

THE DYNAMIC NATURE OF THE *ACQUIS COMMUNAUTAIRE* IN EUROPEAN UNION EXTERNAL RELATIONS*

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1. INTRODUCTION

RECENT years have seen profound and wide-ranging changes to the nature and structure of the European Union (EU). The signing of the EU Constitutional Treaty has paved the way for European nations to realise the approaching of the ambitious aim of the Maastricht Treaty, that is to create an 'ever closer union among the peoples of Europe', based on the values and principles shared by all Member States. This has been achieved through the identification of the Union as the incarnation of democratic values and principles which are respected worldwide. Throughout the history of European integration, the notion "*acquis communautaire*" has remained one of the least-well defined, and one of the most-frequently applied. Having been conceived as a concept linked to the EU legal order, the *acquis communautaire* has quickly become associated with the wider domains of EU policies. In particular, the EU has actively used the "*acquis communautaire*" to strengthen the integrity of its internal legal and political order and to serve its far-reaching external policy ambitions.

Our article focuses on two major objectives. The first is to shed some light on the dynamic character of the *acquis communautaire*. The second is to study the phenomenon of the *acquis communautaire* as an instrument of the EU external policy. In the first part of the article we shall argue that the *acquis communautaire* mirrors the dynamic character of the EU legal

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order. It is a constantly evolving concept, which encroached into legal, political, social, and historical domains. In the second part of the article we shall endeavour to clarify how the dynamic character of the *acquis communautaire* influences the *acquis communautaire* within internal and external dimensions of its application. In this respect we shall advocate the view that the *acquis communautaire* changes its scope in line with objectives of its application. This notion has particular significance for the external dimension of the *acquis communautaire*'s application. It could mean that the *acquis communautaire* is "exported" into legal systems of third countries in line with objectives of EU external agreements and level of political and economic cooperation between the EU and a third country. In the third part of the article we provide the case study on the Ukrainian experience of approximation of national legislation to EU law. In our opinion, this case study displays many supporting arguments in favour of our theoretical findings. This case study indicates that the approximation of Ukrainian laws to those of the EU always took place in line with objectives of the EU-Ukraine Partnership and Cooperation Agreement (PCA)¹ and the general political environment between the EU and Ukraine. We conclude this article with the statement that the dynamic nature and ambiguity of the *acquis communautaire* made it one of the most effective means to "export" the EU's fundamental values and principles into the political and legal systems of third countries. Since the unprecedented EU enlargement at the end of the 20th and early 21st centuries, the need to adopt the *acquis communautaire* is being considered as an essential pre-requisite for maintaining and enhancing good political and economic relations between the EU and third countries.

2. THE "ACQUIS COMMUNAUTAIRE" IS AN AMBIGUOUS AND DYNAMIC CONCEPT IN THE EU LEGAL ORDER

2.1. Hitherto, the *acquis communautaire* remains one of the most ambiguous concepts in EU legal order. Neither EU founding treaties nor EU secondary legislation and the European Court of Justice (ECJ) case law provide any clear definition of the *acquis communautaire*, while frequently referring to this concept. For instance, Article 2(4) of the Treaty on European Union (TEU) recognises the *acquis communautaire* as one of the objectives of the newly-founded EU:

¹ O.J. 1998, L 49, entered into force 1st March 1998.

'to maintain in full the *acquis communautaire* and build on it [emphasis added] with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and institutions of the Community'.

Article 3(1) TEU endorsed the importance of the *acquis communautaire* as a foundation of the EU and of the whole institutional system.

'The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building on the *acquis communautaire* [emphasis added]'.

Provisions of the TEU on the enhanced cooperation between the Member States, in particular, Article 43(1)(e) TEU provided that it 'does not affect the "*acquis communautaire*" and the measures adopted under the other provisions of the [founding] Treaties'.

Further references to the *acquis communautaire* are found in Protocol № 7 of the application of the principles of subsidiary and proportionality annexed to the Treaty establishing the European Community (EC Treaty) by the Treaty of Amsterdam (ToA)², and in Declaration № 51 concerning Article 10 TEU accompanying the ToA³. Moreover, the *acquis communautaire* is mentioned in the Preambles to the "Protocol of the Twelve" and "the Agreement of the Eleven" which form the integral part of the EC Treaty.

'without prejudice to the provisions of the Treaty, particularly those relating to social policy which constitute an integral part of the *acquis communautaire* ... [the High Contracting Parties] state their wish ...

² Provision 2 related to the *acquis communautaire* reads: 'The application of the principles of subsidiarity and proportionality shall respect the general provisions and the objectives of the Treaty, particularly as regards the maintaining in full of the *acquis communautaire* and the institutional balance...'

³ Provision related to the *acquis communautaire* reads as follows: 'The Treaty of Amsterdam repeals and deletes lapsed provisions of the Treaty establishing the European Community... they were in force before the entry into force of the Treaty of Amsterdam and adapts certain of their provisions... Those operations do not affect the '*acquis communautaire*'.

to implement the 1989 Social Charter on the basis of the *acquis communautaire*⁴.

At the same time, Protocol № 2 ToA refers to all agreements and related provisions listed in the Annex to this Protocol as the “Schengen *acquis*”, thereby locating the *acquis communautaire* within a specific area/sector of EU legislation.

The EU institutions are inclined to emphasise the legal nature of the *acquis communautaire*. For instance, the EU’s Glossary plainly considers the *acquis communautaire* ‘the body of common rights and obligations which bind all the Member States together within the European Union’⁵. The 2002 Strategy on Accession equates the *acquis communautaire* with EU legislation⁶. The same approach is undertaken in the EU Constitutional Treaty, which indirectly associates the *acquis communautaire* with the EC/EU legal order⁷.

⁴ Treaty establishing the European Community (O.J. 2002 C 325).

⁵ As the EU’s Glossary of definitions provides: ‘The Community *acquis* is the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises: the content, principles and political objectives of the Treaties; the legislation adopted in application of the treaties and the case law of the Court of Justice; the declarations and resolutions adopted by the Union; measures relating to the common foreign and security policy; measures relating to justice and home affairs; international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union’s activities. Thus the Community *acquis* comprises not only Community law in the strict sense, but also all acts adopted under the second and third pillars of the European Union and the common objectives laid down in the Treaties. The Union has committed itself to maintaining the Community *acquis* in its entirety and developing it further. Applicant countries have to accept the Community *acquis* before they can join the Union. Derogations from the *acquis* are granted only in exceptional circumstances and are limited in scope. To integrate into the European Union, applicant countries will have to transpose the *acquis* into their national legislation and implement it from the moment of their accession’. EU Glossary <http://europa.eu/scadplus/glossary/community_acquis_en.htm>, last visited 30 October 2006.

⁶ “Towards the Enlarged Union” Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries (COM (2002) 700 final, at 1.4).

⁷ Article IV-438 (3-4) of the EU Constitutional Treaty. The EU Constitutional Treaty endeavours to provide more or less coherent clarification of the scope of the *acquis communautaire*. The EU Constitutional Treaty’s provisions on succession

However, the narrow understanding of the *acquis communautaire* as a mere legal concept has been repeatedly challenged by academics. It is almost universally agreed that the *acquis communautaire* is not equivalent to the EU legal order, but constitutes a much broader concept with clear political emphasis, which has stretched the boundaries of a mere legal concept, and has been used in other contexts, including the political, social, and historical. This view has been shared by many experts in European studies. Gialdino⁸, Weatherill⁹, Delcourt¹⁰ and Azoulai¹¹ have emphasised the dynamic nature of the *acquis communautaire* within its legal context. Krenzler and Everson¹² have argued for an even broader understanding of the *acquis communautaire* as a legal framework, embracing real and potential rights within the EU system. Wiener¹³ has

and legal continuity specify elements of the *acquis communautaire* to be transposed into one pillar of EU legal order. These elements encompass the following: EU founding treaties; acts of institutions, bodies, offices and agencies; interinstitutional agreements, decisions and agreements arrived at by the Representatives of the Governments of the Member States; the agreements concluded by the Member States on the functioning of the EC/EU or linked to action by the EC/EU: the declarations, including those made in the context of intergovernmental conferences, as well as the resolutions or other positions adopted by the European Council or the Council and those relating to the EC/EU adopted by common accord by the Member States. The ECJ/CFI case law shall remain the source of interpretation of EU law and of the comparable provisions of the EU Constitutional Treaty. There is no reference to other elements of the *acquis communautaire* apart from EC/EU legal acts. Therefore, the EU Constitutional Treaty regards the *acquis communautaire* as a normative concept that encompasses binding and non-binding EU legal acts.

