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Internal Market *Acquis* as a Tool in EU External Relations: From Integration to Disintegration

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Brexit and the ensuing uncertainty about the United Kingdom's (UK's) future relationship with the European Union (EU) have brought the participation of non-EU Member States in the internal market to the centre of academic attention. The latter phenomenon is not novel and many of the existing frameworks for cooperation between the EU and its neighbourhood countries have been used as models for a possible post-Brexit arrangement. This article identifies the various roles played by the internal market acquis – both of integration and disintegration – in the EU's relations with its neighbourhood by analysing the dynamics between the aims of various bilateral and multilateral instruments and the character and scope of the internal market acquis contained therein. The article argues that over time the function of the internal market acquis has evolved from providing a legal framework for the functioning of the internal market among the EU's Member States to also integrating third countries into the Union's sphere of influence beyond the accession process, and even membership. The internal market can thus no longer be regarded as an 'internal' and exclusive affair for the committed few that offers inspiration and limited access for third countries but rather as a dynamic and geographically inclusive form of collaboration between the Union and its periphery.

Keywords: internal market acquis, EU external relations, neighbourhood policy, European Common Aviation Area, Energy Community, Transport Community, European Economic Area, Switzerland, AA/DCFTA, Brexit, integration, disintegration

1 INTRODUCTION

Close regulatory cooperation between the European Union (EU) and its neighbouring countries dates back to the early days of the European Communities (ECs). The European Economic Community (EEC) signed the first Association Agreements (AA) with Greece and Turkey in 1961 and 1963, respectively.[1] During the next fifty years, the EU has concluded numerous association, cooperation, and partnership agreements with its closer and more distant neighbours. To date, almost every country in the EU's

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1 Agreement establishing an association between the European Economic Community and Greece [1963] OJ L26/294; Agreement establishing an association between the European Economic Community and Turkey [1964] OJ L217/3685 (EEC-Turkey AA).

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neighbourhood[2] has entered into formalized relations with the EU through one or more bilateral and/or multilateral agreements. The agreements in question vary according to the broader political context in which they are situated, the pronounced aims and the scope of the EU *acquis* contained therein. Yet, the central element in the rapprochement between the EU and the third countries concerned is the *acquis* of the EU's internal market, understood for the purposes of the analysis at hand as a collection of primary and secondary law, political instruments, and case law of the EU courts pertaining to the establishment and functioning of the internal market.

The practice of exporting the *acquis* to third countries and, especially, the aim of thereby extending the internal market beyond the EU's borders is an important part of both the Union's foreign policy towards the neighbourhood and the external dimensions of individual policy sectors such as energy and transport. The ongoing uncertainty about the United Kingdom's (UK's) future relationship with the EU post-Brexit, in particular, has sparked discussions about the participation of non-EU Member States in the internal market as an alternative to membership in the Union.[3]

Acquis-exporting agreements concluded between the EU and the countries in its neighbourhood fall within three broad categories based on the depth of integration with the EU thereby envisaged: Partnership and Cooperation Agreements (PCAs) and other agreements belonging to the European Neighbourhood Policy (ENP); AAs, including those establishing Deep and Comprehensive Free Trade Areas (DCFTAs); and multilateral agreements, either sectoral or comprehensive in scope. In turn, the majority of association and partnership agreements form part of broader policy frameworks, such as the Europe Agreements (EAs) or the Stabilisation and Association Process (SAP). Next to these 'macro-policies', regulatory approximation also takes place on the level of 'meso-policies' that represent the external dimension of developments within the internal market[4] which are especially relevant with regard to multilateral sectoral agreements.

On the basis of the aims and scope of the agreements concerning legal approximation with the internal market, one can distil five principal integration functions of the internal market *acquis*. These include the gradual integration of

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2 A notional area that exceeds the geographical borders of Europe and includes the Mediterranean and the Caucasus regions.

3 On the existing frameworks acting as potential role models for a post-Brexit arrangement, *see* J.-C. Piris, *Which Options Would Be Available for the United Kingdom in the Case of a Withdrawal from the EU?*, in *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* 111 (P. J Birkinshaw & A Biondi eds, Kluwer Law International 2016); M. J. Pérez Crespo, *After Brexit The Best of Both Worlds? Rebutting the Norwegian and Swiss Models as Long-Term Options for the UK*, 36 Y.B. Eur. L. 94 (2017); C. Barnard, *Brexit and the EU Internal Market*, in *The Law & Politics of Brexit* 209–211 (F. Fabbrini ed., OUP 2017).

4 S. Lavenex, D. Lehmkuhl & N. Wichmann, *Modes of External Governance: A Cross-National and Cross-Sectoral Comparison*, 16 JEPP 813, 814 (2009).

non-member countries into the wider area of cooperation in Europe; liberalization of trade in the form of establishing a free trade area or customs union; preparing potential candidate countries for membership in the EU; integrating third countries into the internal market; and, as a limited version of the latter, integrating non-member countries into a sector of the internal market. The sixth, emerging function pertains to disintegration and the managing of the relationship between the EU and a former Member State. The different functions of the *acquis* may overlap within a single agreement and among several agreements concluded with the same country.

A distinctive trend in the EU's integration with the neighbourhood is moving towards deeper and more legally binding forms of regulatory cooperation over time and across individual countries and country groups. The article argues that the function of the internal market *acquis* has evolved from merely providing a legal framework for the functioning of the internal market among the EU Member States to also integrating third countries into the Union's sphere of influence beyond the accession process, and even membership. The internal market should no longer be regarded as an 'internal' and exclusive affair for the committed few that offers inspiration and limited access for third countries but rather as a dynamic and geographically inclusive form of collaboration between the Union and its periphery. In the meantime, important differences can be found between the function of the internal market in agreements seeking to enhance integration as compared to those managing disintegration – whereas in the former category *acquis* can be used flexibly to accommodate the particular situations of the third countries and their membership ambitions; in case of disintegration the options available for the withdrawing country are limited in terms of the breadth and depth of future integration.

The following analysis expounds upon the dynamics between the overarching political and economic aims of the EU's agreements concluded with the neighbourhood as well as the means of integrating the latter into the internal market. Structured along the six functions of the *acquis*, the article explores the numerous roles that the internal market *acquis* has held in the EU's formalized relations with its neighbours, elucidates the variation of tools employed in the European integration process reaching beyond the physical borders of the Union, highlights the progression of the Union's relationship with its neighbours based on the internal market *acquis* towards more profundity and increased geographical coverage, and expounds on the distinction between the functions of the *acquis* in 'achieving' and 'maintaining while reducing' integration.

2 GRADUAL INTEGRATION OF THIRD COUNTRIES INTO THE WIDER AREA OF COOPERATION IN EUROPE

The loosest connection between a third country and the single market *acquis* is represented by the model of cooperation between the EU and non-Member States without directly integrating the latter into the internal market. Such cooperation mainly takes place in the framework of PCAs and Euro-Mediterranean Association Agreements (EMAAs)[5] but includes also the ENP, the EU-Russia Common Spaces, the Eastern Partnership and the Union for the Mediterranean (UfM). The latter four programmes do not impose specific obligations of approximation with EU *acquis* but instead endeavour to intensify cooperation already started by the conclusion of the PCAs and EMAAs. In all of these frameworks, approximation frequently takes place on the basis of international conventions[6] and World Trade Organisation (WTO) law[7] instead of EU *acquis*. Speaking of a function of internal market *acquis* is, therefore, only notional.

The majority of the PCAs were concluded in the late 1990s with the former Soviet Union countries, except for the Baltic States. The PCA's aim at setting up a partnership without further association or accession of the respective third country to the EU. For example, some of the explicit objectives of the EC-Russia PCA include the provision of 'appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe', and to create the necessary conditions for the future establishment of a free trade agreement (FTA) including all of the four internal market freedoms except for the most sensitive, the free movement of persons.[8] The Court of Justice of the EU ('the Court') limited the objective of the PCA to setting up a partnership without a further association or accession of the Russian Federation into the EU.[9] More specifically, the EC-Russia PCA was 'not intended to establish an association with a view to the gradual integration of that non-member country into the European Communities'.[10] By separating the area of wider cooperation from integration into the Communities, the Court also

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5 The EU-Israel relationship is exceptional in this regard. Free trade between the EU and Israel in industrial products has been in place since the 1975 Agreement between the EEC and the State of Israel [1975] OJ L136/3. Art. 6(1) of the EC-Israel EMAA [2000] OJ L147/3 aims to 'reinforce' the existing FTA. Pursuant to Art. 1(2) of the EC-Israel EMAA, the specific aim of the agreement is the setting up of political dialogue and the expansion of trade in goods and services, the liberalization of the right of establishment and of public procurement, the free movement of capital and the intensification of cooperation in science and technology.

