Friend Zone Forever? The Essence of and Justifications for the EU's Decision-Making Autonomy

Öberg, Marja-Liisa

Published in:
Journal of Common Market Studies

2023

Document Version:
Publisher's PDF, also known as Version of record

JCMS JOURNAL OF COMMON MARKET STUDIES
UACES
JCMS 2023 Volume 61. Number 6. pp. 1622–1638
DOI: 10.1111/jcms.13459

Friend Zone Forever? The Essence of and Justifications for the EU's Decision-Making Autonomy

MARJA-LIISA ÖBERG
Faculty of Law, Lund University, Lund

Abstract

The expansion of the European Union's (EU) regulatory sphere creates conflicts of sovereignty between the EU and its member states, and third countries that lack a possibility to participate in the making of those laws and policies. The conflict is epitomised in the concept of the Union's decision-making autonomy. Albeit stringently applied, the concept is ambiguous and undefined. This article endeavours to unfold its meaning, use and significance and examine whether its rigid nature is justified in light of the Union's aims to expand its regulatory sphere. The article argues that the ultimate rationale of decision-making autonomy is to ensure the effectiveness of the EU legal order and to compensate for the member states' loss of sovereignty, investment and risk-taking. Insofar as non-member states do not demonstrate similar commitment to the EU, exclusion from decision-making is justified to retain the privilege and attractiveness of membership.

Keywords: Brexit; decision-making autonomy; European Economic Area; mutual trust; sovereignty

Introduction

A number of third countries, such as associated and candidate countries, are integrated in the European Union's (EU) legal and political sphere by international arrangements in exchange for adopting the Union's *acquis*. This practice raises important questions as to the extent of the third countries' exclusion from influencing the substantive content of the EU's policies that become part of the *acquis* and therefore binding upon them (Lavenex and Öberg 2023). In the name of the EU's decision-making autonomy, non-member states are excluded from participating in EU institutions and decision-making procedures. The term was coined by Willy De Clercq, the European Commissioner for External Relations and Trade in a speech given at the 1987 European Communities – European Free Trade Association (EFTA) Ministerial Meeting in Interlaken (De Clercq 1987). Decision-making autonomy relates to the inherent tension in the Union's ambition to export its *acquis* to third countries whilst retaining strict member state authority over the content of the *acquis*. Similarly to the other key safeguarding concept, the autonomy of the EU legal order, decision-making autonomy sets effective limits to the Union's norms export by upholding the 'strict division between member and non-member states', which may have been bridged in policy-integration terms (Schimmelfennig and Winzen 2020, p. 8).

The fundamental conflict between the Union's ambition to export its *acquis* whilst preserving its decision-making autonomy is embedded in the need to safeguard the sovereignties of the EU member states as well as of the third countries concerned. When adopting EU *acquis* under international agreements, third countries conform to their domestic constitutional law, which protects the autonomy of their legal orders. In the case

of the EU *acquis*, however, the norms transfer is often quasi-automatic. This leads to a situation where, in theory, the third countries can reject an update to the *acquis* but, in practice, the cost of so doing is too high. This results in a degree of loss of effective sovereignty relating to the exercise of power (Eliassen and Sitter 2003, p. 136; Graver 2002). To address the sovereignty concerns of third countries adopting EU norms – and specifically their ability to influence the making of norms by which they will later be bound – the Union's law-making procedures allow for a certain degree of third country participation albeit not in formal decision-making.

Whereas generally accepted (Bekkedal 2019; Wessel 2019), the Union's decision-making autonomy hitherto lacks detailed scrutiny as a legal concept in both doctrine and case law of the Court of Justice of the EU (CJEU). This article seeks to investigate the essence of this under-researched notion and evaluate its justification from the perspective of the Union's norms export to associated third countries, with a particular focus on the European Economic Area (EEA) EFTA states and Brexit. The article proceeds from an understanding of decision-making autonomy as a concept protecting the authority of the member states to safeguard the integrity of the EU's trust-based political community by excluding the formal influence of third countries thereupon. It argues that the aim of the Union's decision-making autonomy fulfils a compelling purpose of preserving the exclusivity of membership to safeguard the member states' investment and risk-taking in the common project.

The following section explains how the EU's normative influence is capped by the best-known limiting concept – the autonomy of the EU legal order – and presents a doctrinal view of decision-making autonomy as it flows from a supranationalist conception of integration. Section II presents and examines effectiveness and reciprocity as the key justifications for decision-making autonomy. Section III subsequently discusses sovereignty and mutual trust as further, cumulative rationales of a 'softer', more flexible character of the notion. Section IV provides a critical analysis of whether the concept as currently perceived and applied is the most appropriate from a norm-exporting perspective, and the final section summarises the key findings.

I. Decision-Making Autonomy Versus Autonomy of the EU Legal Order: The Essence

The concept of the autonomy of the EU legal order is well established in EU constitutional law. Its essence lies in the self-referential character of the legal order. As an autonomous legal order, the EU is able to create, validate, apply and interpret legal rules on the basis of tools found within the legal order itself without constant validation by another legal order (Barents 2004, p. 172) or a higher authority (Bellamy 2017, p. 191; Fassbender 2003, p. 116). Autonomy originates from the concept of sovereignty and, especially, the division of sovereign powers between the Union and its member states (Pescatore 1974, p. 30). In Case 6/64 *Costa v ENEL*,[1] the CJEU contended that membership in the Union entails a partial loss of national sovereignty. The ruling established the principle of primacy of EU law over conflicting national laws justified by a limitation of sovereignty stemming from a transfer of real powers from the member states to the

[1]Case 6/64 *Costa v. ENEL* EU:C:1964:66.

Community. The member states' loss of sovereignty is compensated by institutional and procedural safeguards regarding decisions taken by the Union, including participation in the Union's decision-making procedures (Weiler 1991).