⁸ C. GIALDINO, Some reflections on the *acquis communautaire*, 32 *CMLRev.* 1089-1121 (1995).

⁹ S. WEATHERILL, *Safekeeping the Acquis Communautaire*, in: T. HEUKELS / N. BLOKKER / M. BRUS (eds), *The European Union after Amsterdam*, (Kluwer Law International, The Hague / London / Boston, 1998) 153-178, 161-162.

¹⁰ C. DELCOURT, *The Acquis Communautaire: Has the Concept Had Its Day?*, 38 *CMLRev.* 829-870 (2001).

¹¹ L. AUZOLAI, *The Acquis of the European Union and International Organisations*, 11(2) *ELJ* 196-231 (2005).

¹² H. G. KRENZLER / M. EVERSON, *Preparing for the acquis communautaire. Report of the Working Group on the Eastward Enlargement of the European Union*, October 1998 (European University Institute, RSC Policy Paper № 98/6). <http://www.iue.it/RSCAS/WP-Texts/98_06p.htm>, last visited 30 October 2006.

¹³ A. WIENER, *The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance*, 3 *ELJ* 294-315 (1998).

gone further and advocated the theory of the “embedded *acquis*” which covers practices, policy objectives and informal ideas and values. The Dutch legal scholar Mortelmans¹⁴ has depicted the *acquis communautaire* as ‘a political or policy concept’, and has clearly distinguished it from the basic tenets of EU law.

2.2. In our opinion, the ambiguity of the *acquis communautaire* is justified by the dynamic, or *sui generis*, nature of the EU legal order. In this respect, the dynamism of the EU legal order entails its never-ending evolution, under the pressure of various internal and external factors, such as the need for closer economic development inside the EU, and the enhancement of security and political stability along EU borders. The dynamism of the EU legal order is based on acquired common rules, practices and values, which are embraced by the complex notion “*acquis communautaire*”. In other words, the *acquis communautaire* ensures the continuity of the EU legal order through the fact that it encompasses everything that has been achieved within the EU, even beyond legal practices. In general, the *acquis communautaire* may be seen as the result of the application of various tools/instruments/powers which the EU possesses both internally and externally. Commentators have correctly compared the dynamic nature of the EU legal order to a living organism¹⁵. In our opinion, the *acquis communautaire* may be associated with the memory, education and genes of this living organism. If, in a similar vein to Kipling’s Mowgli, the EU were to lose its heritage - the *acquis communautaire* - one could hardly predict how it would survive the pressures of the jungle of the international community.

2.3. The dynamic nature of the “*acquis communautaire*” has proved to be a particularly useful concept in the course of EU external action. The notion “*acquis communautaire*” has gradually become one of the most significant tools underpinning EU’s tailor-made actions towards third countries, ranging from accession to partnership and cooperation initiatives. At the same time, the ambiguity of this notion has resulted in its gradual transformation into a universal category, which has no fixed context and scope, but which must be comprehended exclusively within the particular circumstances of EU external action towards third countries. For example, in the context of accession, the adoption of the *acquis*

¹⁴ K. MORTELMANS, *Community Law: More than a Functional Area of Law, Less than a Legal System*, 1 *LIEI* 23-48 (1996).

¹⁵ *Supra* note 11, at 196.

communautaire by candidate countries means the implementation of the whole EU legal heritage including EU sectoral *acquis*, EU general principles and the ECJ rulings. In the context of the EU policy of partnership and cooperation with third countries, the *acquis communautaire* has a narrower scope, and embraces mainly sectoral EU legislation within priority areas of cooperation, like competition law, protection of intellectual property rights, and state aids. Hitherto, the *acquis communautaire* remains at the top of the EU agenda for external action. The newly-launched European Neighbourhood Policy encourages neighbouring states to adhere to the EU “common values”, and to adopt the vast scope of the *acquis communautaire* in order to achieve mutual access to markets of goods, services and capital¹⁶.

2.4. In conclusion we state that ambiguity of the *acquis communautaire* is justified by the dynamism of the entire EU legal order. The *acquis communautaire* became a very useful concept which reflects the never-ending evolution of the EU. Consequently, the EU is keen to maintain the ambiguity of the *acquis communautaire* in relations with third countries with purpose to ensure the far-reaching export of own principles and values into legal orders of third countries.

3. THE INTERNAL AND EXTERNAL DIMENSIONS OF THE *ACQUIS COMMUNAUTAIRE*

3.1. It is suggested that internal and external dimensions of the *acquis communautaire* are not identical and may vary in line with specific objectives of the *acquis communautaire*'s application. That is to say, the objective of the *acquis communautaire* in its internal dimension is to ensure the consistent development of the EU while preserving European Communities (EC)/EU patrimony through adherence of the Member States to the “fundamental *acquis*” (obligations enshrined in the EU founding treaties), EU general principles, international law *acquis*, applicable to the EU Member States, and “soft law” *acquis*. Conversely, the objective of the *acquis communautaire* in its external dimension is to push candidate countries to the forefront of the acquired level of economic, political and

¹⁶ Communication from the Commission “Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours” (COM (2003) 104 final). Communication from the European Commission “European Neighbourhood Policy Strategy Paper” COM (2004) 373 final.

legal cooperation within the EU. In other words, it is to export as much as possible of the *acquis communautaire*, which is sometime not yet binding towards the EU Member States, with purpose to prepare candidate countries for democratic standards and competitive economy pressures within the EU.

3.2. If we look at the *acquis communautaire* in the EU external agreements we can find additional support for our argumentation that the external dimension of the *acquis communautaire* does not coincide with the internal dimension of the *acquis communautaire*. Two points are worth of attention here. Firstly, none of the EU external agreements replicates the far-reaching objectives of the EU founding treaties. Thus the *acquis communautaire* in an EU external agreement should be applied in accordance with the objectives of these agreements. For instance, the “pre-signature” *acquis communautaire* within the European Economic Area (EEA) Agreement must be applied and implemented in accordance with the EEA Agreement objectives, which are different to the objectives of the EU founding treaties¹⁷. Secondly, the *acquis communautaire* within the EU external agreement must be perceived as having a different legal nature from the *acquis communautaire*. It is because the *acquis communautaire* departs from the supranational nature of the *acquis communautaire*. It may be enforced only via national constitutional procedures as part of the international law applicable in that country. As a result, constitutional courts in third countries can exercise broad discretion in interpreting the relevant *acquis* within their legal orders. Even in the EEA Agreement, where the export of the relevant *acquis* is equipped by a sophisticated homogeneity procedure, it is left to the discretion of national courts of the European Free Trade Area (EFTA) Member States to implement in a homogeneous fashion certain elements of the “post-signature” EC “relevant *acquis*”. This is because the homogeneity formula relies on the unpredicted political will of the EFTA Member States for the voluntary adaptation of the dynamic *acquis communautaire* into their legal orders. Furthermore, the objectives of EU external agreements and the latest trends of EU external policy towards certain third countries may

¹⁷ O.J. 1994, L 1/3. Introduction to Annex XIV of the EEA Agreement warns that ‘preambles, the addresses of the EC acts; references to territories or languages of the EC; references to rights and obligations of EC Member States, their public entities, undertakings and individuals in relation to each other; and references to information and notification procedures are specific to the EC legal order’ and therefore cannot be identically applied to the EFTA Member States.

influence the interpretation of third countries constitutional courts' regarding the relevant *acquis* within their national constitutional orders, as witnessed in the *Sveinbjörnsdóttir* case¹⁸ judged by the EFTA Court, and in the *Scoda Auto* case judged by the Czech Constitutional Court¹⁹.

3.3. Furthermore, we argue that the external dimension of the application of the *acquis communautaire* does not entail its identical scope towards third countries, which signed agreements with the EU. For instance, the *acquis communautaire* to be adopted by candidate countries is not similar to the relevant *acquis* within specific EU external agreement with third countries. In our opinion it is justified by different objectives of the *acquis communautaire* application. The former is aimed at preparing a candidate country for membership in the EU, while the latter is targeted merely at maintaining partnership relations between the parties. Consequently, we suggest that the scope of the *acquis communautaire* in its external dimension is not uniform, but varies from one agreement to another in accordance with specific objectives of EU external agreements.

