EU3D
Differentiation
Dominance
Democracy

The EU's non-members

Key principles, underlying logics and types of affiliation

John Erik Fossum
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with contributions from
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Preface

The EU has expanded in depth and breadth across a range of member states with greatly different makeups, making the European integration process more differentiated. *EU Differentiation, Dominance and Democracy* (EU3D) is a research project that specifies the conditions under which differentiation is politically acceptable, institutionally sustainable, and democratically legitimate; and singles out those forms of differentiation that engender dominance.

EU3D brings together around 50 researchers in 10 European countries and is coordinated by ARENA Centre for European Studies at the University of Oslo. The project is funded by the European Union's Horizon 2020 research and innovation programme, Societal Challenges 6: Europe in a changing world – Inclusive, innovative and reflective societies (2019-2023).

The present report is part of the project's work on EU-external differentiation (work package 3). This report focuses on discerning key principles, underlying logics and types of affiliations in the EU's relations with its neighbours, including candidate states, affiliated non-members, and the UK post-Brexit. This undertaking is a necessary part of EU3D's broader assessment of how differentiation relates to dominance and democracy.

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Chapter 1

Introduction

In the last decade, the EU has confronted the most serious crises and challenges since its inception. Most of these originated *outside* the EU, such as the financial crisis, the refugee crisis, and now the corona pandemic. The financial crisis turned into the Eurozone governance crisis. The refugee crisis exposed the EU's inability to come up with a migrant distribution scheme and a common asylum policy. The corona pandemic has exposed the EU's lack of competence in health, its limited fiscal capacity, and the vulnerability of the single market to the types of disruptions that the corona pandemic has caused. Within the EU, tensions have risen and given impetus to Eurosceptic forces and democratic backsliding.

In light of these developments, it is hardly surprising that the EU that emerged from the poly-crises has become more differentiated. External forces and factors do not only affect differentiation; they have profound effects on patterns and processes of dominance, and democracy. The implication is that we cannot understand patterns and processes of differentiation, and how they relate to dominance and democracy, without explicitly taking external factors and conditions into account.

This report focuses on the principles and arrangements that the EU has established for structuring and conducting its relations with *affiliated non-member states*. The report has four aims.

The first aim is to discuss the principles underpinning the EU's arrangements with non-members, be they states seeking to associate with the EU, or states seeking to disassociate with the EU, notably the UK. In this connection, it is important to recognise that the overarching principles guiding the EU's relations with affiliated non-members are the same universal principles that guide EU external relations *in general*. These principles – understood as principles and not necessarily as practice – are cosmopolitan, not statist. They therefore diverge from the key principle that has for a long time been the hallmark of the world of states, namely state sovereignty. The EU represents an effort at reconfiguring the notion of state sovereign territorial rule, among other things by means of boundaries that are far more permeable than what we normally associate with states (Bartolini 2005). Open and permeable boundaries are generally seen as a hallmark of cosmopolitan universalism. Statists are sceptical of permeable boundaries because they associate open and permeable boundaries with loss of territorial control and the prospect of external colonisation and domination. The implication is that the EU as a non-state entity will be more exposed to such pressures and problems.

The second aim is to provide a brief overview of the EU's external context. The focus is on EU exposure to conflicts and EU vulnerability in relation to great power politics, volatile markets, lack of international order and/or lack of binding rules.[1] Such possible sources of EU external vulnerability have bearings on the EU's relations with affiliated non-members. A brief overview of the EU's external context helps to account for the seeming paradox that the EU is highly externally vulnerable and at the same time often referred to as a (form of unwilling) hegemon in relation to its affiliated non-members.

The third aim is to provide a brief overview of the different forms of affiliation that non-members have with the EU. We are interested in the similarities and differences between these: how (mutually) committing they are; how they are legally embedded and institutionally entrenched; and what their range of variation tells us about the EU. These questions help us to address how EU external vulnerability 'spills over to' the EU's relations with those non-members that the EU builds closer affiliations

[1] Vulnerability is a relational notion, which is composed of two key dimensions: external threats and internal coping mechanisms (Kirby 2006).

with. The report is confined to brief overviews of these arrangements, not in-depth studies. We have prioritised the EU's closest affiliations with EEA (Norway, Iceland and Lichtenstein) and EFTA states (Switzerland) because these non-member states enjoy the most privileged access to the EU. Their affiliations expose the manner in which EU departs from state sovereignty most clearly.

The type of in-depth overview and assessment of the EU's full range of relations with affiliated non-members that this report is confined to sketching the outlines of would be very relevant for understanding Brexit, for several reasons. The UK may end up with a mode of affiliation that resembles an existing one, combines elements from several, or innovates on these. In order to get a better sense of what Brexit may entail, we need to know the types and range of existing EU relations with non-members. Further, the EU's existing relations with affiliated non-members will likely be affected by Brexit, given that it could put other EU arrangements with non-members in play. Further still, it is not unlikely that at least some of the EU's member states will see if they can extract benefits or concessions from the EU in the aftermath of Brexit (including rolling back integration or obtaining exemptions, opt-outs etc.).

The fourth aim is to provide a range of analytical distinctions and building-blocks that EU3D's further research can draw on in terms of discerning in more depth the implications for EU3D's core dimensions: differentiation, dominance and democracy. These three dimensions all figure in and give direction to this report but they are not systematically assessed here.

The report is divided in six chapters. The first chapter forms the introduction. In the second chapter, we present and discuss the principles underpinning the EU's relations with non-members. In the third chapter, we provide a brief overview of the EU's external dimension, with emphasis on tensions and vulnerabilities that bear on the EU's relations with non-members. The fourth chapter provides an overview of the different forms of affiliation that the EU has formed with non-members. The fifth chapter is about Brexit and the principles guiding the EU's approach to Brexit (understood as process and product). To what extent will the UK's relationship with the EU post-Brexit be different from existing EU relations with non-members, and how does Brexit impinge on

the two notions of the EU listed above: EU as highly externally vulnerable and EU as hegemon in relation to affiliated non-members? The sixth chapter concludes and briefly discusses implications for EU3D's core dimensions: differentiation, dominance, and democracy.

Chapter 2

What are the key principles underpinning the EU's relations with affiliated non-members?

This chapter is devoted to outlining the key principles underpinning the EU's relations with affiliated non-members. In outlining these, we confine the attention to the level of principle and hone in on those principles that the EU expresses commitment to – as they are expressed in key provisions in the EU treaties. This chapter pays no attention to practice, in other words, we say nothing about whether or the extent to which the principles that the EU espouses in the treaties are reflected in any part of EU practice.

Basic correspondence between general principles and principles guiding relations with affiliated non-members

Our point of departure is that there is a clear and direct correspondence between the overarching principles guiding EU relations in general and the principles guiding the EU's relations and partnerships with third countries. This is explicitly stated in Article 21 1. in the Treaty on European Union (TEU) (which elaborates on the general principles for EU external action as these are set out in Article 3.5 TEU):

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of

> human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.
>
> (Official Journal of the European Union 2016)

This basic consistency has implications for the EU's relations with affiliated non-members, especially when we keep in mind that the core principles guiding the EU's relations with the outside world are not steeped in a statist sovereignty logic, but are instead imbued with a global-cosmopolitan orientation.[2] They are embedded, as we shall see, in an approach to sovereignty that differs quite considerably from the state-based approach that has dominated the political imagination for centuries.[3] Having said that, it is also the case that the general principles guiding EU external action are entirely compatible with the core constitutive principles of any constitutional democratic political order - whether state-based or not). That is because the core principles guiding constitutional democracy are universal, not confined to a given territory (Fossum and Menéndez 2011).

The fact that the key principles guiding the EU's relations with the external world are the same as those principles guiding the EU's relations with affiliated non-members matters to the analysis conducted here. The

[2] There is a large body of research on cosmopolitanism in the EU context and the notion of the EU as a cosmopolitan vanguard. See for instance: Beck and Grande 2007; Eriksen and Fossum 2012; Fossum, Kastoryano and Siim 2018; Habermas 1998, 2001, 2006.

[3] It is not very surprising that there is a comprehensive debate on the normative principles guiding the EU's external relations. The EU debate is to some extent an Europeanised echo of the International Relations debate between realists and liberal internationalists. Central to this debate is the notion of normative power Europe (Manners 2002). That in turn builds on the notion of the EU as a civilian power (Duchêne 1972, 1973). If we go back in time, we see that the normative basis of market power Europe can be linked to the notion of *douce commerce*, which entailed a taming of the passions; hence was conducive to peaceful and legally regulated conduct (Hirschman 1977).

EU is committed to *advancing these principles* in all its external relations, as is explicitly stated in Article 21.1 TEU, which from a normative perspective implies that the EU subjects itself to consistency requirements not only across different types of external relations but across the internal – external divide. This is part and parcel of the EU's attempt to deal with the Achilles-heel of nation-state-based democracy: the bifurcation of the domestic (democratic) and the international (non-democratic) spheres. Combining internal democracy within states with democracy in the relations between states necessarily means altering the bounds between EU internal and EU external relations, in line with how the EU reconfigures state sovereignty, where the onus is on co-decision in joint institutions (more on this below).

Two implications follow. For one, the EU's commitment to pursuing these principles externally, as Article 21.1 TEU states, echoes the EU's own development and enlargement. For two, given that the EU is not a state, the EU's relations with affiliated non-members cannot be the same as ordinary state-to-state relations. The two dimensions of principal convergence: across different types of external relations and across the internal – external divide are quite telling of the EU as a political entity: the EU is far more permeable than a state; hence there is a strong onus on bridging the EU-internal and EU-external realms because the likelihood of spill-over (in both directions) is high. For our purposes, as we shall see in the next chapters, the EU's permeability means that the EU is very vulnerable to external developments. Thus, internal patterns of differentiation can be quite easily and strongly affected by external relations, actors, and developments. The likelihood of the EU importing differentiating pressures is high.

Conditionality as a key mechanism for promoting EU's general principles

It is not only the EU's general principles that are meant to inform all types of external relations; the same could be said about the core mechanism that the EU uses to promote its basic principles across the globe, namely

conditionality.[4] 'Conditionality' has become a key concept in EU governance debates. Its use became widespread with the 2004 EU enlargement process, and since then, it has been strongly tied to EU enlargements, the EU's European Neighbourhood Policy, the external EU relationships, and even post-accession relations (Gateva 2018).[5]

What these different types of relationships have in common is that, in all of them, the EU has sought to instill respect for its norms by offering a reward –notably, but not exclusively, market access - if certain conditions are met. In this sense, conditionality refers to a mechanism by which the EU makes EU access dependent upon non-members entering certain obligations. Our focus is on conditionality (and its in-built logic relying on rewards and sanctions to ensure that a state fulfils a given set of specified objectives) as *a general mechanism* for fostering convergence between the EU and the external world (in the absence of the hard law and sanctions associated with EU membership). The implication is that there will be considerable variation in the specific design and the mix of incentives and sanctions, as the mechanism is adapted to different circumstances. With this approach we go beyond understanding conditionality as resulting from particular legal provisions specifying parties' commitments, economic sanctions or enforcement procedures. We take conditionality to refer, more widely, to the manner in which the EU seeks to regulate its relations with the external world, be they applicant states, closely affiliated states, or states receiving EU aid. When understood in this broad manner, this

[4] There is a large body of literature on conditionality. For the EU's global use, see for instance Saltnes 2018. For a short selection of entries on EU's relations to affiliated non-members (including applicant states), see: Börzel et al. 2017; Gateva 2015, 2018; Schimmelfennig and Sedelmeier 2004; Sedelmeier 2011.

[5] Scholars identify a wide range of types of conditionality, which include: enlargement conditionality; membership conditionality; accession conditionality; acquis conditionality; democratic conditionality; and political conditionality. For our purposes, democratic conditionality comes closest to the use of conditionality in pursuing core EU principles. Gateva (2018: 17) notes in her survey of the literature 'that there is no commonly agreed-upon definition of EU (enlargement) conditionality; however, scholars tend to agree that the concept of conditionality entails the linkage between fulfilling particular tasks (conditions) and receiving particular benefits (rewards) and that conditionality operates in an environment of power asymmetry'.

mechanism applies to the EU's relations with the EFTA countries. The EU tries to apply conditionality in its relations with the UK post-Brexit.

An important aspect of conditionality, or what some analysts see as a precondition for it, is that it 'operates in an environment of power asymmetry' (Gateva 2018: 17). That means that it cannot be effectively applied across the entire range of EU external relations but is confined to those where the asymmetry works in the EU's favour.[6] That situation applies to applicants as well as to the various arrangements that the EU has fashioned with closely associated non-members, or what has been referred to as privileged partnerships (Gstöhl and Phinnemore 2019). Since the EU grants rights and obligations to non-members, sometimes almost on a par with members, it is important to clarify what distinguishes EU membership from privileged partnerships.

Membership in an organisation is generally equated with certain rights and obligations. The fact that a state is sovereign means that it is in a position to delimit rights and obligations to its members (persons, organisations and sub-units). This need not mean that all members have the same rights and obligations; it means that the state is in a position to determine who gets what and how. State sovereignty means that the state is recognised by other states as sovereign (the external dimension). Sovereignty also implies that the state has the means to be in full control of what goes on within its territory (the internal dimension). Central mechanisms are controls at the borders to keep outsiders out, and a system of sanctions to ensure that citizens comply with laws and otherwise honour their obligations. In order to shed more light on this, we need to look more precisely at how the EU reconfigures state sovereignty.

The EU's approach to sovereignty

The EU is not a state; hence, the EU is not recognised as a sovereign entity on a par with a state (the external dimension). At the same time, and entirely in line with that, the member states have not conferred sovereignty on the EU (the EU-internal dimension). Thus, neither the external

[6] Asymmetry is no guarantee of an assured outcome, however. There are instances when the EU mostly failed to impose conditionality in relations with APC countries within Cotonou agreements (Zimelis 2011).

nor the internal conditions for state sovereignty are in place in the EU. Instead, what we see in the EU is that the member states cede sovereignty *not* to a distant entity but to a common unit that they all participate directly in. In EU parlance, this is generally referred to as *pooling of sovereignty*. This process of pooling has profound implications for the ensuing notion of sovereignty:

> States that are members of the European Union have broken sharply with the classical tradition of state sovereignty. Sovereignty is pooled, in the sense that, in many areas, states' legal authority over internal and external affairs is transferred to the Community as a whole, authorising action through procedures not involving state vetoes […]. Under conditions of extensive and intensive interdependence, formal sovereignty becomes less a territorially defined barrier than a bargaining resource.
>
> (Keohane 2002: 748)

This manner of reconfiguring sovereignty, as we will show,[7] has significant implications for affiliated non-members. In the EU, the onus is placed on *participation in common institutions* rather than on self-governing, the hallmark of the classical notion of state sovereignty. Within the EU context, the more the member states' concerns are made subject to joint decisions, the more important it is to be present and to participate in the making of these decisions. In this EU structure that weaves actors from different levels together (and where an activist European Court of Justice [CJEU] gives added integrationist impetus to the process), the forums and procedures that determine joint decisions increasingly shape the nature and scope of each member (and affiliated) state's self-governing (Fossum 2015a). Or to put it differently, the reneging of external sovereign control transforms the member state's ability to exercise internal sovereignty. Within this EU institutional-constitutional system, the member states are no longer capable of distinguishing between domestic and international affairs, as both sets of issues are increasingly determined (jointly) in common intergovernmental and supranational bodies.

[7] See also: Eriksen and Fossum 2015; Fossum 2015b for this line of reasoning applied to the EFTA states.

That turns the classical approach to state sovereignty as a case of self-governing on its head. If it is necessary to participate in common institutions in order to wield influence on those decisions that actors have agreed to undertake in common *and*, notably, if such participation in common institutions is needed for the state to influence the scope and conditions of its self-governing, then a qualitative change is taking place. The EU appears to be moving towards a system where institutions of joint decision-making increasingly shape and set the terms of domestic sovereign rule. Such a system is based on an altered conception of sovereignty, which seeks to balance shared rule with self-rule in a distinct fusion of levels of governing.[8]

This reconfigured notion of sovereignty is consistent with the above-mentioned general principles and the EU's strong onus on internal – external correspondence. It gives credence to the commitment to cosmopolitan principles because it shows how the EU seeks to reconfigure sovereignty in an inclusive cosmopolitan direction. If the EU moves in the direction of statehood, the cosmopolitan orientation must be reassessed.

The EU's approach to pooling of member states' sovereignty does not give the EU the same assured external presence and control of EU external borders that statehood (with the requisite capabilities) would have provided it with. Hence, the EU's approach to sovereignty is one that makes the EU very permeable to the world surrounding it. It is therefore also by implication an approach to territorial control and boundary control that is far softer than what we find in states.[9] That in turn means that we need to reconsider what EU membership entails, and what distinguishes members from closely affiliated non-members. As was said above, a key aspect of the EU's reconfigured sovereignty is the strong onus on access to and participation in the key EU decision-making bodies. In the next paragraph, we will devise an access/participation scale with four

[8] For the notion of fusion of levels see Wessels 1997; for recent applications to the EU, see Fossum 2020.

[9] This is well-recognised in the literature on EU external differentiation. See for instance: Gstöhl 2015; Gstöhl and Phinnemore 2019; Leuffen et al. 2012. It is also a theme that Phillip Schmitter (1996, 2000) wrote extensively on and introduced new terms such as *condominio* and *consortio.*

levels. We apply that scale to the EU's relations with affiliated non-members in the remainder of the report.

Key mechanisms: Access and participation

The EU's permeability and the fact that participation in the key EU decision making bodies is one of if not the main attributes and distinguishing features of EU membership have prompted us to devise a scale with four levels that will allow us to group the EU's various relations with non-members.[10]

From combining the entries in the Table 1 on political and market access/participation we construct the access/participation scale. The scale reflects how the EU's approach to the pooling of member states' sovereignty shifts the focus from borders and territorial control to participation in decision making and in the EU's internal market. The scale also shows how and the extent to which the EU is open to outsiders: in the sense that some outsiders are able to participate in the EU's single market; in the sense that other non-members have limited access to the EU's single market; and in the sense that some non-members have some limited forms of access to political decision-making (without voting rights or co-decision power).

The first level shows that a distinguishing feature of EU membership is that member states have **full participation in the single market and in the EU's decision-making bodies**. When we talk about participation in decision-making we therefore imply voting rights and co-decision power.

The second level is **full market participation; limited political decision-making access**. Some non-members are assured full participation in the single market.

[10] The scale is constructed with reference to Bechev and Nicolaidis's (2010) distinction between access and convergence. To this distinction we add participation because that refers to the distinctive features of EU's approach to sovereignty. We see convergence in terms of the degree to which a non-member incorporates EU law, whereas access and participation refer to the EU's inclusion of a non-member in its programmes and policies). In addition, we draw on Georges Baur's (2019) distinction between market access and participation (albeit we extend it to encompass both the political and the economic dimension).

Table 1: Access/Participation Scale

			Member states	Non-members
Mode of inclusion	Political decision-making	Co-decision (political participation)	Key determinant of EU membership	N. A.
		No co-decision (limited access, no voting rights)	Opt-outs[11] or when not meeting requisite criteria	Various forms of access without voting rights
	Full market participation	Single market as a seamless web (full market participation)	All member States	Some affiliated non-members: EEA-EFTA and small states
	Limited market access	Segments of the single market: not as a seamless web (limited market access)	N.A.	Switzerland, ENP states, Turkey

The EEA-EFTA states participate in the single market with only very minor limitations (generally speaking self-chosen). Their market participation thus is one that closely resembles the market participation that EU members have. These non-members also have limited forms of access to some of the EU's decision-making bodies. Nevertheless, this is qualitatively different from level one in that they do not participate in EU decision-making.