6 Article 2 of Annex 10 to the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3 (EC-Russia PCA).

7 *See* e.g. Arts 10(1), 28(1) and 36 EC-Russia PCA.

8 Article 1 EC-Russia PCA.

9 Case C-265/03, *Simutenkov*, EU:C:2005:213, paras 27–28.

10 *Ibid*., para. 35.

preordained the PCA countries' feeble prospects of approaching membership within the framework at hand.

The PCA does not grant Russia access to the internal market nor does it establish an FTA. The PCAs contain some EU *acquis* which in certain situations grants to third country nationals equal treatment with EU citizens but contrary to AAs, the competition and state aid clauses in the PCAs do not foresee any harmonization whatsoever.[11] Moreover, the predominantly soft nature of the obligations arising from the PCAs provides evidence both of their flexibility and of the absence of a deep integration perspective between the EU and the contracting parties.

To replace the outdated PCAs, new generation Association Agreements/Deep and Comprehensive Free Trade Areas (AA/DCFTAs) discussed in section 3 below are being concluded with the more ambitious of the countries in question, with 'lighter' agreements remaining as an option for the others.[12]

In 2004, the ENP was launched as a broader framework for governing the relations between the EU and the southern and eastern neighbourhood countries. Implicitly, the ENP provides an alternative to EU membership for those neighbourhood countries that lack a viable membership prospect aiming to avoid new demarcation lines between an integrated Europe and the more distant neighbours.[13] The ENP set out to offer third countries 'the prospect of a stake in the EU's internal market' and the promotion of the four freedoms for the purpose of achieving the primary objective of the ENP – security coupled with stability and prosperity.[14] The priorities for each participating country are specified in the Action Plans, which are soft law instruments covering inter alia political dialogue and reform, trade and measures for gradually obtaining a stake in the EU's internal market.[15] For the achievement of the latter, legislative and regulatory approximation is to take place on the basis of mutually agreed priorities, which are defined in bilateral agreements such as the PCAs or the EMAAs.

Russia does not participate in the ENP. In addition to the 1997 PCA and a number of sectoral agreements, EU-Russia relations are instead governed by the Four EU-Russia Common Spaces on economic affairs, area of freedom, security and justice (AFSJ), external security, and research, education and culture; and the EU-Russia Partnership for Modernization (P4M) which builds on the Four Common

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11 *See* e.g. Art. 53(1) EC-Russia PCA.

12 European Commission and the High Representative, 'Review of the European Neighbourhood Policy' (Joint Communication) JOIN(2015) 50 final, at 6–7.

13 *See* Commission, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Communication) COM (2003) 104 final, at 4.

14 *Ibid*.

15 Communication from the Commission *European Neighbourhood Policy Strategy Paper*, COM (2004) 373 final, at 3.

Spaces.[16] The aim of the Common Economic Space, in particular, is to create an 'open and integrated market' between the EU and Russia without any hard legal obligations regarding approximation with the EU *acquis*.[17] Similarly to the ENP, therefore, the Common Spaces mainly serve as platforms for intensifying cooperation which is laid out in greater detail in a separate regulatory framework.

In 2009, the EU launched the Eastern Partnership as a special eastern dimension of the ENP to support the political and socio-economic reforms of the partner countries and to facilitate approximation with the EU *acquis*.[18] The Eastern Partnership builds on AAs that outline the reform agendas and, where applicable, comprise DCFTAs as their integral part. The partnership does not create binding obligations on behalf of the participating states but recognizes the importance of legislative and regulatory approximation and undertakes to disseminate information about EU law and standards.[19] Its ultimate aim is to create a Neighbourhood Economic Community based on a 'common regulatory framework and improved market access for goods and services', possibly leading to access to the 'non-regulated area of the Internal Market for goods' conditional upon proven 'political and legal reliability'.[20]

The Lisbon Treaty introduced a new legal basis for concluding agreements with the neighbourhood countries in Article 8 of the Treaty on European Union (TEU). The new provision introduces specific, value-based conditionality on the neighbourhood relations[21] and provides a basis for the ENP in the Treaties.[22] The practical value of Article 8 TEU, however, remains to be seen as in practice, AA have retained the status of the preferred legal form for governing the EU's relations with the eastern neighbourhood countries.[23]

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16 Council, 'Joint Statement on the Partnership for Modernisation – 25th EU-Russia Summit, Rostov-on-Don, 31 May-1 June 2010' (Press Release) 10546/10 (1 June 2010).

17 '*Common Economic Space' with Russia: Vice-President Verheugen and Russian Industry Minister Agree on Permanent Framework for Dialogue*, Press Release, IP/05/1547 (Brussels 7 Dec. 2005).

18 The aims of the Eastern Partnership are comparable to the ENP: Council, *Joint Declaration of the Prague Eastern Partnership Summit*, (Press Release) 8435/09, 6 (7 May 2009).

19 *Ibid*.

20 Commission, 'Strengthening the European Neighbourhood Policy' Communication COM (2006) 726, at 5; Commission, 'A new response to a changing Neighbourhood, Joint Communication COM (2011) 303 final, at 9.

21 *See* D. Hanf, *The ENP in the Light of the New 'Neighbourhood Clause' (Article 8 TEU)*, College of Europe Research Paper in Law No 2/2011, 9 (2011).

22 P. Van Elsuwege & R. Petrov, *Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?*, 36 EL Rev. 688, 701–703 (2011); C. Hillion, *Anatomy of EU Norm Export Towards the Neighbourhood: The Impact of Article 8 TEU*, in *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* 13, 17 (P. Van Elsuwege & R Petrov eds, Routledge 2014).

23 References have been made to Art. 8 TEU in the negotiation process of AAs with the European micro-states Andorra, Monaco and San Marino, yet not as a legal basis: *see* P. Van Elsuwege & M. Chamon, *The Meaning of 'Association' Under EU Law', Study Commissioned by the European Parliament's Policy*

Cooperation between the EU and the southern Mediterranean countries is primarily based on the Euro-Mediterranean Partnership ('Barcelona Process') launched in 1995.[24] The EU has concluded EMAAs with all of the Euro-Mediterranean Partnership countries except for Syria and Libya. Despite having been concluded as FTAs, the level of 'association' envisaged by the EMAAs does not differ considerably from the PCAs. Instead, the conclusion of the EMAAs as AAs suggests diversity in the latter category rather than the greater depth of the EU's relations with the southern Mediterranean countries as compared to PCAs. The EMAAs do not endeavour to integrate the southern Mediterranean countries into the EU to any particular degree. The objectives of the EC-Algeria EMAA, for example, include the promotion of trade, and the establishment of conditions for the gradual liberalization of trade in goods, services and capital.[25] Trade liberalization is to be based on WTO rules,[26] whereas in standardization and conformity assessment the use of EU standards is encouraged.[27] The lack of a membership perspective due to their geographical location, as well as the poor economic and turbulent political situations in most of the countries in the region lead to very limited alignment with EU *acquis*.

The state of affairs may, however, change with the adoption of the new DCFTAs. In 2008, similarly to the Eastern Partnership, the UfM was initiated to complement the existing bilateral EMAAs.[28] The specific objective of the UfM is to liberalize trade in two dimensions – bilaterally between the EU and the Mediterranean countries, and multilaterally among the latter. In a long-term perspective, the EMAAs and South-South Agreements are intended to be replaced with DCFTAs.[29]

Department for Citizens, Rights and Constitutional Affairs, 13–14 (2019), www.europarl.europa.eu/supporting-analyses (accessed 26 Feb. 2020).

24 Barcelona Declaration adopted at the Euro-Mediterranean Conference, Barcelona, 27–28 Nov. 1995. The founding members were the EC, Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.

25 Article 1(2) of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2. For the exceptional case of the EC-Israel EMAA, *see supra* n. 5.

26 For example, Arts 6, 11, 30(1), 42 EC-Algeria EMAA [2005] OJ L265/2.

27 Article 55 EC-Algeria EMAA.

28 Council, 'Joint Declaration of the Paris Summit for the Mediterranean – 13 July 2008' (Press Release) 11887/08, para. 13 (15 July 2008). The founding members were the EU27 and Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.

29 'Conclusions of the 8th Union for the Mediterranean Trade Ministerial Conference – Brussels, 9 December 2009' (Press Release) MEMO/09/547 (9 Dec. 2009). Negotiations on DCFTAs with Morocco and Tunisia are currently ongoing.

3 TRADE LIBERALIZATION THROUGH ESTABLISHING AN FTA OR A CUSTOMS UNION

In addition to the gradual integration of third countries into a broader area of cooperation in Europe, the internal market *acquis* can also be used in liberalizing trade via an FTA or customs union. Some examples include the EEC-Turkey AA, the EAs and the Stabilisation and Association Agreements (SAAs) – the instruments of the SAP, as well as the new AA/DCFTAs concluded in the framework of the Eastern Partnership.