In order to test our theory we endeavour to consider if the scope of the *acquis communautaire* changes in line with objectives of EU external agreements. We can highlight two types of the *acquis*, which are most frequently applied within EU external agreements. The first type of the *acquis* encompasses vague legal categories such as "essential elements", "common/shared values", principles of international public law and international trade law, the principle of non-discrimination, and European standards. None of these elements is precisely defined in EU external agreements, thereby providing a wide scope for interpretation by either Party. Nevertheless, these elements are considered important for the construction of a common legal environment between the Parties in the course of the enhancement of mutual relations. For instance, the European Neighbourhood Policy (ENP) emphasises the significance of the "common/shared values" concept for the eventual upgrade of bilateral

¹⁸ The EFTA Court in *Sveinbjörnsdóttir* case characterised the EEA Agreement as 'an international treaty *sui generis* which contains a distinctive legal order of its own' (Case E-9/97, *Erla Maria Sveinbjörnsdóttir v. the Government of Iceland*. Advisory Opinion of the EFTA Court of 10 December 1998, Report of the EFTA Court, at 97).

¹⁹ *Scoda Auto*, Collection of decisions of the Czech Constitutional Court, vol. 8, p. 149.

relations with each neighbour state²⁰. The EU Constitutional Treaty partly rectifies this puzzle by providing a set of the “Union’s values” and principles applicable to both internal and external EU policies. However, the specific legal meaning of the “Union’s values” remains far from clear. We expect that even if the EU Constitutional Treaty eventually comes into force, EU institutions will retain the “final word” in identifying the scope of the “Union’s values” applicable within EU external policy.

The second type comprises the “relevant” *acquis*, which usually means the EU sectoral legislation like competition law, customs, intellectual property, technical and food standards, which is enshrined in the text of an agreement and/or in annexes of an EU external agreement. In general, third countries are bound to adopt the “relevant” *acquis* in order to achieve specific objectives of agreements with the EU, like the access to the EU internal market freedoms (EEA Agreement), establishment of the customs union with the EU (EC-Turkey association)²¹, setting up an enhanced sectoral cooperation with the EU (EU-Switzerland Sectoral Agreements)²².

Both types of the *acquis communautaire*, which are described above are not static concepts but dynamic legal categories which change their scope in accordance with the specific objectives of the EU external agreement. That is to say that the “relevant *acquis*” within the EC-Switzerland Sectoral Agreements (SAs) differs from the “relevant *acquis*” within the EC-Mexico Trade Development and Cooperation Agreement (TDCA)²³. This is because the EC-Switzerland SAs provide for the implementation of a sectoral *acquis communautaire* into the Swiss legal system, while the EC-Mexico TDCA establishes a free trade area between the EC and Mexico on the basis of the relevant World Trade Organisation (WTO) *acquis*. Furthermore, EU external agreements tend to reflect the evolution of the *acquis communautaire* within specific sectors of EC competence. For

²⁰ Communication from the Commission to the Council and the European Parliament “Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours” (COM (2003) 104 final).

²¹ O.J. 1973 C 113/2.

²² 1) the Agreement on Scientific and Technological Cooperation (O.J. 2002, L 114/468); 2) the Agreement on Specific Aspects of Government Procurement (O.J. 2002, L 114/430); 3) the Agreement on Mutual Recognition in relation to Conformity Assessment (O.J. 2002, L 114/369); 4) the Agreement on Trade in Agricultural Products (O.J. 2002, L 114/132); 5) the Agreement on Air Transport (O.J. 2002, L 114/73); 6) the Agreement on the Carriage of Goods and Passengers by Rail and Road (O.J. 2002, L 114/91); 7) the Agreement on the Free Movement of Persons (O.J. 2002, L 114/6).

²³ O.J. 2000 L 276.

instance, the latest generation of association agreements with Western Balkan countries (Stabilisation and Association Agreements - SAAs)²⁴ refers to the newly-occupied sectors of the *acquis communautaire* (audio-visual aspects, cross-border broadcasting, acquisition of intellectual property rights for programmes and broadcasts by satellite or cable, and cooperation in electronic communications and associated services).

3.4. In our opinion, the objectives of EU external agreements imply a hierarchy of *acquis communautaire* elements which are to be exported into a third country's legal system. On the one hand, the aspiration of eventual full EU membership requires a third country to adopt not only the relevant *acquis communautaire* listed in the annexes to the agreement (EEA Agreement, SAAs)²⁵, but also to embark upon the challenging process of voluntary approximation of her national legislation to that of the EU. On the other hand, the objective of a closer political dialogue between the EU and a third country means that this third country must prioritise its strict adherence to "essential elements" clauses (PCAs, TDCAs, the Cotonou Agreement²⁶), and to the sectoral *acquis communautaire* (usually related to the mutual liberalisation of trade), over other elements of the *acquis*. The aim of liberalising the economic relations between the EC and a third country presumes the application of WTO rules and standards, regardless of formal WTO membership (PCAs, the Cotonou Agreement). Logically, the aim of establishing the EC-Turkey customs union requires Turkey to adopt the EC customs *acquis* in full.

3.5. Furthermore, it is important to highlight explicit links between the scope of the *acquis communautaire* to be imposed on a third country and factors such as EU external policy towards third countries and EU recognition of their legal systems. For instance, associate agreements with EFTA countries and with Switzerland contain neither essential elements clauses, nor any reference to the human rights or the fundamental

²⁴ At the moment of writing the SAAs have been concluded with the Former Yugoslav Republic of Macedonia (FYROM) (COM (2001) 90 final) and Croatia (COM (2001) 371 final). The FYROM and Croatia SAAs entered into force on 3rd May 2001 and on 12th December 2001 respectively.

²⁵ The scope of the "pre-signature" *acquis communautaire* is not limited by EC acts directly referred to in the SAs and Annexes, but it does encompass any of the EU-Swiss SAs provisions that is either equivalent to or resembles the relevant *acquis communautaire*.

²⁶ O.J. 2000 L317/3.

freedoms *acquis*. In the case of Switzerland, the absence of these essential elements may be explained by the absence of a framework agreement between the EU and Switzerland. In the case of the EEA Agreement, this may be explained by an insufficient attitude on behalf of the EC towards human rights and commitments to fundamental freedoms in the EU external agreements at the time of signing. The EEA Agreement may have been conceived purely as an economic framework agreement aimed at bringing the EFTA countries closer to the EC internal market. The EC-Israeli Euro Mediterranean Association Agreement (EMAA)²⁷ displays considerable recognition by the EU for the Israeli legal system, far beyond other EMAs²⁸. For example, the approximation clause in the EC-Israel association agreement envisages the possibility of the mutual convergence of the Parties' legislation, while other EMAs provide direct and indirect means for the *acquis communautaire* to be exported into the legal systems of Mediterranean countries.

3.6. To sum up, we state that the export of the *acquis communautaire* takes place in an individual, tailor-made manner, taking into account various political, economic and legal aspects of EU external policy towards third countries. In some cases, the EU is ready to compromise the integrity of the *acquis communautaire* by allowing third countries to implement the relevant sectoral *acquis* in a "piece-by-piece" approach. For example, owing to a tough negotiation strategy, Switzerland was allowed to derogate from some mandatory elements of the Schengen *acquis*. In other cases, the EU strengthens its pressure on third countries to adopt the whole *acquis communautaire*, which in turn promulgates their will to upgrade the format of bilateral relations with the EU. For instance, the latest SAAs stipulate the adoption of the so-called "pre-negotiation" *acquis* by the Western Balkan countries. It brings us to the conclusion that the concept of "*acquis*" in EU external agreements exceeds the boundaries of a legal concept. The *acquis communautaire* must be considered as a dynamic concept and as a sophisticated tool of EU external policy towards third countries, since the *acquis communautaire* changes its scope and meaning in line with objectives of EU external agreements and level of political and economic relations between the EU and third countries.

²⁷ O.J. 2000 L 147/1.

²⁸ The EMAs have been concluded between the EC and Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey, the Palestinian Authority.