The third level is **limited single market access, even more limited access to EU decision-making**. We define access as an arrangement that is delimited because it does not extend to full market participation (so-called 'WTO+ terms'), 'like no or lower tariffs, as well as a reduction of non-tariff barriers to trade or the recognition of professional qualifications etc.' (Baur 2019: 25). No comprehensive *acquis* extension (e.g. financial services passports) to the non-member is foreseen.

The fourth level is **no access** and basically means that there is no formalised relationship wherein an outside entity has been granted access to an EU policy, rule or institution. Given the EU's wide range of formalised

[11] For a non-exhaustive list of opt-outs, see appendix V.

relations across the world, the number of such relations is very limited, indeed. It will not be considered any further in this report.

There is, as the report will show, a clear relationship between the two core mechanisms whereby the EU seeks to propound its principles in the external world – conditionality on the one hand and access-participation on the other. We understand conditionality as bent on ensuring an EU-led and EU-directed convergence (in the rules and regulations in the relevant policy-areas) between the EU and the non-member, whereas the difference between participation and access refers to the extent to which the EU opens its market (and flanking areas), and decision-making bodies to non-members. Simply put, for *non-members*, the closer to level one on the access-participation scale the stronger and more compelling the EU's approach to conditionality will be (the situation for members is different because membership entails fixed entitlements). A state that seeks full participation in the EU's single market must expect to be subject to a strict regime of rule and norm compliance. Full participation generally involves the Court of Justice of the European Union as the final arbiter of the rules and norms guiding the relationship. Weaker forms of access apply more flexible approaches to conditionality. As the EU's chief Brexit negotiator Michel Barnier noted in his 30 June 2020 talk to the Eurofi General Assembly:

> The UK chose to no longer be a Member State. It chose to leave the EU Single Market and stop applying our common ecosystem of rules, supervision and enforcement mechanisms. In particular, it refuses to recognise any role for the European Court of Justice. These choices have consequences. The UK cannot keep the benefits of the Single Market without the obligations.
>
> (Barnier 2020: 3)

Full market participation, Barnier underlines, is conditional on compliance with the EU's system of rules, supervision and enforcement mechanisms. Barnier's statement can be seen as an effort by the EU to *retain* the EU's distinct conditionality and access/participation nexus, where certain forms of conditionality are paired with certain forms of access/participation, as reflected in the different levels of the scale. The EU may either protect this nexus by ensuring that the distinction between the levels in the scale permeate EU – UK relations or in the absence of such influence over the UK, that the EU is able to *protect and uphold* it within the EU post-Brexit.

The question is therefore on what level of the conditionality – access/participation scale the UK post-Brexit ends up, and whether the EU is capable of upholding the differences between the categories in the access/participation scale throughout the Brexit negotiations. In case of a hard Brexit, the question is whether the scale is relevant for the UK.

The question of where to locate the UK on ths scale is highly pertinent because as we said asymmetry is a hallmark of conditionality. An important concern is therefore how asymmetrical the EU – UK relationship is, including across different issue-areas, and whether the UK, which seems bent on changing the EU's conditionality access/participation nexus, is able to do so.

In the next chapter, we will provide a brief overview of the EU's external context. Here we will put to the test – through a limited number of select cases – the question of the extent to which the EU is able to propound its general principles. The main purpose of the assessment is not to give an overview of the gap between principle and practice; we use the information we get on the gap to focus on EU external exposure and vulnerability because our objective is to see how aspects of the gap spill-over to the EU's relations with affiliated non-members. In doing so, we get a better understanding of the relationship between dominance and differentiation, which is a central aim of the report.

Chapter 3

The EU's external context

This chapter provides a brief overview of the EU's external context in order to situate the assessment of the EU's associations with non-members in a broader global (power-political) context. We saw in the previous chapter that the EU in its external relations is committed to the pursuit of a rule-based world order based on a set of universal principles with a clear cosmopolitan imprint. For a long time and perhaps especially post-1989, there was a sense that the world was experiencing a liberal-democratic convergence around the international and regional governing arrangements that constituted the post-war multilateral order. Today we find that a wide range of actors are seeking to undermine or weaken many of the international agreements and institutional arrangements that mark the post-war multilateral global order. The United States (U.S.) played a central role in fashioning the post-war liberal-democratic order, which made the EU's development possible. Today, the U.S.'s role as the mainstay of this order has changed. We see a more inward-looking and less predictable United States that is not committed to maintaining this order. The U.S.'s lack of commitment has opened up new space for authoritarian states to chip away at those vestiges of this order that they do not want. That is particularly the case with Russia and China, although China may not want to undo the structure but rather revise it to suit its

ends. Brexit may be giving added impetus to these developments (but also testifies to strong dis-integrative pressures within the EU).

In this chapter, we consider what these developments may mean for the EU's relations with affiliated non-members. For one, it is clear that the post-1989 notion of a positive liberal-democratic spill-over between global rule-making and the development of a set of rule-based arrangements between the EU and its associated non-members can no longer be taken for granted. The less rule-bound and predictable the global context, the more we need to consider how EU external exposure and vulnerability will affect the EU's relations with affiliated non-members. In other words, we need to consider how or the extent to which the EU's relations with affiliated non-members are shaped by power differentials and patterns of asymmetry between the EU and the external world. That also sheds light on the seeming paradox that we mentioned in the introduction, namely that the EU is highly externally vulnerable, and at the same time often referred to as a (form of unwilling) hegemon in relation to affiliated non-members.

EU vulnerability

We start by specifying what we mean by vulnerability, and define and develop this notion so as to make clear its close affinity to dominance.[12] The key difference between the two terms is that vulnerability refers to potentiality and susceptibility, whereas with dominance we refer to the actual nature of relations among actors.

One aspect of vulnerability is for an actor to find itself in a situation where it will likely be at the mercy of another person's or actor's will, a key trait of dominance. In such circumstances other actors limit one's choice-set, and one may end up taking decisions that one would not have taken had one not faced such external constraints. A second type of vulnerability is to be particularly exposed to arbitrariness and arbitrary decisions. Part of that is the absence of clear and transparent rules that actors abide by. Applied to the EU today, the EU's limited ability to set and enforce a system of international rules that other actors will abide by exposes it to greater arbitrariness. As we will show in the below, such a situation makes

[12] There is a growing body of relevant sources on dominance in an EU context. See for instance: Bellamy 2019; Eriksen 2018, 2019a, 2019b; Fossum 2015a; Fossum 2019a.

the EU vulnerable to power-political machinations because the EU has very limited own EU-level capabilities in the areas that count most in power politics, those of core state powers. A third form of vulnerability is a high susceptibility to pressure, again related to one's own lack of power or weakness. A fourth type of vulnerability is when an actor is faced with a high level of dependence on others for effectuating actions. The institutions at the EU-level depend very strongly on the member states for effectuating EU actions. This makes effective EU action highly dependent on agreement among the member states. When member states are deeply divided on an issue, the EU is unlikely to take decisive action. Finally, the EU's high level of permeability makes it vulnerable in that it is more difficult for the EU to isolate itself from negative internal-external dynamics. Internal tensions and divisions will render external coordination and effective external action difficult; external pressures and conflicting dynamics will have internal centrifugal effects.

How do these factors translate to the EU's relations with affiliated non-members?

In the following, we will discuss three ways in which EU external vulnerability may translate to the EU's relations with affiliated non-members. The first is that the EU 'imports' conflicts from its member states that in turn will have bearings on the EU's relations with non-members. To this end, we will consider how and the extent to which the history of colonialism figures here. The second is the EU's growth through enlargement, which by its nature is about having to grapple with the added diversity that EU expansion necessarily implies. Enlargement to put it simply is about the internalisation of former non-members. Insofar as the EU fails to deal with the added diversity that they bring and when enlargement-spurred diversity increases internal EU tensions and conflicts, this has spill-over effects on the EU's relations with non-members. In addition, enlargement for the EU with the sheer diversity of states surrounding it means that each round of enlargement is increasing the EU's external exposure to conflicts and unstable neighbourhoods. The less capable the EU is to deal with this diversity through increased internal conflicts, the more vulnerable the EU will be to the external world, and the greater the pressure on the EU to harmonise its relations with non-members to avoid importing more tensions and conflicts. The final set of

factors refers to the EU's structure and make-up, especially with regard to the limits to power and influence that are built into the EU's role as a market power: the EU depends on a rules-based world order – without that market power is difficult to translate into political power/influence against recalcitrant big powers.

The EU's recognition that it is externally vulnerable may increase its insistence on sustaining internal unity. That may increase the EU's onus on unifying external relations. One expectation is therefore that the EU's external vulnerability has boomerang effects on its asymmetrical relations with affiliated non-members. Another expectation is that the EU will show less flexibility in negotiations in order to preserve internal EU arrangements, some element of EU-internal coherence and internal EU cooperation. These two expectations may mean that the EU's vulnerability makes it particularly attentive to its basic principles (presented in the previous chapter). Barring that we expect that the EU places the onus on its own institutional self-interest when this diverges from its basic principles. Both expectations underline that the EU sees its external relations as important to internal EU unity or cohesion.

The history of colonialism

History matters in that the EU 'inherits' the member states' external historical experiences and bonds, which reach deep down into history. Since the EU contains the world's largest collection of former colonial powers from the 1400s onwards (but also back to the Roman Empire and Ancient Greece), the colonial dimension necessarily figures, and not only as a historical echo or remembrance. We will highlight three aspects of the colonial dimension and its relevance for the EU's relations with non-members.

The first is that this legacy of colonialism can generate fissiparous pressures within the EU and in the EU's relations with non-members. Consider the history of European warfare: former occupiers (often as empires or with imperial ambitions) and those lands they occupied are currently working together in an EU that is marked by legally regulated collaboration and that increasingly intervenes in their respective societies. This close interaction, especially when problems and crises arise, may reawaken historical memories of transgression and dominance (consider

for instance the images conjured up during the Eurozone crisis). Reconciliation is therefore far from a completed process. It has become a core EU priority in the manner in which the EU is trying to stabilise its external relations. The EP's activities in Ukraine is a case in point.[13] Further, the different rounds of EU enlargement have 'internalised' the historical colonial dimension – insofar as new EU entrants have been former colonial possessions of an EU member state (consider the case of Cyprus or Malta), or member states have been colonial rivals (for instance the UK in relation to France, and the UK in relation to Spain in America and in Gibraltar – the latter with direct implications for the Brexit negotiations).

Second, some of the EU's member states are former colonial powers that have retained special ties and obligations to their former colonies and their citizens. Some elements of mutual rights and obligations continue to persist, in various forms and shapes, with implications for the EU. Since former colonial member states' bonds reach out to different parts of the globe, insofar as these bonds become matters for the EU, the EU is 'extended' along these lines. And then, insofar as the member states' ties pull them in different directions, or into conflict with each other, this will produce differentiating pulls inside the EU. That is part of the question of whether or the extent to which we find traces of Europeans' colonial past(s) in various aspects of Europe's present.[14] In addition to problems of fostering coherent EU policies, this can pull the EU in different directions at critical junctures. A case in point is Brexit. The UK has throughout its EU membership sought to balance its role and standing in the EU with its role in the Commonwealth. Many Brexiteers wanted the UK to prioritise its relations with the Commonwealth over those with the EU. They presented the UK's EU membership as a straitjacket that prevented the UK from harnessing the benefits of its historical global role and exposure. In addition, Commonwealth citizens have special rights in the UK; that included voting rights in the Brexit referendum (most EU citizens in the

[13] Ukraine is considered by the EU a 'priority partner'. In 2014, the EU and Ukraine signed the EU-Ukraine Association Agreement including a Deep and Comprehensive Free Trade Area, which has brought unprecedentedly close tied between the EU and Ukraine. See: https://epthinktank.eu/2019/08/26/democracy-support-for-ukraine-european-parliament-impact-2014-2019/ (accessed 5 November 2020).

[14] This question is discussed in the book Echoes of Empire (Frémaux and Maas 2015).

UK did not have voting rights – reversing this could have produced a different referendum outcome).

Third is the manner in which European colonialism has spurred nation-building on a global scale, aspects of which may now come back as a boomerang on European supranational institution-building. European empires developed colonies that served their needs. As part of the process, colonies (not the least through European settlement) were also exposed to European thinking in communal and political organisational terms. In that sense, decolonisation to some extent echoed European modernisation through state formation and nation building. In other words, much of decolonisation took place with reference to core Western European conceptual containers, notably associated with the notion of the sovereign nation-state. What is then also noteworthy is that decolonisation did not only take place at the same time that the EU consolidated, Europeanisation has significantly transformed the nation-states within Europe.[15] Kalypso Nicolaïdis refers to this process as 'the paradox of inversion':

> As Europeans finally succeeded in shaping the world according to their former (Westphalian) image, a new message was starting to emanate from a new Europe, involving the abandonment of that image: integration across borders, the pooling of sovereignty and the legitimacy of mutual intervention in each other's internal matters. In short, *while deferential recognition of sovereignty was globalized from Europe outwards, civilizational intrusion was internalized within Europe*.
>
> (Nicolaïdis 2015: 297)

This paradox of inversion is then also part and parcel of the 'Europeanisation' of colonial histories, in the sense that the historical baggage associated with European nations' colonial experiences become EU-relevant experiences. Today's EU is thus affected by the historical spread of European values and conceptions of communal organising and belonging; by the networks and links that were forged by the spread of overseas empires, often as precursors for today's globalisation (Frémaux and Maas 2015); and by the memories of European imperial domination that many still harbour. It is worth mentioning that a number of today's leading

[15] One account depicts this as a transition from nation-states to member states (Bickerton 2012).

powers harbour such memories and have learned from their engagement with Western powers:

> Among the norms governing the Western-dominated international system, China's strongest feelings are about the norm of power politics. China has learned, from its bitter experience with Western powers, that lagging behind others leaves itself vulnerable to attacks, and that only by making itself strong can China win others' respect.
>
> (Liqun and Jicheng 2015: 316)

China has certainly followed suit and is currently rivalling the United States as the world's largest economy and is obtaining significant influence through its lending to and investing in Europe.[16] In economic influence terms, there is little doubt that today's China is not content with matching the might of the Western powers.

The more the EU integrates the more it engages with the history and legacy of colonisers and colonised. In addition, the more the EU integrates without establishing independent statehood and the more it engages with the world the more it has to contend with the paradox of inversion. Had the EU sought to establish statehood, the paradox of inversion would have been given a special twist within the EU itself, through Central and Eastern European states' historical experiences of Soviet imperial domination. EU supranational integration and especially EU statehood would be politically exploited by Europhobes eager to build a link to the repressive Soviet past.

The next chapter briefly discusses the EU's growth through enlargement against the question of vulnerability.

Enlargement

The EU from an initial organisation of six member states has grown enormously in size through a number of enlargements, to the West, the South and the East. There has always been a concern that increases in breadth – territorial reach – will stymie integration in depth. Some states, notably the UK under Thatcher, saw further EU enlargement as an

[16] See, for instance, Le Corre (2018).

important assurance that the EU would remain a market and not become a state (Lord 2020).

In terms of vulnerability, there may be a Janus-faced quality to enlargement: increased size can give increased strength and render the EU less externally vulnerable. Conversely, increased size increases EU diversity (and the historical experiences that come with that as the previous paragraph noted), and if this diversity is not addressed, it can generate fissiparous pressures. In addition, increased size exposes the EU more directly to a more diverse and a more volatile world; hence may increase vulnerability through increased external exposure (including through sharing borders with volatile countries/regions).

In this context, it is also useful to keep in mind that the process of EU enlargement combines historical, geopolitical and economic factors. Geopolitical considerations have figured prominently in the EU's continental expansion. The big-bang enlargement to the East could take place during a window of Soviet collapse and amidst Russian transition and weakness. At the same time, the EU's expansion through enlargement changes the EU's geopolitical situation. The EU has, as noted, grown rapidly from a limited six-member Western European collection of states to a post-Brexit twenty-seven-strong near continent-wide association. An intrinsic part of this expansion in territory and membership is importation of difference and diversity. Each new member state brings an added element of diversity – in terms of that state's distinct historical experiences, language, culture, institutional and constitutional make-up and socio-economic model and orientation – that the EU must contend with. This happens directly through the manner in which the member state is incorporated in the EU governing system; indirectly in the manner in which that state's distinctive features are activated in EU polity, politics and policy processes (in a vertical manner); as well as in the interactions among the EU's member states, groups and citizens (in a horizontal manner). The more comprehensive the process of including new members in terms of the size of new entrants (relative and absolute); in terms of the number of entrants; in terms of the diversity of entrants; in terms of the difference between entrants and existing EU-members; and in terms of the speed through which the process proceeds, the more the accession will resemble a 'shock' that the EU will have to contend with. We can assume

that there is a relationship between shock and vulnerability: The greater the shock the more vulnerable the EU is, because it has to commit and divert a lot of resources to grapple with the effects of the shock. This detracts attention from other issues and concerns. This line of argument is closely related to the EU's limited own resources. The EU is highly dependent on the willingness of member states – old and new – to contribute to dealing with the shock. The EU's ability is also limited due to its narrow range of policy instruments and weak sanctioning ability.

The addition of new members has important geopolitical implications because it also alters the EU's external context. The more the EU expands to the East and the South, the more directly it is exposed to a much larger contingent of states that differ significantly from the states in Western Europe. This expansion has meant that the EU encounters a large number of external states that are less democratic and generally speaking have less stable political regimes (especially in North Africa). The expansion of the EU's size has increased the EU's *exposure* to external conflicts; it may also have affected the EU's *vulnerability*. There are fewer physical 'buffers' between conflict zones and EU borders, and a greater onus on the EU to play a regional stabilising role. EU asylum and refugee policy has come to rely heavily on agreements that the EU has struck with non-members such as Turkey.[17] Turkey has by no means refrained from trying to exploit the EU's vulnerability. The refugee crisis has exhibited great differentials in how exposed EU member states are. External developments and crises can appear as EU 'differentiating shocks'. A differentiating shock is a form of upset that is *selective* in orientation, unfolding and effect (Fossum 2020). Hence, external shocks can increase internal EU differentiation.

We will say more on the manner in which the EU handles enlargement in the next chapter. At this point the purpose was to discuss enlargement in the light of the question of EU vulnerability. The answer is mixed: increased size adds strength, but can also somewhat ironically produce greater vulnerability. For the EU's relations with non-members, this matters, on the one hand in terms of the EU's experiences with enlargement, because the lessons learned there will be transferred to the EU's relations with non-members, and on the other hand in that fissiparous pressures will compel

[17] See https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 26 June 2020).

the EU to regulate its relations with non-members in such a manner as to minimise internal strains within the EU.

The limits to market power

A vital component of the EU's development and expansion is the deepening and widening of the EU's single market. This development has prompted analysts to talk about 'Market Power Europe', which refers to an entity that 'exercises its power through the externalization of economic and social market-related policies and regulatory measures' (Damro 2012: 682). The interesting point that the Eurozone crisis and now the corona pandemic underline is that this is a form of 'strength under weakness'. The Eurozone crisis exposed to the full how an EU that was divided on the proper crisis response saw large spreads across the member states that saddled heavily indebted Southern European member states with high interest rates and therefore significant pressure to cut back on public finances to stay within the convergence criteria. There is little doubt that public health cutbacks clearly reduced these states' preparedness and capacity to handle the corona pandemic.