The autonomy of the EU legal order acts as a protective shield against outside influence, transferred from the outer perimeter of the member states' legal orders to surround that of the Union. The concept has two main strands of application: the relationship between EU and international law, and the relationship between the Union and the member states (Odermatt 2018). The shield protects the Union from the influence of unilateral or even collective action by the member states and non-member states alike. The ultimate purpose of the concept of autonomy is to secure the unity and the effectiveness of the EU legal order (Öberg 2020a). Yet, the CJEU's application of the principle of autonomy has been subject to much criticism insofar as it sets substantive limits on the Union's possibilities to engage in deep forms of co-operation with third countries and international organisations (de Witte 2014; Spaventa 2015). Several of the CJEU's opinions concerning the principle of autonomy[2] have concerned agreements that envisage deep co-operation with third countries on the basis of EU *acquis*. Characteristically, in order to achieve the aims of norms export such as homogeneity,[3] the agreements must provide supporting institutional structures to enable a swift and precise transferral of new *acquis* from the EU to the third country contracting parties (Öberg 2020b). Suitable institutional arrangements, however, often give rise to conflicts with the principle of autonomy. A rigid application of the principle has adverse effects on EU's external action more generally, such as in the spheres of investment arbitration (Nagy 2018; Restrepo Amariles et al. 2020), dialogue with international courts (Eeckhout 2015) and the promotion of fundamental freedoms (Spaventa 2015).

In contrast to the autonomy of the EU legal order, neither the substantive content, the rationale nor the limits of the Union's decision-making autonomy in the context of third country participation have (yet) been examined by the CJEU. In Opinion 1/91 (para. 1),[4] the CJEU specifically noted that the Opinion does not consider other provisions of the agreement, 'in particular those dealing with the decision-making process […]'. CJEU guidance is, thus, lacking in terms of the compatibility with the Treaty framework of concrete proposals for third country participation in the Union's formal decision-making procedures such as, for example, the EEA EFTA states' participation in the decision-shaping processes including their enhanced participation in the Schengen Mixed Committee (Gstöhl and Frommelt 2023), as well as the more indirect means of participation via binding decisions of international organisations or treaty bodies such as the EU-Turkey Association Council (Müftüler-Bac 2023) [Correction added on 16 October 2023, after first online publication: Minor corrections in the preceding sentence have been amended in this version.].

The lack of judicial interpretation of decision-making autonomy can owe to the fact that potential encroachments thereupon are less apparent than violations of the autonomy of the legal order and belong to the political rather than the judicial realm. The political will to uphold decision-making autonomy in the negotiations of international agreements is firm,

[2]Opinion 1/91 *EEA I* EU:C:1991:490, Opinion 1/92 *EEA II* EU:C:1992:189, Opinion 1/00 *ECAA* EU:C:2002:231.
[3]For example, Article 1(1) EEA Agreement.
[4]Opinion 1/91 *EEA I* EU:C:1991:490.

meaning that solutions that would encroach upon the Union's decision-making autonomy do not reach the draft texts of the agreements. Instead, references to decision-making autonomy appear in political documents outlining the broad political framework of the Union's relationships with certain third countries such as the EU – EEA EFTA states in De Clercq's speech, and the United Kingdom (UK) in the 2019 Political Declaration accompanying the Withdrawal Agreement (Official Journal of the EU 2020).

Decision-making autonomy can be understood as a means of safeguarding the exclusive authority of the member states that have transferred part of their sovereignty to the EU to decide on the limits of the transferral and, thereby, the integrity of the political community. Decision-making autonomy applies to decisions on the substantive content of EU legislation as well as the choice of whether or not to legislate in a given area and is, in turn, coupled with the frameworks of sovereignty and mutual trust. The substantive connection between the autonomy of the EU legal order and the Union's decision-making autonomy is ambiguous and pertains to the prominent requirement in the autonomy case law, which demands that the 'essential character' of the powers and the institutions of the EU remain unaffected (Opinion 2/13 *ECHR II*, para. 183).[5] Some of the issues pertaining to the essential character of the EU's powers and institutions, such as the requirement to preserve the relationship between the member states as envisaged in the Treaties including 'mutual trust', and preserving the nature of the powers of the EU and of its institutions as conceived in the Treaties (Öberg 2020a, p. 718) have relevance also for the Union's decision-making autonomy.

The lack of CJEU guidance notwithstanding, the essential character of the EU's institutions can inform the essence, operation and limits of the concept of decision-making autonomy. These essential characteristics could potentially include Article 16 of the Treaty on European Union (TEU), which is the key provision unfolding the essence of decision-making autonomy. Article 16 TEU limits the composition of the Council, the Union's main decision-making body, to representatives of the member states only. The same applies to rules on the composition and procedures of other Union institutions included in the making of EU law and policy such as agencies (Lavenex 2015; Lavenex and Lutz 2023; Öberg 2019). Third countries' participation in the Union's formal decision-making structures is essentially confined to the fringes of policy-making. With specific reference to the 'Council's decision-making autonomy', the Council's Rules of Procedure (CRP) preclude the attendance at Council's meetings of third country nationals either in their own right or as members of a member state delegation (Council of the European Union 2016, pp. 16–17), informal Council meetings notwithstanding (Jonsdottir 2023). Distinctly from 'participation', representatives of third countries or international organisations may occasionally 'be present' at certain Council meetings or meetings of Council preparatory bodies when invited as observers and concerning specific agenda items (Council of the European Union 2016, p. 39). As observers, third country representatives may, upon invitation by the Council Presidency, state their views or inform the Council about a matter at issue without participating in discussions or deliberations (Council of the European Union 2016, p. 39). Similar rules apply to the Council's preparatory bodies whose meetings must be organised in a manner that preserves the Council's decision-making autonomy (Council of the European Union 2016, p. 39; Gstöhl and

[5]Opinion 2/13 *ECHR II* EU:C:2014:2454.

Frommelt 2023). Nevertheless, third countries have been able to participate in certain committees and in Working Parties, except for Coreper (Wessel 2019, p. 434).

In the European Council, third country participation is firmly restricted (Article 15(2) TEU) including in meetings in the margins. Third country representatives can be included in 'exceptional circumstances only' with the prior agreement of the European Council acting unanimously (Article 4(2) CRP). Whereas the European Council is not included in the legislative procedures, the very limited participation possibilities of third countries exclude them from exerting influence on the Union's policies 'on the spot'.