4. SUBSTANTIVE AND PROCEDURAL MEANS
OF THE *ACQUIS COMMUNAUTAIRE* EXPORT
INTO LEGAL SYSTEMS OF THIRD COUNTRIES

4.1. In this part of the article we test our theory through the scrutiny of substantive and procedural means to export the *acquis* into the legal systems of third countries. In other words, we analyse whether the objectives of EU external agreements have an effect on the substantive and procedural means of export. The former refer to the fundamental ways of implementing the *acquis communautaire* into third-country legal orders. They are: 1) the export of the fixed *acquis communautaire* into legal systems of third countries through annexes and direct references to the EU *acquis* in EU external agreements; 2) homogeneity; 3) binding and soft harmonisation commitments in EU external agreements; 4) approximation clauses in EU external agreements; 5) mutual recognition agreements. The latter relate to specific technical/procedural tools which either directly or indirectly encourage the implementation of the *acquis communautaire* into third-country legal orders. The following tools are inherent to procedural means of the *acquis communautaire* export into legal systems of third countries: 1) formal and informal involvement of third countries in the EC decision-making process; 2) exchange of information between the EU institutions and third countries' institutions; 3) technical, administrative and financial assistance to third countries.

4.2. The very important issue to consider: does the EU apply substantive and procedural means to export the *acquis communautaire* in line with the objectives of the EU external agreements? We argue that the substantive and procedural means of exporting the *acquis communautaire* are not uniformly applicable, but are rather exercised in accordance with the specific objectives of EU external agreements. Indeed, objectives of the EU agreements unquestionably constitute a driving force behind understanding the role and mechanism of the substantive and procedural means of exporting the *acquis*. Among all these, homogeneity, which is enshrined in the EEA, remains the most advanced tool for exporting the *acquis communautaire*. Nevertheless, the most recent EU external agreements do not replicate the entire homogeneity procedure found in earlier agreements. Instead, they apply selected elements of the homogeneity procedure in order to achieve the specific objectives of the EU external agreements. On the one hand, objectives to bring about closer economic and political cooperation (customs union, free trade area, mutual

recognition regime) imply that third countries will accept binding substantive and procedural means to implement the *acquis communautaire* into their own legal system. On the other hand, the objectives of EC partnership, cooperation and development agreements envisage less ambitious substantive and procedural means (non-binding harmonisation/approximation of laws commitments, supported by technical and educational assistance on behalf of the EU; they also do not envisage the involvement of a third country in EC decision-making procedures). In the former case, the EU expects candidate countries to export the fixed and dynamic *acquis communautaire* as widely and as soon as possible, whereas the latter EU external agreements encourage third countries to embark upon a process of voluntary harmonisation through the gradual adoption of the relevant *acquis*²⁹.

4.3. We believe that the level of institutional integration between the EU and third countries reflects the objectives of EU external agreements. In particular, the composition and competence of common institutions are set up in such a way as to suit the objectives of the EU external agreements. This means that the EU external agreements which pursue closer economic and political cooperation with third countries (EAs, SAAs, PCAs) institute the Councils, Committees, and Parliamentary Committees. On the other hand, external agreements which do not contain any far-reaching integration objectives usually establish a simple one-pillar institutional framework (Joint Committees). Common institutions within EU external agreements significantly contribute to the implementation of the EU constitutional and institutional values, such as transparency and accountability, democracy and judicial control.

4.4. Another observation is that the substantive and procedural means to export the *acquis communautaire* are supported by strong conditionality requirements on behalf of the EU. The further enhancement of bilateral relations between the EU and a third country, in particular the opening of negotiations on a mutual recognition regime, depends on the success of approximation efforts. Therefore, EU external agreements contain conditionality provisions such as: 'account shall be taken of the progress

²⁹ A. EVANS, *The Integration of the European Community and Third States in Europe: a Legal Analysis*, (Clarendon Press Oxford 1996), 381-383. In general A. Evans is critical regarding the nature of voluntary harmonisation within the EAs. In his opinion, voluntary harmonisation is ill-adapted to structural economic problems faced by these countries.

achieved by the Parties in the approximation of their laws',³⁰ or 'the Community shall examine periodically whether [a party to an agreement] has indeed introduced such legislation [in the public utilities sector]'³¹.

4.5. These observations highlight our initial suggestion that the EU considers the export of the *acquis communautaire* an intrinsic part of its foreign policy towards third countries. Indeed, the substantive and procedural means of exporting the *acquis communautaire* into EU external agreements inspire third countries to adopt as much as possible of the dynamic *acquis* in order to create a comparable and friendly legal environment beyond existing and potential EU boundaries.

5. CASE STUDY ON THE IMPACT OF THE EU-UKRAINE PCA OBJECTIVES, AND THE STATUS OF BILATERAL RELATIONS, ON THE IMPLEMENTATION OF THE UKRAINIAN APPROXIMATION PROGRAMME AND ITS INSTITUTIONAL MECHANISM

5.1. Throughout this article we argued that the scope of the *acquis communautaire* reflects the objectives of EU external agreements, as well as the status of EU policy towards a third country. At this stage, we want to test our findings through a case study. The question of our case study is "how" the objectives of the EU-Ukraine PCA and the status of bilateral EU-Ukraine relations influence the Ukrainian approximation of laws programme. We believe that the example of Ukraine will provide strong evidence that supports our theory and, consequently, will help us answer the question of this case study. EU policy toward Ukraine has experienced several important modifications over the last decades which, in our opinion, have directly and indirectly influenced the character of the whole approximation of laws process.

5.2. EU policy towards Ukraine has not been consistent. It changed several times over the last decade. Our case study concerns four stages of EU-Ukraine relations. The first stage lasted from 1994 to 1998. It started with the signing of the PCA by the EU and Ukraine on 16th June 1994, and ended with its entry into force on 1st March 1998. The Ukrainian Parliament - the *Verkhovna Rada* - promptly ratified the PCA on 10th

³⁰ Article 56(3) Croatia SAA.

³¹ Article 72 Croatia and FYROM SAAs.

November 1994³². However, the EU was reluctant to speed up the PCA's entry into force. This could be explained by serious economic and political constraints within the EU towards the whole set of PCA agreements. The former relate to the over-protectionist economic policies employed by Newly Independent States (NIS) countries, which led to severe trade disputes with the EU³³. The latter concern the enhancement of the Commonwealth of Independent States (CIS) structures and the dominant role of the Russian Federation throughout the entire post-Soviet area. In our opinion, the EU used the policy of conditionality with regard to the PCAs' entering into force. This means that the EU used all political and economic means to encourage NIS countries to pursue internal market reforms, and to counterbalance Russian dominance before the PCA formally entered into force. Ukraine was the first country to respond to this strategy. The change of domestic political elites took place in 1996 in Ukraine. This was caused by economic crisis, hyperinflation and disintegration within the entire post Soviet area. In 1996, the first Ukrainian President Leonid Kravchuk (one of the initiators of the USSR's abolishment in 1991) lost his campaign for re-election to Leonid Kuchma. Kravchuk's successor quickly realised that the recovery of the Ukrainian political and economic strength could be accelerated by a change of foreign policy towards Europe. Consequently, President Kuchma gradually reduced the participation of Ukraine in CIS structures, in order to enable a possible rapprochement with the EU, with the perspective of eventual membership. In our opinion, these changes accelerated the formal entry into force of the EU-Ukraine PCA on behalf of the EU on 1st March 1998³⁴. In fact, this was the second agreement, after the Russian PCA, to enter into force³⁵.

The second stage of EU-Ukraine relations lasted from the date of the PCA ratification to the issue by the European Council of the Common Strategy on Ukraine on 11th December 1999. From 1st March 1998 to the present day, the PCA has remained the major legal document governing

³² Law issued by the *Verkhovna Rada* of Ukraine "On ratification of the Partnership and Cooperation Agreement between the European Communities and their Member States and Ukraine", № 237/94-BP.

³³ For example, see on the 'Daewoo' trade dispute between the EU and Ukraine, C. HILLION, Trade dispute overshadows entry into force of EC agreement, 6 *EU Focus* (1998).

³⁴ Council and Commission Decision of 26th January 1998 on the conclusion of the PCA between the EC and their Member States and Ukraine (O.J. 1998 L49).

³⁵ EC-Russia PCA (OJ 1997 L 327), entered in force 1st December 1997.