The notion of the EU as a market power is therefore really Janus-faced: highly exposed and vulnerable to the actions of faceless markets, rating agencies and big powers on the one hand, and on the other hand a globally significant market actor whose norms and rules all affiliated states have to relate to. The smaller the state and the more asymmetrical the relationship between the EU and the non-member-state seeking an EU affiliation, the more significant the EU's market power will be, and the more readily the EU can rely on conditionality. The notion of market power Europe must therefore be directly linked to asymmetrical power relations.

Great-power relations are of course not in the same sense asymmetrical. EU – U.S. and EU – China relations are asymmetrical the other way, especially in military terms.[18] In this sense, and in contrast to the U.S. for instance, EU market power is not very fungible due to the EU's very limited military prowess: it cannot as the U.S. convert military might into

[18] Robert Kagan (2002, 2003) sparked a debate with an essay with the telling title 'power and weakness' to underline the differences between the U.S. and the EU.

economic advantage, or de facto finance military adventures through the central role of the dollar as the main world currency.

In this connection, it is important to pay attention to China's rise because we already have strong evidence to the fact that it has significant implications for Europe's future. China's industrial clout, its financial leverage, and the close bonds that exist between Chinese companies and the Chinese government mean that it is difficult to consider Chinese actions, including for instance foreign investments as mere economic transactions; there are very good grounds for considering strategic implications. This has been a matter for Western states wanting to invite the Chinese company Huawei to develop their fifth generation mobile network. It is also now even more so a matter in light of the economic fallout and repercussions that strategic companies are likely to face from the corona pandemic. In that connection, the European Commission has recently introduced a set of guidelines to protect critical European assets and technology. Former EU Commissioner for Trade Phil Hogan noted that:

> We are facing an unprecedented public health crisis with deep consequences for the European economy. In the EU, we are and wish to remain open to foreign investment. In the current circumstances, we need to temper this openness with appropriate controls. We need to know who invests and for what purpose.
>
> (European Commission 2020a)

No country names are listed but it is not difficult to imagine that the concern with China is high up on that list.

China's increased influence could make the EU the more vulnerable party in the EU-China relationship. China is willing to continuously increase its investments in European member states, including in their national strategic sectors. If China's economic capabilities themselves constitute a challenge to the EU, even more so does the lack of a unified position on how to react to this. When member states diverge on how to relate to strong external states such as China, such internal EU divisions increase EU vulnerability. A well-known Chinese project significantly increasing the country's influence in Europe – the Belt and Road initiative – showed that different positions among EU member states prevented the EU from speaking with one voice. As a matter of fact, while a country like Italy

officially signed onto the project, others (most notably, France and Germany) put forward their reservations. Different member states' views of external actors often originate from different degrees of trust among Member States. Chinese foreign direct investment in Italy has until recently been significantly lower than in other major European economies such as Germany and France, which suggests that intra-European competition for Chinese investment has existed. The degree of trust seems to be linked to the commitment to the integration process. For instance, recent Italian polls show a higher level of trust for China and Russia than for Germany. Similarly, in Italy the share of those favouring remaining in the EU is close to the share of those wanting to leave the EU. In the past, the former was considerably higher than the latter.[19]

To sum up this chapter, the EU has developed as a 'civilian power' (Duchêne 1972) and does not possess a degree of military might that it can convert into economic advantage. Instead, the EU seeks to regulate the relations to affiliated states and the wider world through entrenching as far as possible binding systems of norms and rules. In a world that appears to be turning away from rule-based conduct and towards a greater role for power-politics, the EU finds itself very vulnerable. We have suggested that this development has spill-over effects on the EU's affiliations with non-members. In this latter case, as the next chapter will show, the asymmetry is much more to the advantage of the EU and has brought up the notion of the EU appearing as a regional hegemon. In this context, we cannot rule out a potentially paradoxical scenario where increased EU vulnerability (in relation to big powers and volatile markets) makes it take measures that render it appear more of a hegemon in its relations with affiliated non-members.

We are interested in clarifying how the conditionality – access/participation nexus is configured across the EU's different relations with affiliated non-members. That includes establishing whether the EU negotiates with each state, and as such develops a specific set of rules that regulate the EU's relations with that particular state, or whether the EU seeks to develop as uniform a set of rules as possible. If arrangements are tailored

[19] See https://www.ft.com/content/4ca9aafe-9c37-11ea-adb1-529f96d8a00b (accessed 5 November 2020).

to specific circumstances will they still be informed by the logic of conditionality? Are we talking about different types of conditionality? Further, we consider how rule enforcement is undertaken, with a view to establish how committing it is, and who has the final word. Further, we situate the affiliated non-member countries on our access/participation scale.

Chapter 4

Overview of the different forms of non-member affiliation

This chapter spells out the key rules and principles that the EU is supposed to follow in its relations with affiliated non-members and considers with reference to some of the cases whether these are borne out in practice. [20] The focus is on states that have different ties with the EU without being a member of it. As noted in the introduction, this is only a brief and sketchy overview of the relations. It is also lopsided, in that we have placed most emphasis on those affiliated non-members that qualify for EU-membership but do not want to be EU-members. The rationale for this bias is that these are the states that show most clearly how the EU's changed approach to sovereignty makes the distinction between EU 'insiders' and 'outsiders' very fuzzy, indeed.

> *1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.*

[20] This overview excludes countries that have signed free trade agreements (FTA) with the EU, such as South Korea, Mexico, Canada and Japan, because these agreements are aimed at EU integration, as 'the obligation for the partner country to apply, implement or incorporate in its domestic legal order a predetermined selection of EU acquis' (Van der Loo 2016: 28, cited in Baur 2019: 23).

> *2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.*
>
> *(TEU, Article 8)*

Chapter 2 showed that the EU is committed to the promotion of its values beyond its bounds through close and peaceful cooperation. Article 8 above specifies how the EU is to regulate its relations with neighbouring countries which for our purposes is basically synonymous with affiliated non-members. Article 8 refers to the development of a special relationship with neighbouring countries, which is nevertheless embedded in the EU's general principles, as outlined in Article 21.1. Article 8 does not commit the EU to develop the same type of relations with all the neighbouring countries. That would be very difficult given that the world surrounding the EU is composed of such a wide range of states of different levels of development, with significant variations in state capacity, and with different regimes and cultural orientations. The sheer diversity in the EU's external environment means that the EU faces a significant challenge of importing diversity, which, as noted, will be exacerbated the more diverse the EU's own approach to the external world is. For the EU, there is a distinct challenge of coordinating its external relations. Thus, we may assume that the more differentiated the EU's relations with the external world, the more likely it is for the EU to import problematic forms of differentiation.

The fact that we may identify four different categories of EU relations with non-members suggests that there is considerable potential for the EU to import fissiparous pressures from its different external relations:

a. EU's relations with states that seek EU membership;

b. EU's relations with states that qualify for EU membership but do not want it or that have explicitly rejected it for instance in popular referenda;

c. EU's relations with states that do not qualify for EU membership and want a looser EU affiliation;

d. EU's relations with states that exit the EU.

Each category of states seeks a different relationship with the EU. If the EU accommodates each group of states on that group's terms, these affiliations will work at cross-purposes and put added pressure on the EU; hence undermining the logic of the EU's conditionality – access/participation nexus. In what sense might that be the case? The first group of states seeks EU membership. They would naturally be inclined to do so on those terms that are most favourable to themselves. The more different from the EU these states are, the greater the gap that must be bridged between them and the EU. In other words, how far the EU would have to bend to adjust to them. The second group consists of states whose populations have either explicitly rejected EU membership in popular referenda or have no appetite for membership but nevertheless want a close non-membership affiliation. It follows that these states are very concerned about the need for retaining a significant measure of independence, including protecting or sheltering specific sectors, policy measures or institutional arrangements from EU influence and control. The third group may either want the EU to relax membership criteria so that they could join, or pursue the type of affiliation that is most favourable to them. The fourth group will likely want some form of affiliation, but will be very concerned with preserving its new-won independence (at least rhetorically). In that sense, it will be concerned with showing that the mode of affiliation that it ends up with will assure the desirable level of independence. It follows that each state or group of states will be concerned with and keep a close watch on how the EU treats the others, and will want to extract benefits and concessions from the EU insofar as these are seen to be available to other states.

Thus, whereas the groups have different interests and concerns, there is a clear danger of spill-over of demands across these groups of states. The EU therefore has a strong incentive to narrow the range of options and harmonise its relations with non-members to prevent or rein in such spill-over pressures wherever possible. In addition, an important consideration for the EU whose motto is 'ever closer union' is that increasing the size and territorial reach of the EU means that widening does not come at the expense of deepening (a condition listed at the European Council meeting in 1993 that spelled out the conditions for further enlargements, see below). Further, the EU's mode of relating to the external world matters: law-based relations are quite different from relations based on power-

politics and bargaining. Norm-based export generates predictability insofar as all actors abide by the rules. At the same time, insofar as outsiders are granted rights against the EU, its states, businesses, and citizens, such a situation renders the EU vulnerable to shirking and rule-breaking. The more extensive the rights the EU grants to outsiders, the more we should expect the EU to be concerned with putting in place adequate compliance mechanisms. The more independence non-members seek the less inclined they will be to accept such compliance mechanisms.

We discuss these considerations in relation to the conditionality – access/participation nexus that we outlined in Chapter 2.

The EU's relations with states that seek EU membership

> *Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.*
>
> *(TEU, Article 49)*

Article 49 states that the EU is open to membership to all European states that respect its values (even if it is readily apparent that some long-term applicants such as Turkey are unlikely ever to become members and that EU's openness may be a thing of the past). Membership is voluntary and conditional on compliance with the EU's values. At the same time, each new member increases the EU's diversity; hence, openness to new members entering the EU entails that the EU will necessarily be importing diversity. The addition of new members means that the EU's challenge of reconciling widening and deepening is affected: the EU will need to strike

a new balance between these two key considerations. It matters a lot for EU coherence how the EU relates to applicants and new member states.

For a state to obtain EU membership, it has to comply with a range of criteria; hence the onus on **conditionality**. Such conditions have firmed up over time.[21] Of particular relevance for the latest bouts of enlargement, are the criteria that were set out by the European Council in Copenhagen 1993 (European Council 1993). To qualify as an applicant, a state must: (1) have achieved stability of institutions guaranteeing democracy, the rule of law and human rights; (2) have a functioning market economy with the capacity to cope with competitive pressures and market forces within the EU; and (3) be able to take on the obligations of EU membership, including adherence to the aims of economic and political union. An additional condition specifies that the EU must be able to absorb new members and maintain the momentum of integration (European Council 1993: 13).

The EU, in line with its membership requirements, presupposes that applicants become full-fledged members, which is underlined by the need for them to accept the entire *acquis*.[22] Transition periods for up to 12 years after enlargement have been granted for new members to adapt and implement the regulations. That shows that whereas the assumption is that once a member, each new entrant has to be treated equally, practice does not always follow from this.

Before the large-scale enlargement in 2004, the EU introduced minority protection conditions that only apply to applicants. Some member states

[21] See https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en (accessed 26 June 2020). There is a comprehensive body of literature on EU enlargement. For a brief selection, see Chiva and Phinnemore 2012; Gateva 2015; Kelemen, Menon and Slapin 2014; Nugent 2004; Schimmelfennig and Sedelmeier 2005a, 2005b; Sjursen 2002, 2006.

[22] This is not without exceptions, though. Both Poland and the Czech Republic negotiated the opt out from the Charter of Fundamental Rights after enlargement (even if they signaled the lack of interest in the document before actual enlargement). Officially it was part of the negotiations of the Treaty of Lisbon after they became full members. The 'no-derogation' principle was clearly the most fundamental rule of the 2004 enlargement.

introduced restrictions on Eastern/Central Europeans' access.[23] It might here also be noted that three of the EU-eight member states (Hungary, Poland and Slovenia) used reciprocal measures and restricted access to their labour markets for nationals from those member states that restricted labour market access for their nationals.

Perhaps of particular importance for the enlargement and post-enlargement dynamics was the unequal treatment of farmers in the new versus old member states. This was imposed in the chapter 'agriculture' – i.e. the reformed CAP, which decoupled direct payments etc. Central and Eastern European states have viewed that as an instance of unequal treatment and a matter of dominance.

The EU has a system of monitoring as part of a comprehensive process of ensuring that applicant states comply with the EU's entrance conditions before they become members.[24] Once an applicant becomes an EU member state it is responsible for the implementation and enforcement of EU policy within its bounds (article 291 Treaty on the Functioning of the European Union [TFEU]) and is also required to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaties or resulting from an act of an EU institution. All of this means that EU applicants need to have the requisite level and type of state capacity, not the least because the member states carry out the EU's decisions. In addition, it should be added that they also need to have capacity to carry out those tasks that are not mandated by the EU, but which are necessary to live and thrive within a heavily Europeanised setting. With this is meant capacity to handle those aspects of EU membership that may have negative distributive or other internal consequences. It is also necessary to have the intellectual and material capacities that are required for sustaining an adequate balancing of the mandated tasks and the internal effects of Europeanisation.

[23] There were 'adaptation periods'. Initially the UK, Ireland and Sweden open their labour market fully to all newcomers (the UK actually included some minor restrictions such as obligation to register the workers from new member states). Austria and Germany allowed such access only after seven years after entry, i.e. 2011.

[24] See for instance Schimmelfennig and Sedelmeier 2002, 2005a, 2005b; Gateva 2015.

Applicant states and EU member states are subject to monitoring from the European Commission, which is in charge of ensuring the application of the Treaties and of overseeing the application of all Union law (Art 17 Treaty of the EU TEU). There is now also a system of post-accession conditionality.[25]

We thus see that the 'rewards' that applicants reap when complying with the EU's conditions is full-fledged EU membership and equal status and representation in the EU's governing bodies, even if we have pointed to certain discrepancies or deviations from the equality principle.

It should also be noted that the new members enter a differentiated Union where not all members are incorporated in all EU arrangements. Thus, the EU has conditions for entering Schengen and for adopting the euro, and a number of the EU's new member states (Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania) since 2004 have still not qualified for the euro. As the European Commission notes on its website: 'At the time of their accession, they did not meet the necessary conditions for entry to the euro area, but have committed to joining as and when they meet them – they are Member States with a 'derogation', such as Sweden'.[26]

The EU, as noted, sets down conditions for the inclusion of new members: prior to membership each new member state is vetted for compliance with a range of rather well-specified criteria.[27] The assumption is that states will continue to abide by EU rules and norms, once they become members. The problem here is threefold. First, each member state is responsible for implementing EU rules and norms; hence there is a large scope for shirking obligations and containing compliance (Conant 2002). Second, the EU member states have a very prominent presence in the EU

[25] Gateva (2018: 16) notes that: 'the establishment of the Cooperation and Verification Mechanism (CVM) to monitor developments in Bulgaria and Romania in the areas of judicial reform and the fight against corruption and organized crime after their accession to the Union set an important precedent and sparked a debate about the effectiveness of postaccession conditionally'. If we look at how these issues are discussed in relation to current candidates in line for membership, we see that the post-accession conditionality for Bulgaria and Romania was assessed negatively as a mechanism. In the current setting with Balkan candidates this is not a preferred mechanism.

[26] See https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en (accessed 4 November 2020).

[27] For an overview and a four stage model of conditionality, see Gateva 2015.

institutions – especially through veto power in the European Council; hence have the capacity to block measures bent on reinforcing EU monitoring or sanctioning. Third, the EU's system of sanctions is overall quite weak. When a member state fails to comply with EU law, the Commission can initiate an 'infringement procedure' with the aim of ensuring that the member states comply with the law within a given time limit. For its part, the European Court of Justice (CJEU) is responsible for ensuring that the law is observed in the interpretation and application of the Treaties (article 19 TEU). When a case is referred to the CJEU by the Commission – or by another member state, although the cases of the latter kind remain extremely rare – the CJEU determines whether the member state has fulfilled its obligations under Union law, and may impose on the member state a financial penalty if such is not the case (article 260 TFEU).

Compared to states these sanctioning mechanisms are very weak. In addition, the CJEU's status is under considerable pressure, as was made very clear as a result of the 5 May 2020 ruling of the Second Senate of the German Constitutional Court on the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB). Even if the ruling aimed at confining or clarifying the ECB's role, it was a direct affront on the CJEU.[28] Analysts have raised concerns that this may set in motion further national challenges to the ascendancy of the CJEU. Statements by Polish officials among others testify to the need to take such concerns seriously.

There is therefore considerable scope for backsliding when less EU-loyal political elites take power in states that have not settled within themselves what role they should play in Europe. These observations suggest that EU conditionality has its clear limits. The literature underlines that the coercive nature of conditionality ends when a new state becomes an EU-member. After that other EU measures must ensure rule and norm-compliance. As we see in particular with such member states as Hungary and Poland, they have chipped away at constitutional democratic arrangements well after becoming EU members (in the case of Poland eleven years after). The EU's ability to enforce democracy among its

[28] See https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (accessed 4 November 2020).

members is thus limited. This is if anything exacerbated in connection with the corona pandemic.

These observations point to the limits of the EU's pre-accession and post-accession mechanisms for ensuring rule and norm compliance. If we look at the two latest rounds of enlargement to the East, we see that there are considerable variations in terms of compliance by the former entrants (there is also variation among 'old' members).[29]

There is also the question of the sheer magnitude of change that EU conditionality can ensure, especially in connection with the big-bang enlargement that included 10 new member states. Such a large number of states and people not only put the EU's 'digestive capacity' to a real test but had a real potential for significantly transforming the EU. Some analysts then also argue that the process of Eastern enlargement has significantly transformed the EU. Jan Zielonka (2006: 3) argues that Eastern enlargement 'has resulted in more layers of authority, more cultural, legal and political pluralism, more diversified and cross-cutting institutional arrangements'. Zielonka further argues that the EU through Eastern enlargement has taken a major step away from statehood in the direction of a form of neo-medieval empire with fuzzy borders and lines of authority.

The implication is that the EU's accession criteria have not succeeded in reining in the types and ranges of diversity that Eastern expansion engages with. The issue will likely also crop up in the EU's approaches to the other categories of states - perhaps in particular in relation to post-Brexit UK given that it is the largest and most substantial non-member seeking some form of EU-affiliation.

The EU's relations with states that qualify for EU membership but do not want it

As specified in Article 49 listed above, the question of the reach of EU rules and norms is not confined to EU membership applicants: States can be granted access to or participation in the EU's internal market and other arrangements without being EU members. As Article 49 notes: *These*

[29] See https://ec.europa.eu/info/sites/info/files/file_import/report-2019-annual-report-monitoring-application-eu-law_en.pdf (accessed 4 November 2020).

agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly (authors' italics).