In sum, decision-making autonomy creates a 'legal fortress Europe' with a near-Teflon coating both outwards towards third countries and inwards towards the member states. It goes a step further from the autonomy of the EU legal order, which demands member state participation in the execution of common policies (Opinion 1/76, para. 11(b))[6] by limiting participation in decision-making procedures to the member states *only*. Although the purpose of decision-making autonomy is similar to the autonomy of the EU legal order, it operates in a different dimension and protects a different set of interests.

II. Application and Justifications of Decision-Making Autonomy: Effectiveness and Reciprocity

The ultimate purpose of the EU's decision-making autonomy is supposedly manifold. First, similarly to the autonomy of the EU legal order, it serves the purpose of ensuring effectiveness. Second, and partly related to the former, it intends to retain the distinction between member states and non-member states, marking differences in the commitment to and investment in the EU project. Whereas the autonomy of the EU legal order seeks to safeguard the legal order from existential threats emanating from international law or from the member states, decision-making autonomy safeguards the exclusivity of membership and, thereby, the sacrifices made and risks assumed by the member states as the committed members of the club.

Similarly to the autonomy of the EU legal order, unity and effectiveness also apply to upholding the Union's decision-making autonomy. Maintaining the effectiveness of the EU's decision-making was the key justification for decision-making autonomy prior to the conclusion of the EEA Agreement. In his 1987 speech, De Clercq declared that the future co-operation of the Community with the EEA EFTA states must be based on three principles: First, 'Community integration comes first'; second, 'the Community's decision-making autonomy must be preserved' for the purposes of finalising the internal market in the planned timeframe without delays caused by the inclusion of non-member states in the decision-making processes (De Clercq 1987, pp. 5–6). As a third point, De Clercq highlighted concerns about the balance between benefits and obligations because the EFTA states would not share the same 'Community discipline and solidarity' as the member states (1987, pp. 7–8). De Clercq's speech illustrates the limits of EU integration, which, to a large extent, lie in the status of membership: the integration of third countries is encouraged but not at the expense of integration within the Union (Eliassen and Sitter 2003, p. 130).

[6]Opinion 1/76 *European Laying-up Fund for Inland Waterway Vessels* EU:C:1977:63.

De Clercq's reference to Community integration was based on an assumption that the participation of countries who are not bound by the EU's supranational principles would cause undue delays in the law-making processes and, thereby, render the Community's procedures less efficient. Initially, 'common decision-making', or 'osmosis' between the Community and the EFTA pillars, had been envisaged in the form of joint decision adopted by a joint body allowing both sides to preserve their decision-making autonomy throughout the decision-shaping process (Delors 1989). The plan was discarded during the negotiations, especially by the Community but also by the EFTA countries who wished to preserve their decision-making autonomy from the supranational Community system (Holter 2017, p. 5).

Amongst all third countries, the EEA EFTA states enjoy the most extensive set of participation rights in the making of EU *acquis*. The EEA was set up as a sphere of 'comfortable duality' where non-member states were given the opportunity to participate in the common undertaking during the informal stages preceding the official adoption of EU *acquis* without, however, deciding on its 'nature, scope, development or authoritative interpretation' (Magen 2007, p. 388). The involvement of the EEA EFTA states in decision-shaping (Gstöhl and Frommelt 2023) means that all parties are able to preserve their decision-making autonomy albeit at different stages and in different venues – the EU in the Council and the EEA EFTA states in the EEA Joint Committee and in the national parliaments.

The question of third countries' stake in the process of developing EU law and policies has maintained its relevance since the creation of the EEA. In 2002, Romano Prodi, the former President of the European Commission, proposed the inclusion of the neighbourhood countries in a Common European Economic Space short of, but not excluding, membership on the basis of 'sharing everything with the Union but institutions' (Prodi 2002). Inherently, this plan did not include participation in the decision-making processes.

Brexit has provided another stark perspective on De Clercq's balancing act between third country participation and exclusion, and the fair balance between the rights and obligations of the member states. During the withdrawal process, up until formally leaving the Union on 31 January 2020, the UK enjoyed full participation rights in the Union's institutions whilst heading towards separation rather than (further) integration. The transition period arrangements and post-Brexit relationship have raised similar issues of third country inclusion as regarding the EEA. The aim of the Brexit arrangements has not been to integrate the UK in the EU but, on the contrary, to maintain a distance between the parties. During the Brexit negotiations, concerns were raised as to the 'cohesion and legitimacy' of the EU legal order, suggesting that as a third country, the UK should not be granted more advantageous treatment than a member state (Dougan 2020, p. 638). The European Council recalled the balance of rights and obligations, ensuring a level playing field, preserving the integrity of the Single Market, and the autonomy of the Union's decision-making (European Council 2018, para. 7). Allowing for an imbalance in the EU–UK relationship would conflict with reciprocity, which is a basic premise of EU membership, and challenge the Union's relations with other associated third countries (Dougan 2020, p. 638).

Throughout the withdrawal process, a firm distinction was made between the EU member states and the UK as a country no longer enjoying membership status (European

Council 2018; Official Journal of the EU 2020). During the transition period, the UK retained most of the rights and obligations of a member state but pursuant to Article 7 of the Withdrawal Agreement, no longer participated in or nominated or elected members of the EU institutions, nor participated in the decision-making of the Union bodies, offices and agencies and expert groups (Council of the European Union 2018, para. 18; European Council 2017). The EU, thereby, safeguarded its decision-making autonomy. By way of derogation, pursuant to Article 128(5) of the Withdrawal Agreement (Official Journal of the EU 2019), during the transition period, representatives or experts of or designated by the UK could, upon invitation, exceptionally attend meetings of expert groups, and bodies, offices or agencies when the discussions concerned individual acts to be addressed during the transition period. The presence of the UK was necessary and in the interest of the Union, in particular for the effective implementation of Union law during the transition period without voting rights (Jonsdottir 2023). Post-Brexit, the UK no longer enjoys access to the Union's decision-making procedures. As in the case of the EEA, co-operation arrangements between the EU and the UK are a source of tension, such as concerning third country contributions to Common Security and Defence Policy operations. In the latter, third countries have been critical of being rendered 'second-class stakeholders' with restricted access to information and involvement in the planning and decision-making procedures (Tardy 2014, p. 4). In terms of involvement, the UK's ambitions were higher. Regarding agencies, for example, the UK proposed 'associated membership', or a kind of 'third country plus status' (Ott , p. 255), whereas none such had previously been granted to the EEA EFTA states (Öberg 2019). The bid was unsuccessful (Kaeding 2021), confirming the prominence of decision-making autonomy.