EU-Ukraine relations³⁶. In general, the EU-Ukraine PCA objectives focus on the establishment of a political dialogue; the facilitation of economic relations between the EU and Ukraine; the promotion of democratic reforms in Ukraine; human rights protection and the establishment of a legal order that guarantees the rule of law. The Preamble of the Agreement intentionally omits any reference to 'the process of European integration' or 'the objective of membership in the EU', as these were provided in the EU association agreements with countries of Central and Eastern Europe known as "Europe Agreements" (EA)³⁷. Therefore, the EU-Ukraine PCA does not pursue far-reaching objectives of either close economic cooperation between the Parties, or full EU membership. Instead, it is aimed solely at the development of close political relations; the promotion of trade, investment and harmonious economic relations between the Parties; the sustaining mutually advantageous cooperation and the support of Ukrainian efforts to complete its transition into a market economy³⁸. Thus, the EU-Ukraine PCA, as well as other PCAs, could be seen as a quite successful formula in EU external policy. For the time being, it certainly serves its purpose as a reliable legal instrument in sustaining long-term relations with NIS countries, while holding them at a safe distance from closer access to the EC Single Market³⁹. The scope of EU legislation put forward as a pattern of approximation for Ukraine mirrors the narrow objectives of the EU-Ukraine PCA. It comprises "priority areas" defined in Article 51 PCA⁴⁰. The "approximation clause" in Article 51 of the PCA imposes a soft law obligation on Ukraine merely to 'endeavor to ensure' the compatibility of its legislation to EC laws.

With the entering into force of the PCA in 1998, the Ukrainian government decided to push for a deeper level of cooperation with the EU.

³⁶ Similar PCAs were signed with Armenia, Azerbaijan, Belarus (it has not come into force), Georgia, Kazakhstan, Kyrgyzstan, Russia, Uzbekistan, Turkmenistan (it has not yet entered into force).

³⁷ For example, the Preamble to the EC-Hungary EA.

³⁸ Article 1 EU-Ukraine PCA.

³⁹ For the comparative overview and scrutiny of the PCAs see R. PETROV, *The Partnership and Cooperation Agreements with the Newly Independent States in: A. OTT / K. INGLIS (eds.), European Enlargement Handbook* (Asser Press, The Hague 2002) pp. 175-194.

⁴⁰ These are: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of life and health of humans, animal and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations and transport.

It openly promulgated the eventual objective of EU-Ukraine cooperation - full EU membership. One may suspect that the Ukrainian government seriously considered the possibility of replicating the example of the EA countries which had managed to acquire candidate country status in very short time after signing the EAs. In other words, the Ukrainian government made an attempt to “catch the train” of accelerating European integration by fulfilling formal commitments in the PCA.

With the purpose of “knocking” on the “European door”, the Ukrainian government soundly proclaimed its European aspirations. The general framework of the integration process was set up in the Strategy of Integration of Ukraine into the EU (Strategy of Integration)⁴¹. The purpose of this document is to declare Ukrainian ambitions to join the EU as soon as possible. Besides, this document determines the major priorities of the executive power to fulfil the objective of ultimate EU membership⁴². Intrinsically, the President of Ukraine stated that ‘joining the European political, economic and legal area and, subsequently, acquiring associate membership of the EU constitute the major priority of the Ukrainian foreign policy in the medium term’⁴³. Soon after, the scope of competence of the executive agencies was defined, and the corresponding institutional framework was established with the purpose of accelerating the process of integration and of implementing the PCA⁴⁴.

The approximation of the Ukrainian legislation to EU law was formally launched in 1999 when the Cabinet of Ministers of Ukraine issued the Concept of Adaptation of Ukrainian laws to the legislation of the EU (Concept of Adaptation), in which the official understanding of the adaptation process was set up⁴⁵. The Concept of Adaptation formulates the

⁴¹ Edict (*Ukaz*) of the President of Ukraine “On approval of the ‘Strategy of integration of Ukraine to the European Union’”, 11 June 1998, № 615/98.

⁴² The initial deadline to qualify for full membership in 2007 was recently extended to 2011. The deadline to acquire WTO membership was set at 2003 (Address of the President of Ukraine to the *Verkhovna Rada* of Ukraine “European Choice. Conceptual foundations of the strategy of economic and social development of Ukraine in 2002-2011”, 20 June 2002, № 20-IV).

⁴³ *Supra* note 41, para 7 of the preamble.

⁴⁴ Ruling (*Rasporiadzhenia*) of the President of Ukraine “About the list of the governmental authorities responsible for fulfilment of the tasks defined by the “Strategy on Integration of Ukraine to the European Union”, 27 June 1999, № 151/99-рп (as amended by Edict of the President of Ukraine, 06 July 2000, № 240/2000).

⁴⁵ To date, about 50 legal acts concerning the integration of Ukraine into the EU have been adopted by the *Verkhovna Rada* and the Government of Ukraine.

notion “adaptation” as a gradual and coherent process, which encompasses three basic stages, each of them guaranteeing a certain level of conformity of laws in the specified priority spheres⁴⁶.

The first stage of adaptation is targeted at developing the Ukrainian legal system in accordance with the Copenhagen criteria, approximating Ukrainian laws in the priority areas envisaged in the PCA and other international treaties relating to EU-Ukraine cooperation and within the priority fields in the Concept of Adaptation⁴⁷.

The second stage of adaptation comprises the reconsideration of Ukrainian legislation in force in the spheres, specified in Article 51 of the PCA with the purpose of *approximate adequacy* [emphasis added] with EU legislation. Furthermore, this stage anticipates the provision of legal assistance on the establishment of a free trade area between Ukraine and the EU, as well as the consequent preparation of Ukraine for an association agreement with the EU. It is envisaged that this stage of adaptation is likely to commence in time for the transition membership period of the first wave accession of the Central and Eastern European countries into the EU. Of course, this timetable has not been met by the Ukrainian side.

The third stage of adaptation is the least well-defined. It could be launched upon the EU's acknowledgment of sufficient progress by Ukraine in pursuing tasks set for the first and second stages of adaptation. The final stage of adaptation is aimed at preparing Ukraine for the negotiation of an accession agreement with the EU, and the subsequent harmonisation of the entire Ukrainian legislation with the whole “Community *acquis*”.

Undoubtedly, the EU noticed the integration efforts in Ukraine and decided to encourage its further progress, while underlining that the perspective of the EU membership for Ukraine is still remote. For this purpose, the EU sent the very first positive signal to the Ukrainian government by issuing the EU Common Strategy on Ukraine (CS). This document (adopted by the European Council on 11th December 1999 in Helsinki) complements the PCA, thereby marking the emerging skeleton

⁴⁶ Decree of the Cabinet of Ministers of Ukraine “Concept of adaptation of the legislation of Ukraine to the legislation of the EU”, 16 August 1999, № 1496. Recently, legal acts issued by the Government of Ukraine seem to apply simultaneously and, sometimes interchangeably, the definitions “adaptation”, “approximation”, “harmonisation”, without clarifying the difference of their content.

⁴⁷ *Ibid*, Article 2 para 4.

of laws governing the relations between Ukraine and the EU, wherein the PCA occupies the upper level⁴⁸. The CS displays clear political and economic guidelines to Ukraine for the purpose of enhancing the nature of its relations with the EU. In response to Ukraine's reiterated diplomatic calls for a new framework agreement, the CS merely acknowledges and welcomes Ukraine's European aspirations, and states its major objective of working with Ukraine to facilitate further rapprochement with the EU⁴⁹. The CS towards Ukraine prioritises the support for the democratic and economic transition in Ukraine, including the progressive approximation of its national legislation⁵⁰, and foresees the possibility of studying the circumstances of the establishment of a free trade area between Ukraine and the EC⁵¹. The CS on Ukraine has further endorsed the importance of the approximation of Ukrainian legislation to the EU, and complemented the list of priority areas⁵². On the one hand, the CS towards Ukraine supported Ukraine's European aspirations, and encouraged Ukraine to pursue the voluntary harmonisation of its legislation to that of the EU. On the other hand, it confirmed its unwillingness to revise and enhance the modest objectives of the EU-Ukraine cooperation outlined in the PCA.

In general, very little progress was made during the second stage of harmonisation/adaptation programme in Ukraine. Neither of the stages envisaged in the Concept of Adaptation has been achieved. The Ukrainian government failed to move further than enunciating "pro-European slogans". It has become apparent that the success of the harmonisation/adaptation programme is intrinsically linked to an

⁴⁸ Presidency Conclusions, Helsinki European Council (O.J. 1999, L 331/1, at 56).

The same is envisaged in the CS towards Russia. The European Council meeting in Cologne in June 1999 adopted the first CS towards Russia. Presidency Conclusions, Cologne European Council (O.J. 1999, L 157/1, at 78).