Sieglinde Gstöhl and David Phinnemore refer to these arrangements as privileged partnerships, which in contrast to the EU's relations to its non-European partners:

> [I]nvolve more intense forms of cooperation and integration as well as institutionalized governance arrangements […] Privileged partnerships have been created as forms of external differentiated integration because of the varying abilities and willingness of the EU's neighbouring countries to join as full members.
>
> (Gstöhl and Phinnemore 2019: 3)

Such privileged partnerships are marked by extensive reciprocal rights and obligations. In effect, when taken to the full, this form of:

> [P]articipation in the EU's internal market grants partner countries treatment as if they were EU member states […] A level playing field is guaranteed by applying the internal market *acquis*. A *condition sine qua non* is an institutional set-up of an at least partly quasi-supranational character.
>
> (Baur 2019: 23–24)

For non-members that seek a privileged partnership with the EU, a critical consideration is to strike a proper balance between assured EU market (and other) participation (or more limited forms of access) on the one hand and sufficient scope for independent action on the other. Precisely the fact that the EU allows for a form of inclusion that basically equates treatment on a par with that of a member (not in terms of political participation, of course, as reflected in level two on the access-participation scale in Table 1 above) necessarily means that this will be a difficult balancing act – for non-members but also for the EU if the relationship gets politicised.

The category of privileged partnerships encompasses both the states that qualify for EU membership but do not want it (the term privileged partnership is not applied to pre-accession countries because they will become EU members), and those states that do not qualify for EU-membership and instead seek or settle for some form of closely affiliated non-membership arrangement. All the four EFTA states would qualify for

EU membership, but have, for different reasons, either not formally applied or have rejected membership in popular referendums. Iceland applied for EU membership in July 2009, but in 2015 the Icelandic government approached the EU Commission with the following request: 'Iceland should not be regarded as a candidate country for EU membership'.[30] Norway has applied for EU membership four times in 1962 and 1967 and in 1972 and 1994. The two first instances, in 1962 and 1967, were aborted because of de Gaulle's veto against the UK's application (Bjørklund 1997: 143–144). The two latter in 1972 and in 1994 resulted in negotiated agreements that were subsequently rejected in negative popular referendums. Switzerland, after a negative referendum, turned down EEA membership in 1992 and has instead established a set of bilateral agreements with the EU. Switzerland's arrangement is formally speaking less extensive and less mutually committing compared to the European Economic Area (EEA) arrangement, the EFTA portion of which is made up of Norway, Iceland and Lichtenstein. The EEA agreement encompasses these three countries and all the EU's member states.[31]

The EEA agreement is discussed here first because as Gstöhl and Phinnemore (2019: 187) note: 'the EEA […] created a privileged partnership which soon became a stable point of reference for later relationships. Once in place, it structured the subsequent logic of EU neighbourhood relations'. The EEA Agreement came into effect in 1994 (Lichtenstein's took effect 1 May 1995) and was intended to include the remainder of the European Free Trade Association (EFTA[32]) states in the EU's internal market. When the EEA Agreement took effect, the EEA-EFTA countries had to incorporate all relevant EU legislation that was in effect at the time of signing the agreement. In line with what was said about EU conditionality above, the EEA Agreement is intended to ensure legal

30 See https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/iceland_en (accessed 4 November 2020).

31 For overviews of this mode of association, see, for instance, Arnesen et al. 2018; Baudenbacher 2015; Claes and Tranøy 1999; Eriksen and Fossum 2014, 2015; Fossum and Graver 2018; Fredriksen and Franklin 2015; Frommelt 2017; Müller-Graff and Selvig 1997; Rye 2012; Sverdrup 1997.

32 EFTA was established in 1960, and has now four members: Iceland, Liechtenstein, Norway and Switzerland. Three of these countries are members of the EEA but not Switzerland.

homogeneity within the entire 30-member EEA. The 'reward' for the EEA-EFTA states would be assured participation in the EU internal market basically on a par with an EU member state (level two on the access/participation scale in Table 1).

The main objective of the EEA Agreement was:

> [T]o establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties.
>
> (Official Journal of the European Communities 1994)[33]

With homogeneity is meant:

> [A]n economic area based on common rules and equal conditions of competition, and providing for the equivalent means of enforcement, including at the judicial level. Because it is dynamic, the homogeneity is also maintained when rules and interpretation of rules change in the EU.
>
> (Fossum and Graver 2018: xvii)[34]

Nevertheless, whereas the homogeneity is dynamic, it is not automatic. The EEA agreement seeks to reconcile this tension by means of a two-pillar structure with bridging institutions, as well as a court and a surveillance body.[35]

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[33] For a comprehensive overview of the specific provisions of the EEA Agreement, see Arnesen et al. 2018.

[34] On the principle of dynamic homogeneity in EEA law, see Hreinsson (2015)

[35] The first pillar is constituted by the EU institutions; the second one by the EEA-EFTA institutions. There are also joint bodies to implement the EEA Agreement. 'The two-pillar structure is necessary because the EEA-EFTA States have not transferred any legislative competences to the EU or to the joint EEA bodies. In addition, the EEA-EFTA States are also […] constitutionally unable to accept binding decisions made by the EU institutions directly'. See https://www.efta.int/sites/default/files/documents/eea/eea-institutions/The-Two-Pillar-Structure-Incorporation-of-new-EUacts.pdf (accessed 4 November 2020).

The EEA-EFTA countries, as indicated in Chapter 2, should be situated on level two of our access/participation scale. They participate in most aspects of the EU's internal market (the agriculture and fisheries sectors are formally speaking exempted, but even here there is a lot of Europeanisation) even if they are not part of the EU's customs union (that is also the case with Switzerland). In contrast to Switzerland's (broad range of) sectoral bilateral agreements, the EEA Agreement is a broad and dynamic multilateral agreement between the post-Brexit 27 EU member states and the three EFTA states Iceland, Liechtenstein, and Norway.[36]

The fact that the EEA agreement is dynamic is intended to ensure effective market participation. Each EEA-EFTA state´s compliance with the evolving EEA rules is closely monitored by the EFTA Surveillance Authority (ESA). Appendix I provides an overview of implementation of EU law in the entire EEA area (EU member states and the three EEA-EFTA states). The Single Market Scoreboard reveals that the transposition deficit in the three EEA-EFTA countries is not higher than the EU member state average; for Norway's case at 0.1, it is considerably lower.

With regard to the EEA Agreement, there has been considerable expansion into related flanking areas, such as for example environmental and social affairs. In addition, the dynamic nature of the EEA agreement makes it difficult for a state to prevent areas that have been explicitly excluded from the agreement being subsequently pulled into its orbit. For Norway, a telling example is agriculture. It is politically very sensitive, and was *explicitly excluded* from the initial EEA Agreement. At present, 40 per cent of the rules and regulations that Norway incorporates are in the field of agriculture. Important reasons for inclusion were the need for market access for fish and the sheer dynamics of horizontal expansion. These provisions are not confined to border crossing activities but cover internal affairs:

> In practice today, this body of regulations makes up the main portion of all public regulation pertaining to production, sale, labelling,

[36] For overviews of Norway's relationship with the EU, see Claes and Tranøy 1999; Eriksen and Fossum 2014, 2015; Fossum 2019b, 2019c; NOU 2012; Sverdrup 1997. For Iceland's relationship see Jonsdottir 2012; Thorhallsson 2004, 2019. For overviews of Lichtenstein's relations with the EU, see Frommelt 2016, 2017, 2018.

> hygiene and so forth with regard to fish and agriculture in Norway and to a large extent sets the standards in both these sectors.
>
> (NOU 2012: 2, 646-47, authors' translation)

The Norwegian government maintains a system of subsidies that it has considered necessary to sustain thriving rural communities in a country where the conditions for large-scale farming are challenging.

The situation of agriculture for Norway shows how the affiliated non-member loses control over an issue-area that it explicitly sought to *remove* from the trade-off equation and testifies to the manner in which a dynamic EU integration process undermines the prospects for states' self-rule. A further problem for this type of close affiliation without membership is that when the EU undergoes a treaty change, there is no mechanism in the EEA-agreement to update its rules as a follow-up to such changes in the EU. Since the EFTA Court is anxious to ensure legal homogeneity, it relates to the new EU legislation (Fredriksen and Franklin 2015: 649). Thus, insofar as the EEA rules are subsequently changed through legal interpretation, 'this means that legislation is changed without any collaboration from the EFTA countries' (Graver 2016: 818).

An open market in goods, services, persons and capital requires low-threshold access and passage. That is one of the reasons why the EEA-EFTA states have signed the Schengen association agreements, which in effect locates them within the EU's external borders and systems of border controls. Norway (and Iceland) needed an association agreement with the EU to sustain the institutionalised system of Nordic cooperation. Norway has a 1630-kilometer-long border with Sweden that has been open for over 200 years. When Sweden entered the EU in 1995, Norway could only keep this border open through affiliating with Schengen. That meant that Norway would be inside the EU's external border, with responsibility for border controls. Had Norway opted to stay outside of Schengen, it would have undermined the Nordic Passport Union and the provisions for free movement within the Nordic region.

Norway has signed a number of additional parallel agreements with the EU, including agreements on asylum and police cooperation (Dublin I and II) and on foreign and security policy – Norwegian troops are at the disposal of the EU's battle groups. The Norwegian Official Report that

produced the largest-ever assessment of the EEA Agreement estimated that around seventy-five per cent of all of the EU's laws and regulations apply to Norway (NOU 2012: 2).[37]

This dense form of affiliation generates its own pressures for contiguity in norms, rules and interpretations, which show up in how domestic institutions operate. Two telling examples pertain to how the Norwegian Supreme Court, in the rulings Nye Kystlink and Bottolvs, voluntarily adapted to EU law, and did so in issue-areas that were *not* regulated by the EEA agreement (Fredriksen 2015). In a situation of tight regulation coupled with 'regulatory gaps', rule contiguity becomes important. The institutions within a closely associated non-member will feel strong domestic pressures for filling in whatever 'gaps' there are between the different agreements that the country has signed with the EU (Fredriksen 2018).

The onus on uniformity is not only to be found on the side of the EEA-EFTA countries. The recent CJEU Case C-897/19 I.N.:

> [S]trengthens the impression of the EEA/EFTA States as 'insiders' rather than 'outsiders' also in matters where the application of EEA law is affected by parts of EU law that fall outside the scope of the EEA Agreement, but which are covered by other agreements between the EEA/EFTA States and the EU.
>
> (Fredriksen 2020).

The presentation thus far has shown that the EEA-EFTA states have extensive rights and obligations in relation to the EU, and their participation in the EU's internal market is so extensive that it is almost on a par with member states. Hence, there is no doubt that these states have to be placed at level two (the closest level to EU-members) on the access/participation scale. As was also noted about level two, this form of market participation that is similar to de facto economic membership does not of course extend to the political realm, because the EEA-EFTA states have only limited access to EU decision-making forums; they are barred from participation with co-decision rights in the European Council, the Council and the EP.

[37] For Iceland's agreements with the EU, see https://ec.europa.eu/trade/policy/countries-and-regions/countries/iceland/ (accessed 26 June 2020).

To illustrate with reference to Norway, within the framework of the EEA Agreement, Norway has a number of experts in EU bodies and committees, especially under the Commission (NOU 2012: 2, 824, 829–830). In issues regulated by the Schengen agreement, Norway has the right to participate in meetings (without voting rights) in the Council and has representatives in the committees under the Council. The issue of access is raised with every new arrangement that Norway signs with the EU. The EU crisis combatting measures in the areas of financial services and banking regulations are a case in point. As the Norwegian government noted:

> In order to ensure uniform surveillance and application of the legislation in the financial services field, representatives of the EFTA Surveillance Authority and of the national competent authorities in the three EEA-EFTA States shall participate to the fullest extent possible, without voting rights, in the Boards of Supervisors of the EU ESAs and their preparatory bodies. The EU ESAs shall also participate to the fullest extent possible, without voting rights, in the work of the EFTA Surveillance Authority and its preparatory bodies in so far it is related to their activities.
>
> (European Council 2014: 3)

The Norwegian Parliament has six representatives in the EEA Parliamentary Committee, gets access (through invitation) to the EU's system of interparliamentary coordination (COSAC), and has the right to be present in the interparliamentary committee on foreign and security policy. There are also explicit measures taken by Norway to get better access to the EU system. For instance, the Norwegian Parliament has an office in Brussels that is located in the EU Parliament. The Norwegian EU Delegation in Brussels understands itself as a spokesperson for Norwegian interests, and Norwegian regions and local government bodies have got representatives present in Brussels.[38] The same applies to various business and trade union interests.

The fact that the EEA-EFTA states have comprehensive rights and obligations without participation in EU decision-making suggests that the relationship is a matter of taxation without representation given that EEA-EFTA member states and Switzerland contribute to the EU budget and

[38] See https://osloregion.org/en/ (accessed 12 November 2020).

take part in EU programmes such as Horizon 2020 and Erasmus + as a crucial part of their integration in the Internal Market. The EEA agreement makes explicit this commitment: the EU and the EEA-EFTA States:

> [S]hall take the necessary steps to develop, strengthen or broaden cooperation on matters falling outside of the four freedoms, where such cooperation is considered likely to contribute to the attainment of the objectives of [the] Agreement, or is otherwise deemed by the Contracting Parties to be of mutual interest.
>
> (Article 78 EEA Agreement)

Under the EEA Agreement the financial contribution is calculated by applying a proportionality factor. Since 2011 the overall level of net contributions expressed in terms of commitments has increased. The EEA-EFTA commitment to the 2014-2020 funding period is approximately 3.22 billion euro according to forecasts made at the beginning of the period. Switzerland's contribution for the same period has been 2.54 billion euro.[39]

These observations suggest that the EEA-EFTA countries have not proven capable (or not even willing) of confining the incorporation to market-related issues. Their extensive market participation incorporates them in the broader legal and socio-economic order that the EU has been constructing over time. The distinctive feature of the form of affiliation that they have chosen is akin to voluntary hegemonic submission (Eriksen and Fossum 2015). The EU is not set up to be a hegemon, but some of its relations to (non)members resonate well with hegemony.

To what extent is the case of Switzerland different from the situation facing the three EEA-EFTA countries Norway, Iceland and Lichtenstein? Formally speaking the main difference between the arrangements that the EEA-EFTA states have forged with the EU and the arrangement that Switzerland has forged is that the former is multilateral whereas the Swiss

[39] See https://www.europarl.europa.eu/RegData/questions/reponses_qe/2017/007891/P8_RE(2017)007891(ANN1)_XL.pdf (accessed 4 November 2020).

arrangement is bilateral. The EEA-EFTA countries participate more extensively in the EU's internal market than does Switzerland. Baur notes that:

> Switzerland only participates in the internal market with regard to free movement of persons and air transport. However, Switzerland does not participate in the internal market with regard to free movement of goods (except for those which are covered by the mutual recognition agreement), nor in the internal market for capital or services, except for those covered by the Agreement on Free Movement of Persons (AFMP). In these areas, it does, however, have access to the internal market according to FTA or WTO terms.
>
> (Baur 2019: 25)

What the Swiss and the EEA-EFTA states share is that each mode of EU affiliation is based on a broad range of agreements. Norway for instance has well over 120 agreements with the EU.

Switzerland's EU relationship is based on two sets of bilateral agreements, which are labelled bilateral I (entered into force in 2002) and Bilateral II (signed in 2004 and gradually implemented since). These are formally speaking *static sectoral agreements*, which add up to 20 main and over 100 secondary agreements, without an overarching structure binding them together. The agreements in Bilateral Package 1 are tied together with a so-called Guillotine Clause that makes the agreements dependent on each other. For instance, Article 36 (4) of the agreement on air traffic states that 'the seven agreements referred to in paragraph 1 shall cease to be applicable six months after receipt of the notification of non-renewal'. In this connection, it is useful to recall that also the Schengen and the Dublin agreements are tied together in this manner. The agreements further have provisions for the inclusion of new legislation into the agreements, and the right of the other party to adopt safeguard measures if a party refuses to agree to the inclusion of new legislation. Although formally reciprocal, the provisions are mechanisms to include new or amended EU legislation in the agreements.

Switzerland's EU relationship is, however, quite dynamic. Appendix II and III provides an overview of Switzerland's dynamic adoption of EU law developments, and the operation of the Swiss dispute settlement procedure.

The EU has long been quite dissatisfied with the Swiss arrangement and prefers an arrangement as close to the EEA agreement as possible. After close to four years of negotiations, the two parties were able to reach an agreement and released a draft Institutional Agreement (IA) to clarify and facilitate Switzerland's access to the single market. The economic importance of such an agreement should not be understated: one in three Swiss Francs are earned through trade with the EU, Switzerland is the EU's third largest trading partner – after the U.S. and China – and the EU is Switzerland's first trading partner and 1 500 000 jobs depend on Swiss exports to the EU.

The IA applies to five pre-existing bilateral market access agreements, signed in 1999, as well as to future agreements. The five pre-existing agreements cover the free movement of persons, air transportation, rail and road transportation of people and goods, agricultural goods and mutual recognition of conformity of goods. Future agreements could include the agreement currently being negotiated on electricity and other issue-areas.

The IA establishes institutional mechanisms to address (1) how EU law is implemented in Switzerland, (2) how the application of agreements is monitored and (3) how disputes are to be settled in the case of a disagreement. On the first point, the automatic adoption of EU law in Switzerland is explicitly ruled out in the IA. Appendix II and III, taken from a brief written by the Swiss Directorate for European Affairs (DEA), outlines the implementation process for EU law in Switzerland.[40] On the second point, the IA determines that Switzerland and the EU are both independently responsible for the application of market access agreements on their territory. On the third point, Appendix II, taken from the same source, outlines the full dispute settlement mechanism. The IA establishes an arbitration panel which ultimately rules on the dispute and can decide on potential proportionate compensatory measures. Finally, the IA establishes a horizontal joint committee to ensure the proper functioning of the agreement and provides for the establishment of a joint parliamentary committee, which can issue reports and resolutions.

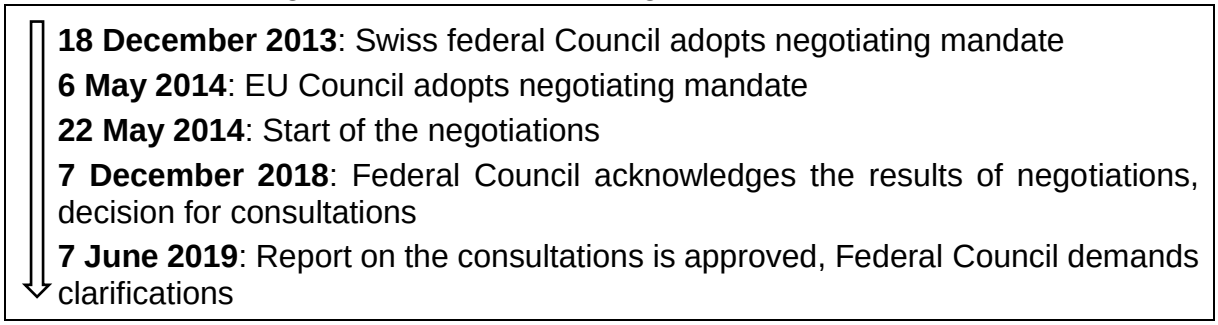
[40] See https://www.eda.admin.ch/dam/dea/en/documents/abkommen/InstA-Wichtigste-in-Kuerze_en.pdf (accessed 11 November 2020).

The IA provides Switzerland with a number of specific exemptions for the dynamic adoption of EU law, namely confirming existing special arrangements for overland transport, agriculture and the coordination of social insurance systems.

The IA outlines the legal framework for state subsidies in Switzerland and the EU, to ensure a level playing field between countries. The provisions are limited to non-directly applicable principles establishing a framework under which concrete measures can be taken in specific sectoral agreements. Additionally, each authority is responsible for monitoring its state subsidies independently, on the condition that the Swiss system is equivalent to that of the EU.