AA, concluded under Article 217 of the Treaty on the Functioning of the European Union (TFEU), constitute the main vehicle for trade liberalization with the neighbourhood countries. The objectives of the AAs may include preparing countries for membership in the EU; offering an alternative to membership; development cooperation; and inter-regional assistance.[30] Their common feature is reciprocity although the scope of rights and obligations may vary from one agreement to another. According to the Court, 'an association agreement creates[es] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system'.[31] The precise character of the special, privileged links is not clarified in the judgment. In practice, the reciprocal rights and obligations in the AAs regularly include the third countries' adoption of EU *acquis* or accession to international conventions in exchange for financial and technical assistance and, to varying degrees, access to the internal market.

For example, the objective of the 1963 EEC-Turkey AA is to promote trade and economic relations between the EU and Turkey and, subsequently, to create a customs union covering all trade in goods.[32] The specific *acquis* to be adopted by Turkey is laid out in the decisions of the Association Council[33] which together with the Agreement form the 'law of association'.[34] Legal convergence with EU *acquis* is, however, only to take place 'as far as possible',[35] not aiming at complete regulatory harmonization. The EU-Turkey law of association comprises extensive parts of internal market *acquis* but falls short of all four free movement rights. Pursuant to

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30 D. Hanf & P. Dengler, *Accords d'association*, 2004/1 College of Europe Research Papers in Law 2004/1, 10–14 (Bruges 2004).

31 Case 12/86, *Demirel*, EU:C:1987:400, para. 9.

32 Article 2 EEC-Turkey AA.

33 Most importantly, Decision 1/95 of the EC-Turkey Association Council of 22 Dec. 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1 (Decision 1/95); and a number of subsequent decisions of the EC-Turkey Customs Cooperation Committee laying down the detailed rules for the application of Decision 1/95.

34 E. Lenski, *Turkey (including Northern Cyprus)*, in *The European Union and Its Neighbours: A Legal Appraisal of the EU's Policies of Stabilisation, Partnership and Integration* 283, 289 (S. Blockmans & A. Łazowski eds, T.M.C. Asser Press 2006).

35 Article 54(1) Decision 1/95, *supra* n. 33.

the programmatic Article 12 of the EEC-Turkey AA,[36] for instance, the parties are to progressively secure the free movement of workers yet to this date, the free movement of workers between the EU and Turkey has 'not at all' been realized.[37]

In the 1990s, the EC concluded almost identical bilateral AA – the EAs – with ten Central and Eastern European Countries (CEECs) that joined the EU during the two consecutive enlargements of 2004 and 2007. The explicit objective of the EAs was to gradually establish an FTA.[38] The agreements provided for the abolishment of quantitative restrictions and, gradually, customs duties,[39] liberalization of trade in most areas except for agriculture and fisheries, and provisions on the movement of workers, capital and services. Eliminating unfair competition in the CEECs prior to their integration into the internal market was of crucial importance.[40] Yet the intensity of legal approximation in the EAs differed significantly from one provision to another. Whereas the rules on trade in goods and on competition and state aid reflected the EC Treaty quite precisely, there were substantial divergences in the rules pertaining to the free movement of persons, services, capital and the right of establishment.[41] Overall, the EAs were geared towards deeper co-operation with the EU than the EEC-Turkey AA.[42]

Between 2000 and 2005, the EU concluded SAAs with six Western Balkan countries: Albania, Bosnia and Herzegovina, Croatia, North Macedonia, Montenegro and Serbia. In 2015, an SAA was concluded with Kosovo. Similarly to the EAs, the SAAs are virtually identical in content and envisage the creation of an FTA. The SAAs provide for approximation with the fundamental elements of the internal market *acquis* and other key policy areas including provisions on the free movement of workers, services, and capital and freedom of

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36 Case 12/86, *Demirel*, *supra* n. 31, para. 23.

37 Commission, 'Proposal for a Council Decision on the position to be taken on behalf of the European Union within the EEC-Turkey Association Council with regard to the provisions on the coordination of social security systems' COM (2012) 152 final, at 6; Case C-81/13, *United Kingdom v. Council*, EU:C:2014:2449, para. 57. Moreover, the opening of labour markets has been stalled on both sides and restrictions are in place also for EU citizens to undertake labour activities in Turkey: Lenski, *supra* n. 34, at 294–296.

38 For example, Art. 7(1) of the Europe Agreement establishing an association between the EC and their Member States, and Poland [1993] OJ L348/1 (EC-Poland EA).

39 Article 13 EC-Poland EA.

40 Commission, 'The Europe Agreements and beyond: A Strategy for the countries of Central and Eastern Europe for Accession' (Communication) COM (94) 320 final, at 5.

41 P. C. Müller-Graff, *Legal Framework for Relations Between the European Union and Central and Eastern Europe: General Aspects*, in Enlarging the European Union, 27, 34 (M. Maresceau ed., Longman 1997). An indication of the more restricted scope of the fundamental freedoms in the EAs is provided in the agreements that do not speak of the 'free' movement of persons' and 'freedom of establishment' but merely the movement of workers, establishment, and the supply of services: Cremona, *The New Associations: Substantive Issues of the Europe Agreements with the Central and Eastern European States*, in *The Legal Regulation of the European Community's External Relations After the Completion of the Internal Market* 141, 145 (S. V. Konstadinidis ed., Dartmouth 1996).

42 *See further* D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* 50 and 52–53 (Sheffield Academic Press 1999).

establishment,[43] albeit subject to restrictions.[44] In order to avoid distortions to the internal market that the SAA countries will gradually be gaining access to, competition provisions play an important role in the agreements.[45]

The EU's new integration approach towards the neighbourhood is two-dimensional. The AAs coupled with DCFTAs envisage multilateral cooperation through the approximation of third countries' legal systems with EU *acquis*, provide for the third countries' entry into the internal market and are expected to lead to increased competition within the neighbourhood. The new AA/DCFTAs have been concluded with Georgia, Moldova and Ukraine. Negotiations with Azerbaijan on a DCFTA, but excluding an AA, are currently ongoing. Negotiations with Armenia on a DCFTA were finalized in 2013 but since Armenia's membership in the Eurasian Economic Union[46] proved incompatible with the provisions of the DCFTA, a different agreement narrower in scope and more modest in terms of access to the internal market – the EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) – was instead signed in November 2017.[47] The aim of the CEPA is legislative cooperation between the EU and Armenia without establishing an association.[48] The scope of EU *acquis* in the CEPA is largely limited to the field of energy in which increased market integration and gradual regulatory approximation with 'the key elements of EU *acquis*' are envisaged.[49]

The high ambitions of the AA/DCFTAs are reflected in their aims to 'gradually'[50] bring the third countries as close as possible to the internal market by providing far-

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43 Title V Stabilisation and Association Agreement between the EC and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/166 (EC-Albania SAA).

44 These restrictions primarily concern the free movement of workers. *See* e.g. Art. 47 EC-Albania SAA.

45 For example, Art. 40 EC-Albania SAA on state monopolies, Art. 71 on competition law, Art. 72 on public undertakings.

46 A Russia-led economic union established in 2015 featuring a single market and a customs union and comprising as Member States Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. *See further* in E. Vinokurov, *Introduction to the Eurasian Economic Union* (Palgrave Macmillan 2018).

47 EEAS, *New Agreement Signed Between the European Union and Armenia Set to Bring Tangible Benefits to Citizens* (Press Release) (24 Nov. 2017), https://eeas.europa.eu/headquarters/headquarters-homepage/36141/new-agreement-signed-between-european-union-and-armenia-set-bring-tangible-benefits-citizens_en (accessed 26 Feb. 2020).

48 Commission and EEAS, 'Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part' (JOIN/2017/037 final – 2017/0238 (NLE)), at 3.

49 Recital 20, Preamble to the Comprehensive and Enhanced Partnership Agreement between the European Union and the Republic of Armenia [2018] OJ L23/4.