⁴⁹ Article 6 of the CS towards Ukraine.

⁵⁰ It is stressed in Article 20 of the CS towards Ukraine that approximation should take place in such areas as: competition policy, standards and certification, intellectual property rights, data protection, customs procedures and environment.

⁵¹ Article 61 of the CS towards Ukraine.

⁵² These are issues of fiscal policy, personal data protection and money laundering. Decisions of the Helsinki Summit with regard to the approximation were implemented into Ukrainian legislation by the decision of the 4th Interministerial Coordination Council on that adaptation of the Ukrainian legislation to EU legislation by Decree (*Postanova*) of the Cabinet of Ministers of Ukraine "Regulation on Interministerial Coordination Council on the adaptation of Ukrainian legislation to EU legislation", 12 June 1998, № 852.

efficiently-functioning institutional framework and comprehensive educational measures in the area of EU law. Unfortunately, the Concept of Adaptation did not ensure the achievement of these aims. Very little has been done to spread knowledge about foundations of EU law among Ukrainian civil servants and governmental officials. A limited number of courses in EU law was set up in Ukrainian universities. European technical assistance has not been always effectively used. As a result, the Ukrainian government failed to accumulate the considerable expertise in EU law necessary to pursue voluntary harmonisation on a more efficient level. In our opinion, this situation resulted from the lack of a general consensus within the EU on the scope and limits of the harmonisation/adaptation programme in Ukraine. A significant advance of the Ukrainian harmonisation/adaptation programme could encourage the EU to enhance the format of EU-Ukraine relations. We suspect that at that stage, the EU was not interested in the enhancement of bilateral relations with Ukraine, owing to its preoccupation with serious external (the approaching absorption of the Central and Eastern European countries into the EU), and internal (launch of EURO) challenges.

The third stage of EU-Ukraine relations lasted from 11th December 1999 (issuing of the CS on Ukraine) until 2004 (launch of the ENP). The impressive progress of the Central and Eastern European countries towards full EU membership encouraged the President of Ukraine Leonid Kuchma to reiterate calls for eventual EU membership. One of his first steps was the issuing in 2000 of the comprehensive Programme of Integration to the EU (Programme of Integration)⁵³, which displayed a framework of short-term, medium-term and long-term objectives for the executive branch of power to integrate Ukraine into the EU. This is a legal document of a higher value than the Concept of Adaptation, since it was issued by the President of Ukraine. It therefore has priority over legal acts issued by the executive and municipalities. The Programme of Integration complements the Concept of Adaptation by establishing institutional and administrative mechanisms for the harmonisation/approximation process. In particular, the Programme of Integration binds the Cabinet of Ministers to ensure funding from the State Budget for the harmonisation/approximation process. Furthermore, the Cabinet of Ministers of Ukraine is requested to issue yearly Adaptation Action

⁵³ Programme of integration to the European Union, approved by the Edict of the President of Ukraine, 14th September 2000 № 1072/2000.

Plans⁵⁴, which set up a precise list of organisational and legislative measures to be enforced and adopted in the course of the calendar year. The PCA common institutions (Cooperation Council and Cooperation Committee) are empowered to monitor the implementation of yearly Adaptation Action Plans. The scope of these plans is not exclusive to the adoption of the *acquis communautaire* into the Ukrainian legal order. In fact, yearly Adaptation Action Plans could envisage the adoption of international rules which help to reach the general objectives of the EU-Ukraine partnership. For instance, the 2002 Yearly Action Plan pays particular attention to cooperation with international institutions and the enforcement of international conventions (accession into the WTO is regarded as one of major priorities for the time being). In response to the Cabinet of Ministers Action Plan, all ministries and government agencies involved in the process of Ukraine's integration into the EU were requested to issue their own yearly Adaptation Action Plans⁵⁵.

Furthermore, Ukraine passed considerable institutional reforms following the launch of the Programme of Integration in 2000. Hitherto, the President of Ukraine has remained the main political figure enforcing European integration policy in the country. He guides and defines the strategy of integration, sets up the external policy priorities, and as part of his jurisdiction authorises agencies, organisations, institutions and civil servants to execute duties concerning integration. Advisory bodies were established to assist the President of Ukraine in framing the integration strategy into the EU and other international institutions.

The Cabinet of Ministries of Ukraine ensures the implementation of the Programme of Integration in practice. The major workload is divided between the Ministries, each of them responsible for a certain sphere, designated by the Cabinet of Ministers⁵⁶. The Coordination Council for the adaptation of Ukrainian legislation to EU laws⁵⁷ exercises general

⁵⁴ Action Plan for the fulfilment of priority provisions of the Programme of integration in 2002 adopted by the Ruling the Cabinet of Ministers of Ukraine on 28th January 2002, № 34-p.

⁵⁵ For example see the Action Plan 2002 of the Ministry of European Integration and Economy on 1st April 2002, № 90.

⁵⁶ Decree of the Cabinet of Ministers "On the approval of the Temporary Rules of Procedure of the Cabinet of Ministers", 5 June 2000, № 915 amended by Decree of the Cabinet of Ministers, 10th January 2002, № 39.

⁵⁷ Resolution of the Cabinet of Ministers of Ukraine "On some issues of adaptation of the Ukrainian legislation to that of the EU", 15th October 2004 № 1365/2004.

coordination of the approximation of laws process within the executive branch of power and issues binding decisions. All legal acts to be issued by the Cabinet of Ministers must be taken through the monitoring and compliance procedure. Any draft that falls within the priority areas of adaptation must be screened by the Ministry of Justice for conformity with EU legislation⁵⁸. In case of a submitted draft's inconsistency with EU legislation, the Ministry of Justice issues its conclusion that could contain the reasons for non-compliance. Nevertheless, it is up to the Cabinet of Ministers to have the final word in deciding whether it is necessary to pass the particular law, taking into account either the affirmative or negative conclusion of the Ministry of Justice. Such a juncture shows the wide scope of the discretion of the Cabinet of Ministers in shaping the speed and depth of the adaptation process in Ukraine. However, it could be argued that the work of the Cabinet of Ministers in the harmonisation/adaptation of Ukrainian legislation has not been sufficiently monitored by the judiciary and legislature or the general public. The Cabinet of Ministers is accountable to the President of Ukraine and the *Verkhovna Rada*. Nevertheless, the Cabinet of Ministers was not publicly criticised by the delay in the harmonisation/adaptation. Owing to the lack of transparency within the Cabinet of Ministers, the accountability of its work to the general public in Ukraine was also hampered. Yearly Adaptation Plans have not been adequately discussed in the media, and academics and students had very little chance to obtain prompt information about new initiatives within the harmonisation/adaptation process.

Until 2002, the adaptation process was exercised solely within the executive branch of power under the guidance of the President of Ukraine. Therefore, there was neither a comprehensive legal nor a coherent institutional mechanism for coordinating the adaptation process by all branches of power, including the legislature and the judiciary. As a result, many of the Ukrainian laws adopted by the executive were inconsistent with primary laws issued by the *Verkhovna Rada*. From 1999 to 2004, some attempts were made to bring all branches of power into the coherent institutional framework of the adaptation process⁵⁹. The major

⁵⁸ Decree of the Cabinet of Ministers "On the establishment of the State Department in issues of adaptation of legislation", 24th December 2004, № 1742.

⁵⁹ The Strategy on integration empowered the highest, central and local executive authorities of Ukraine to establish close cooperation with the legislative - the *Verkhovna Rada* - and the relevant local council authorities to pursue integration into the EU at all levels of the Ukrainian society.

breakthrough came after the parliamentary elections in 2002, when Ukraine's European aspirations were given a majority endorsement by the victorious political parties. The *Verkhovna Rada* has explicitly acknowledged the need to adopt laws aimed at the implementation of the PCA, the accession of Ukraine into the WTO, and the establishment of a free trade area with the EC. As a result, the Parliamentary Committee for issues of European Integration was established. The *Verkhovna Rada* Rules of Procedure were amended so as to avoid the adoption of laws which contradict EU legal standards⁶⁰, and a framework law "On the All State Programme on the adaptation of Ukrainian legislation to EU laws" (Programme on adaptation) was issued in 2004⁶¹. In our opinion, the issue of the Programme on adaptation was a desperate attempt to accelerate the integration of Ukraine into the EU. This law envisages the export of the whole "accession *acquis*" into the legal system of Ukraine, since the objective of this law is the 'alignment of the Ukrainian legislation with the *acquis communautaire* taking into consideration criteria specified by the EU towards countries willing to join the EU'. In other words, Ukraine readily agreed to implement the "accession *acquis*" on a voluntary basis, without any perspective of full EU membership. It should be noted that the EU never indicated that voluntary harmonisation would lead to the immediate recognition of Ukrainian perspectives to join the EU. Nevertheless, the Ukrainian government decided that the harmonisation/adaptation programme would be the most expedient way to step into one of waves of the European enlargement in the region of Eastern Europe. Despite such ambitious "approximation offers" on behalf of Ukraine, EU-Ukraine mutual relations have reached a deadlock. Until now the EU has remained reluctant to acknowledge any perspective of either full EU membership, or association between the EU and Ukraine.

