease to exist, and the TEC will change its name to “The Treaty on the functioning of the European Union”.¹⁴⁵ An important aspect of this is the aim of the Union to accede to the ECHR, which is provided for in an amendment made to article 6 of the TEU:

“2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

This amendment will entail the possibility for the ECtHR to rule on the judgments of the ECJ, thus making it possible for a second instance to make sure that the rulings of the ECJ are in line with the provisions of the ECHR. Hence, the eventual ambiguity concerning the legal status of the ECHR within community law will be over.

The amended article 6 TEU will also contain provisions on the legal status of the Charter of fundamental rights:

¹⁴⁵ Amendment made to Article 1 Para. 3 of the TEU, Article 2 b Lisbon Treaty, consolidated version

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

The addition is somewhat ambiguous, since the next part of the amendment reads:

“The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

Poland and the United Kingdom had reservations as to the application of the Charter, which resulted in an additional protocol, the Protocol on the application of the Charter of Fundamental rights of the European Union to Poland and to the United Kingdom. This additional protocol establishes that the Charter “does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”¹⁴⁶

2.8 Conclusions

The aim of this chapter has been to distinguish the legal criteria for joining the European Union that can be foreseen by the applicant country. By the letter of the Treaties, the procedure of accession to the EU is open to every European state that fulfils the criteria of democracy and the respect of human rights. The process from an accepted application to full membership is nevertheless time consuming and complicated. What might seem rather “easy” when reading the wording of the Treaties is in fact a long process and the outcome is not only due to the candidate’s ability to fulfil the legal obligations contained in the Treaties, but also a result from the political will of the Member States. An additional factor that further complicates the process is the above-mentioned protocol attached to the Amsterdam Treaty, which also can be said to reduce the openness of the regime of accession, since it increases the discretionary power of the Member States.

Considering the future of the EU and the enlargement, it is safe to say that the aim is even higher in the Lisbon Treaty when it comes to recognizing human rights and the right of minorities, the applicant state should no longer just comply with the provisions, it should also *promote* them according to

¹⁴⁶ Article 1 of the Protocol on the application of the Charter of Fundamental rights of the European Union to Poland and to the United Kingdom

the new article 1 (a). The question of minorities was raised before the enlargement in 2004 with the argument that the Member States at the time, EU 15, did not have the same problems with minorities. However, significant problems remain in the CEE countries, especially concerning the Roma population, the Russian minority in the Baltic countries and the Hungarian minority in Romania. One could also wonder if there is a state in Europe today, which is not a member of the EU and known for its promotion of the rights of minorities?

If the Lisbon Treaty enters into power, the ECHR and the Charter of fundamental rights would, once and for all, become EU-law. The Charter would definitely constitute a part of the *acquis communautaire* since it would be upheld to the same status as the Treaties. The ECHR would constitute general principles of Community law, not only by reference to jurisprudence, but also from explicit statements of the Treaty.

The institutional changes of the Lisbon Treaty are particularly interesting with Turkey's entry into the EU in mind. With a population of more than 72 million in 2005 and a population growth outnumbering the rest of the EU countries,¹⁴⁷ the country would gain a huge influence in the EU institutions if it would accede under current rules. Turkey's accession would significantly affect the allocation of European Parliament seats of current Member States, in particular the medium sized and large countries. Turkey would have an important voice in the decision making process in view of its population share which would be reflected in the Council voting system. The impact in terms of the Commission would be less important given the planned reduction of the members of the Commission from 2014 onwards.¹⁴⁸

The fact that Turkey is such a populous country could also require that transitional measures be introduced in the area of free movement of persons. (However, some integration of Turkish workers on the EU labour market has already taken place due the Association Agreement, which will be further developed in the second part of this thesis.) The experience from the enlargement in 2004, when the CEE countries joined the EU, shows that the EU labour market could cope with a large-scale enlargement with (and for some countries without) the help of transitional measures. The provisions on European citizenship in the TEC are, on the other hand, of particular interest in the case of Turkey. The EU has not previously faced an enlargement to a country which nationals already are numerous established within the Union. If the legal trend within the EU is to grant increasingly extensive rights to persons only relying on their European citizenship, this could mean that persons who are not economically active would be able to join their relatives already residing within the EU. Every enlargement has presented its particular challenges in reconciling EU law with the situation of the

¹⁴⁷ Statistics from the OECD,

<http://stats.oecd.org/wbos/viewhtml.aspx?queryname=334&querytype=view&lang=en>

¹⁴⁸ COM (2004) 656 final *Issues arising from Turkey's membership perspective*, p. 46

acceding state, and this might be an important challenge for the EU and for individual Member States. Nevertheless, the European citizenship is supposed to be the fundamental status of nationals of Member States according to the ECJ. Another important aspect is the fact that the rights conferred by the European citizenship are an important part of the work of unifying the peoples of Europe, and it could be problematic if they were to be restricted to an individual Member State.

3 Future enlargement of the European Union – the challenge of Turkey

3.1 Introduction

The history of Turkey's relations with the EU is a long one. It dates back to Turkey's application to join the EEC made on July 31, 1959. That application was rejected, but led to the signature of the Ankara Agreement on September 12, 1963 and the Additional protocol on November 23, 1970. An eventual accession of Turkey to the EC was envisaged by the Agreement in article 28 and a timescale of between 12 and 22 years for the establishment of a customs union and the free movement of workers was established.¹⁴⁹

The application for membership and the signing of the Ankara Agreement was made within the context of a general westernization of Turkish politics. The fact that Greece had applied for membership earlier the same year and the fear of the Soviet Union could also have been contributing factors.¹⁵⁰

During the 1970s, the agreement broke down economically and in 1980, it was suspended due to the Turkish military coup. The suspension lasted until 1986, when relations with the EU began to normalize again. In April 1987, Turkey applied for full membership of the EC. Contributing factors to this decision could have been the fact that the Ankara Agreement did not function as planned, but also the adoption within the EC of the Single Act. Turkish officials estimated that it would be better to apply for membership as fast as possible, since further integration within the Community would render accession more difficult in the long term.¹⁵¹