III. The Rationale of Decision-Making Autonomy: Cost of Membership

Decision-making autonomy is a compound concept building on the cumulative effects of the loss of sovereignty and shared trust. The loss of sovereignty is the principal cost of EU membership justifying the possibility to influence the Union's law and policies (Gstöhl 1994, p. 335) via participation in the EU's decision-making procedures. There is no clear indication of how much sovereignty must be lost to justify a country's inclusion in decision-making. The formal threshold is membership, which is the culmination of the accession process – a lengthy rite of passage during which candidate countries prove their loyalty, commitment and trustworthiness by conforming with EU values and standards and adopting the broad spectrum of EU *acquis* in order not to undermine the EU's 'policy-making capacity' (Schimmelfennig and Winzen 2020, p. 169). Candidate countries must also demonstrate the ability to contribute to the Union's budget, policies and programmes to, ultimately, be unanimously approved by the EU institutions and the member states. The EU's 'marriage contract' (Delors 1990, p. 9) is comprehensive and includes the aims and principles enshrined in the EU Treaties, the foundational principles of direct effect, primacy and state liability, and the future development of the entirety of the Union's policies.

Association agreements feature certain similarities with the accession process in terms of the long negotiation period compelling decisiveness with regard to choosing the European path. Associated third countries, too, make investments when aligning with EU law and policies and take risks, not least by choosing the European path over competing

alliances. However, their overall set of obligations is not commensurable to membership. For equal say, third countries must have an equal stake in important common issues that require collective decision-making (Christiano 2010, pp. 130–131). The EEA Agreement and the Political Declaration emphasise the aim of the relationship between the EU and the EEA EFTA states and the UK to be based on 'equality and reciprocity and of an overall balance of benefits, rights and obligations' (Recital 4, Preamble of the EEA Agreement), and 'a balance of rights and obligations [which] must ensure the autonomy of the Union's decision making […]' (Official Journal of the EU 2020, para. 4), respectively. The commitment of the EEA EFTA states, for example, to the range of EU *acquis* is limited, as is their loss of sovereignty despite the 'self-inflicted hegemony' (Eriksen and Fossum 2015b). The objectives of the 'dynamic and homogeneous' EEA legal order (Recital 4, Preamble to the EEA Agreement), the replication of some of the foundational principles of the EU legal order by the EFTA Court (Baudenbacher 2013) and the quasi-automaticity of the transferral of the *acquis* make the EEA move in the same direction but not in the same lane as the EU. The regulatory co-operation between the EU and the UK is significantly more modest.

The second broad aspect of the cost of membership besides the loss of sovereignty is mutual trust. The EU constitutes a community of 'political trust' (Brouwer 2016, pp. 61–62), which binds together political actors and member state representatives in the EU institutions. Participation in the trust community is directly connected to the loss of sovereignty via mutual recognition – the obligation to accept rules, decisions and judgments from other member states as equivalents and collaborating in their enforcement (Lavenex 2007, p. 765) without participating in their making. Participation in decision-making procedures instrumentalises mutual trust between the member states and serves as compensation for the loss of sovereignty (Schimmelfennig 2015) as well as the risks associated with the unanticipated future developments of the integration process. Countries that fail to demonstrate a similar level of trust towards the existing member states or are not perceived by the latter as sufficiently trustworthy are excluded from involvement in common decision-making.

The principle of mutual trust further connects the Union's decision-making autonomy to the essential elements of the EU legal order. In Opinion 2/13, the CJEU established that the essential characteristics of EU law have led to a 'structured network of principles' and 'mutually interdependent legal relations binding the EU and its Member States, and its Member States with each other' (para. 167). These characteristics are based on the set of common values enshrined in Article 2 TEU, which justify the existence of mutual trust between the member states (Opinion 2/13, para. 168). Trust is a cornerstone of EU integration: It helps overcome diversity in the construction of a political community (Klingemann and Weldon 2013, p. 458) and balances responsibilities (Vajda 2019, p. 19). Articles 49 and 2 TEU condition Union membership to adhering to the Union's 'constitutional identity' (Besselink 2017, p. 129) and to a commitment to promote the common values (European Council 1993). Albeit a 'journey to the unknown' (Mitsilegas 2006, pp. 1281–1282), mutual trust within the EU is managed (Gerard and Brouwer 2016, p. 19). Mutual trust is furthermore not 'blind' or absolute (Lenaerts 2017; Prechal 2017, p. 85) as it relies on the 'trust safeguards' of shared values, institutions and a legal framework that includes tolerance for exceptions from common policies

(Gerard 2016, p. 79). A potential lack of common values reduces expectations on mutual trust, hence the exclusion of outsiders from formal decision-making.

Throughout history, the member states' rule of law records have challenged mutual trust within the EU to its limits. The ultimate sanction for disobedient member states is provided in the Article 7 TEU procedure of suspending certain rights deriving from the Treaties, including the voting rights of the representative of the government of a member state engaged in a serious breach of the values of the Union as provided in Article 2 TEU. The procedure underscores the central value of voting rights: the possibility to influence the content of common rules and policies must be based on a foundation of trust. Differently from the external context, however, the potential exclusion of member states from decision-making in the Council is the extreme action, limited to the very specific decision-making procedure in the Council and not in the other institutions, and is politically nearly impossible to enforce (Kochenov and Pech 2015, p. 517). Once an EU member, a state is embraced by mutual commitment towards other member states, which is exemplified by the fact that no immediate sanction – and especially not expulsion – follows a member state's breach against rule of law principles. Prior to triggering the 'nuclear option' of Article 7 TEU, recourse is had to other methods such as persuasion (Kochenov and Pech 2015, p. 516), suggesting that membership constitutes a formal entry ticket into the EU's trust community. Membership rests on the foundation of assumption of strong loyalty and trust amongst the member states, which is tested prior to accession and accepted during membership (Cremona 2005, p. 19).