50 Article 1(2)(d) of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3 (EU-Ukraine AA/DCFTA); Art. 1(2)(h) of the Association Agreement between the between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4 (EU-Georgia AA/DCFTA); Art. 1(2)(g) of the Association Agreement between the European

reaching market access and comprehensive regulatory approximation[51] without, however, offering a membership perspective.[52] Several sectors of the internal market are covered, such as energy, transport, services and agriculture, and incorporate all four fundamental freedoms albeit with substantial exceptions from the free movement of persons.[53] Differently from other FTAs, integration on the basis of EU *acquis* is a legal obligation,[54] and subject to strict, ENP and pre-accession type of conditionality.[55] The scope of the AA/DCFTAs and the level of integration envisaged in parts of the agreement is significant: in the fields of services, establishment and public procurement, for example, the EU-Ukraine AA/DCFTA reaches close to the level of integration envisaged in the Agreement on the European Economic Area (EEA).[56,57] The AA/DCFTAs, moreover, build on the non-EU contracting parties' participation in the Energy Community and the European Common Aviation Area (ECAA) through which the latter already adopt relevant EU *acquis*. The aspirations of the AA/DCFTAs in the substantive realm are supported by an institutional and procedural framework that includes elements of other agreements envisaging deep (sectoral) integration, but falls short of the EEA equivalent and is not applied uniformly to all parts of the Agreement.[58]

4 (PRE-) PRE-ACCESSION

The third function of EU *acquis* in international agreements is the preparation of potential candidate countries for future EU candidacy status. This category is made

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Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260/4 (EU-Moldova AA/DCFTA).

51 Recital 16, Preamble to the EU-Ukraine AA/DCFTA; Art. 1(2)(h) EU-Georgia AA/DCFTA; Art. 1 (2)(g) EU-Moldova AA/DCFTA.

52 *See further* G. Van der Loo, *The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study*, CEPS Special Report, 4 (2017).

53 The aim of the parties is visa liberalization, *see* Recital 22, Preamble and Art. 19(3) EU-Ukraine AA/DCFTA; Recital 18, Preamble and Art. 15(2) EU-Moldova AA/DCFTA; Recital 21, Preamble and Art. 16(2) EU-Georgia AA/DCFTA. Visa facilitation for short-stay travel to the EU has been implemented by Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 Nov. 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and whose nationals are exempt from that requirement, OJ L303/39.

54 G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* 362 (Brill 2016); G. Van der Loo, *The EU–Ukraine Deep and Comprehensive Free Trade Area: A Coherent Mechanism for Legislative Approximation?*, in *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* 63, 68 (P. Van Elsuwege & R Petrov eds, Routledge 2014).

55 G. Van der Loo, P. Van Elsuwege & R. Petrov, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, EUI Working Papers LAW 2014/09, 16 and 28 (2014).

56 [1994] OJ L1/3.

57 Van der Loo, *The EU-Ukraine Association Agreement*, *supra* n. 54, at 304–308; Van der Loo, *EU-Ukraine Deep and Comprehensive Free Trade Area*, *supra* n. 54, at 5–6, https://eeas.europa.eu/sites/eeas/files/tra doc_150981.pdf (accessed 26 Feb. 2020).

58 For a detailed account, *see* Van der Loo, Van Elsuwege & Petrov, *supra* n. 55, at 11–22.

up of essentially the same frameworks as discussed in the previous section with the exception of the AA/DCFTAs.

The aims and contents of the EEC-Turkey AA together with the subsequent political developments demonstrate most explicitly that whilst AAs are a starting point for approximating third countries' legal systems with the EU *acquis*, their conclusion is not strictly connected to future membership in the EU. Article 28 of the AA makes a reference to Turkey's possible future accession to the EU.[59] At the 1999 Helsinki Summit, Turkey obtained the status of a candidate country and accession negotiations were started in 2005. After that, Turkey has been adopting EU *acquis* as part of the pre-accession strategy.[60] Following a significant deterioration in the rule of law in Turkey in the recent years, however, accession negotiations had effectively come to a halt.[61]

The EAs, on the other hand, were initially not considered part of the pre-accession strategy but rather as means of modernization and integration without an imminent membership perspective.[62] They prove that the role of the internal market *acquis* can change over time within the same instrument. Whilst the EAs had more ambitious objectives of integrating the CEECs into the internal market than the EEC-Turkey AA, the preambles of the first EAs did not contain but a slight indication of the associated countries' membership aspirations.[63] The EU's initially careful approach changed after the 1993 Copenhagen European Council where EU membership was declared to be available for the associated CEECs who so desire after satisfying the relevant economic and political criteria.[64] The 1994 European Council at Corfu included the EAs into the pre-accession strategy by stating that the full potential of the EAs and the decisions taken in Copenhagen in 1993 must be 'exploited with a view to preparing for accession'.[65] It was thereafter recognized that

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59 The provision reads as follows: 'As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community'.

60 Maresceau defines, despite admitting the difficulty thereof, pre-accession strategies as 'EU initiatives whereby candidate countries for EU membership are brought closer to the EU in political, economic, and legal terms so that, in the end, accession is not too abrupt for both the candidate countries *and* the EU to absorb': M. Maresceau, *Pre-accession*, in *The Enlargement of the European Union* 9, 10 (M. Cremona ed., OUP 2003).

61 Council conclusions, 'Enlargement and stabilisation and association process' Brussels, 26 June 2018, 10555/18, 13.

62 This was made explicit by the Commission: '[Eventual membership] is not among the objectives of the [EAs] … [which] have a special value in themselves and should be distinguished from the possibility of accession to the Community … ': Commission, *Association Agreements with the Countries of Central and Eastern Europe: A General Outline* (Communication) COM (90) 398, at 3.

63 *See* e.g. Recital 15, Preamble to the EC-Poland EA.

64 European Council, 'Conclusions of the Presidency – Copenhagen, 21-22 June 1993', SN 180/1/93 REV 1, at 13.

65 European Council, 'Conclusions of the Presidency – Corfu, 24-25 June 1994', SN 150/94.

the preparation of the CEECs for integration into the internal market was the key element of the pre-accession strategy.[66] The post-1994 EAs already contained explicit references to the associated countries' membership perspectives.[67]

Transforming the EAs into pre-accession instruments was not a difficult task. They did not contain the entire accession *acquis* but their far-reaching substantive content set a good basis for the application of the four freedoms and legislative approximation and established a suitable institutional framework.[68] In the 1995 White Paper, the Commission sketched out the pre-accession strategy of integrating the CEECs into the internal market, hence filling in the gaps.[69] With the exception of the free movement of persons, the voluntary approximation framework of the White Paper was content-wise equivalent to the EEA Agreement.[70] The aim of the EAs themselves had never been to fully integrate the CEECs into the internal market as that stage that was envisaged and accomplished by the EEA Agreement.

The EAs and the SAAs have operated in similar political contexts but differently from the EAs, the SAAs recognize the non-EU contracting parties as potential candidates for EU membership,[71] and mention their 'gradual rapprochement with the European Union'[72] despite the limited effect thereof on the substantive content of the agreements. The SAAs function in the pre-pre-accession process is to prepare future candidate countries for a subsequent accession process. The potential candidate status of the SAP countries was recognized in 2000.[73] Among the SAA countries, Croatia joined the EU in 2013, Montenegro and Serbia have started accession negotiations, North Macedonia and Albania enjoy official candidate status and Bosnia and Herzegovina and Kosovo are potential candidate countries.

5 EXPANDING THE INTERNAL MARKET

The final category of the integration functions of the internal market *acquis* in the EU's external relations is that of integrating third countries into the internal market

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66 European Council, 'Conclusions of the Presidency – Essen, 9-10 Dec. 1994', SN 300/94.

67 *See* e.g. Recital 23, Preamble to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1998] OJ L68/3.

68 Maresceau, *supra* n. 60, at 16–17. In fact, only after 1994 has the EU engaged in genuine pre-accession strategies: *ibid.*, at 9.

69 Commission, 'White Paper – Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union', COM (95) 163 final (CEEC White Paper).

70 M. Maresceau & E. Montaguti, *The Relations Between the European Union and Central and Eastern Europe: A Legal Appraisal*, 32 CML Rev. 1327, 1336 (1995). For a contrasting view of the EEA and the CEEC White Paper *see* M. A. Gaudissart & A. Sinnaeve, *The Role of the White Paper in the Preparation of the Eastern Enlargement*, in *Enlarging the European Union* 41, 66–71 (M Maresceau ed., Longman 1997).

71 Recital 17, Preamble to the EC-Albania SAA.

72 Article 8(2)(1) EC-Albania SAA.

73 European Council, 'Conclusions of the Presidency – Feira, 19-20 June 2000', SN 200/00.

independently of the non-EU contracting parties' membership aspirations. This integration may either cover the entire internal market or be limited to one or more specific policy sectors. In spite of differences in the breadth of the cooperation across policy areas, both categories share roughly the same depth of integration with the exception of some fundamental freedoms, in particular the free movement of persons.