The question of Turkey's eligibility was however still being debated on a political level. Several scholars argue that the fact that an eventual membership was envisaged already by the Ankara Agreement shows that Turkey is a European country and eligible for membership.¹⁵² The country's eligibility was confirmed by the Commission in its opinion on Turkey's application for membership in 1989¹⁵³, even though the Commission proposed to delay Turkey's accession beyond the short and medium term due to the country's economical situation and the unsolved problems with

¹⁴⁹ Rogers and Scannell, *supra* note 52, p. 325

¹⁵⁰ Arıkan, *Post-Helsinki: is Turkey in the EU accession process?*, in Neuwahl, *supra* note 29, p. 266

¹⁵¹ *Ibid* pp. 267-268

¹⁵² See e.g. Arıkan, in Neuwahl, *supra* note 29, p. 268

¹⁵³ COM 2000(97) final, *supra* note 26, p. 56

Greece and Cyprus.¹⁵⁴ In return, the EC decided to establish a customs union with Turkey, which was accomplished in March 1995.¹⁵⁵ This was followed by a period with Turkish assertiveness and EU reluctance in EU-Turkish relations. The main argument against a Turkish membership was the failure to comply with the Copenhagen Criteria, the lack of respect for human rights and the Greek-Turkish dispute. This led the Commission to exclude Turkey from the enlargement process in Agenda 2000, where the Commission only suggested strategies for intensifying the customs union and the political dialogue.¹⁵⁶ As political, economical and institutional reforms progressed in Turkey, the European Council in Helsinki decided to grant the status of Candidate Country to Turkey in 1999 based on the findings of the Commissions progress report on Turkey. The accession negotiations were set out to start as soon as Turkey would fulfil the political criteria.¹⁵⁷ In 2001, the Council decided to adopt an Accession partnership, which was revised in 2003.¹⁵⁸

In its Communication of October 2004, the European Commission found that Turkey sufficiently fulfilled the Copenhagen political criteria and recommended opening accession negotiations with Turkey.¹⁵⁹ These negotiations are currently proceeding, but some chapters are frozen. Due to the budgetary frame of the Union, Turkey's accession is not possible before the end of the current budget, which is in 2014.¹⁶⁰

Üçer presents three major obstacles to Turkey's accession to the EU: Turkey's ability to meet the Copenhagen criteria, the EU's institutional structure and thus the importance given to the Member States' preferences, particularly regarding Turkey's relations with Greece, and finally the European public's support for Turkey's membership to the European Union. The Union has also explicitly stated that ongoing disputes with a Member State can act as an obstacle to Turkey's closer integration to the European Union.¹⁶¹

¹⁵⁴ Arikan, in Neuwahl, *supra* note 29, 150 p. 268

¹⁵⁵ Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 *on implementing the final phase of the Customs Union*. (OJ 1996 L 35/1)

¹⁵⁶ COM 2000(97) final, *supra* note 26, pp. 56-57

¹⁵⁷ Conclusions of the presidency, Helsinki European Council 10 and 11 December 1999, Para. 12

¹⁵⁸ Council Decision 2001/235/EC (OJ 2001 L 85/13) and Council Decision 2003/398/EC (OJ 2003 L 145/ 40)

¹⁵⁹ COM (2004) 656 final *Recommendation of the European Commission on Turkey's progress towards accession*, p. 9

¹⁶⁰ Üçer, *supra* note 122 p. 199

¹⁶¹ *Ibid*, pp. 200-201

3.2 Turkey and the free movement of workers

The free movement of workers could present a significant challenge for the EU when it comes to Turkey's accession to the Union. Over three million Turks reside legally within the EU, which makes them by far the largest group of third-country nationals. Different studies give varying estimates of expected additional migration that could follow Turkey's accession. The fear of massive migration is also contributing to the negative public opinion when it comes to a Turkish membership of the EU. The Commission states in a report from 2004 that it could consider transitional provisions as well as a permanent safeguard clause in order to avoid serious disturbances on the EU labour market.¹⁶²

The status, which Turkish workers enjoy under Community law, lies at present between that of European Union citizens and third-country nationals. Their status is mainly determined by the decisions taken by the EC-Turkey Association Council following the 1963 Association Agreement between the EC and Turkey. The ECJ plays an important role when interpreting these decisions.¹⁶³

This chapter aims to further investigate the question of Turkey and the free movement through the current applicable agreements between the EU and Turkey as well as central jurisprudence from the ECJ.

3.2.1 The Ankara Agreement

Article 310 TEC provides for the conclusion of agreements between the Community and third countries or international bodies. Article 300 TEC establishes the procedure and states that such agreements are to be binding on all the institutions of the Community and on the Member States.

The Association Agreement with Turkey (often called the Ankara Agreement) was signed in 1963 and constituted a first step towards the accession of Turkey to the EEC.¹⁶⁴ The aim of the Agreement was to establish a customs union in stages. An additional protocol to the Ankara Agreement was signed in 1970, which established the timetable for a full customs union between the EEC and Turkey. The free movement of persons should be achieved at the same time.¹⁶⁵ As the Turkish military coup led to a temporary suspension of the Agreement after 1980, the timetable could not be met.

¹⁶² COM (2004) 656 final *Issues arising from Turkey's membership perspective*, p. 5

¹⁶³ *Ibid.*, p. 18

¹⁶⁴ Articles 10 and 28 of the Agreement

¹⁶⁵ Rogers and Scannell, *supra* note 52, p. 253

One of the most important articles of the Ankara Agreement is article 12, which relates to the free movement of workers. The article reads: “The Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.” (Now Articles 39, 40, 41.) This is further developed in the additional protocol from 1970. Articles 36-40 lay down timeframes that are more exact and confer a decision-making power to the Council of Association. The Council of Association was established with the purpose of ensuring the implementation of the Agreement. The Council consists of representatives from the Member States and from Turkey, all according to article 6 of the Agreement.

Decision 1/80 from 1980 is one of the most important decisions of the Association Council, containing articles that have been interpreted by the ECJ in a number of cases. One of them is article 6(1), which confers various rights for Turkish workers exercising an activity within the EU if they satisfy different conditions, e.g. to be in legal employment and fulfilling the requisite time periods. Another important step was taken in the case C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461, where the ECJ established that the decisions of the Association Council could have direct effect in the EC.