In order to rectify such a perplexing situation, the Commission initiated the "Wider Europe - Neighbourhood" policy towards third countries sharing an immediate post-enlargement border with the EU⁶². The

⁶⁰ Decree of the *Verkhovna Rada* of Ukraine "Recommendations after parliamentary hearings in issues of realisation of the governmental policy on integration of Ukraine to the EU", 17th January 2002, № 2999-III.

⁶¹ Law of the *Verkhovna Rada* of Ukraine "About the All State Programme of adaptation of Ukrainian legislation to that of the EU", 18th March 2004, № 1629-IV.

⁶² Communication from the Commission to the Council and the European Parliament "Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours". (COM (2003) 104 final).

Commission acknowledged Ukraine as its “privileged partner” along with Russia, Belarus, and Moldova. In the case of Ukraine, the eventual objectives of the ENP are: 1) the establishment of a free trade area between the EC and Ukraine; 2) access to selected segments of the EC internal market and the EC “financial packages”. In return, it encourages Ukraine to continue the voluntary adoption of the *acquis communautaire*, without participating in the EU decision-making and legislative procedures.

The adoption of the bilateral Action Plan in February 2005 by the Commission and the Ukrainian government marks the beginning of the fourth stage in the EU-Ukrainian relations. Action Plans identify the format of bilateral relations between the EU and neighbouring countries for the next three-year term. Therefore, Action Plans are not identical. On the contrary, they are tailored to satisfy the individual needs of the neighbouring countries in the course of rapprochement with the EU. At the same time, Action Plans contain some common elements which respond to the overall objectives of the ENP. They are: adherence to common democratic values, the establishment of a functioning market economy, and the approximation of neighbouring countries’ laws to that of the EU. The ENP encourages neighbouring states to embark upon the voluntary adoption of the *acquis communautaire*, without participating in the EU decision-making and legislative procedures. Bilateral Action Plans have been agreed to clarify the precise scope of the *acquis communautaire* to be adopted by a neighbouring state. Hitherto, the bilateral Action Plans have been concluded with Ukraine, Israel, Jordan, Morocco, Moldova, the Palestinian Authority, and Tunis.

In our opinion, the EU-Ukraine Action Plan does not move further than the EU-Ukraine CS in terms of clarifying the possibility of Ukrainian accession to the EU. It merely ‘acknowledges Ukraine’s European aspirations and welcomes Ukraine’s European choice’. Furthermore, it recognises the PCA as a ‘valid basis for EU-Ukraine cooperation’. However, the Action Plan envisages the further economic integration of the Parties ‘through joint efforts’ towards an EU-Ukraine free trade area, following Ukraine’s accession to the WTO. Furthermore, ‘consideration will be given to the possibility of a new enhanced agreement, whose scope will be defined in the light of the fulfilment of the objectives of this Action Plan and of the overall evolution of EU-Ukraine relations’.

One of the major objectives of the Action Plan is to outline the priority areas for the internal reforms to be implemented by Ukraine. The emphasis on voluntary harmonisation is the strongest among all the Action Plans. For example, the EU-Ukraine Action Plan encourages Ukraine to enhance

its legislative and institutional foundations, in order to absorb not all, but a wide range of the *acquis communautaire*. The priority areas of approximation exceed what is envisaged in the PCA and the CS. It covers the following legal reforms to be undertaken by the Ukrainian government within the three-year term: the adoption and enforcement of EU common values (democracy, rule of law, human rights and fundamental freedoms); adherence to fundamental democratic principles (respect for free media, respect of rights of national minorities, protections of rights of children); the signing and enforcement of international conventions (Charter of the International Criminal Court, United Nations Security Council Resolutions); participation in international democratic and security initiatives (non-proliferation of weapons of mass destruction, combating terrorism); cooperation in EU foreign and security policy. We forecast that one of the first steps of legal reform in Ukraine could be the revision of the Constitution of Ukraine, in order to establish the supremacy of international law within the Ukrainian legal order⁶³. In our opinion, the priority for the institutional reform must be the establishment of a Ministry of European Integration that would be capable of coordinating the approximation process within the executive, legislative and judiciary.

The EU-Ukraine Action Plan must be perceived as something different or parallel to the PCA. The EU-Ukraine Action Plan serves as a practical tool to reach the objectives of the ENP. One may argue that the EU-Ukraine Action Plan brings Ukraine closer to the EU through other various non-contractual means than formal cooperation within the PCA. As stated above, this conclusion is based on three factors. Firstly, the launch of the EU-Ukraine Action Plan stipulated the *de facto* enhancement of the political, economic and legal commitments envisaged in the PCA by the Ukrainian political elite and general public. Of course, these commitments are of a non-binding nature and, therefore, cannot override commitments within the PCA. Nevertheless, the EU-Ukraine Action Plan contributed to the re-orientation of the Ukrainian political elite towards Europe, and accelerated the voluntary harmonisation of Ukrainian legislation to that of the EU. Secondly, the EU-Ukraine Action Plan persuades Ukraine to

⁶³ Article 9 of the Ukrainian Constitution provides that 'international treaties that are in force, agreed to be binding by the *Verkhovna Rada* of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.' Thus in case of conflict between the Constitution of Ukraine and the PCA, a provision of the Constitution of Ukraine either prevails or must be amended.

reconsider the application of international law sources within its national legal system, in order to enable the implementation of European common values and principles. Thirdly, the EU will closely monitor the success of the Action Plan implementation through means already developed and tested within the “pre-accession” of the Central and Eastern European countries. In our opinion, the ENP offers better means (action plans, country reports) to ensure the effective implementation of the *acquis communautaire* by Ukraine than under the PCA. One may predict that special attention will be paid by the EU to the effectiveness of the harmonisation/approximation process in Ukraine in the course of implementing the Action Plan. Therefore, Action Plans represent a successful model for how initiatives taken outside the PCAs may affect the approximation process, without imposing binding commitments on a third country.

5.3. To conclude, in the case study we set out a number of considerations which lead us to believe that the objectives of the PCA and the status of relations between the EU and Ukraine are intrinsic factors which determine the scope and means of the *acquis communautaire* to be exported into the Ukrainian legal system. The first consideration is that one-sided attempts by Ukraine to secure the possibility of joining the EU through the promulgation of the voluntary harmonisation of legislation has not brought about any positive result, irrespective of the actual progress made by the Ukrainian government. It must be admitted that the Ukrainian government has achieved quite modest results in the course of approximating national legislation to that of the EU. Most national legal acts in approximating laws have had a declarative character. The Ukrainian government has continued to maintain trade barriers in order to protect national producers. Anticompetitive behaviour and state aid to national enterprises have been sustained. However, the basic institutional framework has been established. All branches of power have started to cooperate to ensure the success of the voluntary harmonisation programme. The example of Ukraine shows that EU institutions could be interested in supporting and acknowledging the process of voluntary harmonisation within a third country through technical assistance and additional initiatives, such as the ENP. However, the EU has hardly changed the format of bilateral relations without serious political or economic justifications. That is why Ukrainian efforts to launch the “accession *acquis*” in 1999 and in 2004 did not have an effect on the general state of EU-Ukraine relations. In both cases, the EU welcomed

Ukrainian approximation efforts, but did not push through Ukrainian chances to join the EU.