5.1 Comprehensive integration into the internal market

The only genuine example of an agreement exporting EU *acquis* for the purpose of extending the internal market outside the Union in a comprehensive manner without explicit membership aspirations is the Agreement establishing the EEA. The EEA Agreement was signed in 1992 as a multilateral AA between the EC, its Member States and the countries of the European Free Trade Association (EFTA) except for Switzerland and entered into force in 1994. Most of the former EEA EFTA countries have by now joined the EU,[74] rendering Iceland, Liechtenstein and Norway the only non-EU participants in the EEA. There are no indications, however, that the EEA would cease to exist in the foreseeable future.[75]

The objective of the EEA Agreement is to create a 'homogeneous European Economic Area' based on equal conditions of competition and respect for the same rules.[76] This explicit aim of homogeneity differentiates the EEA Agreement from all other neighbourhood agreements discussed above. The EEA Agreement covers almost the entire spectrum of internal market *acquis* making the EEA EFTA States full-fledged participants in the internal market while excluding the customs union and the Common Commercial Policy as well as the common agricultural and fisheries policies.[77]

The annexes to the EEA Agreement containing 'EEA-relevant provisions' are updated on a continuous basis by a decision of the Joint Committee for the purpose of guaranteeing legal security and homogeneity within the EEA.[78] An elaborate institutional framework, too, has been set up for the purpose of ensuring a uniform application of the *acquis*. In contrast to the AAs discussed above which mainly establish an association council, the EEA agreement features a Joint Committee, parliamentary cooperation, and the EFTA Court as the body with a jurisdiction to,

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74 Austria, Denmark, Portugal, Sweden, United Kingdom, Finland.

75 Norway's possible accession to the EU was rejected at referenda both in 1972 and 1994. In July 2009, Iceland submitted an application for EU membership and started accession negotiations in 2010 but negotiations were suspended in 2013 and in Mar. 2015, Iceland withdrew the application. Liechtenstein's EU membership has not been subject to genuine discussion.

76 Article 1(1) EEA Agreement.

77 Article 8(3) EEA Agreement.

78 Article 102(1) EEA Agreement.

among others, give advisory opinions and adjudicate disputes between the EFTA countries arising from the interpretation of the EEA Agreement.[79] The system established by the EEA agreement thus goes well beyond exporting the internal market *acquis*, having become a legal system of its own.[80]

Switzerland, albeit a member of the EFTA, is not a party to the EEA Agreement. Switzerland participated in the negotiations together with the other EFTA members but following a negative referendum in 1992 did not proceed to conclude the EEA Agreement. The EU-Swiss relationship is instead governed by over a hundred bilateral agreements. These agreements notably include the two packages of 'Bilateral I' and 'Bilateral II' signed in 1999 and 2004 containing seven and nine agreements, respectively. The policy areas covered by the agreements include, i.e. the free movement of persons, air transport, rail and road transport, trade in agricultural products, public procurement, mutual recognition of conformity assessment, processed agricultural products, environment.

The two series of agreements feature some noticeable differences. The Bilateral I agreements were concluded as AAs as a single package. The agreements are bound together by the 'guillotine clause' which requires that all seven agreements enter into force together and that none of them be terminated individually.[81] The guillotine clause glues together some of the pieces of *acquis* in the jigsaw puzzle of the EU-Switzerland relationship and helps maintain its uniformity.[82] The Bilateral II agreements are not AAs and do not contain a guillotine clause because their subject matters are not as closely interconnected as those of the Bilateral I.

The objective of the EU-Switzerland bilateral agreements is to enhance deep sectoral cooperation but not to offer full participation in the internal market on equal terms with the EU Member States such as the EEA. Similarly to the latter, the annexes to the bilateral agreements list applicable EU legislative acts and strive towards homogeneity between EU *acquis* and pre-signature *acquis* in the agreements, leaving the effect of post-signature *acquis* to be decided on an ad hoc basis.[83] The fact that the provisions of the bilateral agreements are to be interpreted and applied in the light of the case law of the Court confirms that the nature of the EU-Swiss

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79 *See* Arts 32, 34, 35 & 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/3.

80 Case E-9/97 *Sveinbjörnsdóttir v. Iceland* [1998] EFTA Ct Rep 95, para. 59.

81 *See* e.g. Art. 25 EC-Switzerland Agreement on the Free Movement of Persons [2002] OJ L114/6. The Bilateral I agreements entered into force simultaneously on 1 July 2002.

82 *See* R. Schwok, *Switzerland – European Union: An Impossible Membership?*39 (P.I.E. Peter Lang 2009).

83 For example, Art. 1(2) of the Agreement between the European Community and the Swiss Confederation on Air Transport [2002] OJ L114/73.

relationship is to some extent comparable to the *sui generis* character of the EU and the EEA legal orders.[84]

Echoing the negative result of the Swiss referendum to join the EEA, the cooperation is rightfully referred to as 'differentiated integration' placed somewhere between cooperation and integration.[85] On the one hand, the EU-Swiss bilateral agreements envisage much deeper integration with the EU internal market than the EAs and the SAAs requiring Switzerland to adopt all EU *acquis* in the fields covered by the bilateral agreements. On the other hand, not all of the four freedoms of the internal market in the EU and EEA apply to the bilateral agreements, notably excluding to varying degrees the free movement of capital and services and the freedom of establishment. Yet differently from multilateral sectoral agreements, the EEA Agreement and the EU-Swiss bilateral cooperation provide relatively comprehensive frameworks for the respective third countries' participation in the internal market.

5.2 Sectoral integration into the internal market

The new form of sectoral cooperation between the EU and the countries in its neighbourhood – 'legally binding sectoral multilateralism'[86] – is providing a successful alternative to bilateral agreements such as those concluded between the EU and Switzerland. It is a means of exporting the internal market *acquis* in individual policy areas thereby creating 'homogeneous' regulatory spaces that comprise the EU as well as a number of third countries.

The function of internal market *acquis* in sectoral integration differs significantly from those discussed above. In the previous categories, internal market *acquis* is used mainly as a tool of the EU's external policy[87] and a platform for political and economic cooperation between the EU and individual third countries or regional country groups. Deep sectoral cooperation, however, both builds on the foundation of the ENP, SAP and the Euro-Mediterranean cooperation that have gradually prepared the neighbourhood countries for adopting EU *acquis* and contributes to the overarching policy frameworks by, for example, further integrating the energy markets of the Eastern Partnership,[88] and deepening cooperation in the aviation sector of the Euro-

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84 S. Breitenmoser, *Sectoral Agreements Between the EC and Switzerland: Contents and Context*, 40 CML Rev. 1137, 1144 (2003).

85 *Ibid*., at 1185.

86 S. Blockmans & B. Van Vooren, *Revitalizing the European 'Neighbourhood Economic Community': The Case for Legally Binding Sectoral Multilateralism*, 17 EFA Rev. 577 (2012).

87 *See* e.g. M. Cremona, *Enlargement: A Successful Instrument of Foreign Policy?*, in *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* 397 (T. Tridimas & P. Nebbia eds, Hart Publishing 2004).

88 Council, 'Joint Declaration of the Eastern Partnership Summit – Warsaw, 29-30 September 2011', 14983/11, para. 13.

Mediterranean framework.[89] In the meantime, importantly, sectoral cooperation complements the EU's internal policies with a structured external dimension.[90] The EU has currently concluded three multilateral sectoral agreements – the Energy Community Treaty (EnCT), the ECAA Agreement and the Transport Community Treaty (TCT).

5.2[a] *Energy Community Treaty*

The majority of energy resources consumed in the EU, in particular oil and gas come from producers outside the Union, making coordinated external action indispensable for the creation of an internal energy sector.[91] Whereas constructing the external dimension of the EU's energy market on bilateral relations carries the risk of fragmenting the market, jeopardising the security of supply and leaving the Union politically vulnerable, a multilateral approach has been preferred both within the EU and in cooperation with third countries.[92]

The EU's internal energy market not yet finalized,[93] the need for an external dimension, especially to ensure security of transit in the trans-European energy networks, was recognized early on.[94] In 2002, the EU, together with nine South East European (SEE) countries, signed the Athens Memorandum in which the parties agreed to work towards establishing an integrated regional energy market in electricity by 2005.[95] A year later, a similar Memorandum of Understanding (MoU) was signed in Athens on the gas market.[96]

The Athens Process was given a legally binding form by the conclusion of the EnCT between the EC, of the one part, and Albania, Bulgaria, Bosnia and Herzegovina, Croatia, North Macedonia, Montenegro, Romania, Serbia, and

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89 The first Euro-Mediterranean Aviation Agreement between the EU and Morocco was concluded in 2006.

90 *See* e.g. Commission, 'Common Aviation Area with the Neighbouring Countries by 2010 – Progress Report' (Communication) COM (2008) 596 final.

91 Commission, 'White Paper – An Energy Policy for the European Union' COM (95) 682 final (1995 White Paper), at 8.

92 The sensitivities surrounding energy policy do not, in themselves, support a move from bilateralism to multilateralism, *see* K. Westphal, *Energy Policy Between Multilateral Governance and Geopolitics: Whither Europe?*, 4 Internationale Politik und Gesellschaft 44, 58–60 (2006).