3.2.2 Demirel and Sevince jurisprudence

The legal implications of the provisions relating to the free movement of workers have been examined by the ECJ in several cases. This section will deal with two of them. The first one, the *Demirel*¹⁶⁶ case, concerns the interpretation of an article of the Ankara Agreement itself. The second one, the *Sevince*¹⁶⁷ case, is about the interpretation of rights conferred by a decision of the Association Council.

The *Demirel* case concerned a woman of Turkish nationality. She had come to live with her husband, who was working in Germany. Her visa was only valid for the purpose of visit and not for family reunification. The laws on family reunification of the Land had been previously been tightened, which meant that Mrs Demirel’s husband no longer fulfilled the conditions set to be able to bring his family to Germany. The questions referred to the ECJ in the proceedings sought to establish whether the article 12 of the Ankara Agreement and article 36 of the protocol constituted rules of Community law, directly applicable in the internal legal order of the Member States.

According to the ECJ, a provision in an agreement concluded between the Community and non-Member States is directly applicable when the provision at stake contains a clear and precise obligation, which is not

¹⁶⁶ Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*. [1987] ECR p. 03719

¹⁶⁷ Case C-192/89 *S.Z. Sevince v Staatssecretaris van Justitie*. [1990] ECR p. I-03461

subject to the adoption of any subsequent measure. The Court then examined the provisions of the Ankara Agreement, and found them to be of a general character, mainly setting out the aims of the association without establishing any detailed rules. Thus, the ECJ concluded that the provisions of the Ankara Agreement essentially served to set out a programme and were not sufficiently precise and unconditional to be capable of governing directly the free movement of workers.¹⁶⁸

The *Sevince* case concerned the interpretation of decisions of the Association Council, and especially the question whether these decisions had direct effect in the territory of Member States. The ECJ first established its own jurisdiction, which derived from the Court's previous jurisdiction, where the Court ruled that the provisions of an agreement concluded by the Council with a third country form an integral part of the Community legal system. Hence, the decisions of a body established by that agreement are directly connected with the Agreement to which they give effect. These decisions will then form an integral part of the Community legal system as well.¹⁶⁹

As for the question of the direct effect of decisions taken by the Association Council, the ECJ referred to the applicable criteria used in the *Demirel* case. The Court had held that a provision in an agreement concluded between the Community and a non-member state must be regarded as being directly applicable when the provision at stake contains a clear and precise obligation, which is not subject to the adoption of any subsequent measure. In other words, the same criteria should apply in order to decide whether the decisions of the Association Council had direct effect or not. In the *Demirel* case, the relevant provisions served mainly to set out a programme, whereas the relevant provisions in the *Sevince* case (Articles 2(1)(b) and 7 of Decision No 2/76 and the third indent of Article 6(1) and Article 13 of Decision No 1/80) was directly applicable, due to their wording, purpose and nature. These articles contained a clear and precise obligation, which did not entail the adoption of any subsequent measure. The judgment in *Sevince* established improved rights for Turkish workers in the EU by confirming the rights of Turkish workers set out in the decisions of the Association Council. One of the rights confirmed was the right to access any paid employment, after a specified period of legal employment in a Member State.

3.3 Human rights in Turkey

This section will describe some areas of concern within Turkish legislation and civil society. The question of respect of human rights and the situation of the Kurdish minority as well as the limits of freedom of expression are often subjects of concern in reports on human rights made by international

¹⁶⁸ Para. 23 of the *Demirel* judgment

¹⁶⁹ Paragraphs 9-10 of the *Sevince* judgment

organisations and in the Commission's annual progress reports. Different EU institutions as well as the European Council have repeatedly stated that the ongoing reform process will affect the pace of the accession negotiations. The respect of human and fundamental rights is an important part of the membership criteria, since it is directly established in Articles 49 and 6(1) TEU. It also forms a part of the Copenhagen political criteria.

3.3.1 General overview

The situation concerning Human Rights in Turkey is generally described as progressing, even though significant difficulties remain when it comes to implementing and enforcing reformed laws and international conventions on Human Rights. The perspective of future EU membership is seen as a largely contributing factor to the improving situation.¹⁷⁰

Turkey is a party to the central conventions on Human Rights, such as the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Elimination of all forms of Racial Discrimination*, (CERD), the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the *Convention on the Rights of the Child* (CRC) and the ECHR.

Turkey has not yet ratified the facultative protocol to CAT, which concerns the prevention of torture. The protocol was signed in 2005 and it should serve to establish a procedure for regular visits to the signatory states.¹⁷¹ In October 2006, Turkey ratified Protocol No 14 of the ECHR that amends the control system of the Convention, but the country has not ratified three additional protocols to the ECHR. The first Optional Protocol to the ICCPR was ratified in November 2006 and entered into force in February 2007. The Protocol recognises the competence of the UN Human Rights Committee to receive and consider complaints from individuals concerning violations of human rights.¹⁷²

Turkey has not signed nor ratified the Rome statute of the International Criminal Court. However, Turkey has made statements concerning its commitment to adhere to the Rome statute. The country has therefore changed the constitution and the penal code in order to simplify future adherence.¹⁷³

¹⁷⁰ Human Rights Watch, World report 2006, the chapter on Turkey is available at <http://hrw.org/wr2k7/pdfs/turkey.pdf>

¹⁷¹ Report from the Swedish ministry of Foreign affairs, "Mänskliga rättigheter i Turkiet 2007" p. 3

¹⁷² COM (2007)663 *Turkey 2007 progress report*, pp. 4 and 11

¹⁷³ Report from the Swedish ministry of Foreign affairs, "Mänskliga rättigheter i Turkiet 2006" p. 3

During the last ten years, the ECtHR has found Turkey guilty of violation of one or more articles of the ECHR in approximately 330 judgments. Most of the applications made in 2006 and 2007 referred to the right to a fair trial and the protection of property rights. Other frequent issues include the right to life and the prohibition of torture. Turkey has carried out several institutional reforms, serving to guarantee the execution of the ECtHR's judgments.¹⁷⁴ Turkey's international obligations in the field of human rights deriving from international conventions take precedence over national law and an increasing number of judges make reference to international conventions on human rights and the ECHR in their judgments.¹⁷⁵

