CHAPTER FIVE

THE INSTITUTIONALISATION OF THE INTEGRATION OF CYPRUS: ANOTHER INSTANCE OF SUPRANATIONAL DIFFERENTIATION?

It appears from the previous Chapters that Cyprus follows a differentiated path of integration, the main components of which have already been presented and/or examined. In Chapter 3, different types of differentiation contained in the 2003 Treaty of Accession were identified, leading to the “asymmetric non-participation of individual Member States in selected areas of Union activity”, including Cyprus. In Chapter 4, it was demonstrated that Protocol 3 is rather an instance of intergovernmental differentiation at the EU constitutional and institutional level, to the extent that it amends the EC Treaty on the basis of an international agreement between Member States and that it provides for further bilateral co-operation between Member States within the framework of EU law.

Drawing on the terminology on differentiation identified by Stubb, the 2003 Treaty of Accession appears to constitute an intense exercise of supranational ‘graduated’ or ‘multi-speed’ integration determined in time and/or space, completed by substantial elements of ‘multi-level’ integration or ‘variable geometry’ in certain policy areas, triggered either at the supranational level (Schengen, EMU, freedom of movement of workers) or by intergovernmental mechanisms (Protocol 3). In any case, membership ‘à-la-carte’ seems to be absent from the menu. Whereas Stubb associates ‘multi-speed’ integration to time and ‘variable geometry’ to space as a determining factor respectively, it is contended that ‘variable geometry’, like integration ‘à-la-carte’, is determined by the substance of integration as opposed to any other factor. It is rather the

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scope of the restraint on the substance of integration that matters, to the effect that ‘variable geometry’ and integration ‘à-la-carte’ are variations of the same type of differentiation, determined by the intensity of the exception/derogation as a variable.

All the instances of flexibility studied so far have one point in common, in so far as they are part of the EU legal order. The legal instruments concerned normally apply to all Member States “with only their legal effects being suspended or modified with regard to some Member States. The law does not have a limited geographic scope which generally exempts a Member State from its geographic field of application. This common ground extends to transitional periods which have been a regulatory tool of successive enlargements.” Protocol 3 would also appear to fall within this broader network of differentiation, like any other territory of a Member State falling *prima facie* into the EU legal order but benefiting from a differentiated regime, whereby Community law is applicable albeit to a limited extent.

A study of Cyprus’ differentiated path of integration would not be complete however without a thorough examination of Protocol 10 annexed to the 2003 Treaty of Accession, as it does not appear to fit into the types of differentiation described above. The regime put in place by Protocol 10 deals with the *de facto* division of the island and, as such, is deemed to be temporary. With respect to the duration of a differentiation, Ehlermann argues as follows:

> There is no easy answer to the question whether rules which differentiate have to be limited and what are their ultimate deadlines. The two most important factors are the type of situation which justifies differentiation and the existence or absence of an obligation to act. While natural differences (like climate and distance) are likely to justify permanent differentiation, situations that are the product of historical development of human societies (differences of *taste* according to the terminology used by H. and W. Wallace) are more likely to call for only temporary differentiation. This is particularly so if they are at the root of differentiation in areas where the Community has a precise obligation to act in order to bring about a certain result.

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830 “Dans le cas du concept de ‘géométrie variable’, la majeure partie de l’activité et du droit communautaires est considérée comme inaccessible au recours à une différenciation en fonction de la matière. Dans le cas du concept ‘à-la-carte’, le domaine inaccessible est très restreint, voire inexistant”; in Ehlermann, 194.


832 Ehlermann, 195.