93 Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Communication) COM (2015) 080 final, at 7–8; Commission, 'Fourth report on the State of the Energy Union' COM (2019) 175 final, at 7.

94 1995 White Paper, *supra* n. 91, at 29–30.

95 Memorandum of Understanding on the Regional Electricity Market in South East Europe and its Integration into the European Union Internal Electricity Market, 2002 (The Athens Memorandum 2002).

96 Memorandum of Understanding on the Regional Energy Market in South East Europe and its Integration into the European Community Internal Energy Market, 2003, 15548/03/bis (The Athens Memorandum 2003).

Kosovo (United Nations Interim Administration Mission in Kosovo (UNMIK)),[97] of the other part in 2005.[98] The Treaty entered into force in 2006.[99] Moldova, Ukraine and Georgia have subsequently joined the Energy Community.

The specific aims of the EnCT include, among others, the creation of a stable regulatory and market framework for ensuring steady and continuous energy supply; the creation of a 'single regulatory space' for trade in Network Energy including the electricity and gas sectors; and establishing conditions for trade in energy.[100] These objectives are, according to Article 3 EnCT, to be attained via extending the relevant EU *acquis* to all contracting parties, setting up a mechanism for operation of Network Energy Markets, and establishing a single market in electricity and gas. Included is the *acquis* on energy, environment, competition and renewables. The Energy 2020 strategy followed up on the provision and set the objective of extending the EnCT both substantially and geographically.[101]

5.2[b] *ECAA Agreement*

The logic underpinning the creation of the ECAA is similar to that of the Energy Community. The EU's single market for aviation was created in the 1990s by liberalizing the air transport sector.[102] The external dimension of the internal market in aviation was created in response to the 2002 Open Skies judgments in which the Court declared certain parts of the Open Skies Agreements to fall within the EU's exclusive competence and brought along a revolutionary departure from the prevailing practice of bilateral cooperation between the Member States and third countries.[103] As a result, around 2000 bilateral agreements concluded by the Member States had to be renegotiated.

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97 United Nations Interim Administration Mission in Kosovo.

98 Treaty establishing the Energy Community [2006] OJ L198/18. The EnCT was concluded on the legal bases of Arts 47, 55, 83, 89, 95, 133 and 175 EC Treaty.

99 Initially concluded for a period of ten years, the EnCT was extended for another ten-year period in 2013: Art. 97 EnCT; Decision of the Ministerial Council of the Energy Community 'On extending the duration of the Energy Community Treaty' D/2013/03/MC-EnC.

100 Article 2 EnCT.

101 Commission, 'Energy 2020 A strategy for competitive, sustainable and secure energy' (Communication) COM (2010) 639 final, at 18. The new Energy Union strategy calls for further strengthening of the EnCT: Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' (Communication) COM (2015) 080 final, at 7.

102 This was achieved by the three market liberalization packages of 1987, 1990 and 1992: L. Butcher, *Aviation: European Liberalisation, 1986-2002* (2010), House of Commons Library Standard Note SN/BT/182.

103 Case C-467/98, *Commission v. Denmark*, EU:C:2002:625; Case C-468/98, *Commission v. Sweden*, EU:C:2002:626; Case C-469/98, *Commission v. Finland*, EU:C:2002:627; Case C-471/98, *Commission v. Belgium*, EU:C:2002:628; Case C-472/98, *Commission v. Luxembourg*, EU:C:2002:629; Case C-475/98, *Commission v. Austria*, EU:C:2002:630; Case C-476/98, *Commission v. Germany*, EU:C:2002:631.

The judicial momentum was followed by political initiatives by the Commission, which declared that the development and competitiveness of the internal aviation market demanded further action in the external sphere.[104] Deep multilateral cooperation was first undertaken with the SEE countries whose aviation markets were already inclining towards the EU and were considered to deliver greater operational efficiency, security and safety than other possible markets, as well as to provide a sectoral contribution to the EU's neighbourhood policy.[105]

The Agreement on the ECAA was signed in 2006 between the EC and its Member States, of the one part, and Albania, Bosnia and Herzegovina, Bulgaria, Croatia, North Macedonia, Iceland, Montenegro, Norway, Romania, Serbia and Kosovo (UNMIK), of the other part,[106] and entered into force in 2017. Pursuant to Article 1(1) of the Agreement, the ECAA is based on 'free market access, freedom of establishment, equal conditions of competition, and common rules including in the areas of safety, security, air traffic management, social and environment'. The relevant *acquis* to be adopted by the non-EU contracting parties comprises i.e. access to the aviation market, aviation safety, aviation security, air traffic management, environment, social aspects and consumer protection.[107]

The more recent Common Aviation Area (CAA) Agreements, similar in content but bilateral in form and somewhat less ambitious than the ECAA Agreement,[108] are part of the process of developing a wider CAA in the EU's neighbourhood, complementing the EU's aviation policy as well as the ENP.[109] The CAAs have been concluded with Georgia in 2010 and Moldova in 2012, essentially serving as a ante-chamber before joining the ECAA.[110] In the southern neighbourhood, the EU has signed Euro-Mediterranean Aviation Agreements with Morocco (2006), Jordan (2010) and Israel (2013).[111]

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104 Commission, 'Developing the agenda for the Community's external aviation policy' (Communication) COM (2005) 79 final, at 4.

105 *Ibid*., at 8.

106 [2006] OJ L285/3.

107 Article 3 ECAA Agreement.

108 The ECAA Agreement, e.g. envisages the direct application of the judgments of the CJEU which does not apply for the bilateral agreements, *see* Commission, 'The EU and its neighbouring regions: A renewed approach to transport cooperation' (Communication) COM (2011) 415 final, at 4.

109 Commission, 'Common Aviation Area with the Neighbouring Countries by 2010 – Progress Report' (Communication) COM (2008) 596 final, at 2.

110 Article 25(2) of the Common Aviation Area Agreement between the European Union and its Member States and Georgia [2012] OJ L321/3; Art. 25(2) of the Common Aviation Area Agreement between the European Union and its Member States and the Republic of Moldova [2012] OJ L292/3. Analogous agreements with Ukraine and Armenia are pending signature whereas negotiations on a CAA with Azerbaijan are currently ongoing.

111 Negotiations with Tunisia have been completed and await signature while the negotiations started with Lebanon in 2009 are not currently active: Commission, 'International Aviation: Lebanon', https://ec.europa.eu/transport/modes/air/international_aviation/country_index/lebanon_en (accessed 26 Feb. 2020). The conclusion of a similar agreement with Algeria is envisaged: Commission, 'Creation of a Common Aviation Area with Algeria' (Communication) COM (2008) 682 final.

External action in the aviation sector including the exporting of the EU's aviation *acquis* is thereby not constrained to the multilateral model but features a variety of instruments that take into consideration the development of the aviation market, the ambitions of the third countries including their readiness to adapt to EU regulations and standards, and the interests of the EU and its Member States.[112] This is notwithstanding the ultimate aim of the Union to create a 'single ECAA' with two multilateral agreements, one for the eastern and one for the southern neighbourhood countries acting as intermediate steps.[113]

5.2[c] *Transport Community Treaty*

Road, rail, inland waterway and maritime transport are further key areas of cooperation between the EU and its neighbouring countries. The focus of the EU's common transport policy is on integrating transport networks for the benefit of greater cohesion in the internal market as a whole.[114] The ambitious Trans-European Transport Network (TEN-T) policy seeks to enhance transport connectivity within the EU to overcome the existing bottlenecks and technical barriers.[115] The neighbourhood countries have been integrated into the EU's transport networks since the Ministerial Conferences on Crete (1994)[116] and in Helsinki (1997) in which the ten Pan-European Corridors (PEC) and Transport Areas were identified.[117] The extension of the EU transport networks to the neighbouring countries is closely connected to the implementation of the ENP[118] and the EU enlargement strategy, and enjoys a prominent place in the new DCFTAs.[119]

In order to give transport cooperation in the SEE region a legally binding form and to improve the regulatory and investment environment,[120] the TCT was

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112 Commission, 'Common Aviation Area with the Neighbouring Countries by 2010 – Progress Report, *supra* n. 109, at 6.

113 Commission, 'The EU and its neighbouring regions', *supra* n. 108, at 4.

114 Commission, 'Extension of the major trans-European transport axes to the neighbouring countries' (Communication) COM (2007) 32 final, at 4.

115 Revised in 2004 by Decision No 884/2004/EC of the European Parliament and of the Council of 29 Apr. 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network [2004] OJ L167/1.