A zero tolerance policy on torture has been introduced by the government, which has led to a downward trend in the number of reported cases of torture and ill-treatment. Different measures to improve the situation include a faster treatment of cases concerning torture and making limitation of torture cases impossible.¹⁷⁶ The policy has also led to the establishment of a number of forensic medicine centres, which shall serve to strengthen the system for medical examination in accusations of abuse. Cases of torture and ill-treatment are still being reported, mostly during arrest and in connection to detention centres.¹⁷⁷

Capital punishment for crimes committed in times of peace was abolished in 2002. In February 2006, the parliament decided upon the ratification of the 13th additional protocol the ECHR, which entails the prohibition of capital punishment in all circumstances, including times of war.¹⁷⁸

3.3.2 Freedom of speech

Article 301 of the Turkish penal code is a cause of concern in the Commission's annual Progress reports on Turkey.¹⁷⁹ The article, on the denigration of Turkishness, the Republic, and the foundation and institutions of the State, was introduced with the legislative reforms of 1 June 2005 and replaced Article 159 of the old penal code.¹⁸⁰ Article 301 states:

“1. Public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey shall be punishable by imprisonment of between six months and three years.

¹⁷⁴ COM (2007)663, *supra* note 172, p. 12

¹⁷⁵ Report from the Swedish ministry of Foreign affairs, "Mänskliga rättigheter i Turkiet 2006" p. 6

¹⁷⁶ *Ibid* p. 3

¹⁷⁷ COM (2007)663, *supra* note 172, p. 13

¹⁷⁸ Report from the Swedish ministry of Foreign affairs, "Mänskliga rättigheter i Turkiet 2006" p. 5

¹⁷⁹ COM (2007)663 *supra* note 172, p. 14

¹⁸⁰ Public statement of Amnesty International on 1 December 2005, Index No EUR 44/035/2005

2. Public denigration of the Government of the Republic of Turkey, the judicial institutions of the State, the military or security structures shall be punishable by imprisonment of between six months and two years.
3. In cases where denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third.
4. Expressions of thought intended to criticize shall not constitute a crime.”

The article has been subject to extensive criticism from human rights organisations. The debate has mainly concerned the fact that the distinction between criticism and denigration could be problematic, which would lead to lack of legal certainty of the crime. According to Amnesty International, Turkish Minister of Justice Cemil Cicek, has stated that “the whole issue comes down to how the laws are interpreted”.¹⁸¹

Turkey is a State Party to both the ICCPR and the ECHR, which both contain provisions relating to the freedom of expression, in article 10 of the ECHR and article 19 of the ICCPR. Article 301 of the penal code could therefore entail difficulties for Turkey in assuming its obligations under international law.

In March 2000, the ECtHR found Turkey guilty of violation of article 10 of the ECHR, in the case of *Özgür Gündem v Turkey*.¹⁸² The case concerned, among other things, prosecutions initiated for offences against article 159 of the Turkish penal code. (Now article 310.)¹⁸³ *Özgür Gündem* was a daily newspaper published in Istanbul from 30 May 1992, which mainly wrote about Turkish Kurdish issues, whereas the Turkish Government argued that *Özgür Gündem* acted as a propaganda tool for the Kurdistan Workers’ Party (PKK). The newspaper had been subject to several attacks on its premises and personnel and a selection of articles and news reports had been subject to prosecutions for the offence of insulting the State and the military authorities.¹⁸⁴

In the progress report on Turkey from 2007, the Commission expresses its concern for the prosecution and conviction of the expression of non-violent opinions under these provisions of the Turkish penal code. The Commission concludes that article 301, as well as other provisions of the Turkish penal code, need to be brought in line with the ECHR and the case law of the ECtHR.¹⁸⁵

¹⁸¹ Public statement of Amnesty International on 1 December 2005, Index No EUR 44/035/2005

¹⁸² *Özgür Gündem v Turkey* (00023144/93) [2000]

¹⁸³ Para 29 of the *Özgür Gündem* judgment

¹⁸⁴ Paragraphs 38 and 39 of the *Özgür Gündem* judgment

¹⁸⁵ COM (2007)663, *supra* note 172, pp. 14 - 15

3.3.3 The Kurdish minority

The discrimination of minority groups has become an important problem that the EU has to face during the enlargement process. Different solutions to combat discrimination have been discussed within the Union for a long time. The first substantial change came with the Treaty of Amsterdam in 1999, which included amendments to the TEU.¹⁸⁶ Article 6(1) of the TEU now establishes that the Union is founded on the respect for Human Rights and the respect for fundamental rights, as guaranteed by the ECHR. The ECHR has no particular provision about minority protection. However, minorities are mentioned in Article 14, where, “affiliation to an ethnic minority” is mentioned as one of the grounds on which people can be discriminated against in the enjoyment of their rights and liberties stated in the Convention.

Other provisions of the Treaty that might be of interest are the provisions on European citizenship, Articles 17-22 of the TEC. The European citizenship, also introduced by the Treaty of Amsterdam, could be seen as something that does not replace nationality or citizenship of a member state but is rather an attempt to create a European nation. The range of rights conferred by the European citizenship is limited and mainly political. However, Vasiljević suggests that the interesting point is that the introduction of the concept led to many discussions on the definition and understanding of concepts such as nationality and citizenship. She therefore suggests that this might lead to a change of the understanding and definition of the concept of minority.¹⁸⁷

The Racial Equality Directive¹⁸⁸ should serve to promote equal opportunities for ethnic minorities and to suppress racial discrimination. The purpose of the directive is to establish a framework for the prevention of discrimination based on racial or ethnic origin, by making the principle of equal treatment law in all the member states, according to Article 1 of the Directive.

As mentioned above, the protection of minorities also constitutes a part of the Copenhagen Criteria. Article 21 of the Charter of Fundamental Rights prohibits discrimination based on the membership of a national minority as well as discrimination on ethnical grounds. The Copenhagen Criteria is annually evaluated by the Commission in its progress reports, which means that the way a candidate state treats its minorities may affect the pace of the association process. The impact of the Charter of Fundamental Rights is probably of less significance, even though it shows the aims of the EU. Since the Charter only is applicable when a Member State applies EU-law, its significance for a purely internal situation is limited.