Finally, one of the cornerstones of the agreement concerns the free movement of labour. The IA states that Switzerland must adopt relevant EU law relating to the posting of workers within three years of its entry into force. It is the EU's view that general exemptions in the free movement of labour are not aligned with its laws, so none are provided in the IA.

Box 1: Timeline of negotiations for Institutional Agreement between Switzerland and the EU



Source: Swiss Directorate for European Affairs[41]

The draft IA was acknowledged by the Swiss Federal Council on 7 December 2018, but not signed. In fact, the Council sent a letter to former President of the European Commission Jean-Claude Juncker on 7 June 2019, stating its willingness to enter into the IA, which it considers to be in the interest of Switzerland, but explaining that the agreement will have to pass a popular referendum before it is signed. As such, the letter

[41] See https://www.eda.admin.ch/dea/en/home/europapolitik/chronologie.html (accessed 5 November 2020).

highlights the three following issues that would need to be clarified in order for the IA to get a majority approval in a Swiss popular referendum:

1. The provisions of the IA will not apply to the existing Free Trade Agreement, for which Switzerland is a signatory;

2. Switzerland will be allowed to keep its national policy on salary protection;

3. No provision of the IA can be interpreted as an obligation for Switzerland to implement the directive on free movement of citizens in the EU, and any implementation will only be possible via negotiations between the two parties.

The EU has stated that it is unwilling to reopen negotiations, and as such, clarification of these points will have to be done based on the framework of the current agreement. An important reason for the EU's firmness pertains to the fear that concessions to Switzerland could spill-over to the EU-UK Brexit negotiations.

Commission President Ursula von der Leyen and President Simonetta Sommaruga had a bilateral meeting on 20 January 2020 in Davos. Ms von der Leyen underlined the importance of this agreement for Swiss-EU relations, and Ms Sommaruga reiterated that the Federal Council intended to sign the agreement, pending clarification on the three issues stated above. Switzerland stated that, in spite of both parties' willingness to conclude the agreement, some flexibility was needed. It also made clear that its financial contributions to select EU states was 'conditional on the absence of discriminatory measures […] on the part of the EU'.[42] The parties agreed to intensify cooperation on an informal expert level. It was announced that after the UK ceased to be an EU member (31 January 2020), the bilateral agreements between the EU and Switzerland would apply also during the transition period (i.e. until 31 December 2020).

On 27 September 2020, Swiss citizens have been called to vote in a referendum on whether or not to withdraw from the agreement on the free movement of persons with the EU. An end to free movement would

[42] See https://www.eda.admin.ch/dea/en/home/aktuell/medienmitteilungen.html/content/dea/en/meta/news/2020/1/20/77852 (accessed 4 July 2020).

result in around 450 million EU citizens losing the right to live and work in Switzerland without any formal restrictions, and would also affect Swiss who want to live and work in the EU. If the 'yes' option wins, almost all bilateral agreements with the EU will be endangered by virtue of a 'guillotine clause', by which the EU can cancel all bilateral agreements with Switzerland if one of them is terminated unilaterally. (Schwok 2020). A yes result would have put the EU-Switzerland relationship back on the agenda, as a renegotiation of the Swiss-EU agreement on the free movement of persons would be needed to overcome this situation. The Swiss Instead, preliminary results show that it was rejected by a clear majority (62-38 per cent).[43]

If we consider the unique Swiss form of sectoral bilateralism in relation to the EU's conditionality-access/participation nexus, where EU membership gives full co-decision and full market participation, we see that Switzerland's EU arrangement is based on a different calculus, also from that of the EEA-EFTA states. Formally speaking, Switzerland's arrangement appears to offer more scope for retaining state and popular sovereignty in return for a more limited form of market participation. An obvious difference between the Swiss arrangement on the one hand and that of the EEA-EFTA states is that the Swiss EU affiliation is less hierarchical since there is no set of supranational arrangements that regulates it. Nevertheless, if we look at practical reality we see that the Swiss-EU relationship, it has been shown, is quite dynamic (Vahl and Grolimund 2006).

Analysts have noted that 'Swiss bilateralism – while apparently more tailored – does not necessarily imply that the EU exerts less influence on Swiss policies that it does in the formally more constraining EEA' (Lavenex and Schwok 2015: 49). There are significant functionalist pressures that emanate from close patterns of interdependence. Swiss authorities have since the late 1980s operated with the doctrine of 'autonomer Nachvollzug', which refers to autonomous adaptation and represents a policy of voluntary alignment with the EU. This doctrine '[…] stipulates that each new piece of legislation is evaluated with respect to its compatibility with EU norms' (Lavenex 2009: 552). In a similar manner,

[43] See https://www.ft.com/content/5a642ce6-1a76-460c-9857-b880b0fb7bc0 (accessed 28 September 2020)

Alfred Tovias noted more than ten years ago that 'Switzerland has had an EC reflex for more than a decade now and tries to shadow EU moves autonomously. Because this process is invisible and silent, it is frequently but wrongly ignored' (Tovias 2006: 215).

EU-affiliated states that do not qualify for EU membership

In this category, following Sieglinde Gstöhl (2015), we find four main forms of affiliations. These are: the European Neighbourhood Policy (ENP), Turkey's customs union, the position of the European small-sized countries, and sectoral multilateralism such as the Energy Community Treaty. In the following, our brief overview covers the three first affiliations, not the sectoral energy-based one.

The EU's Neighbourhood policy (ENP) was initiated in 2004, and its design 'clearly followed the EU's experiences with enlargement' (Gstöhl and Phinnemore 2019: 13). These authors depict the 'colour revolutions' in Georgia and Ukraine in 2003-2004 and the EU's 'big bang' Eastern enlargement in 2004 as a kind of critical juncture that produced the ENP. Additional factors triggering the ENP were enlargement fatigue and the notion of the EU as a hub for developing the arrangement of 'sharing all but institutions', which originated as early as 2002.

The ENP policy was based on the two principles of conditionality and differentiation, with the European Commission noting that '[t]he ambition and pace of development of the EU's relationship with each partner country will depend on its degree of commitment to common values, as well as its will and capacity to implement agreed priorities' (European Commission 2004: 8, cited in Gstöhl and Phinnemore 2019: 13). At present, the EU works with 16 partners: its immediate neighbours by land or sea – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine.

In these cases, EU membership cannot be the reward for undertaking particular domestic institutional or policy reforms. Instead, the ENP provides Eastern and Southern Mediterranean countries with enhanced preferential trade relations, they receive financial and technical assistance and 'the prospect of a stake in the EU Internal Market based on legislative

and regulatory approximation, the participation in a number of EU programmes and improved interconnection and physical links with the EU' (Gstöhl 2015: 18).

Agreements between the EU and each partner country are established bilaterally, which allows for stronger differentiation between agreements. To date, 12 action plans have been adopted, with very varied content, from technocratic, functionally oriented low politics agreements on aviation, to more controversial issues regarding immigration controls. In the absence of the leveraging card of EU membership, and as a result of the ENP countries' different degrees of interest in developing deeper forms of association with the EU, the application of conditionality in ENP agreements has been less straightforward than for the EU enlargement negotiations. Inconsistencies in the EU's approach to each of these neighboring countries have been highlighted (Börzel and Lebanidze 2017; Lavenex 2008).

The relationship with Turkey is one of the most distinctive that the EU has established with external countries. Turkey applied in 1987 to join the European Economic Community, following an earlier association agreement dating back to 1963. Since 1995, Turkey and the EU have established a Custom's Union which grants Turkey only selective access to the EU's internal market - this does not include services. Turkey has no say on the decisions affecting it, and lacks reciprocity with regard to EU trade agreements with third countries.

Since 1999 Turkey is considered a candidate country to join the EU, and in 2005 accession negotiations were initiated upon the Commission's assessment that Turkey then sufficiently fulfilled the Copenhagen political criteria (Aydin and Keyman 2004). However, these negotiations are effectively frozen: of the 33 chapters of the negotiation, only 16 have been opened, and in only one area (science and research) has there been an agreement. The EU has considered that Turkey does not meet the Copenhagen criteria on several key counts, with acute problems remaining in various areas such as minority rights, fundamental freedoms (in particular the freedom of expression), and the judicial system.[44] The

[44] See https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf (accessed 4 November 2020).

Cyprus dispute has also hampered the negotiations, Turkish seaports and airspace have been closed to Cyprus despite the demands of the Custom Union agreement (Aydın and Keyman 2012). From 2013 onwards, the more salient negotiations between the EU and Turkey have concerned the thousands of people seeking refuge in Turkey from Syria. A Joint EU-Turkey Action Plan was agreed in October 2015 and an EU Facility for Refugees has been set up in Turkey[45]. No progress has been made on the accession of Turkey to the EU, but, despite the freezing of negotiations, the EU has not been able to decide on whether to withdraw the enlargement offer.

The EU's relations with the small-sized countries is akin to what Gstöhl (2015: 862) terms an 'absorption model'. This is the most asymmetrical relationship that the EU has developed with non-members because it is about a direct form of EU guided and EU led norm and rule transfer to the affiliated states.

Summary

This chapter has provided a brief and somewhat lopsided overview of the EU's different affiliations with non-members. The chapter also briefly discussed the EU's affiliations with applicant states. It showed that these states stand out because they are in the 'waiting-room' for EU-membership and are assumed to adopt the entire EU acquis upon entry as EU members. That has not precluded forms of EU differentiation, for instance in connection with the fact that some member states restricted certain forms of new members' access for certain periods of time, and due to the fact that the EU also has specific conditions for inclusion in the Eurozone and Schengen that a number of new entrants still do not fulfil. The chapter showed the limits to EU conditionality in the sense that the process of membership vetting did not transform the acceding members to such a degree that backsliding would be impossible. Nevertheless since much of the backsliding took place well after these states had become members, the question is whether the EU has the requisite ability to keep members in check.

45 See https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en (accessed 4 November 2020).

The remainder of the chapter was devoted to what Gstöhl and Phinnemore (2019) have labeled as privileged partnerships. This group of states consists of EFTA states that qualify for EU membership on the one hand and states that do not but nevertheless have formed close – privileged – partnerships with the EU on the other. These arrangements vary as noted by Gstöhl (2015) along a number of dimensions: narrow (sectoral) versus broad (many sectors); bi- or multilateral; based on a single-pillar or a two-pillar system; *acquis* import can be *static* with regard to a given number of norms identified at the time of an agreement, or it can be (partly) *dynamic* in terms of an incorporation of future *acquis*. They also range from near-complete participation in the EU's internal market (EEA-EFTA states) to partial forms more akin to what we have referred to as access (level three on the access-participation scale in Table 1 above).

The picture we get is one of a composite set of arrangements that are set out to reconcile the EU's onus on ensuring internal cohesion and preventing fragmentation through simplifying the EU's relations with non-members. In principle, that can be done through closing borders and thus preventing external centrifugal pulls (a typical statist measure). Or conversely through opening borders so that non-members gain access but on the condition that they comply with EU norms and rules. The easiest way for the EU to do so is to opt for as extensive an EU norm and rule export as possible. At the same time, there is in the EU a clear recognition that extensive rule export and the rights and obligations that come with that have limits: non-member states' ability and willingness to incorporate and abide by these vary considerably. From the non-members' perspective the onus is on finding a viable balance between EU access/participation on the one hand and national sovereignty on the other. Market homogeneity implies a measure of supranational surveillance, enforcement and dynamic adaptation to the *acquis*, which encroaches upon national sovereignty. Nevertheless, as was seen in the case of Switzerland, the asymmetry in relations shows up whether there is a supranational system of enforcement in place or not. The Swiss case suggests that the calculus is complicated by the fact that, as Baur (2019) notes, there is an important difference between internal market access and internal market participation. It is not clear that a less hierarchical surveillance system based less on internal market participation and more on market access

necessarily yields so much more national room of manoeuvre. This is obviously an important matter with regard to Brexit.

This chapter has also shown that formally speaking the market access – market participation distinction does not correspond with formal mode of affiliation, which when considering the extensive scope of market participation that EEA members have would suggest EU membership. There are two main reasons for this discrepancy in the EU. One is as noted that non-members can have full market participation but not political participation with co-decision power. The separation of political and economic participation marked the need for a distinct level two on our access/participation scale. The other reason is that formally speaking the EEA agreement is not based on an institutional arrangement that ensures a high level of acquis export. Formally speaking the EEA agreement is a two-pillar arrangement that is supposed to protect the EEA-EFTA states against EU law having direct effect and supremacy. That is amplified by the fact that EU norm and rule import requires agreement among the EEA-EFTA states; hence implying that these states have wiggle-room. Had they had a lot of wiggle-room in their actual dealings with the EU, we would have had to modify the claim that the relationship is guided by the notion of conditionality. Nevertheless, as we have also seen in practice the direction is pretty close to one-way: from the EU to the EEA-EFTA states. The latter score high on EU compliance because the EEA states, Norway in particular, are concerned with assuring EU internal market participation, as well as access to/participation in almost as wide a range of EU activities as possible. Note here also that the so-called reservation right in the EEA agreement is not a veto right. It allows the EEA_EFTA states to prevent a given piece of EU legislation from operating in the EEA-EFTA states; these states cannot block the piece of EU legislation (that has been passed at the EU-level before it reaches the EEA institutions). The EEA reservation right has never been used. Other arrangements such as Schengen have so-called guillotine clauses which means that the entire agreement can lapse in case of non-compliance.

The spirit of conditionality therefore applies across the board to the relations the EFTA nations have with the EU, even if conditionality is more a reflection of actual practice than EEA design.

Finally, the factors that shape how EU affiliation arrangements operate in practice extend beyond the nature of the legal and institutional arrangement and even beyond the degrees of correspondence between the EU and the non-member. Political and cultural factors matter greatly, not the least how a non-member's political system and civil society handle this mode of affiliation. This becomes readily apparent when we consider that in a multilevel system where members participate in decision-making at the central level, they are able to bring their concerns directly to the attention of the other members, and insofar as they have veto power can compel the others to take their concerns directly into consideration. That is not the case with a non-member however many reciprocal rights and obligations there are.

Lacking participation in EU decision making and lacking effective means for addressing their grievances in common, the non-members have to sort out their issues and grievances domestically. Under conditions of asymmetry that generally means that they need to develop sorting mechanisms that enable them to live with those issues that they cannot influence, and means for dealing with those that they can. This requires a certain level of state capacity and is a difficult balancing act. It is difficult to think that it can be performed well unless there is a high level of trust between the EU and the non-member. That type of trust however as the Norway example shows very clearly is based on active measures for *de-politicising* the most controversial aspect of Norway's EU affiliation, namely the question of EU-membership (Fossum 2010).

These observations on the one hand confirm the merit of the conditionality – access/participation nexus for understanding non-members' EU affiliations, including their range of variation. On the other hand, they confirm the democratic problems associated with arrangements of highly lopsided participation: involvement in the single market but not in political decision-making. Finally, they show that there are specific political-cultural conditions that are necessary for states to be able to live within these conditions that are difficult to export. The next chapter on Brexit will show that these particular political-cultural conditions find barren soil in the UK.

Table 2: Overview of basic principles for the EU's external and internal relations

Global level	Promote binding international collaboration wherever possible (tie down great powers and nullify power differentials)
EU aid and democracy promotion beyond Europe	Rights-based (and other forms of) conditionality in connection with aid and democracy promotion
Europe: relations with affiliated non-members	The conditionality – access/participation nexus in relation to affiliated non-members
EU: internal relations	Participation in the relevant decision-making forums for member states (and their citizens) – this is gradated in relation to how many policies/institutional arrangements that they are participating in, in line with differentiated integration

The argument thus far suggests that a state that leaves the EU and seeks to retain certain rights and obligations will have to relate to the EU's conditionality - access/participation nexus as have the non-members in this chapter: if the former member wants continued access to EU rights and EU provisions, such access comes with the obligation to abide by the conditions that the EU has established.

In the final portion of this summary, we sum up the basic principles (see Table 2) for the EU's external and internal relations, as they were presented above.

The first dimension recognises international anarchy (absence of an overarching authority capable of issuing binding rules) and a fundamental asymmetry in great-power relations, as spelled out in Chapter 2. The EU is trying to reduce the asymmetry it experiences in relation to other major powers through promoting binding international rules and agreements. On the one hand this can be related to the EU's basic principles and the onus on ensuring internal – external consistency, as a precondition for instituting democracy in interstate relations. On the one hand, it can be related to the EU's built-in asymmetry: an economic elephant and a military-political mouse, and the fact that EU power is far less fungible (transferable) across policy realms than is for instance US power. Promoting binding international rules and agreements appears as

a central plank in the EU's approach to dealing with great power asymmetry and arbitrariness.

The second dimension reflects a different type of asymmetry, this time in the EU's favour: countries that depend on the EU are subject to EU-set conditionality rules and provisions. The EU can do it because there is asymmetrical (inter)dependence in the EU's favour.

The third dimension is again about asymmetry in the EU's favour in its dealings with affiliated non-members. In this case the EU appears as an economic giant and its lack of military and other hard powers matters less. In addition, these countries depend on and want something from the EU. So conditionality is again an important operative mechanism. In addition, the EU allows many of these states (based on trust and compatibility) to participate in EU policies and arrangements, but without real participation in political decision making, of course. Since these relations vary on access and participation we get a conditionality – access/participation nexus that is unprecedented.

The fourth dimension is about EU internal affairs. What first and foremost distinguishes EU membership is that the EU's member states and citizens have rights to participate in EU decision-making. In a range of issues – notably core state powers issues – member states hold veto rights. The EU is marked by differentiated integration of members, and reflects that member states hold different visions of what type of political system the EU should be: a collection of states; a fledgling state; or some type of mixed regime.

Chapter 5

What is distinctive about Brexit?

Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in

> *decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*
>
> *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*
>
> *(TEU, Article 50)*

On 21 January 2020, the UK became the first country to have left the EU. Exiting from the EU is thus an exceptional event. There are cases of subnational entities that have withdrawn from the EU, such as Algeria in 1962 after its declaration of independence, and Greenland after a referendum on 23 February 1982, when it decided to leave the then European Communities (EC). However, none of these exits is equivalent to Brexit, as neither Greenland nor Algeria was a sovereign EU member state but a part of an EU member state.[46] Post-Brexit UK's status as an ex-member state has no precedence (Lord 2015). Given that the EU is a political system (even if it is not a state), we cannot place Brexit in any known category of secession.

From the standpoint of EU differentiation, a critical issue is what Brexit will do to EU internal coherence and unity. At the time of writing, it is fair to state that the EU has sustained a unified position in the Brexit negotiations under the leadership of Michel Barnier. The same applies to the EU's position on the terms of future relations with the UK. To cite Brigid Laffan, the EU's response to Brexit was rapid, united and effective.[47]

In theory, of course, there are several ways in which Brexit could have affected EU unity: Brexit could increase the range of EU affiliations with non-members by adding yet another mode; Brexit could affect existing forms of EU affiliation with non-members; Brexit could increase or reduce

[46] To make Greenland exit the EC, the territorial jurisdiction of the Treaties was reduced through a Treaty change ratified by all member states, Greenland became an 'associated overseas territory' (Article 204 TFEU) with special arrangements with the EU. Algeria stopped being considered a French department with the independence proclamation.

[47] Brigid Laffan in her Yves Mény annual lecture on 30 September 2020: https://www.youtube.com/watch?v=hhHXCiOSd0I&feature=youtu.be (accessed 5 November 2020).

the EU's ability to shape its surrounding states by aligning them to its norms, rules and values. A key issue, as noted above, was whether Brexit would change the EU's conditionality – access/participation nexus.