The second consideration is that the scope of the *acquis communautaire* to be implemented by Ukraine mirrors the changes in bilateral relations between the EU and Ukraine. The first significant change took place in 1999, when the CS towards Ukraine was adopted at the Helsinki Summit. This document endorsed the approximation as one of the major objectives of EU-Ukraine cooperation, and added new priority areas of the approximation process in Ukraine to what has been already specified in the PCA. The second significant change took place in 2005 after the adoption of the EU-Ukraine Action Plan. This document considerably revises the scope of the *acquis communautaire* to be adopted by Ukraine. In addition to the priority areas of approximation in the PCA, the Action Plan puts forward common values, and EU principles, as well as various political and economic criteria to be effectively implemented by the Ukrainian government. Furthermore, the EU-Ukraine Action Plan lists in detail actions and elements of the *acquis communautaire* which must be implemented by Ukraine. To ensure that the Ukrainian government takes these commitments seriously, the EU applied strong conditionality on Ukraine promising to sign a new enhanced agreement upon the successful fulfilment of the Action Plan within a three-year term. The new “enhanced” or “neighbourhood agreement” will substitute the existing EU-Ukraine PCA, which expires in 2008. The Commission will launch negotiations with Ukraine on this agreement in 2007. It is difficult to predict the exact scope of the agreement since this type of contractual relationship will be a complete novelty in EU external relations. However, following general objectives of the ENP the new “enhanced” or “neighbourhood agreement” will certainly does not offer a perspective of the full EU membership for Ukraine but could offer a stake in the EC internal market for Ukrainian nationals. To be able to get this offer Ukraine most likely will be expected to adopt and effectively implement European common democratic values and extended scope of the *acquis communautaire*. It is quite possible that the *acquis communautaire* within the new “enhanced” or “neighbourhood agreement” between the EU and Ukraine will exceed the *acquis communautaire* provided in the earlier EU-Ukraine documents (PCA, CS, Action Plan) and will be supplemented by stringent monitoring procedure on behalf of the EU. In this case, the *acquis communautaire* will be used as an important tool in hands of EU institutions, which will be in position to interpret unilaterally the scope of applicable *acquis*, to speed up, and, therefore, to influence democratic and market reforms in Ukraine in the foreseeable future.

6. CONCLUDING REMARKS

Carried to its logical conclusion, we state that the EU is active in pursuing the policy of “exporting” the *acquis communautaire* into the legal orders of third countries. That is to say that the enhancement of political and economic relations between the EU and a third country (offering a candidate state status, establishing a customs union, providing access to EC internal market freedoms) could encourage the party to an agreement to embark upon the voluntary harmonisation of its legislation to that of the EU. Therefore, we insist on considering the *acquis communautaire* within EC/EU external agreements as a dynamic category, which directly depends not only on the explicit objectives of these agreements, but also on the wider framework of relations between the parties and the general political climate of bilateral relations.

Subsequently, we argue that the *acquis communautaire* should be regarded as a sophisticated tool of EU external policy. Recognising the established role of the EU as a “rule generator”, we acknowledge that the vague concept of the “*acquis communautaire*” serves as an appropriate “wrapping” for the export of EU-generated rules abroad. Similar to a missionary, the *acquis communautaire* gradually establishes a friendly legal environment beyond EU borders through the export of its values, principles, and legal heritage abroad. In many cases, the EU does not worry about the non-binding nature of the approximation commitments. Reluctance and caution of third countries to adopt the *acquis communautaire* could be appeased by carefully-orchestrated EU external policy and the use of conditionality, which does not depend on the existence of binding harmonisation/approximation commitments.

These thoughts carry us to the conclusion that the omission of a precise definition of the concept of “*acquis communautaire*” in the EU Constitutional Treaty is not fortuitous, but intentional. In other words, despite being a guardian of constitutional values, the EU Constitutional Treaty does not anchor the *acquis communautaire* to a shore of fixed and coherent legal definitions. Instead, the EU Constitutional Treaty paves the way for the continuation of the open-ended application of this category by the EU institutions, despite its being designed to simplify the EU legal order. We believe that this juncture explicitly supports our position that the past, recent, and future application of the *acquis communautaire* within the realm of EU external action is subordinated to tailor-made objectives and *de facto* relations with third countries. This view perfectly echoes the aphorism by the XIX century Russian satirist Kozma Putkov: “First buy a

painting, and then look for a frame". Indeed, the *acquis communautaire* serves as a frame to support and to "embellish" EU external policy towards a third country. In return, one must be able to view the entire intricate picture of the EU relations with third countries, in order to evaluate the suitability and to recognise the scope of the *acquis communautaire* within a particular EC/EU external agreement.

Another ancillary idea of this article was to give the reader a rather more comprehensive view of the way in which the logic behind the *acquis communautaire* operates. Our methods and research findings are not exclusive to the *acquis communautaire*. We believe that the same approaches may be applied to other dynamic notions, such as "values of the Union" and "EU general principles". The contemporary scholar would find it difficult to operate with the "*acquis communautaire*" without possessing a comprehensive knowledge of all the potential dimensions of this notion. Thus, it is hoped that, in many respects, this study can be used as a self-contained guide for determining the likely scope of the *acquis communautaire* in the course of the negotiations of future EU external agreements by third countries.

Furthermore, our study has highlighted other problems which warrant investigation in the near future. The first problem is that third countries may experience difficulties in accepting legal norms developed elsewhere. Phrases from EU legal acts may be incorporated into the legal systems of third countries. However, ideas and objectives of these norms cannot be replicated without exporting entire regulatory and institutional mechanisms accumulated within the EU throughout the history of European integration. The second problem relates to the impact of political agenda in relations between the EU and third countries in the process of harmonisation/approximation of laws. A case study on the Ukrainian experience of adapting national law to that of the EU illustrates that political realities of the EU-Ukraine relations have always determined Ukraine's stance towards harmonisation/approximation commitments. The third problem involves the implications of the *acquis* as an international law obligation for a third country. The export of the *acquis communautaire* implies a drastic change of third countries' constitutional foundations. In most cases, third countries must revise their constitutions in order to enable the legal effect of the *acquis*, and in particular, of EU general principles and common values. However, the modest level of cooperation provided in most EU external agreements and non-binding harmonisation/approximation commitments provide very little incentive for comprehensive constitutional reforms in third countries. We have endeavoured to express our view on these issues. However, they require

deeper study and a more comprehensive research analysis. Therefore, we hope that our work will complement prolonged discussion on the external dimension of the *acquis communautaire*, and will provide lavish food for further explorations of this subject.

ABSTRACTS/RÉSUMÉS

The aim of this article is a legal study of the dynamic nature of the concept of the *acquis communautaire* in the domain of EU external relations. It is argued that the *acquis communautaire* varies in line with objectives of internal and external dimensions of its application. The major objective of the *acquis communautaire* in its internal dimension is to enable the consistent development of the EU while preserving EC/EU patrimony by Member States. The objective of the *acquis communautaire* application in its external dimension is to export the *acquis communautaire* overseas in order to push third countries at the forefront of the acquired level of economic, political and legal cooperation achieved by the EU. It is argued that the *acquis communautaire* in its external dimension is not coherent, but mirrors the specific objectives of relations between the EU and third countries. Results obtained through comprehensive analysis of EU external agreements and the case study indicates that the *acquis communautaire* is a complex legal category of a dynamic nature. One must take into consideration the general objectives of EU external agreements, and the status of bilateral relations between the EU and third countries, in order to comprehend the fullest scope of the applicable *acquis communautaire*.

Le but de cet article est de présenter une étude juridique de la nature dynamique du concept de l'acquis communautaire dans le domaine des relations extérieures de l'Union européenne. Il est avancé que l'acquis communautaire varie en fonction d'objectifs de dimensions internes et externes de son application. L'objectif majeur de l'acquis communautaire dans sa dimension interne est de permettre le développement cohérent de l'Union européenne tout en préservant le patrimoine CE/UE des États membres. L'objectif de la mise en oeuvre de l'acquis communautaire dans sa dimension externe est d'exporter l'acquis communautaire afin d'amener les pays tiers au niveau acquis de coopération économique, politique et juridique atteint par l'Union européenne. Il est avancé que l'acquis communautaire dans sa dimension externe n'est pas cohérent mais reflète les objectifs spécifiques des relations entre l'Union européenne et les pays tiers. Les résultats obtenus à travers une analyse complète des accords extérieurs de l'Union européenne et l'étude de cas montrent que l'acquis communautaire est une catégorie juridique complexe de nature dynamique. Il convient de prendre en considération les objectifs généraux des accords extérieurs de l'Union européenne et le statut des relations bilatérales entre l'Union européenne et les pays tiers pour comprendre toute l'étendue de l'acquis communautaire applicable.

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