¹⁸⁶ Vasiljević, *The legal aspects of the protection of minorities in the process of stabilisation and association*, Faculty of Law, Zagreb, p. 253

¹⁸⁷ *Ibid* p. 254

¹⁸⁸ Council Directive 2000/43/EC of 29 June 2000 *implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*

Turkey rests its current practices towards minorities on the Lausanne Treaty.¹⁸⁹ The Lausanne Treaty was signed on 24 July 1923 by the British Empire, France, Italy, Japan, Greece, Romania, and the Serbo-Croat-Slovene State on one part and Turkey on the other. The Treaty mainly serves to establish the borders between Turkey and its neighbours. (Another interesting article is article 20, where Turkey recognizes the annexation of Cyprus proclaimed by the British Government.)

The provisions of the Lausanne Treaty on the rights of minorities primarily concern non-Muslim religious communities, i.e. Jews, Armenians and Greeks. The rest of the population is considered as Turkish, with equal rights and obligations before the law. The provisions on the protection of minorities are found in section III of the Lausanne Treaty, articles 37-45. Nevertheless, Article 39 of the Lausanne Treaty reads:

“No restrictions shall be imposed on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press, or in publications of any kind or at public meetings.

Notwithstanding the existence of the official language, adequate facilities shall be given to Turkish nationals of non-Turkish speech for the oral use of their own language before the Courts”.

The Commission considered in its Progress report from 2007 that the Turkish approach on minority issues should not prevent Turkey from granting rights to Turkish citizens on ethnical, religious or linguistic grounds, since the full respect of cultural diversity and minorities rights has not yet been achieved.¹⁹⁰

Turkey has also made a reservation to the ICCPR regarding the rights of minorities, which states “Turkey reserves the right to interpret and apply the provisions of Article 27 of the ICCPR in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July and its Appendixes.” Turkey has also made a reservation to the ICESCR regarding the right to education. The Commission notes both reservations as a cause of concern.¹⁹¹

The use of other languages than Turkish is illegal in political life; Article 81(C) of the Law on political parties forbids the use of all other languages than Turkish by political parties. This has especially affected Kurdish parties in the southeast of the country, of which some members have been sentenced for having speaking Kurdish at the party’s general congresses.¹⁹²

¹⁸⁹ Kütük, *Turkey’s integration into the European Union*, Painosalama Oy, Turku, Finland, 2003 1st edition p. 132

¹⁹⁰ COM (2007)663, *supra* note 172, p. 21

¹⁹¹ *Ibid*, p. 21

¹⁹² *Ibid*, p. 22

Several sentences against Kurdish journalists and politicians have been examined by the ECtHR, such as the *Özgür Gündem* case described above. In 2005, a friendly settlement between the applicants Leyla Zana, Veysel Turhan and Hamit Geylani and Turkey was achieved.¹⁹³ Leyla Zana had previously been sentenced to a 15-year punishment by the Ankara State Security Court. She was the first Kurdish woman to enter the Turkish parliament in 1991 where she spoke Kurdish after reciting the loyalty oath in Turkish, saying that she would “struggle so that the Kurdish and Turkish peoples may live together in a democratic framework.”¹⁹⁴

Kütük considers the Kurdish issue to be a typical area where Turkey and the EU do not understand the sensitivity of the other, since Turkey’s sensitivity is based on a fear of separatist threats to the national unity of the country. He also points out the common belief that minority rights could be used as a stepping-stone towards an independent Kurdish state.¹⁹⁵

3.4 Turkey and Cyprus

The Cyprus question continues to affect Turkey’s European Union aspirations. Turkey is in an occupying situation of an EU Member State and has been convicted for continuous violations of human rights by the ECtHR in matters relating to the conflict. The conflict affects different key areas of EU law and politics, such as the free movement of persons and the Schengen acquis. Hence, according to Protocol 10 of the Accession Treaty of Cyprus, the *acquis communautaire* is suspended in the Northern part of the island.

Cyprus has been divided since 28 August 1974. The southern, Greek-Cypriot government controls 60% of the island and the Turkish army 36.3%. The neutral zone where the UN Peace Corps are settled constitutes 3.7%. The division of the island has caused a massive migration, about 200,000 Greek Cypriots and 60,000 Cypriot Turks has left their homes. After unsuccessful negotiations, the Turkish Republic of Northern Cyprus (TRNC) was founded in 15 November 1983.¹⁹⁶ The TRNC has not been recognized by the international community; the Security Council immediately deplored the declaration of independence and deemed it to be illegal.¹⁹⁷ The EC also made a similar statement. The exception is Turkey, which both claims that the TRNC is an independent state and stations 30,000 military there.¹⁹⁸

This chapter will further focus on the impediment of the free movement of persons in connection with human rights issues.

¹⁹³ *Zana et autres c. Turquie* (51002/99 and 51489/99) [2005]

¹⁹⁴ <http://www.amnestyusa.org/amnestynow/leyla.html>

¹⁹⁵ Kütük, *supra* note 189, p. 132

¹⁹⁶ Üçer, *supra* note 122, p. 203

¹⁹⁷ Resolution 541(1983) of the Security Council

¹⁹⁸ Üçer, *supra* note 122, p. 203

3.4.1 The Cyprus question and the free movement

Questions relating to the division of Cyprus and the free movement have been examined by the ECJ in the case of *The Queen v Minister of Agriculture*.¹⁹⁹ In this case, the ECJ had to examine the question of whether the Member States could import agricultural products (citrus fruits and potatoes) originating from the North of Cyprus, thus accepting the labels and phytosanitary certificates attached to these products, issued by the TRNC. The TRNC was not accepted by the Member States or by the international community. On the other hand, the Association Agreement between the EC and Cyprus, which should apply to the entire island, governed the issue of importation. The Commission and the United Kingdom both held that, in view of the special situation of Cyprus, these labels should be accepted in order to prevent discriminations between individuals and companies of Cyprus.²⁰⁰ The ECJ did not agree. The Court concluded that the system of labelling of different agricultural products was of great importance, since the labels and certificates issued by competent authorities reflected a mutual confidence between the importing and the exporting states. The Court therefore held that such a system could not function properly unless the procedures for administrative cooperation were strictly complied with. The ECJ stated, “Such cooperation is excluded with the authorities of an entity such as that established in the northern part of Cyprus, which is recognized neither by the Community nor by the Member States; the only Cypriot State they recognize is the Republic of Cyprus.”²⁰¹ The Court therefore ruled that the Association Agreement precluded the acceptance by the competent authorities of a Member State of movement certificates issued by authorities other than the competent authorities of the Republic of Cyprus, when these products were imported from the part of Cyprus to the north of the United Nations Buffer Zone.