The EU's trust community is not monolithic. Many different trust communities exist along the patterns of variable geometry (de Witte 2018, p. 228) and differentiated integration (Brouwer 2016, p. 64). For example, member states with negotiated opt-outs from EU policies are excluded from, and member states involved in enhanced co-operation included in the respective trust communities. The multitude of trust communities in itself is not detrimental to mutual trust within the EU. Insofar as variable geometry is politically accepted on membership level, formal mutual trust (Brouwer 2016, p. 62) is not adversely affected. Neither is the EU's trust community exclusive to membership; it can be expanded and the decision-making venues opened to third countries (Brouwer 2016, p. 65). However, integrating third countries into the trust community can also pose challenges rendering third country entry into the trust community accompanied by participation in decision-making less than self-evident.

The minimum base of values shared between the EU, the EEA EFTA states and the UK is enshrined in membership in the Council of Europe. This is complemented by the proclaimed 'proximity, long-standing common values and European identity' (Recital 2, Preamble of the EEA Agreement), and the common values and interests that 'arise from their geography, history and ideals anchored in their common European heritage' (Official Journal of the EU 2020, para. 3). Yet, the common values and European heritage only compensate for the lack of mutual trust embedded in membership to a certain extent. The future relationship between the EU and the UK was not seen as capable of amounting to the rights and obligations of membership (Official Journal of the EU 2020, para. 5). The same reasoning is apparent in the case of the EEA where deep co-operation notwithstanding, the EEA EFTA states are not regarded as members of the EU as a club for the truly committed with the accompanying participation rights. To exemplify, co-operation between the EU and the third countries concerned often takes place in the EU's core

policy areas, such as the internal market and the Area of Freedom, Security and Justice (AFSJ) (Eliassen and Sitter 2003, p. 126). In these instances, a third country's sovereignty has been limited to the extent of participation in the policies, which can, for example, include elements of mutual recognition. However, this does not formally justify the EU's abandonment of decision-making autonomy. On the contrary, member states that opt-out from common policies, too, are excluded from decision-making. A similar case in point is the UK's former opt-out from Schengen co-operation and the subsequent refusal of the EU to allow the UK to participate in Frontex. In Case C-77/05 *UK v Council*,[7] the CJEU established that the UK's participation in the adoption of the Frontex Regulation pursuant to the Schengen Protocol is conceivable only if the UK adopted the relevant Schengen *acquis* (para. 62). In the context of this policy area, the CJEU recognised a package of rights and obligations from which no cherry-picking can be allowed. This builds on an understanding of a shared cost of membership and the accompanying privileges.

In comparison with associated third countries, member states with opt-outs are still conceived as 'insiders' rather than 'outsiders'. By way of analogy, it is possible to imagine the existence of trust communities across the Union's borders comprising both member and non-member states. The prerequisites for such trust communities would be partial loss of sovereignty and the sharing of common values as a minimum base for mutual trust. Sovereignty costs can be assumed by third countries in the accession as well as association processes but are not applicable to a withdrawing member state. Common values, which in the EU are an assumption based on Article 4(2) TEU (Lenaerts 2017, pp. 808–809), can be shared by acceding and associated countries, as well as withdrawing member states where the formal guarantees are either not yet applicable, possibly not applicable to a sufficient degree, or no longer applicable. The privileged membership status upholds the EU's decision-making autonomy whilst preserving the direct influence on EU law and policies for the truly committed (Nic Shuibhne 2019, p. 38).

As discussed throughout this Special Issue, third country influence on the EU legal order is not strictly confined to the formal decision-making or decision-shaping procedures but includes more indirect forms of influence that feed into the common Union system based on mutual trust. To that extent, trust in (certain) third countries is embedded in that form of political co-operation and becomes an important vehicle thereof. This can have important consequences for the concept of autonomy in its dual appearance. The autonomy of the EU legal order is safeguarded primarily by the CJEU reviewing institutional arrangements found in envisaged or existing agreements. Beyond CJEU scrutiny and in the face of indirect third country influence on EU law and policies, one can ask what role the autonomy of the EU legal order will play. Rather than the CJEU, the task of guarding the autonomy of the Union's political order of which decision-making is a part is seized by the political actors.

IV. What Kind of Decision-Making Autonomy for the Union?

Conflicts of sovereignty are central to regional integration, but instead of dealing with questions about the transfer of member state sovereignty to a supranational level and its

[7]Case C-77/05 *UK v Council* EU:C:2007:803.

divisibility (Saurugger and Terpan 2019, p. 903), third country (partial) integration in the EU's policies gives rise to another kind of sovereignty conflict. In that conflict, balance must be found between mutual sovereignty claims of the third countries that lack a possibility to influence the content of the norms, which are transferred to their legal orders in a quasi-automatic fashion, on the one hand, and the EU and its member states, on the other. In the EU context, maintaining decision-making autonomy whilst seeking to be an effective norms exporter towards a variety of associated and other third countries leads to a battlefield of claims of sovereignty. On the battlefield of sovereignties, it may be queried whether there is room for Magen's comfortable duality. The situation is most comfortable for the Union. For the EEA EFTA states, it is convenient insofar as balance is upheld between their wish to participate in the internal market and the unwillingness to invest in the broad spectrum of EU policies and their, partially unforeseen, future developments. By participating in the internal market, associated non-member states reinforce the attractiveness of the EU and thereby contribute to the success of the common European project.