116 Crete Declaration adopted at the Second Pan-European Transport Conference, Crete, Greece, 16 Mar. 1994.

117 Helsinki Declaration 'Towards a European Wide Transport Policy: A Set of Common Principles' adopted at the Third Pan-European Transport Conference, Helsinki, 25 June 1997.

118 For this, a High Level Group on the Extension of the major trans-European transport axes to the neighbouring countries and regions was established by the European Commission in 2004: Commission Decision C(2004) 3618.

119 Commission, 'The EU and its neighbouring regions', *supra* n. 108, at 3.

120 SEETO Comprehensive Network Development Plan 2014, at 58, www.seetoint.org/library/multi-annual-plans/.

concluded in 2017.[121] The agreement has not yet entered into force but is being applied provisionally.[122] The TCT builds on the ECAA Agreement and aims to fully integrate the SEE region into the EU's internal transport market. Similarly to the EnCT and the ECAA Agreement, the TCT is based on the alignment of third country legal systems with the EU *acquis* in the field of transport, including in the areas of technical standards, interoperability, safety, security, traffic management, social policy, public procurement and environment.[123] Similarly to the ECAA Agreement, integration into the internal market in transport takes place in stages. Transition between the stages is conditional upon alignment with the EU *acquis*, to be assessed by the Commission.[124] The future plans of the TCT include further integration of the eastern neighbourhood into the EU's transport standards and networks but do not currently envisage bilateral satellite agreements of the CAA-type.[125]

6 MANAGING THE RELATIONSHIP BETWEEN THE UNION AND A FORMER MEMBER OR ASSOCIATED STATE

In addition to gradual rapprochement with the EU, it may be necessary to employ the internal market *acquis* also for the purposes of maintaining a link between the EU and a state that is not moving closer but rather further away from an enhanced level of cooperation with the EU and its internal market, such the UK which formally left the EU on 31 January 2020. In these cases, the internal market *acquis* plays a crucial role as a lifeline to be held on to in the continuing relationship between the Union and the former Member States.

Brexit, the currently sole example of 'differentiated disintegration' by an EU Member State,[126] entails complete withdrawal from the Union whereby, after the expiry of the transition period, according to the most radical of scenarios all ties between the UK and the supranational EU legal order will be cut. In spite of losing its immediate compulsory character, however, the EU internal market *acquis* is unlikely to become redundant in the UK. Some segments of the internal market *acquis* will remain in force as the 'sensible' rules approved by the national government[127] despite becoming extracted from the EU's constitutional system. Other ties will likely be

121 [2017] OJ L278/3. On the negotiating history and the difficulties surrounding the conclusion of the Treaty, *see* Blockmans & Van Vooren, *supra* n. 86, at 597–598.

122 Council Decision (EU) 2017/1937 of 11 July 2017 on the signing, on behalf of the European Union, and provisional application of the Treaty establishing the Transport Community [2017] OJ L 278.

123 Article 1(1) TCT.

124 Article 27 ECAA Agreement; Art. 40 TCT.

125 *See* Commission, 'The EU and its neighbouring regions', *supra* n. 108.

126 *See* F. Schimmelfennig, *Brexit: Differentiated Disintegration in the European Union*, 25 JEPP (2018), 1154.

127 As opposed to 'stupid' and 'amendable': C. Barnard, *The Practicalities of Leaving the EU*, 41 EL Rev. 484, 485 (2016).

(re-)established with the conclusion of a new agreement governing the UK's relationship with the Union.

During the long period of negotiations following the notification in March 2017 of the UK's intention to withdraw from the Union, a 'no deal' and 'hard' Brexit proved to be the least attractive of the solutions available. In order to avoid significant disruptions in the economy, the repeatedly renegotiated Agreement on the withdrawal of the UK from the EU ('Withdrawal Agreement') predominantly retains the *status quo* of the application of EU *acquis* in the UK during the transition period lasting until 31 December 2020,[128] while excluding the UK from exercising influence on the making of the *acquis*.[129] Article 50(2) TEU provides that the Union, when negotiating the arrangements for the withdrawal of a Member State shall '[take] account of the framework for its future relationship with the Union'. Whereas the Withdrawal Agreement is incapable of predicting the precise contents of the future agreement, it could be expected to include a portion of internal market *acquis*, which in turn will assume a wholly new function in the Union's relations with a neighbouring country.

Any country in the EU's neighbourhood, especially one sharing a common border with the EU is dependent on maintaining a well-functioning trade relationship with the Union whose Member States combined typically constitute its largest trade partner. Constructing a trade partnership on WTO rules alone is hardly sufficient for the withdrawing state,[130] nor would a customs union with the EU or an FTA be void of shortcomings.[131] An EEA or Switzerland type of an arrangement would be possible in theory but is, despite allowing for access to the internal market, an unlikely option to be resorted to in practice.[132] The EEA, for example, is unappealing to the UK due to its inflexibility whereas the EEA EFTA States fear for the disruption of the current balance among the participants.[133]

The Union's negotiator's position has been firm in insisting on a partnership 'as close as possible' while maintaining the 'balance of rights and obligations' and ensuring 'a level playing field' between the parties.[134] This partnership would

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128 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/7. For detailed analysis *see* M. Dougan, *An Airbag for the Crash Test Dummies? EU-UK Negotiations for a Post-Withdrawal 'Status quo' Transitional Regime Under Article 50 TEU*, 55 CML Rev. 55, 62 (2018).

129 Article 7(1) Withdrawal Agreement.

130 *See* F. Baetens, '*No Deal is Better Than a Bad Deal'? The Fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net*, 55 CML Rev. 133 (2018).

131 European Union Committee, *Brexit: The Options for Trade* 73–75 (HL 2016–17 5); G. Sacerdoti, *The Prospects: The UK Trade Regime with the EU and the World*, in *The Law & Politics of Brexit* 71 (F. Fabbrini ed., OUP 2017).

132 *See* Pérez Crespo, *supra* n. 3.

133 European Union Committee, *supra* n. 131, at 21.

134 European Council, Art. 50 Guidelines, EUCO XT 20001/18, 23 Mar. 2018, para. 3.

preferably build on the idea of the indivisibility of the four fundamental freedoms that form the core of the internal market,[135] essentially rejecting a Swiss-style piecemeal solution deemed to 'undermine the integrity and proper functioning of the Single Market'.[136] The UK's approach, in turn, has been selective, welcoming continued internal market access for manufactured goods and agricultural products as well as profound cooperation in a number of priority areas such as energy and transport whilst excluding the continued application of the internal market *acquis* in its entirety, in particular the free movement of persons.[137] The negotiators' current compromise on a future agreement has been communicated in the Political Declaration accompanying the Withdrawal Agreement.[138] The parties have expressed their common intent to give the future 'ambitious, broad, deep and flexible' partnership the form of a comprehensive agreement – an FTA possibly coupled with an AA as an overarching framework – featuring deep integration also in other prioritized sectors; ambitious in scope and depth and mindful of the economic integration of the parties, their respective sizes and geographic proximity.[139]

Despite an AA/DCFTA not being a novel type of a neighbourhood agreement, the *acquis* is in the post-Brexit arrangement expected to fulfil a function very different from those already concluded with the eastern neighbourhood countries, notably by decreasing economic integration. The aim of the existing agreements has been to achieve such integration whilst, for example, recalling the close historical relationship and progressively closer links between the EU and the third country concerned.[140] During the transition period, the function of the internal market *acquis* is to maintain the prevailing conditions for economic and personal exchange between the EU and the UK and, in fact, the UK's continued participation in the internal market. Yet in the post-Brexit agreement, the *acquis* will be confined to a rather particular role of maintaining close ties with the EU and the internal market, but not too close. In practice, this cannot in the case of a withdrawing Member State mean but a significant downgrade from the membership level of integration.

135 *Ibid*. Reiterated in the Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] OJ C34/1, para. 4. Note, however, in the same para. a contradicting reference to '[…] respecting the result of the 2016 referendum including with regard to […] the ending of free movement of people between the Union and the United Kingdom'.

136 European Council, Art. 50 Guidelines, *supra* n. 134, para. 7.

137 United Kingdom Government White Paper, *The Future Relationship Between the United Kingdom and the European Union*, CM 9593 (2018).

138 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2020] OJ C34/1 (Political declaration).

139 *Ibid*., paras 3, 5, 16, 17 & 120.