Turkey made a declaration regarding its non-recognition of Cyprus in 2004 when signing the Additional Protocol to the Association Agreement, which took place in connection to the latest expansion of the Union. However, in a declaration of 21 September 2005²⁰², the European Community and its Member States made clear that the Turkish declaration was unilateral and did not form part of the Protocol and had no legal effect on Turkey’s obligations under the Protocol. The declaration also stressed that the EC and its Member States recall that the Republic of Cyprus became a Member State of the European Union on 1st May 2004 and that they only recognise the Republic of Cyprus as a subject of international law.

¹⁹⁹ Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*. [1994] ECR p. I-03087

²⁰⁰ Para. 19 of the *The Queen v Minister of Agriculture* case

²⁰¹ Para. 40 of the *The Queen v Minister of Agriculture* case

²⁰² C/05/243 *Declaration by the European Community and its Member States of 21 September 2005*

Paragraph 3 of the declaration establishes that The EC and its Member States expect full, non-discriminatory implementation of the Additional Protocol, and the removal of all obstacles to the free movement of goods, including restrictions on means of transport. Therefore, Turkey must apply the Protocol fully to all EU Member States.

The issue of negotiations between the parties is also addressed in the declaration; the EC and its Member States stress that the opening of negotiations on the relevant chapters will depend on Turkey's implementation of its contractual obligations to all Member States and that failure to implement its obligations in full will affect the overall progress in the negotiations.

The Council decided in 2006 that negotiations should not be opened on eight chapters due to Turkey's restrictions regarding Cyprus. The Council decided as well that no chapter should be provisionally closed until the Commission had confirmed that Turkey had fulfilled its commitments relating to the obligation of full and non-discriminatory implementation of the Additional protocol to the Association Agreement.²⁰³

3.4.2 The Green Line Regulation

The isolation of the Turkish Cypriot community and the impediment of the free movement, resulting from the conflict, has, as shown above, been a matter of concern to the EU. The Council has therefore adopted different measures proposed by the Commission to end the isolation of the Turkish Cypriot community.²⁰⁴ Free movement of Greek and Turkish Cypriots as well as other EU citizens throughout the island should now be ensured through the so-called *Green Line Regulation*.²⁰⁵ The regulation should serve to improve the current situation relating to the free movement, e.g. removing obstacles in the trade for agricultural products and establishing a simplified procedure for the inclusion of animals. The Regulation provides for an increased ceiling for travellers crossing the green line.²⁰⁶

The Regulation defines the terms under which the provisions of EU law will apply to the line between the areas in which the Government of the Republic of Cyprus exercises effective control and the areas in which it does not, i.e. the Green Line. In other words, the Green Line regulation determines the legal framework of the crossing of goods, persons and services in Cyprus. The regulation also serves to safeguard that the "Green Line" does not constitute an external border of the EU. However, article 2 of the Regulation states that all persons should undergo at least one check in order to establish

²⁰³ COM (2007) 663, *supra* note 172, p. 24

²⁰⁴ COM (2006) 649 final, *supra* note 14, p. 10

²⁰⁵ Council Regulation 866/2004/EC of 29 April 2004 *on a regime under Article 2 of Protocol 10 to the Act of Accession*

²⁰⁶ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/197&format=HTML&aged=1&language=EN&guiLanguage=en>

their identity. Third country nationals should only be allowed to cross the line if they possess a residence permit for the Republic of Cyprus and provided that they do not represent a threat to public policy or public security, according to the same article.

3.4.3 Jurisprudence from the ECtHR

The Cyprus conflict has been examined by the ECtHR in two important cases, the *Loizidou*²⁰⁷ case and the *Cyprus v Turkey*²⁰⁸ case. The latter case was a massive loss for Turkey, since as the Court found that Turkey had committed 14 violations of the ECHR. These cases are interesting since they not only concern matters relating to fundamental rights such as the right to property, within an EU context they also concern matters relating to the free movement of persons.

3.4.3.1 *Loizidou v Turkey*

Mrs. Loizidou, a Cypriot national living in Nicosia, had been prevented from gaining access to her properties in northern Cyprus since 1974 because of the presence of Turkish forces. The Turkish Republic of Northern Cyprus (the TRNC) had proclaimed in its constitution that all immovable property that had been abandoned should be the property of the TRNC.²⁰⁹

Mrs. Loizidou was thus effectively prevented from enjoying her property rights, but she could not invoke the responsibility of the TRNC, since it was not an internationally recognized state.²¹⁰

Turkey, however, was a party to the ECHR and in actual control of the armed forces on northern Cyprus. Turkey's responsibility under Article 1 of Protocol No. 1 to the ECHR was invoked before the Court. The Article states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The Court found that since Mrs. Loizidou had been refused access to her land since 1974, she had effectively lost all control over, as well as all possibilities to use and enjoy, her property. The continuous denial of access should therefore be regarded as an interference with her rights under Article 1 of Protocol No. 1. The Court held that the continuous denial of Mrs. Loizidou's access to her property was a matter which fell within Turkey's "jurisdiction" within the meaning of Article 1 of the Convention and was

²⁰⁷ *Loizidou v Turkey* (15318/ 89)[1996]

²⁰⁸ *Cyprus v Turkey* (25781/94) [2001]

²⁰⁹ Para. 18 of *Loizidou v Turkey*

²¹⁰ The Security Council considered the declaration to be legally invalid and called for its withdrawal in its resolution 541(1983)

thus imputable to Turkey.²¹¹ Turkey exercised effective overall control of the area through its military presence there, with the result that its responsibility under the Convention could be engaged for the actions of the TRNC authorities, which survived by virtue of Turkish military support.