We noted above that the EU's external role is Janus-faced in that the EU is more vulnerable in relation to big powers and market actors than would be a state of its size and, at the same time, the EU is a market power with leverage to align smaller surrounding states with its rules, norms and values. Since the EU–UK relationship is less asymmetrical than the EU's relations with the other affiliated non-members, the question was where (or even whether) the UK post-Brexit can be placed on the EU's access/participation scale, and the EU's ability to apply conditionality is to a large extent dependent on EU-favourable asymmetrical relations. Without an agreement on the future relations, power politics, asymmetries and forms of vulnerability come to the fore.

At the time of writing in October 2020, the future relation between the EU and the UK has still not been established. The ongoing negotiations are very much on the kinds of trade relations and market access. The EU is concerned with how to ensure that the conditionality-access-participation links are well calibrated. The EU has put a strong emphasis on ensuring that the UK's exit from the EU is conducted in accordance with predictable rules and procedures, ensuring that no precedent is set for an attractive outside option to EU membership.

We will address the formal affiliation first and thereafter the question of asymmetry and vulnerability. With regard to the prospects for a formalised UK post-Brexit arrangement with the EU, it matters that the EU has a formalised procedure for exit. The EU from the beginning of the negotiations has put in place a strong and well defined process based on the EU treaty provisions. The Treaty of Lisbon, enacted on 1 December 2009, introduced for the first time a procedure for a member state to withdraw voluntarily from the EU – Article 50, as listed above. As is clear from the above, Article 50 does not establish 'substantive conditions' for a member state to leave the Union, i.e. the member state does not need to provide reasons to justify why it wishes to stop being a member of the Union, and

the member state can come to that decision by means of its own constitutional provisions.[48]

Article 50 does not specify what type of new affiliation the withdrawing member state will have. Article 50 stipulates that the new affiliation will be the result of a process of negotiation, for which Article 50 indicates the procedure quite briefly. Article 50 states that the Union shall negotiate the terms of the withdrawal with the departing state, *'taking account of the framework for its future relationship with the Union'* (authors' italics). When a state withdraws from the EU, the EU Treaties cease to apply in the state concerned, extinguishing the rights and obligations deriving from the Treaties. In addition, agreements between the EU and third countries or international organisations also cease to apply to the withdrawing state. That of course also means that the UK left the EEA at the same time as it left the EU, even if it did not comply with the notification requirement in the EEA agreement. As concerns domestic UK law, national acts adopted to transpose or implement EU law remain valid until the national authorities decide to amend or repeal them. That is important given that the UK, throughout its 37 years long EU membership, has incorporated roughly 14.000 EU legal acts and provisions. EU-derived law makes up at least one-seventh of UK law (Chalmers 2016).

Thus, even if no state has ever left the EU before the UK decided to do so in 2016, the EU had a procedural framework in place – however rudimentary it was. The same cannot be said for the UK when the referendum result came in on 23 June 2016. The UK political establishment was utterly unprepared for a 'Yes' vote. The wording of the UK referendum question was itself clear, but it could not resolve the question of whether voting 'No' to EU membership and exiting the EU actually entailed that the UK would no longer be subject to the EU's norms and rules (Fossum 2016). It was not clarified in advance what kind of relationship the UK would have

[48] Strictly speaking we could say that there is no explicit stipulation that spells out how a state that considers exiting the EU should relate to the other members. At the same time, if we consider Article 4.3, which refers to the principle of sincere cooperation, that provision applies as long as the state is subject to the EU treaties. However, one could argue that the UK interpreted this principle narrowly in the case of the Brexit referendum, in the sense that it failed to provide most of the EU citizens that were resident in the UK with voting rights in the Brexit referendum.

with the EU after it had taken the formal decision to leave the EU. That set in motion a long and extremely tangled process of working out what Brexit entailed.[49]

A crucial moment was 29 March 2017 when Theresa May wrote to European Council President Donald Tusk to notify him of the UK's intention to leave the EU, hence asking to trigger Article 50.[50] When the deadline lapsed two years later, the UK needed several more extensions and a change of Prime Minister to exit, in other words, while the EU reacted quickly, it took the UK several years to figure out what it wanted from Brexit. That marked the end of the first stage of negotiations, or what is often referred to as the 'divorce settlement'. It meant that on 1 February 2020 the United Kingdom withdrew from the European Union and from the European Atomic Energy Community (Euratom). Together with the Withdrawal Agreement, the parties agreed on a political document that committed them to negotiate 'a new partnership'[51] during the transition period. According to said document, the new partnership will include provisions on basic values and principles; on governance; on trade; on law enforcement and judicial cooperation; and on foreign policy, security and defence. But as recent developments have shown (in September 2020), and that we will return to below, it cannot be taken for granted that such agreements will be respected.

If we look back to the beginning of the Brexit process, we see that the EU's structuring of the negotiations mattered a lot to the early outcomes. The EU insisted on the need to conduct the negotiations in two stages: negotiate the divorce settlement first, and then the new terms of association; and monitor progress in stage one before the second stage was activated. In this connection, it is noteworthy that the EU talks about and

[49] For a timeline of events, see http://researchbriefings.files.parliament.uk/documents/CBP-7960/CBP-7960.pdf (accessed 11 September 2020).

[50] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf (accessed 11 September 2020).

[51] Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland COM/2020/35 final https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52020PC0035 (accessed 11 September 2020).

treats Brexit as a divorce in terms more similar to the breakup of a state rather than as the voluntary withdrawal of a member from a loosely knit confederation of states (Fossum and Graver 2018).

The EU's preference has always been for the UK to sign up to an agreement that is as similar to the EEA agreement as is possible, given that the EEA agreement is a kind of template for countries that qualify for EU membership (which the UK certainly does). The EU's chief negotiator Michel Barnier said back in 2017 that: 'The UK has chosen to leave the EU. Does it want to stay close to the European model or does it want to gradually move away from it? The UK's reply to this question will be important and even decisive because it will shape the discussion on our future partnership and shape also the conditions for ratification of that partnership in many national parliaments and obviously in the European parliament. I do not say this to create problems but to avoid problems' (European Commission 2017).

In terms of the role of norms and rules, from the EU's perspective it is obvious that unlike all negotiations that the EU has conducted with other partners, the EU-UK post-Brexit affiliation is about *establishing processes to manage the divergence* between the UK's and the EU's policies. The starting point is the fact of almost full alignment between the parties; the question is how much divergence will follow.

In this connection, it is important to track in detail how the UK relates to the EU-law in place in the UK. As a member of the EU since 1973, the UK has been one of the main players in the construction of the EU as we know it today. Although often portrayed as an 'outsider' to the EU, particularly because of its non-participation in the Schengen agreement and the European Monetary Union, the UK has been an active player and a pace-setter in the EU. The UK was a major player in the development of the EU's single market, championed the EU enlargements in 2004, 2007 and 2013 (Ker-Lindsey 2017), and defined much of the national responses to the 2008 financial crisis (Quaglia 2009). Although the UK was the most outvoted member state in the EU Council from 2004 to 2016 (particularly from 2010 to 2016), it supported more than 97 per cent of the EU laws adopted in the same period (Hix, Hageman and Frantescu 2016). As for the adoption of EU policies, the UK has been a competent implementer of the *acquis communitaire* (Falkner et al. 2005).

For a country with such strong existing convergence, an EEA agreement would involve a measure of dynamic homogeneity, which would mean sustaining the already established EU–UK norm and rule compatibility. It might be useful to note that the EU's stance is easier to put into practice than is the UK's because the EU wants the UK to remain EU-aligned as much as possible.[52] A less comprehensive agreement that does not include single market participation would raise questions of compatibility over time.

However, the UK has rejected the need to have full access to the EU's internal market and customs union (even if the Northern Ireland agreement, which was an uncertain compromise of different concerns, brings these issues up). Instead it has insisted on a distinctive relationship with the EU, which would have some parallels with the EU's agreement with Canada, or barring that, with Australia[53]. The UK government's own preference has been to negotiate agreements in a range of different fields, which would be a matter of picking-and-choosing those portions of the European collaboration that the UK wants to sign up to.[54] This pick-and-choose model is rejected by the EU.

During the negotiations, the UK and EU agreed on the terms of reference on the future relationship partnership defining a series of elements to guide the discussions, which include eleven negotiation groups divided according to policy areas, and a timetable of negotiating rounds.[55] At the time of writing this report, two months until the end of the transition

[52] The scope of the agreement matters to the subsequent process: a limited agreement that is within the realm of EU competence can be signed by the EU institutions exclusively; a more comprehensive mixed agreement requires ratification by all the EU's national and regional parliaments, as well.

[53] See https://www².gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu (accessed 16 June 2020) and; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf (accessed 11 September 2020).

[54] For an overview of the present status of the negotiations, see: https://www.iiea.com/wp-content/uploads/2020/04/EU-UK-Relationship-briefing.pdf (accessed 11 September 2020).

[55] See the Terms of Reference on the UK–EU Future Relationship Negotiations at https://ec.europa.eu/info/sites/info/files/terms-of-reference-eu-uk-future-relationship.pdf (accessed 11 September 2020).

period on 31 December 2020, there remains a considerable amount of unresolved issues to clearly define the type of relationship that the EU and the UK will have in the future.

On 18 March, the Commission published a draft for a proposed New Partnership with the UK[56] (henceforth, 'Draft Agreement'[57]). It covers all areas that have been negotiated so far.[58] On 15 April, the parties checked the status quo of the technical negotiations after having exchanged legal texts. Further meetings via videoconference were scheduled. Both sides agreed to prioritise the proper and timely implementation of the Withdrawal Agreement. On 15 June, Prime Minister Boris Johnson met the President of the European Council, Charles Michel, the President of the European Commission, Ursula von der Leyen, and the President of the European Parliament, David Sassoli. It was taken note of the UK's decision not to ask for an extension to the transition period, which will thus end on 31 December 2020.

In this sense, despite the efforts to advance on the negotiations, the possibility of not reaching a deal (often called 'hard Brexit') is very much alive. An EEA-type of arrangement now seems to be ruled out. This means that the UK will not be part of the single market as of January 2021. From the UK's point of view, this has the advantage of not having to accept free movement of persons and the rulings of the Court of Justice of the European Union (CJEU). Moreover, it also removes the obligation to contribute to the EU budget, an issue that has traditionally been very sensitive for the country.[59] The question then is what kind of trade arrangement will be found. Will it be a Canada-type deal? Will it even be a form of participation in the EU's Customs Union? If the UK remained in

[56] The document includes the negotiating guidelines of the General Affairs Council (25 February 2020) and the EU-UK Political Declaration of October 2019. See https://ec.europa.eu/info/sites/info/files/200318-draft-agreement-gen.pdf (accessed 20 May 2020).

[57] It is important to stress that this is a draft – written by the Commission – for a final agreement. It thus represents the view of the EU and has not been approved by the UK.

[58] See https://ec.europa.eu/commission/presscorner/detail/en/IP_20_447 (accessed 20 May 2020).

[59] See https://ukandeu.ac.uk/fact-figures/what-is-hard-brexit/# (accessed 4 July 2020).

the EU Customs Union, it would not be able to sign its own trade deals. Any benefit from existing trade deals would remain with a soft Brexit, but the UK would not be part of the negotiation of future ones.[60]

Much of the impact of Brexit on both the UK and the EU will depend on the agreement that the parties are able to reach on how to organise and regulate their future partnership. The first scenario, that an agreement is reached, is uncertain, and we do not know what such an agreement might contain. Conversely, the second scenario, a no-deal outcome, would come with significant costs (Wolff 2019). In addition, a no-deal outcome would have bearings on trust:

> Should the negotiations fail, one can easily imagine them descending into a vicious circle of mutual recrimination as each side blames the other for the fallout and a form of low-level trade war, fought out over fish, road and air travel, and financial services […] The absence of an agreement when transition ends will have severe practical, economic and diplomatic consequences.
>
> (Menon 2020)

The EU has made preparations for both scenarios. For the first, it has produced 'Readiness Notices' for around 40 different economic sectors.[61] In the Readiness Notices, the EU informs economic operators of how they might be affected after the end of the transition period. The EU outlines what the legal *status quo* would be – as this was set out in the Withdrawal Agreement. It also indicates the consequences for their activities if the EU and the UK reach a free trade agreement. The crucial point is that even the most comprehensive free trade agreement will not be equal to the sharing of the full EU *acquis*, to participation in the internal market and to membership in the customs union. Not surprisingly, then, 'there will be far-reaching and automatic changes and consequences for citizens, consumers, businesses, public administrations, investors, students and researchers as of 1 January 2021. These changes are unavoidable –

[60] See https://ukandeu.ac.uk/fact-figures/what-is-soft-brexit/ (accessed 4 July 2020).

[61] For each sector, see https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/future-partnership/getting-ready-end-transition-period_en (accessed 4 July 2020).

whatever the outcome of the ongoing negotiations' (European Commission 2020b: 30). These consequences will be even stronger in case of a no-deal.[62] The EU has then also sought to prepare for a no deal scenario.[63]

How vulnerable the EU will be vis-à-vis this new external neighbour and the degree of asymmetry of their relationship will depend on whether there will be an agreement; on the dynamics of the negotiations – especially if they unfold in a trust-building or trust-destroying manner (credibility of commitment), as well as on the broader patterns of power and vulnerability. Both parties exhibit certain vulnerabilities; hence outcomes will be affected by these. Here we examine the negotiations on trade and common defence policy – two key policy areas[64] – to identify the preferences of the UK and the EU, and the potential scenarios that might develop as a result.

Vulnerability and asymmetry

Vulnerability, as noted above, is a relational notion that refers to external risks and threats as well as internal coping mechanisms. It was specifically applied by Keohane and Nye (2001) to contexts of complex interdependence. At the time of the Brexit referendum there were concerns that the UK's decision to leave the EU would spark similar moves across the EU, but these have not materialised. In addition, the EU has thus far adopted a unified stance in the Brexit negotiations. Nevertheless, the long-term implications hinge on a range of factors, such as whether there will be an agreement or not (how extensive an eventual agreement is, whether the parties comply with it); the depth and scope of mutual interdependence and interweaving; and internal factors and forces within the EU and the UK.

At this point, since we do not know whether there will be an agreement of not we cannot establish whether the parties will mobilise resources and

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62 EU's preparations: https://ec.europa.eu/info/sites/info/files/commission_implementing_acts_preparedness_and_contingency_march_2019_0.pdf (accessed 11 September 2020).

63 See https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5509 (accessed 11 September 2020).

64 As we will get back to in the below, foreign, security and defence has become excluded from the negotiations.

capabilities against each other or whether they will work out their relations within mutually agreed arrangements. The assumption is that the presence or absence of agreement has implications for the parties' psychological dispositions. Without this information, our assessment of vulnerability must be confined to a presentation of some of the terms of interdependence.

Trade policy

We will first consider the negotiations on trade established between the EU and UK, both for goods and for services. This is one of the most crucial aspects of the negotiations as a result of the 47 years of common market and the strong economic interdependence between the EU and the UK. We examine first the existing trade relationships between the EU and the UK to get a better understanding of the stakes, and then the different positions as expressed by the EU and the UK negotiators.

The EU is the UK's largest trading partner. The balance of trade for goods and services between the two partners in 2019 was from the perspective of the UK -72 billion pounds; while trade in services is in surplus for the UK (23 billion pounds), goods trade recorded a deficit of -95 billion pounds.[65] In 2018, the EU accounted for 43 per cent of all UK exports and 49 per cent of all imports. The degree of interdependence is large: Petroleum and petroleum products, the single largest export to the EU, accounts for 64 per cent of all UK exports of petroleum and petroleum products. For the EU, the UK is one of its most important trading partners after the United States and China. In comparison to other neighbour countries with which the EU has established close political and economic affiliations, such as Norway, Switzerland or Turkey, the volume of EU-UK trade exchange is much larger. Vehicles and pharmaceutical products are the largest EU exports to the UK, accounting for over 46 billion pounds in 2018. In services, the UK was the EU's largest trading partner.

With regard to food, 30 per cent of the food consumed in the UK (in 2017) came from EU countries, and 50 per cent from the UK itself. This makes

[65] See https://commonslibrary.parliament.uk/research-briefings/cbp-7851/ (accessed 11 September 2020).

the EU the most important food supplier to the UK (other foreign partners are marginal). UK food supply is dependent on imports:

> In 2017 the value of imports [from foreign countries as a whole, not only the EU] was greater than the value of exports in each of the broad categories of food, feed and drink except 'Beverages' which had a trade surplus of £1.71 bn, largely due to exports of Scotch Whisky'. The largest trade deficit is on 'fruit and vegetables.
>
> (UK Government 2018)

This strong interdependence suggests that both the EU and the UK would want to pursue deep and comprehensive agreements that absence of tariffs. But the reality of Brexit and the political onus on 'taking back control' has been reflected in negotiating positions. Attempts at striking a balance between preserving trade and retaining the right to unilaterally regulate certain aspects of economic activity has shifted a lot in the UK over time. For the EU, supranational institutions are necessary for market integration. For the UK, they represent a hindrance for national self-determination. In this sense, while they both have indicated willingness to reach some form of agreement, recent UK moves seem to have moved the spectacle of no further deal Brexit up on the probability scale. The two parties disagree on the degree of convergence to be achieved. The EU clearly does not want to accept a close trade relationship without a close a close alignment on standards where the UK would abide by EU rules. For its part, the UK appears to want a level of rights comparable to those enjoyed by EU member states but duties at a level of third countries and certainly does not want to align with EU rules. In conclusion, a key aspect of what is at stake in the negotiations hinges on the nature and status of the EU's conditionality – access/participation nexus.

In the Withdrawal Agreement, the UK and the EU made explicit their commitment for a 'Comprehensive Free Trade Agreement' (CFTA) establishing the rules for goods and services exchanges, without tariffs and quotas and the commitment to a level playing field. In doing so, both parties stated their willingness to establish a closer affiliation than a no-deal Brexit would entail. Indeed, absence of an agreement would make trade relations between the EU and the UK follow World Trade Organisation (WTO) rules. Under WTO rules, trade disputes between the

EU and the UK would be settled by international dispute settlement[66] and border management of goods must ensure the application, as Papazian (2018) states, of a 'non-discrimination principle', enshrined in Article I of GATT 1994. Such a principle is known as the Most-Favoured Nation (MFN) obligation and forces a WTO member to accord the same treatment to the other 163 WTO members, unless it has concluded a preferential trade agreement with one or several WTO members.[67] Should Brexit end with a no-deal, the MFN principle would apply to EU-UK trade. In the extension of that, it is important to recall that:

> [A] free trade agreement does not provide for internal market concepts (in the areas of goods and services) such as mutual recognition, the 'country of origin principle', and harmonisation. Nor does a free trade agreement remove customs formalities and controls, including those concerning the origin of goods and their input, as well as prohibitions and restrictions for imports and exports.
>
> (European Commission 2020c: 2)

While both parties share the view that an agreement on trade is necessary, the negotiations have already exposed the difficulties of reaching a compromise. For the UK government, no EU institutions and governance arrangements should play a role in the domestic legal order, and no obligation to be aligned with EU laws should apply.[68] The general impression is that the present UK government is bent on doing away with as much of the EU's conditionality – access/participation nexus as possible. The UK has proposed to agree on common standards on some goods only (e.g. agricultural products) and to address technical (non-economic)

[66] With reference to the borders between Ireland, Northern Ireland and the UK, a no-deal would trigger the WTO Most-Favoured Nation (MFN) Principle, which 'would prevent the UK from maintaining an open border between Northern Ireland and the Republic of Ireland (Papazian 2018).