Overall, the EU is considered an effective gatekeeper and preserver of the Union's formal decision-making autonomy (Bekkedal 2019; Törö 2010; Wessel 2019). In this form, decision-making autonomy is a strongly protective form of autonomy lacking development in scope and time. These characteristics can also be applied to the 'selfish Court' (de Witte 2014) interpretation of the autonomy of the EU legal order, or the CJEU's keenness to control the relationship between itself and the ECtHR (Rosas 2020, p. 47). Bekkedal has claimed that unless decision-making autonomy is applied less stringently, the EU will not be very accessible to outsiders (2019, p. 386). The claim is a truism insofar as the aim of decision-making autonomy is precisely to retain the exclusive access to the Union's decision-making procedures to the group of the committed. From the EU's perspective, treating third countries as outsiders (Bekkedal 2019, p. 415) is not a flaw in the system but a fundamental policy choice intended to safeguard the Union's political edifice and the exclusivity of membership. Overall, decision-making autonomy is less concerned with protecting the EU's decision-making from foreign actors but with protecting a privilege. The privilege provides a payoff for those devoted to the common project that pay with their sovereignty, act in a spirit of loyalty (Article 4(3) TEU) and assume the risks of supranational decision-making where decisions are occasionally adopted against one's approval (Dehousse and Weiler 1990, p. 250). With reference to the theory of exit and voice (Hirschmann 1970; Weiler 1991), the EEA EFTA states adopt EU acquis in a quasi-automatic manner but make use of exit (non-membership) rather than voice (participation in decision-making). The principle of autonomy of the EU legal order specifically keeps third countries at an arm's length, underscoring the insider/outsider distinction in the EEA. Brexit, on the other hand, is strongly focused on the UK regaining sovereignty. The privilege is reversed – the UK wishes to preserve its autonomy as a privilege but lacks the proper justification in terms of loss of sovereignty and mutual trust.[8] Regardless of the remaining ties with the Union, especially as illustrated by the Northern Ireland Protocol (Phinnemore 2023), the symbolic gesture of (Br)exit defeats any arguments for compensation by means of participation in the Union's decision-making.

[8]The author owes this insight to Sandra Lavenex.

Decision-making autonomy could also be conceived as a flexible notion that would allow for a dynamic development of EU–third country relations. A flexible concept of 'strategic' decision-making autonomy could allow for third country participation in the making of EU law and policies where necessary for achieving policy goals such as the expansion of certain Union policies beyond the Union's borders. Examples could include the internal market or policies within the AFSJ, such as the Schengen or Dublin systems where third country participation is already well established. Speaking against a flexible notion of decision-making autonomy is the fact that the concept is not primarily court-developed but interpreted and applied by political actors. The latter are more capable than the CJEU in finding an appropriate balance within the concept between the Union's contrasting policy needs – the foreign policy goals of integrating third countries via exporting EU norms, and the need to protect the exclusivity of membership. Because, in practice, in the course of this balancing act, decision-making autonomy is for the most part strictly upheld, it is likely that politically, the current application of decision-making autonomy is considered by the EU to be uncontroversial and unproblematic.

The examples of indirect forms of third country influence presented in this Special Issue show that the Union's decision-making autonomy is stringent, but limited. The question of flexibility in the framing and application of the concept of the Union's decision-making autonomy ultimately boils down to whether more external differentiated integration is desired and flexible tools to accommodate it needed. In broad terms, it speaks to the balancing between 'the unity of the EU and the unity of Europe' in European integration (Schimmelfennig and Winzen 2020, p. 179) insofar as decision-making autonomy challenges the formal borders of EU membership and access to formal decision-making for the benefit of more expansive norms export and cross-membership participation in EU policies. There are many categories of external differentiated integration tailored for the neighbouring countries' positions on the EU's integration scale, accommodating for the third countries' individual situations in relation to (non-)membership, including in the accession process. Removing the protective shield of decision-making autonomy to open for further expansion of the non-membership category could, however, lead to 'devaluing the currency of EU membership' (Fossum 2023). The cost of membership could no longer be balanced against the privileges thereof which include the voice in the making of the Union's laws and policies. In turn, disincentivising membership could lead to a loss of the strong core of member states driving the further development of the Union's policies.

Conclusions

In its many forms, the Union's concept of autonomy is a protective notion aimed at controlling external, non-EU influence on the Union's legal and political order by either the international community, third countries or the member states. The Union's decision-making autonomy shares similarities with the widely discussed autonomy of the EU legal order. Yet, compared with the autonomy of the EU legal order, decision-making autonomy occupies a different space – the EU's political order; is guarded by different players – the political actors rather than the CJEU; and, beyond the purpose of ensuring the effectiveness of EU policies, aims to preserve the member

states' investment, commitment and risk-taking vested in EU membership in the EU as a value-based organisation conditioned by mutual trust.

Third countries' adoption of EU rules entails economic benefits as well as sacrifices in terms of sovereignty loss. The impossibility to influence the content of those rules constitutes a recurring point of criticism, specifically regarding the 'hegemonic relationship' between the EU and associated third countries 'not by intent' but by 'complex interdependence and the European integration process' (Eriksen and Fossum 2015a, p. 3). Whether that hegemonic relationship should be dissolved by granting the third countries participating in the EU's policies and adopting EU rules a formal possibility to influence their making depends on whether 'borderland differentiated integration' – partly in and partly out – is a desirable form of both EU integration and the EU's norms export to non-member states.

On the one hand, a flexible notion of decision-making autonomy that allows for some degree of formal participation in the making of the EU *acquis* would mitigate the democratic deficiencies of third country integration without membership in the EU's policies. It would offer more flexibility in the integration of the 'maverick', reluctant rich countries (Schimmelfennig and Winzen 2020, p. 6), in particular, whereas the final goal of less wealthy neighbourhood countries would rather be membership. On the other hand, the key justification for upholding the Union's decision-making autonomy and, thereby, the exclusivity of membership is the incomparable scope of commitment to the EU project in its entirety, by the EU member states and third countries, respectively. Relaxing the Union's decision-making autonomy would pierce the concrete wall of membership, diluting the distinction between insiders and outsiders and, possibly, reducing the attractiveness of membership leading to increased disintegration. Insofar as the lessons of Brexit have taught that the latter is politically undesirable, decision-making autonomy seems to be here to stay.

Acknowledgements

The author acknowledges receipt of funding to complete this research from the Ragnar Söderberg Foundation (Ragnar Söderbergs stiftelse), Grant No. RP12/16. I would like to thank John Erik Fossum, Xavier Groussot, Sandra Lavenex, Jacob Öberg and Jarle Trondal as well as the two anonymous reviewers and the JCMS editorial team for their helpful suggestions and comments on earlier versions of this article.