140 Recital 1, Preamble to the EU-Ukraine AA/DCFTA. Compare with *ibid*., paras 3 & 5.

Anything else would question the very purpose of the withdrawal if not narrowly limited to the question of membership *per se*.[141]

The UK has declared an ambition of continued alignment with EU *acquis* in certain preferential areas[142] and agreed with the EU that the post-Brexit relationship may evolve in the future.[143] The current experiences of the EU's integration with third countries outside the accession process have revealed that close cooperation with the Union in the sphere of the internal market is generally expected to be both gradually deepening as well as entailing significant spill-over effects in other areas of collaboration. Placing a permanent constraint on the depth or, indeed, the breadth of a deeply integrated country's[144] future relationship with the EU can be an onerous task. Furthermore, while it is unprecedented for the Union to conclude with a neighbouring country an agreement reversing integration in such a drastic manner, it would be equally unprecedented for any deep form of economic integration with a geographically close neighbour to the EU to take place on the basis of any rulebook other than the Union's. Underscored by the loss of bargaining power on behalf of the UK as a withdrawing state *vis-à-vis* the Union,[145] the EU may be expected to play a major role in deciding the regulatory menu. This, in turn, speaks for a high probability that the future partnership will be built around the UK's continued application of the internal market *acquis*.

The EU has persistently rejected a piecemeal approach to the future partnership with the UK. Third countries in a forward-moving integration process are generally granted a step-for-step entry into the internal market, conditional upon their implementation of the *acquis*, including both sectoral integration and partial access to the internal market that does not comprise all of the four fundamental freedoms. Sectoral integration such as in the energy and transport sectors is generally considered advantageous for the internal market and, indeed, an indispensable element thereof. In the same vein, participation in the internal market to the extent of some freedoms but not all is regarded as acceptable when the neighbouring country does not (yet) fulfil the Union's requirements for, in particular, the free movement of persons. It also applies when the third country has opted for a sectoral form of integration from

141 The UK's 2016 'new settlement' in the EU as compared to the post-Brexit arrangement is a case in point. For analysis *see* E. M. Poptcheva & D. Eatock, *The UK's 'New Settlement' in the European Union: Renegotiation and Referendum*, European Parliamentary Research Service PE 577.983 (2016).

142 *See* United Kingdom Government White Paper, *supra* n. 137, at 12–14. Note, however, the most recent position of the UK Government aiming for an FTA similar to the EU-Canada Comprehensive Economic and Trade Agreement (CETA) as well as a number of sectoral agreements excluding, i.e. regulatory alignment and joint institutions: UK Government, *The Future Relationship Between the UK and the EU*, Written statement to Parliament (3 Feb. 2020), www.gov.uk/government/speeches/the-future-relationship-between-the-uk-and-the-eu (accessed 26 Feb. 2020).

143 Political declaration, *supra* n. 138, para. 5.

144 *See ibid*.

145 *See* Schimmelfennig, *supra* n. 126.

the beginning, such as the EU-Swiss partnership which excludes the free movement of services and establishment. The partial integration of third countries into the internal market may hence be regarded as a success for the Union without concerns being raised as to its detrimental effect on the integrity and proper functioning of the internal market in the EU.[146] In the case of the withdrawal of a Member State, however, cherry-picking especially among the fundamental freedoms is presented as a threat to the internal market. While inconsistent with previous practice, the EU's position may be motivated by the size and prominence of the UK as a former Member State as well as the inequality of their respective bargaining powers, but is essentially driven by a perceived existential threat of Brexit to the European project rather than the future functioning of the internal market.[147]

7 CONCLUSION

The EU's external action towards the neighbouring countries is not confined to bilateral trade relations, democratization and improving security at the Union's immediate borders but is increasingly directed towards integrating the neighbouring countries both into a wider area of cooperation in Europe and, more specifically, into the EU internal market, serving the Union's external as well as internal interests. In the gradual integration of third countries without (immediate) membership in the Union, the paradigm of the internal market as the engine behind the EU's accomplishment has been successfully incorporated into its external relations. It is reflected in the evolution of the function that the internal market *acquis* in the EU's neighbourhood agreements over the years and across different countries and country groups. A lack of linearity notwithstanding, the obligations to apply and implement internal market *acquis* have become standard in the agreements concluded by the EU with the neighbouring countries, and their role of gradually or comprehensively integrating third countries into the internal market ever more pertinent.

The many integration functions of the *acquis* identified in this article generally correlate to the 'concentric circles of EUropean integration'.[148] First, the profundity of integration largely mirrors the third country's geographical proximity to the EU and especially to the initial 'core' of European integration – the founding Member States. Multilateral sectoral cooperation which includes not only some of the EU's

146 Should the aim be the extension of the internal market to non-member countries, one could merely ask whether an arrangement falling short of full membership could be regarded as equally effective or whether the institutional arrangements could possibly adversely affect the autonomy of the EU legal order.

147 *See* e.g. M. Wind, *Brexit and Euroskepticism*, in *The Law & Politics of Brexit* 221, 224–225 (F. Fabbrini ed., OUP 2017).

148 S. Lavenex, *Concentric Circles of Flexible 'EUropean' Integration: A Typology of EU External Governance Relations*, 9 Comp. Eur. Pol. 372, 387 (2011).

closest and economically most developed neighbours but also countries in the European periphery and beyond, however, deviates from the prevailing trend. The second criterion that largely determines the extent to which non-members are willing to adopt EU *acquis* is their membership prospect. An outlook of future accession to the Union provides important incentives for third countries to align their national regulatory frameworks with the EU's *acquis*. Exceptions include the non-European parties to the bilateral CAA agreements that serve as a preparatory stage for the ECAA, and the EEA EFTA States and Switzerland that will not join the EU in the foreseeable future. The most far-reaching legal approximation projects in terms of the aims and scope of the *acquis* have, paradoxically, been undertaken by countries that have chosen not to become members of the EU although accession would, at least from the perspective of fulfilling the membership criteria,[149] be predominantly a technical matter.

Bilateral and multilateral agreements are reinforcing mutually and *vis-à-vis* the internal market. Bilateralism has proven to be the EU's natural first choice for cooperation with third countries, allowing for individual approaches and tailor-made solutions, and catering for the interests and integration objectives of both the Union and the non-EU partners. Bilateral agreements, such as the PCAs, EMAAs, SAAs and the AA/DCFTAs provide a general political framework for the EU's relations with the countries concerned. The internal market *acquis* included therein may act as first steps towards regulative cooperation with the EU or, such as in the case of the AA/DCFTAs, a second stage in the move towards deeper forms of integration with the internal market. The comparably more inflexible multilateral agreements are few in number but have become the EU's preferred option for integrating into the internal market economically highly developed countries that are able to abide by EU standards, or for cooperating with less developed countries in policy sectors featuring a strong cross-border dimension. Multilateral frameworks are furthermore expected to facilitate the progress of reaching the EU's internal policy goals by managing the indispensable external dimension of the EU's internal policies. Whereas bilateralism provides breadth in the integration of third countries to the Union's sphere of influence and to the internal market, the multilateral frameworks offer depth. The EEA currently provides a satisfactory alternative to EU membership for the participating countries whilst multilateral sectoral cooperation is gaining ground due to providing 'fast track' integration opportunities in prioritized sectors. Multilateral agreements also enable the creation of a common market space outside the EU's borders, including among the third countries. This further facilitates trade,

149 'Countries such as Switzerland and Norway already meet all of the membership criteria': 'Composite Paper on the Commission Reports 1999: Reports on progress towards accession by each of the candidate countries' (13 Oct. 1999), at 5.

commitment to the EU project and the ultimate achievement of a pan-European market resembling a domestic market as closely as possible.

The internal market *acquis* – omnipresent in the EU's cooperation with the neighbourhood since its early days – has, thus, fulfilled a wide range of functions ranging from the establishment of initial partnerships to full-scale integration of third countries into the internal market and exerts a positive integration force. Over time, the *acquis* has proven itself a self-evident and, indeed, indispensable element of the EU's external action. Its extensive application by non-Member States is key to securing long-term commitment to the European project both within the Union as well as in its neighbourhood and corroborates the Union's thrust as a normative superpower in the region.

The success of the internal market project and its extension to third countries has, however, unexpected consequences for the EU's future relationship with a former Member State. Practice has shown that the internal market is, indeed, an expandable feature yet disintegration therefrom can be considered a hazard for European integration. Gradual access to the internal market is a possibility for countries whose legal and political system needs serious upgrades to match EU standards whereas a former member may in a drastic scenario be left with a humble choice between all or (almost) nothing: the whole internal market package or an FTA. To revert to the widespread cherry-analogy, from the EU's perspective the internal market is available for cherry-picking until the moment of making a membership commitment, especially when the berries are generously handed out by the EU itself. A withdrawing Member State, however, may well have to content itself with fallen fruit unless a serious commitment to the Union is renewed. From the Union's perspective, expanding the internal market is thus not an altruistic project but one pressing high demands on loyalty and obligation. This notwithstanding, even less intensive cooperation in the internal market carries larger benefits for both the Union and a withdrawing state than no ties at all.