[67] The MFN principle includes customs duties and any charges imposed on importation and exportation, but also rules related to the latter.

[68] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf (accessed 11 September2020) and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf (accessed 4 November 2020).

barriers to trade through regulatory cooperation. It has insisted on complementing the free trade agreement with a number of sectoral agreements, each with its own mechanism, which would fragment the dispute settlement mechanism. The UK does not want to accept the CJEU to have a say in the British legal system.[69] The problem is what to do if/when national standards (rules of origin) differ. The UK wants to commit to the goods standards that are in place in free trade agreements that the EU has with third countries, but this, the EU argues, would not be compatible with fair competition if links are very close.

In the Draft Agreement, the EU seems to accept the idea of complementing sectoral agreements – less so to downplay the role of the CJEU in the process of checking compliance. Interestingly, in the Draft Agreement published by the EU:

> [T]here is no express statement that the jurisdiction of the Court of Justice of the European Union applies. The possibility for UK courts to make a preliminary ruling request is left open (Article LPFS.2.6) in a section entitled 'Title III: Level Playing Field and Sustainability.
>
> (EU Law Live 2020)

Also, on some others issues, differences remain. Energy is a sector that the UK would like to regulate through an *ad hoc* agreement that provides autonomy over its energy policy. Here, while cooperation on nuclear energy is something that both parts aim to pursue, according to Andrews-McCarroll, the EU highlights its differences with the UK when stating that 'the EU is seeking a comprehensive partnership on trade and investment in energy, taking into account that the UK will be outside the EU internal energy market' (Andrews-McCarroll 2020: 5).

With regard to trade (but not only that), one of the most controversial issues in the Brexit negotiations was (is) the border between Ireland (part of the EU) and Northern Ireland (part of the UK). For Northern Ireland to stay in the EU's Customs Union and its single market is essential to the Irish economy and the peace process.

[69] The UK's reluctance to recognise the ECJ is also evident in law enforcement and judicial cooperation in criminal matters.

The new Withdrawal Agreement negotiated by PM Boris Johnson and the European Commission in October 2019 is a typical compromise but in essence keeps Northern Ireland in the EU's Custom's Union and single market while in appearance a different wording is found. The main difference compared to the first draft agreement is that now the UK as a whole exits the EU Customs Union, whereas some EU rules continue to apply to Northern Ireland. Thanks to this, the new 'Protocol on Ireland and Northern Ireland' avoids a hard border between the two parts of Ireland (and, thus, between the EU and the UK). Northern Ireland will have to apply the Union's Customs Code to the products it imports. As a consequence, customs controls on the whole Irish island will be avoided. Some controls (e.g. sanitary and phyto-sanitary) on goods imported to Northern Ireland will still need to be done. Most importantly:

> [N]o customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, […] unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing.
>
> (Official Journal of the European Union 2020: Article 5. 1)

The new Protocol establishes that four years after the end of the transition period and following consultations with the United Kingdom, the Northern Ireland Assembly can – by simple majority – consent or not to the continued application of EU law. If the Assembly votes for disapplication of EU law, the Protocol 'ceases to apply two years later'.[70] This procedure is repeated every four years. If the Assembly approves the continued application of EU law, the subsequent vote can take place only eight years after.[71]

[70] See https://www.bbc.com/news/explainers-53724381 (accessed 11 September 2020).

[71] See https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement/protocol-ireland-and-northern-ireland_en#main-elements-of-the-protocol (accessed 11 September 2020).

The negotiation on services trade exhibits specificities[72] that are distinct from the negotiations on goods trade, particularly as concerns financial services, which are of great importance to the British economy and to the City of London, in particular. It is no surprise, then, that in no other area is the UK as ambitious as in financial services. The UK aims to minimise barriers following the model of the EU-Japan trade agreement and the Canadian European Transatlantic Agreement (CETA). That would mean to set common standards beyond the ones set by the WTO.

The position of the EU departs from free trade agreements with third countries, i.e. the recognition that standards of regulation are substantially equal to the EU's and, thus, participation in the market is granted on the same terms as for member states. Usually, it is the Commission which determines and declares equivalence, but in some cases it can be left also to the member states. Supported by its specialised agencies (for instance, EBA, ESMA or EIOPA for financial services), the Commission takes equivalence decisions in the 'form of an implementing or delegated act,[73] in accordance with what is envisaged in the corresponding equivalence provision in the basic act'.[74] Equivalence might be declared fully or in part;

[72] In 2014, the service sector contributed for approximately 2/3 of both EU employment and value added (gross value added). The latter is defined as Gross Domestic Product (GDP) minus taxes on products plus subsidies on products. In the UK, services made up ca. 55 per cent of value added share, making the country rank third among EU Member States. It ranks even second on the employment share of market services (52 per cent). For detailed data, see https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_services_en.pdf (accessed 4 July 2020). More recent data also show the weight of services in the British economy. In 2018, the sector 'accounted for 81 % of total UK economic output (Gross Value Added) […] and for 84 % of workforce jobs in September 2019' (Tyler 2020). Of those numbers, the service sector is meant to include the retail sector, the financial sector, the public sector, business administration, leisure and cultural activities.

[73] On the difference between those acts, see https://ec.europa.eu/info/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_en (accessed 4 July 2020).

[74] See https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en (accessed 26 September 2020).

for a limited or unlimited period; and to an entire economic sector of a third country or only to a portion of it.

Equivalence is connected to but nevertheless distinct from passporting. Passporting is the principle according to which financial services companies of EU member states can – in principle on a permanent basis – conduct free operations within the territory of the EU (Christie and Wieser 2020) provided they 'obtain authorization from their "national competent authority"' (Nicolaïdis 2017: 25). If they do, they can act in another member state but remain 'under the sole supervision of their home country' (ibid.). Equivalence, in turn, is a recognition that regulation in another country is equivalent and therefore service provision does not need to be limited by additional regulation.

As becomes clear, equivalence is not a prerogative among EU member states, since there is unified regulation within the EU's single market. Instead, passporting exists between the EU and third countries. When the UK left the EU, it became a third country. This has three important implications especially in case of no-deal. Firstly, with third countries, there is no presumption of equivalence as between member states. Hence, the UK would not enjoy the privilege of full equivalence any longer. Secondly, equivalence applies across sectors and for specific cases: negotiating a 'full' equivalence would not be possible. Thirdly and crucially, unlike in the case of the EU, equivalence 'can be withdrawn unilaterally at a relatively short notice' (Christie and Wieser 2020: 1). To further complicate the issue, there is no commonly accepted definition of equivalence at WTO level. Hence, if the UK becomes a third country, it would need to agree on a definition with the EU. Passporting does not exist for third countries, as it is related to the concept of the single market. For the UK, losing passport rights means no freedom of service and freedom of establishment any longer.

The point is that the EU aims at unilaterally deciding on equivalence in financial services and will automatically withdraw equivalence after the end of the transition period (31 December 2020). Not surprisingly, the UK opposes unilateral removal of financial equivalence on the side of the EU. The UK's strategy is issue-linkage: concessions on a certain policy are

connected to demands on another one.[75] As it becomes clear, the EU and the UK try to reconcile the need for financial stability with their willingness to autonomously decide on equivalence (Christie and Wieser 2020). A possible solution could be 'to give full and unequivocal financial-sector equivalence for at least five years, which could only be withdrawn in the case of serious divergences by one of the partners' (Christie and Wieser 2020: 2). In the past, the EU has proved to be willing to withdraw equivalence, so also the UK would first need to pass its test: being a member state of the EU for many years will not give it a privileged treatment in that regard.

In the document outlining its negotiating positions, the UK government calls for stability, market integrity and consumer protection. Although recognising the need for 'regulatory cooperation arrangements', it stresses regulatory autonomy and the 'structured processes for the withdrawal of equivalence findings' (UK Government 2020: 13). Equivalence in financial services is stated as a negotiating objective, but within a framework of 'unilateral equivalence assessment' (ibid: 30). The EU's position, as outlined in the Council's directives on negotiation (25 February 2020), is even clearer. Each party shall retain regulatory and decision-making autonomy and 'the ability to take equivalence decisions in their own interest' (European Council 2020: 12). Equivalence decisions are considered a key instrument when cooperating on financial services. Thus, both parties agree on unilateralism in establishing equivalence mechanisms. It is also interesting to note that the whole cooperation on financial regulation and supervision remains voluntary.

On financial services, the EU and the UK recognise their 'structural interdependencies' as well as the structural interdependence of both

[75] For instance, there have been warnings of a fish-for-financial markets clash. See https://www.ft.com/content/cdf8af0a-40fd-11ea-bdb5-169ba7be433d) (accessed 11 September 2020). On fishing policy, the EU aims to keep in place quotas for the yearly amount to be exploited. However, the UK opposes this because it wants to become 'an independent coastal state, outside the Common Fisheries Policy'. See https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1553 (accessed 4 November 2020). The UK agrees, provided that quotas are renegotiated annually, as is the practice with Norway. Crucially, the UK states that it will no longer comply with the quotas that member states have under the Common Fisheries Policy.

parties with reference to finance (Kalaitzake 2020). Financial services are those developed in London given that at present there is no European counterpart that could replace the City. In addition to that, it would be suboptimal from a market perspective to 'split' the role of London among multiple financial centres in the EU. Moreover, European firms need access to London's financial services. For the UK, the financial market is a form of structural power considering the way it benefits the British economy (especially in terms of employment[76]) and its contribution to the GDP. In principle, this would give the whole sector a strong bargaining position vis-à-vis the government. As Baccaro and Pontusson (2016: 17) point out, 'EU states have amassed a trade surplus in goods to the tune of £138bn with the UK, offset somewhat by the UK's large (and 'price-insensitive') financial and business service exports'. Taken alone, the surplus of financial services was equal to the surplus of all other surpluses producing UK export sectors combined (Kalaitzake 2020). Size, market depth and available liquidity make London unique as a financial centre. This, combined with the difficulty of finding competitive alternatives, marks the EU financial dependence on the City of London. As a matter of fact, the expected 'flight' of financial actors from London did not occur in a significant way after Brexit. Overall, 60 per cent of all capital market related activity in the EU occurred in London. It is not surprising, thus, that 'of all the areas that could negatively impact the EU after Brexit, the prospect of losing access to London's market infrastructure services has perhaps generated the most concern' (Kalaitzake 2020: 12). Thus, both parties are aware of the high structural interdependence they have on financial trade. For the UK, the strength of its financial sector is certainly an asset during the negotiations. Stating that the source of financial influence is primarily structural means that it can be a constraining element for policy-makers. It remains to be seen whether this negotiating asset is perceived to be stronger than the one in trade in goods. It also remains to be seen to what extent the UK will be willing to use the financial leverage to force the EU to compromise on other issues (e.g. fishing).

[76] The financial sector accounted for 7.3 per cent of employment in 2018 and for roughly 11 per cent of GDP in the same year (Kalaitzake 2020).

Security and defence policy

As well as trade, negotiations following the Brexit referendum have also concerned defence and security policy. Once the transition period is over, and in the absence of a deal, the UK will no longer apply the EU's Common Security and Defence Policy (CSDP) which, since 1992 with the adoption of the Maastricht treaty, has been the vehicle through which the EU has exerted its influence on the world. By means of the CFSP, EU members have carried out common military and civil missions, diplomacy and coordinated military intelligence and capacity.

Just as in the trade negotiations, both the UK and the EU have indicated the need for close cooperation in external action post-Brexit. In the Political Declaration setting out the framework for the future relationship between the EU and the UK, the signatories expressed the need for 'close, flexible and scalable cooperation' that respect the parties' autonomy. They also called for the development of mechanisms to ensure structured consultation and regular thematic dialogue. Along the same lines, the Withdrawal Agreement included a provision for adopting an early agreement on foreign policy and defence before the end of the transition period. Cooperation between the UK and EU would facilitate the development of common strategies to challenges such as terrorism, cyber-warfare, crisis management, etc.

The possibility of reaching an agreement has been raised during the negotiations between the EU and the UK, but the negotiating positions have been far apart. The UK has indicated its preference to develop a 'deep and special partnership with the EU that goes beyond existing third country arrangements' (UK government 2017: 2). Such partnership, it has argued, would be rooted in common values and common threat assessments, and would draw on the important role the UK plays in defence and security, not least due to its significant resources. In the negotiations, the UK has referred to its weighty military power. Its budget for defence has been the largest in the EU countries in absolute terms and the second largest in NATO (after the U.S.). It is one of the few countries in the world with nuclear weapons (Trident nuclear missiles), a founding and current key member of NATO and a permanent member of the UN Security Council. The UK is ahead of any other EU country in

electronic surveillance, drone and satellite technology. The UK government has recently expressed its commitment to continue to play this role after Brexit by meeting (and even exceeding) the NATO target of spending two per cent of GDP on Defence, the 0.7 per cent of GNI to international development, and the pledge to maintain the nuclear deterrent (UK Government 2020b).

Like the UK, the EU has also expressed its commitment to ensuring as close cooperation on defence matters as possible. However, it has also argued that, as a third country, the UK will not have the same rights and benefits as EU member states. A comprehensive framework of cooperation will not be equivalent to full membership: no standing invitation to participate in EU missions will be made, and the regulations for participation in the European Defence Fund and PESCO are likely to be strict[77]. In particular, the EU has made cooperation on defence matters conditional on the UK maintaining an equivalent protection in matters of data protection and human rights to the EU.[78] During the negotiations, the EU has sought to avoid defence and security matters to be a 'bargaining chip' for the UK to leverage in trade negotiations, and has argued that any partnership agreement should be taken as a 'single package', with foreign policy and defence being one of the main components along with general arrangements (including provisions on basic values and governance) and economic arrangements (including trade and level playing field guarantees).[79]

The impact of Brexit on the EU and the UK defence policies will depend very much on the agreement reached after the transition period, but there is no doubt that Brexit changes the defence landscape in Europe. With the UK's departure, the EU has lost a member with major expertise on defence matters and a key international player. Some EU members seem to be taking steps to compensate for the negative impact (increased

[77] See Foreign Policy, Security and Defence part of the Draft text of the Agreement on the New Partnership with the United Kingdom, at: https://ec.europa.eu/info/publications/foreign-policy-security-and-defence-part-draft-text-agreement-new-partnership-united-kingdom_en. (accessed 11 September 2020).

[78] Furthermore, one of the EU's concerns in security cooperation is harmonisation of the definition of terrorism.

[79] This principle has been relaxed during the negotiations. See European Council (2018).

vulnerability) by reinforcing common defence and security. France and Germany have called for strengthening the role of the EU in defence and NATO's European pillar, as well as fostering closer bilateral cooperation (French Ministry of Europe and Foreign Affairs 2019). The President of the Commission Ursula von der Leyen made 'an integrated and comprehensive approach to (European) security' a priority of her programme,[80] and the European Commission has proposed to increase spending on defence from 2.8 billion euros for the 2014-2020 period to 22.5 billion euros for the 2021-2027 period. In this sense, Brexit gives an opportunity to increase defence integration. Slow progress in this field in the past has been credited to the UK's opposition to an integrated EU defence policy, and its preference for NATO as a multilateral organisation for defence cooperation in Europe. However, differences in strategic priorities between EU member states and the limited resources and capabilities made available for developing the policy have been highlighted as the main impediments for the development of a common defence strategy and policy at the EU level (European Court of Auditors 2019). The Covid-19 pandemic adds a new layer of complexity to an already unpredictable situation, as EU members and EU institutions re-examine their priorities.

For its part, with its departure from the EU, the UK stops participating as a full EU member in CSDP, where it exerted strong leadership and influence. There are mechanisms for third countries to participate in EU defence operations via third-party agreements, but this will depend on the progress of the negotiations between the EU and the UK. Whitman (2016) has identified three types of potential scenarios for the UK's partnership with the EU, according to the degree of access to EU institutions and decision making: integrated player, associated partner or detached observer. While the EU has experience in establishing the second and the third types of affiliations with non-EU members, the first scenario would be a new type of EU affiliation with a non-EU member. In the following we will link these categories to the levels in the access/participation scale that we presented above.

[80]See https://euobserver.com/opinion/145992 and https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (accessed 11 September 2020).

A partnership where the UK is an integrated player would consist in an EU+1 arrangement, in which the UK is granted observer status on the Agency's Steering Board, takes part in future civil and military operations, holds associate membership status of the European Defence Agency (EDA), and makes a contribution to the EDA budget. It is the closest type of affiliation, and the one that comes closest to our level two (access without voting power in decision-making processes) in the access/participation scheme, even if the dynamics in the security field are different due to the less formalised nature of relations in these issue-areas than for instance in the far more formalised EU's single market.

Given its important defence capacity and intelligence, this type of partnership would give an influential role to the UK in EU defence matters. However, as a non-EU-member, the UK would no longer be a participant in the policy-decision institutions such as the Foreign Affairs Council, the European Council and the Political and Security Committee. This is a novel and unchartered type of affiliation, which would put the UK as the closest ally to the EU in the area of foreign policy, without actually being an EU member. Brexit is in this case a catalyst for increased differentiation.

As an associated partner, the UK would establish a relationship with the EU in foreign and security policy similar to that of Norway (for a detailed analysis of the Norwegian case, see Sjursen 2015). This means that the UK would be aligned with the EU in declarations and actions, such as sanctions, at the invitation of the EU. The UK would remain outside the EU's structures of military planning but may decide to take part in aspects of implementation; hence suggesting a similarity to level three (very limited to no access in decision making processes) in our access/participation scale. In order to reach agreements, the UK and the EU would establish a 'dialogue' at ministerial, director and working-group level rather than allowing for direct access to policymaking. Under this model the UK would lose its capacity to participate and influence the development of EU foreign, security and defence policy, but it would be involved in an EU activity that takes account of its preferences as a result of a preferential relationship.

A detached observer scenario is the looser type of association that the UK can establish with the EU, by which foreign and security policies are independent (not necessarily rival) both politically and organisationally –

indicative of a weak version of level three access in our access/participation scale. By means of this type of association, the UK and the EU would establish their relationship bilaterally, and on a case-by-case basis and not through existing third-party arrangements. Common missions are possible when convergence exists. Under this type of affiliation, convergence on foreign policy and defence policies might depend on the agreements in other sectors such as trade. It is, in this sense, the more volatile type of affiliation. This is the type of affiliation that might result from a no-deal Brexit. Whether this brings about a more isolationist UK will depend on the UK's role and stance on other multilateral frameworks such as NATO but also the Anglo-French Lancaster treaties, the European Intervention Initiative, the Joint Expeditionary force, etc. (Mills 2019).