Correspondence:
Marja-Liisa Öberg, Faculty of Law, Lund University, Lund, Sweden.
email: marja-liisa.oberg@jur.lu.se

References

Barents, R. (2004) *The Autonomy of Community Law* (Alphen aan den Rijn: Kluwer Law International).

Baudenbacher, C. (2013) 'The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together'. In *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (The Hague: T.M.C. Asser Press), pp. 183–203.

Bekkedal, T. (2019) 'Third State Participation in EU Agencies: Exploring the EEA Precedent'. *Common Market Law Review*, Vol. 56, No. Issue 2, pp. 381–416.
Bellamy, R. (2017) 'A European Republic of Sovereign States: Sovereignty, Republicanism and the European Union'. *European Journal of Political Theory*, Vol. 16, No. 2, pp. 188–209.
Besselink, L. (2017) 'The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives'. In Jakab, A. and Kochenov, D. (eds) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press), pp. 128–144.
Brouwer, E. (2016) 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust'. In Brouwer, E. and Gerard, D. (eds) *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (EUI Working Paper, MWP 2016/13), pp. 59–68.
Christiano, T. (2010) 'Democratic Legitimacy and International Institutions'. In Besson, S. and Tasioulas, J. (eds) *The Philosophy of International Law* (Oxford: Oxford University Press), pp. 119–137.
Council of the European Union (2016) *Comments on the Council's Rules of Procedure; European Council's and Council's Rules of Procedure* (Brussels: General Secretariat of the Council).
Council of the European Union. (2018) Supplementary Directives for the Negotiation of an Agreement with the United Kingdom of Great Britain and Northern Ireland Setting Out the Arrangements for Its Withdrawal from the EU, XT 21004/18, 29 January, Brussels.
Cremona, M. (2005) 'EU Enlargement: Solidarity and Conditionality'. *European Law Review*, Vol. 30, No. 1, pp. 3–22.
De Clercq, W. (1987) Speech Held at the EC-EFTA Ministerial Meeting, Interlaken, 20 May, SPEECH/87/32.
de Witte, B. (2014) 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union'. In Cremona, M. and Thies, A. (eds) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart Publishing), pp. 33–46.
de Witte, B. (2018) 'An Undivided Union? Differentiated Integration in Post-Brexit Times'. *Common Market Law Review*, Vol. 55, No. Special Issue, pp. 227–249.
Dehousse, R. and Weiler, J.H.H. (1990) 'The Legal Dimension'. In Wallace, W. (ed.) *The Dynamics of European Integration* (London: Pinter Publishers), pp. 242–260.
Delors, J. (1989) *Address Given to the European Parliament (17 January 1989),* Bulletin of the European Communities*, Supplement 1/89* (Luxembourg: Office for official publications of the European Communities).
Delors, J. (1990) *Introduction of the Commission's Programme for 1990 by the President of the Commission of the European Communities* (*Bulletin of the European Communities*, Supplement 1/90) (Luxembourg: Office for Official Publications of the European Communities).
Dougan, M. (2020) 'So Long, Farewell, Auf Wiedersehen, Goodbye: The UK'S Withdrawal Package'. *Common Market Law Review*, Vol. 57, No. Issue 3, pp. 631–704.
Eeckhout, P. (2015) 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' *Social Science Electronic Publishing presents Social Science Research Network*, Vol. 38, pp. 955–992.
Eliassen, K.A. and Sitter, N. (2003) 'Ever Closer Cooperation? The Limits of the 'Norwegian Method' of European Integration'. *Scandinavian Political Studies*, Vol. 26, No. 2, pp. 125–144.
Eriksen, E.O. and Fossum, J.E. (2015a) 'Introduction: Asymmetry and the Problem of Dominance'. In Eriksen, E.O. and Fossum, J.E. (eds) *The European Union's Non-members: Independence Under Hegemony?* (Abingdon: Routledge), pp. 1–14.

Eriksen, E.O. and Fossum, J.E. (2015b) 'Hegemony by Association'. In Eriksen, E.O. and Fossum, J.E. (eds) *The European Union's Non-members: Independence Under Hegemony?* (Abingdon: Routledge), pp. 230–242.
European Council. (1993) Conclusions of the Presidency, 21–22 June, Copenhagen.
European Council. (2017) December Guidelines, EUCOXT20011/17, 15 December, Brussels.
European Council. (2018) Art. 50 Guidelines, EUCO XT 20001/18, 23 March, Brussels.
Fassbender, B. (2003) 'Sovereignty and Constitutionalism in International Law'. In Walker, N. (ed.) *Sovereignty in Transition. Essays in European Law* (Portland: Hart Publishing), pp. 115–145.
Fossum, J.E. (2023) 'The EU Versus Third Countries: Consequences for Democracy and the Political Order'. (this issue)
Gerard, D. (2016) 'Mutual Trust as Constitutionalism?' In Brouwer, E. and Gerard, D. (eds) *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law, EUI Working Paper, MWP 2016/13*, pp. 59–68.
Gerard, D. and Brouwer, E. (2016) 'Mapping Mutual Trust – An Introduction'. In Brouwer, E. and Gerard, D. (eds) *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law, EUI Working Paper, MWP 2016/13*, pp. 1–3.
Graver, H.P. (2002) 'Mission Impossible: Supranationality and National Legal Autonomy in the EEA Agreement'. *European Foreign Affairs Review*, Vol. 7, No. Issue 1, pp. 73–90.
Gstöhl, S. (1994) 'EFTA and the European Economic Area or the Politics of Frustration'. *Cooperation and Conflict*, Vol. 29, No. 4, pp. 333–366.
Gstöhl, S. and Frommelt, C. (2023) 'Beyond Downloading: Venues for Associated Neighbouring Countries to Influence EU Law and Policies'. (this issue)
Hirschmann, A.O. (1970) *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press).
Holter, D.W. (2017) 'Legislative Homogeneity'. In Baudenbacher, C. (ed.) *The Fundamental Principles of EEA Law* (Cham: Springer), pp. 1–17.
Jonsdottir, J. (2023) 'The European Economic Area: Decision-shaping During the COVID-19 Pandemic'. (this issue)
Kaeding, M. (2021) 'EU Agencies and Brexit: Assessing the Implications of Brexit for EU Agencies'. EU3D Research Papers No. 20, November 2021.
Klingemann, H.-D. and Weldon, S. (2013) 'A Crisis of Integration? The Development of Transnational Dyadic Trust in the European Union, 1954–2004'. *European Journal of Political Research*, Vol. 52, pp. 457–482.
Kochenov, D. and Pech, L. (2015) 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality'. *European Constitutional Law Review*, Vol. 11, No. 3, pp. 512–540.
Lavenex, S. (2007) 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy'. *Journal of European Public Policy*, Vol. 14, No. 5, pp. 762–779.
Lavenex, S. (2015) 'The External Face of Differentiated Integration: Third Country Participation in EU Sectoral Bodies'. *Journal of European Public Policy*, Vol. 22, No. 6, pp. 836–853.
Lavenex, S. and Lutz, P. (2023) 'Third country access to EU agencies. Exploring spaces for influence'. (this issue)
Lavenex, S. and Öberg, M.-L. (2023) 'Third Country Influence on EU Law and Policy Making: Setting the Scene'. (this issue)
Lenaerts, K. (2017) 'La Vie Après L'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust'. *Common Market Law Review*, Vol. 54, No. Issue 3, pp. 805–840.
Magen, A. (2007) 'Transformative Engagement through Law: The Acquis Communautaire as an Instrument of EU External Influence'. *European Journal of Law Reform*, Vol. 9, No. 3, pp. 361–392.