Turkey did not recognize the judgment at first, but has now agreed to pay Mrs. Loizidou continuous compensation for the loss of her property rights.²¹²

3.4.3.2 Cyprus v Turkey

The case of *Cyprus v Turkey* relates to the same situation as the *Loizidou* case, i.e. the Turkish military presence, which has existed in northern Cyprus since 1974, with the result of a continuing division of the territory of Cyprus.

In these proceedings, Cyprus contended that Turkey was accountable under the ECHR for the different violations of the Convention. The proclamation of the TRNC had taken place in November 1983 and the subsequent enactment of the TRNC Constitution in May 1985. Cyprus maintained that the TRNC was an illegal entity from the standpoint of international law and pointed to the international community's condemnation of the establishment of the TRNC. Turkey, on the other hand, maintained that the TRNC was a democratic and constitutional State, which was politically independent of all other sovereign States, including Turkey. Turkey held that the allegations made by Cyprus could only be imputable to the TRNC and that Turkey could not be held accountable under the Convention for the acts on which those allegations were based.²¹³

Cyprus alleged violations of the Convention under Articles 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, Articles 1 and 2 of Protocol No. 1, and Articles 14, 17, and 18 before the Court. The alleged violations concerned i.e. slavery, denial of adequate medical treatment and services, threat to security of person, lack of a fair hearing before an independent and impartial tribunal, interference with their right to respect for their private and family life. These violations were divided into four categories of complaints, concerning alleged violations of the rights of Greek-Cypriot missing persons and their relatives, alleged violations of the home and property rights of displaced persons, alleged violations of the rights of enclaved Greek Cypriots in northern Cyprus and alleged violations of the rights of Turkish Cypriots and the Gypsy community in northern Cyprus.²¹⁴

Concerning Turkey's denial of liability under the Convention, the Court held that the facts complained of in the application fell within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention.

²¹¹ Para. 64 of the *Loizidou* judgment

²¹² <http://news.bbc.co.uk/1/hi/world/europe/3257880.stm>

²¹³ Paragraphs. 69-71 of the *Cyprus v Turkey* judgment

²¹⁴ Para. 18 of the *Cyprus v Turkey* judgment

The ECtHR also noted that this finding was consistent with its earlier statements in its *Loizidou v Cyprus* judgment.²¹⁵

The ECtHR ruled that there had been 14 violations against the Convention, namely Articles 2, 3, 5, 6, 8, 9, 10, 13 and Articles 1 and 2 of the Protocol. Some Articles were subject to continuous violation or applicable in several situations.

3.5 Conclusions

This chapter has addressed some of the main difficulties in Turkey-EU relations: The free movement of persons, which is a cornerstone in the EU acquis, combined with the fact that Turkey has a relatively modest economy, affects the public opinion in negative way in most EU countries. Turkey is also a populous country, which would render it a considerable influence in EU institutions and decision-making. This does not correspond well with the fact that the country has been convicted of human rights violations by the ECtHR to such a large extent. The conflict between Cyprus and Turkey could be one of the most significant obstacles to progress in the EU-Turkey negotiations and therefore to a Turkish membership of the EU.

The issue of free movement of persons and Turkey brings about some difficult questions. The status of Turkish workers lies between Union nationals and third-country nationals and has done so for quite a long time. The *Sevince* jurisprudence led to an improvement of the situation of Turkish workers since it established that the decisions of the Association Council could have direct effect, thus confirming the validity of decisions giving Turkish workers the possibility to look for any employment on the labour market in a Member State if they previously have been engaged in legal employment there.

The Commission (and most likely, a majority of the Member States) will probably suggest transitional measures in order to face eventual problems and a flood of migrating Turkish workers on the European labour market. However, the expected flood of immigrant workers when the CEE countries joined the EU failed to appear. The question is whether the current situation with an EU labour market that is partly open to Turkish workers would be significantly changed if Turkey was to accede to the EU and transitional periods would be established? What could be a more important challenge is, more likely, the European citizenship as developed in the first part of this thesis.

Turkey's shortcomings when it comes to meeting the human rights conditionality is a subject to EU concern. The situation is currently progressing and Turkey takes different steps, both internally and externally to align to the EU acquis. Nevertheless, the limitation on freedom of speech and the Kurdish issue remain matters of concern. Several CEE countries

²¹⁵ Para. 61 of the *Cyprus v Turkey* judgment

were criticized for their shortcomings in the treatment of minorities before joining the EU, but this was obviously not seen as a decisive factor in the negotiations. Article 310 of the Turkish penal code could lead to difficulties for Turkey when it comes to fulfilling its obligations under public international law. The article is also a reminder of the traditionally strong influence by the military in civil society, which is rather troublesome, since it could affect the country's ability to meet the political requirements set out in the Copenhagen Criteria. Weak administrative structures and other shortcomings of the judicial system, especially in the southeast of the country, is a part of that problem too. This affects both human rights issues, since torture and other ill-treatment is more likely to take place under such circumstances, as well as the ability to efficiently adopt and to implement the *acquis*.

The conflict between Turkey and Cyprus is the last important difficulty to Turkish EU-membership dealt with in this thesis. The conflict needs to be solved if Turkey should be able to continue its EU aspirations. The fact that Turkey currently refuses to let Cyprus-flagged vessels and airplanes use Turkish harbours and air territory means that Turkey does not comply with its obligations under the Ankara Agreement. Since the TRNC is not an internationally recognized state, Turkey is also in an occupying position of an EU Member State. The ECtHR has confirmed the responsibility of Turkey for actions carried out on northern Cyprus. The fact that Turkey has accepted the judgments of the ECtHR and agreed to pay damages to the victims is an improvement, but the key problem, i.e. the ongoing occupation, is a sensitive political issue and a solution has not yet been reached.