Mitsilegas, V. (2006) 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU'. *Common Market Law Review*, Vol. 43, No. Issue 5, pp. 1277–1311.
Müftüler-Bac, M. (2023) 'Turkey's Influence as a Third Country on the European Union: From Association to a Key Partner'. (this issue)
Nagy, C. (2018) 'Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back"'. *German Law Journal*, Vol. 19, No. 4, pp. 981–1016.
Nic Shuibhne, N. (2019) 'What is the Autonomy of EU Law, and Why Does that Matter?' *Nordic Journal of International Law*, Vol. 88, No. 1, pp. 9–40.
Öberg, M.-L. (2019) 'Third Countries in EU Agencies: Participation and Influence'. In Hofmann, H.C.H., Vos, E. and Chamon, M. (eds) *The External Dimension of EU Agencies and Bodies: Law and Policy* (Cheltenham: Edward Elgar Publishing), pp. 204–221.
Öberg, M.-L. (2020a) 'Autonomy of the EU Legal Order: A Concept in Need of Revision?' *European Public Law*, Vol. 26, No. 3, pp. 705–740.
Öberg, M.-L. (2020b) *The Boundaries of the EU Internal Market: Participation Without Membership* (Cambridge: Cambridge University Press).
Odermatt, J. (2018) 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' In Cremona, M. (ed.) *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing), pp. 291–316.
Official Journal of the European Union. (2019) Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, CI 384/1.
Official Journal of the European Union. (2020) Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom, C 384I/178.
Ott, A. (2020) 'The UK's Participation in EU Agencies Post-Brexit: Associated Membership, Observers or International Cooperation?' In Santos Vara, J., Wessel, R. and Polak, P. (eds) *The Routledge Handbook on the International Dimension of Brexit* (Abingdon: Routledge), pp. 255–269.
Pescatore, P. (1974) *The Law of Integration* (Leiden: Sijthoff).
Phinnemore, D. (2023) 'The United Kingdom: Turning Its Back on Influencing the EU?'. (this issue).
Prechal, S. (2017) 'Mutual Trust Before the Court of Justice of the European Union'. *European Papers*, Vol. 2, No. 1, pp. 75–92.
Prodi, R. (2002) 'A Wider Europe – A Proximity Policy as the Key to Stability'. Speech Held at the Sixth ECSA-World Conference 'Peace, Security and Stability International Dialogue and the Role of the EU', 5–6 December 2002, Brussels, SPEECH/02/619.
Restrepo Amariles, D., Farhadi, A.A. and Van Waeyenberge, A. (2020) 'Reconciling International Investment Law and European Union Law in the Wake of Achmea'. *International and Comparative Law Quarterly*, Vol. 69, No. 4, pp. 907–943.
Rosas, A. (2020) ''External' Case Law as a Source of Inspiration for the Court of Justice of the European Union'. In Reich, A. and Micklitz, H.-W. (eds) *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford: Oxford University Press), pp. 38–53.
Saurugger, S. and Terpan, F. (2019) 'The Court of Justice of the European Union, Conflicts of Sovereignty and the EMU Crisis'. *Journal of European Integration*, Vol. 41, No. 7, pp. 903–920.
Schimmelfennig, F. (2015) 'What's the News in 'New Intergovernmentalism'? A Critique of Bickerton, Hodson and Puetter'. *Journal of Common Market Studies*, Vol. 53, No. 4, pp. 723–730.
Schimmelfennig, F. and Winzen, T. (2020) *Ever Looser Union?: Differentiated European Integration* (Oxford: Oxford University Press).

Spaventa, E. (2015) 'A Very Fearful Court?: The Protection of Fundamental Rights in the European Union After Opinion 2/13'. *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 1, pp. 35–56.
Tardy, T. (2014) 'CSDP: Getting Third States on Board'. European Union Institute for Security Studies, March 2014.
Törö, C. (2010) 'External State Partners in ESDP Missions: Third Country Participation in EU Crisis Management'. *European Foreign Affairs Review*, Vol. 15, No. Issue 3, pp. 325–345.
Vajda, C. (2019) 'Achmea and the Autonomy of the EU Legal Order'. Law TTIP Working Papers, 2019/1.
Weiler, J.H.H. (1991) 'The Transformation of Europe'. *The Yale Law Journal*, Vol. 100, No. 8, pp. 2403–2483.
Wessel, R.A. (2019) 'Friends with Benefits? Possibilities for the UK's Continued Participation in the EU's Foreign and Security Policy'. *European Papers-A Journal on Law and Integration*, Vol. 2, pp. 427–445.