4 Concluding remarks

One of my aims when writing this thesis was to explore to what extent the European Union could continue to expand, i.e. if Europe has any legal limits. The EU acquis is continually expanding, making future enlargements increasingly challenging, both for the Union and for the candidate state. This development creates some interesting dilemmas. How can the EU continue its deepening integration, as stipulated in the preamble to the Rome Treaty, and at the same time continue to unite the people of Europe?

It seems like the exact borders of the European Union remain to be debated, and that they are, in the end, defined by the political will of the Member States. We know from the findings of the Commission that the word “European” in article 49 of the TEU refers to the common values of the Member States, as well as their common historical and cultural heritage. This common background could be considered as essential if the current legal development of the EU is going to continue. In order to create a political Union with an ever deepening cooperation, there must be some similarity between the participating countries. However, the EU has accepted the accession of states with a non-democratic past and newly reformed legal and administrative systems. In other words, the interpretation of common historical and cultural values can be somewhat extensive.

Turkey has oriented its external politics towards the west since the 1950s. The first application to join the EC was made in 1959, which eventually led to the signature of the Ankara Agreement. Turkey currently aligns with EU positions in most international organisations, and the adoption of the acquis in the external policy area is therefore not a cause of concern. Nevertheless, the internal development of a candidate state is of a much greater importance. It is the existence of pluralist democracy, market economy and a well-functioning administrative system, as stipulated in the Copenhagen Criteria that will make the actual implementation of the acquis possible.

In addition, the Copenhagen Criteria establish that membership requires the guarantee of human rights, including the respect for and the protection of minorities. This is a significant challenge for Turkey. Turkey adheres to all central international conventions on Human Rights, but does not comply with its obligations. The fact that the country has started to carry out judgments from the ECtHR is an improvement, but there is still doubt about whether Turkey will be able to meet the human rights conditionality. Can the lack of respect for human rights prevent Turkey from joining the EU? Considering the fact that it is the Council that finally approves the candidate state, this is surely something that can be used to advocate against a Turkish membership of the EU on a political level. On a legal level, the answer is more uncertain. The large number of judgments condemning Turkey for violations of the ECHR could be difficult to reconcile with the obligation to carry out judgments of the ECJ, since the Court makes significant use of the

Convention. The ECJ has previously stated that it is not for the Court to rule upon questions concerning when the accession of a candidate country could be possible. These kinds of issues are determined by the procedure established by the relevant articles of the Treaties and by the institutions and authorities indicated in those articles. On the other hand, the jurisprudence of the ECJ forms a part of the *acquis*, which means that the obligation to comply with the provisions of the ECHR is important for EU membership as well, even though the Council of Europe is an independent organisation.

The legal conditions for accession have been quite complicated to sort out when writing this thesis. Only two articles of the Treaties, articles 49 and 6(1) of the TEU, directly address the conditions of accession. The preambles of the Treaties define the aims of the Union, and to unite the people of Europe is one of them. The procedure described in article 49 TEU entails a complex work of screening the candidate and results in long negotiations where the candidate state is in a weak negotiating position and the exact conditions of accession are more or less unilaterally imposed by the Union. From a legal standpoint, this could mean that the conditions set out in article 6(1) TEU, i.e. the respect for human rights, are an important part of the conditions of accession, since they are the only written condition found in the Treaties. If so, Turkey's more than 300 violations of the ECHR during the last years is a serious obstacle to its accession to the EU. In other words, the ECHR has a significant impact, from several aspects, on the conditions of accession.

If the Lisbon Treaty would enter into force, the ECHR would definitely constitute a part of the EU *acquis*, as well as the Charter of fundamental rights. According to the Commission, the entrance into force of a new Treaty is necessary before further enlargement can take place. This would entail a demand of even higher standards of the candidate states when it comes to meeting the human rights conditionality. Since the candidate states are in a weak negotiating position, it does not seem likely that they would be able to renegotiate this. The human rights conditionality could therefore be used in quite a cynical way in order to prevent some states from joining the Union.

Another important issue when it comes to enlargement is the question of the power balance within EU institutions. If Turkey would accede to the EU, it would gain a significant importance within the institutions, especially the European Parliament and the Council. The Lisbon Treaty somewhat addresses this matter in order to render further enlargement possible, but the key principles that governs the allocation of seats would still apply. This is problematic, since Turkey is a populous state, which still has restraints on civil society and fundamental rights such as the freedom of expression.

The question of the absorption capacity of the Union is of special interest when it comes to Turkey. Due to the Ankara Agreement, Turkey has access to the internal market, even though limited. A significant integration of Turkish products on the EU market has therefore taken place, but the full

integration of Turkish workers is not an aim of the Agreement. The free movement of workers is a chapter of the *acquis* that has a significant influence on the internal market, which could make transitional measures necessary. Even so, the free movement of persons is one of the four freedoms assured by the Treaties. Article 39 TEC, which assures the free movement of workers, prohibits discrimination based on nationality. According to the Commission, permanent safeguard clauses could be envisaged if Turkey were to join the Union. This does not correspond well with the principle of non-discrimination, established by article 12 TEC. Today, the Union also has the advantage of the experience gained when the CEE countries joined the EU, combined with the previous experience from when Spain, Portugal and Greece entered the EC.

The absorption capacity of the EU and the ongoing legal integration raise questions about the possibility of future enlargements. The legal trend of the EU is a constantly deepening cooperation and an increased level of supranationality, especially if the Lisbon Treaty would enter into force. It will be a considerable challenge, both for the EU and for European states with membership aspirations, to reconcile the economic and infrastructural reality of these countries with the Treaties and EU secondary legislation. In the case of Turkey, there have been suggestions that Turkey should not accede to the EU, but be a privileged partner with access to the inner market. Since there is no legal guarantee for an applicant state that it will be able to join the Union, such an outcome could be possible if some Member States decided to vote against Turkish membership during a Council meeting, since unanimous action is required in article 49 TEU. In fact, there is an overall lack of legal predictability for the candidate country in the accession process. The legal rules that govern the conditions of accession give the Member States the power of decision. They are deliberately designed to take the political and economical development of the candidate state into account, in order to make sure that the candidate will fit well into the EU and be able to adjust to its new obligations.

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