The negotiations on trade and on defence between the EU and the UK confirm the difficulties of anticipating what type of partnership the UK and the EU will establish in the near future. Following months of tough negotiations and notwithstanding inclusion in the Political Declaration,[81] foreign, security and defence policy do not figure among the UK draft texts for future EU-UK agreements published by the British government in February 2020. Whitman (2020) finds at least three explanations for the removal of these policy sectors from the negotiating table. Firstly, the UK had an interest in centring negotiations on trade and market access as well as other related policies, such as competition, environment and fisheries. Secondly, and connected to that, the costs of non-agreement in foreign, security and defence policy are considered low if not negligible, at least when compared to trade. The reason is the overall high development of those policy sectors in the UK, already back to when it was an EU member state. Since January 2020, the UK also did not participate any longer in the debate on an EU's defence union, on the development of Common Foreign and Security Policy (CSDP) and on strengthening a permanent structured cooperation (PESCO). Thirdly, and perhaps most importantly, the UK already started conducting its own foreign policy in a way independent of the EU. This is particularly evident in trade policy with Japan, the US, Australia, New Zealand and – last but not least – China. Ultimately, the

[81] It mentions 'cooperation in sanctions, defence industry and research, consular cooperation in third countries as well as the UK being invited to EU foreign minister meetings and potentially participating in EU military operations' (Whitman 2020).

UK's decision to put foreign, security and defence policy out of the negotiations is compatible with its willingness to restore national self-determination also in its relations with other states. Self-determination is linked to flexibility in policy positions, which is something the EU-UK Political Declaration enabled only to a limited extent. Although the UK certainly does not have the foreign policy weight of the past, formally its place within important international fora – most notably the permanent membership of the UN Security Council – supports the desire for autonomy in the relations with the external world.

For the reasons seen above, foreign, security and defence policy are unlikely to come back to the negotiating table before the end of the transition period. In the future, *ad hoc* agreements on specific aspects of those policies seem more likely (Whitman 2020). From a symbolic point of view, the fact that negotiations do not any longer involve foreign policy – and, what's more, that no comprehensive agreement on it is to be expected – mirrors 'a lowering of ambition and a move away from an all-encompassing comprehensive future relationship' (Ibid.). Divergence in policy preferences may become possible. Also given the degree of UK's foreign, security and defence policy development, the EU might feel the consequences of such a divergence.

The affiliation that the EU established with other neighbouring countries before Brexit manifested the EU's strong market power, which gave the EU a solid negotiating position. This market power is comparatively smaller when it concerns the UK. At present, the degree of interdependence between the EU and the UK, plus the distance in the negotiating positions between the two parties, put both the negotiations and the outcome of the negotiations in unchartered territory. As for the negotiations, it remains to be seen whether the UK's request for issue-specific agreements enables it to reach an outcome closer to its preference. It might be argued that the EU's acceptance of the UK's way to negotiate on an issue-related basis represents a new principle in dealing with non-affiliated countries. In addition, it needs to be considered that member states delegated to the Commission the task of conducting the negotiations based upon their mandate, which presents the EU as quite a unified actor. Whether this will continue to be the case remains to be seen, particularly as the final agreement will need to pass parliamentary

ratification in each member state (including, in some cases, ratification by regional parliaments).

At the time this report is concluded (November 2020), no final agreement has been reached yet. In a keynote address on 2 September 2020, the EU's chief negotiator, Michel Barnier, outlined the need for arriving to an agreement by the end of October, in order to give the EP and the Council enough time to approve it, and to national parliaments to ratify it. The whole process must be completed by 31 December 2020. Barnier charged the UK of not being constructive in the negotiations, specifically on guarantees for open and fair competition, fisheries, and 'any meaningful horizontal dispute settlement mechanisms'.[82] Reluctance to transpose what was agreed in the Political Declaration into a legal text is what the UK's government currently shows, Barnier said. Interestingly, he argues that the publicly expressed willingness to break with the EU contradicts what British negotiators really want, i.e. to pursue continuity in many trade sectors. In other words, as previously underlined, the UK's stance is still one of preserving the rights of an EU member state without the obligations that this status brings along.[83] A crucial point is the system of state aid.

According to Barnier, the EU's priority remains to fully implement the Withdrawal Agreement, particularly the 'Protocol on Ireland and Northern Ireland'. Related to this, the EU wants to check the standards of goods entering Northern Ireland, since under certain conditions they can then freely move to Ireland (i.e. to the EU). Specifically, that means applying the EU's Customs Code to imports in Northern Ireland, and the EU exports procedure to exports from Northern Ireland.[84]

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[82] See https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1553 (accessed 11 September 2020).

[83] See footnote 82.

[84] See https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_1553 (accessed 11 September 2020).

A contentious issue is the UK Internal Market Bill,[85] which was introduced to the House of Commons on 9 September 2020. It has not been approved at the time of completing this report. The bill aims to regulate the UK internal market after the end of the transition period. As both the EU and the UK(!) recognised, some parts of the bill undermine the Withdrawal Agreement. This means that they violate international law.[86]

The EU has immediately reacted to the Internal Market Bill, saying it will make recourse to the legal remedies that the Withdrawal Agreement foresees in case of violations of the obligations included in the text.[87] There is not much time left until the end of the transition period.

Summary

Brexit is unprecedented: the first instance where a member state leaves the European Union. As such, it is a matter of dislodging from the EU's norms and rules. However, the break will not be complete because the UK has been thoroughly Europeanised, and the UK has throughout the Brexit process expressed an interest in some form of association with the EU. As such, Brexit has the potential to establish a new mode of EU affiliation.

The EU's approach to non-members, this report has shown, is based on convergence. The UK moves in the opposite direction; hence, for the EU the aim is to limit divergence. During its 47-year-long membership, EU legislation and standards have become integral parts of the UK's legal system. For the EU, its preferred option was to encourage the UK to opt for a mode of affiliation that would enable it to stay as close to the EU *acquis* as possible. That has proven very difficult, as the UK appears to have taken a firm view on removing itself from the EU. Hence, it appears that the EU's strategy vacillates between preventing the UK from receding too far from the EU's rules and standards on the one hand, to preventing

[85] For the text of the bill, see https://publications.parliament.uk/pa/bills/cbill/58-01/0177/20177.pdf (accessed 11 September 2020).

[86] See https://www.irishtimes.com/news/world/uk/four-ways-the-new-uk-bill-breaches-the-brexit-treaty-1.4350877 (accessed 11 September 2020).

[87] See https://www.euronews.com/2020/09/10/eu-says-the-uk-s-controversial-new-brexit-bill-puts-northern-ireland-peace-deal-at-risk (accessed 11 September 2020).

the UK from undoing the EU's standards, on the other. The former is about preserving the present EU-UK relationship; the second is about protecting the EU, whatever the relationship with the UK. In both cases, the EU is concerned with protecting as much as possible of the conditionality – access/participation nexus that it has developed with other affiliated non-members. We have seen that this nexus – as conditionality – relies on a situation of asymmetry whereby the EU calls the shots.

At the same time, we have seen that the EU is externally vulnerable and that some of that vulnerability spills-over to the EU's relations with affiliated non-members where the EU tries to prevent importing more diversity and fissiparous pressures to prevent these relations rendering it more externally vulnerable or internally divided. In a situation of global norm and rule convergence, such an undertaking is far more conducive to the EU and its approach to fostering democracy in interstate relations than the present situation marked by an increased role of power politics and increased arbitrariness. Global power politics can thus spill-over to the EU's relations with non-members. The extent to which hinges to a large extent on whether EU–UK relations will exhibit different patterns of asymmetry, either across the board, or in certain issue-areas with spill-over potential.

A critical issue is therefore to understand the nature and dynamic of EU–UK relations, not only in terms of the actual bargaining process but in terms of the broader context of resources and powers to draw upon. Having briefly assessed this, we have found that each party has its advantages or special leverage: the UK has a negative goods trade balance whereas European member states very much rely on the City of London for financial services. The EU sets the terms of access and participation in the single market; the UK nevertheless has sector-specific market power which it can draw on in the negotiations.

In the first part of the negotiations, the UK also tried to exploit its leading role within European Common Security and Defence Policy (CSDP) to influence the negotiations. With the UK's departure, the EU must find one or more new leading member states in CSDP and at the same time try to increase overall integration in that policy field. Hence, one might argue that there are at least two policy areas where the negotiating position of the UK is comparatively stronger than the one of the EU: the financial

sector and security and defence policy. The latter is particularly crucial as it involves a core state power: here, the EU finds it particularly difficult to pursue integration in the form of new supranational capacity and must rely on intergovernmental decision-making, where single member states might play a leading role on behalf of the EU as a whole.

However, while on goods and services the UK may still want to reach a deal with the EU given the high level of interdependence (although the Internal Market bill raises questions about willingness and reliability); foreign, security and defence policy has been removed from the negotiating table because the UK prefers to exercise its global role in an independent and flexible way.

We cannot ignore the role of size, which implies that the EU has a stronger bargaining power in the negotiations. Nevertheless, we have noted that the EU's market power is not that fungible. And, when approaching specific policy fields, one finds that the EU has vulnerabilities too. Not by chance, the UK prefers to negotiate issue by issue. Hence, although power asymmetry as a whole is in favour of the EU, there are crucial policy sectors in which that asymmetry plays against it. The nature and number of those policy sectors could represent an important leverage for the UK.

For the EU these observations suggest that insofar as the EU's conditionality – access/participation nexus hinges on asymmetry, the situation of the UK is different from that of the other affiliated non-members where the asymmetry is greater. Both the EU and the UK are vulnerable to global developments, and both are vulnerable to internal pressures and fissiparous tendencies. The UK is also deeply divided on the direction it should take in relation to Brexit. These observations show that there is still a lot of uncertainty.

Chapter 6

Concluding reflections

The purpose of this report was to provide an overview and assessment of the principles and arrangements that the EU has established for structuring and conducting its relations with non-member states. To that end, we started by identifying the key principles underpinning the EU's arrangements with non-members. The overarching principles, as made explicit in the EU treaties, are general or universal in orientation. In other words, the overarching principles are the same for states seeking to associate with the EU, as well as for states seeking to disassociate with the EU, even if the latter is far less explicitly articulated than the former. Nevertheless, we can surmise from Article 50 TEU that the EU is committed to uphold its general principles, also in relation to a state that is exiting the Union. The general principles that the EU espouses are thus universal with a clear cosmopolitan imprint. That is, we have shown, substantiated by the manner in which the EU seeks to reconfigure sovereignty in Europe, as part of the attempt to legally regulate interstate relations and render them subject to democratic rules and norms. The EU-led political order in Europe is one that places the onus on states pooling sovereignty in common institutions. EU configured sovereignty thus places a strong onus on states' (and citizens') participation in joint forums. The EU's general principles are compatible with cosmopolitan democracy and non-domination through a legally embedded system of rule. The EU

seeks to promote these principles through a set of distinct mechanisms summed up in what we have termed the 'conditionality – access/participation nexus'.

From a normative perspective, there is a built-in tension in this: In a world of states with clear limits on the scope for legally regulated interstate relations, the nexus, we have shown, works best under conditions of asymmetry. The problem facing the EU as a major market power is that it has weak own resources, its basic power is not very fungible (not easily translatable to core state power), and the EU is highly dependent on member state willingness and ability. These factors make the EU vulnerable, especially in a world that is turning towards power politics. We have shown that the EU's exposure and vulnerability to the external world and great powers have bearings on its relations with non-members. The EU's external role is thus marked by a paradox: The EU is highly externally vulnerable and at the same time often referred to as a (form of unwilling) hegemon in relation to non-members. This situation has the potential of generating a vicious circle whereby increased EU vulnerability (in relation to power politics and volatile markets) may reinforce the EU's appearance as a hegemon in relation to affiliated non-members. Faced with external fissiparous pressures the EU may be less accommodating to affiliated non-members.

The assessment of the EU's specific relations with non-members showed a wide range of arrangements, and even if there were local adaptations, the basic logic was the same: The EU sought to uphold the conditionality – access/participation nexus through adapting its affiliations to the specific circumstances of the states; hence the different levels on the scale. In this context, we find both democratising and domineering tendencies. EU external differentiation can therefore both be associated with democracy and dominance. The mixes are found by close scrutiny of specific cases and relations.

With regard to the conditionality – access/participation nexus, the states with the closest EU affiliations scored the highest on participation and faced the strongest sanctioning mechanisms (level two on the scale). Less committing forms of involvement with the EU end up lower on the scale (level three) and came with weaker sanctioning mechanisms. At the same time, we saw that EU conditionality did not set member states on an

irreversible democratising path; there are clear instances of serious backsliding, especially in Hungary and Poland.

Brexit puts the conditionality – access/participation nexus to the test. A key aspect of EU conditionality is asymmetry, and EU–UK relations are less asymmetric than are relations between the EU and the other affiliated non-members. In addition, the current UK government is committed to prove its ability to move away from the EU; hence is showing willingness to test the EU's willingness and ability to insist on sustaining the integrity of the internal market and the EU's regulatory standards.

If the EU manages to impose its standards, it will contain the differentiating impetus of Brexit. If the UK manages to develop a bespoke arrangement with considerable access/participation but subject to weaker sanctions or compliance mechanisms, the EU could face either a differentiating or a disintegrating impetus, depending on how or the extent to which this is translated to the EU members and the affiliated non-members. If the UK ends up without a deal – a hard Brexit – the question turns to one of how able the EU is to protect its standards and its internal cohesion.

For the UK, it is noteworthy that as long as the EU's conditionality – access/participation nexus is intact, the UK will most likely not be able to recompense loss of co-decision power at the EU level with self-rule (also because the issue of the location of UK self-rule is a matter of deep internal contestation, and the Internal Market bill has heightened these). It is noteworthy that this will be the case not only if the EU manages to ensure that the UK continues to abide by EU norms and rules; it will also be the case if the EU manages to protect its standards from the UK.

The EU's relations with non-members, this report has shown, activates all three core dimensions of EU3D: differentiation, dominance, and democracy. We have tried to show how these three dimensions are configured and how they relate in the current dynamic and volatile situation. Developments feed into theorising, and theorising helps to give meaning and direction to our reflections.

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Appendixes

Appendix I: Implementation of EU law in Member States and EEA countries

The Single Market Scoreboard (SMS) is a European Commission monitoring tool, which measures the transposition of EU directives relating to the single market into Member States and EEA-EFTA countries. It uses the 5 following indicators:

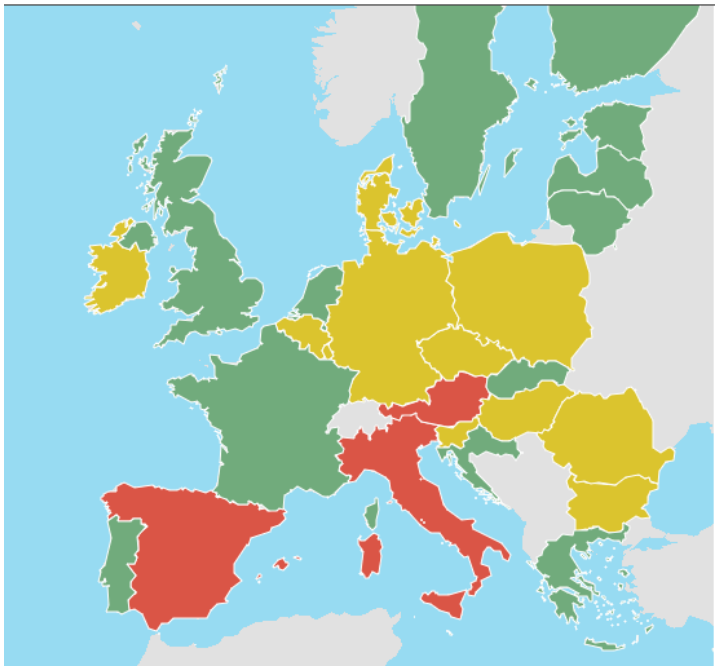
1. Transposition deficit (per cent of all directives not transposed)
2. Change over the last six months (change in number of non-transposed directives)
3. Long-overdue directives (two years or more)
4. Total transposition delay (in months) for overdue directives
5. Conformity deficit (per cent of all directives transposed incorrectly)

Its latest report takes into account all transposition notifications made by 10 December 2018 for directives with a transposition deadline on or before 30 November 2018.

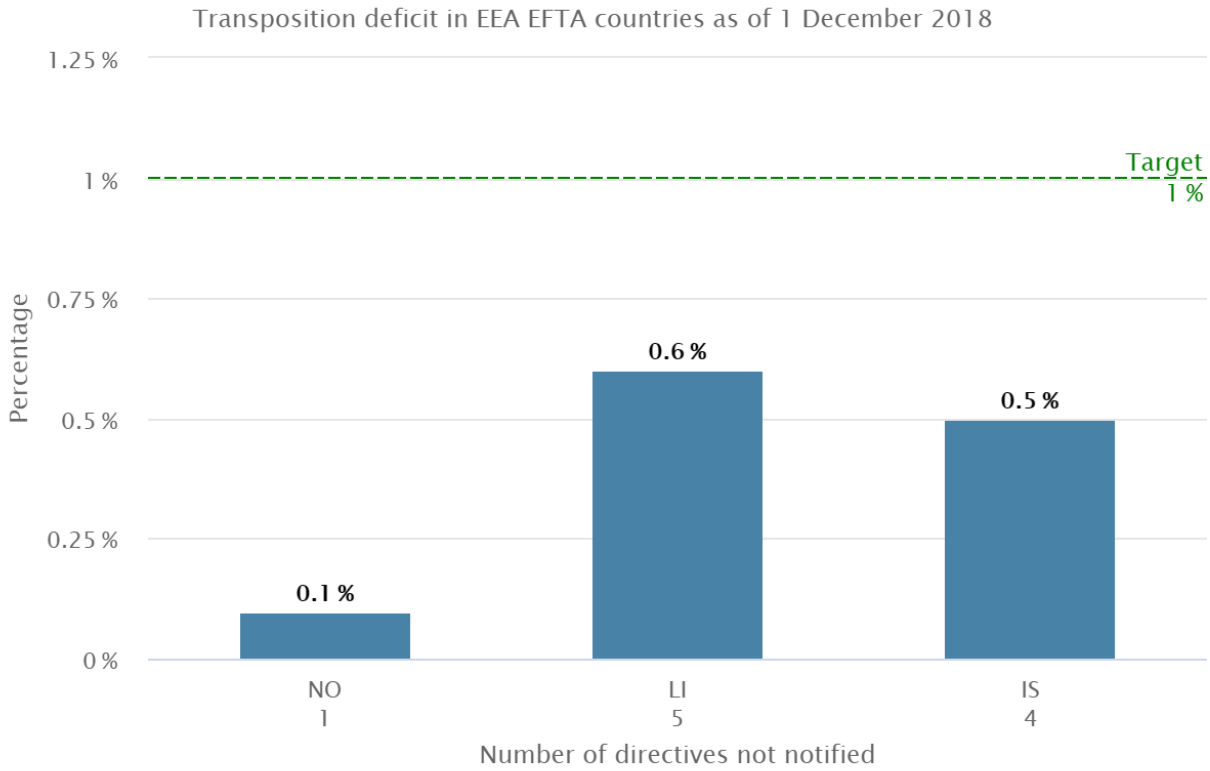
The resulting Scoreboard is as follows:

Based on these five indicators, the SMS has created a map to give an overview of each MS' overall performance.

This overall performance indicator is available for each country dating back to November 2011.



The SMS also computes transposition deficit Norway, Liechtenstein and Iceland:



All three of the above figures were taken from: Single Market Scoreboard – Transposition. (n.d.). Single Market Scoreboard. Available at: https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm#changes-transposition-deficit (accessed 29 January 2020)

For further detail on these countries, the EFTA Surveillance Authority (ESA) monitors their compliance to the EEA. Their latest report, from July 2019, shows that the transposition deficit (defined as the percentage of EU directives not transposed into national law) for all three countries has slightly increased since November 2018. The following graphs are taken from this report:

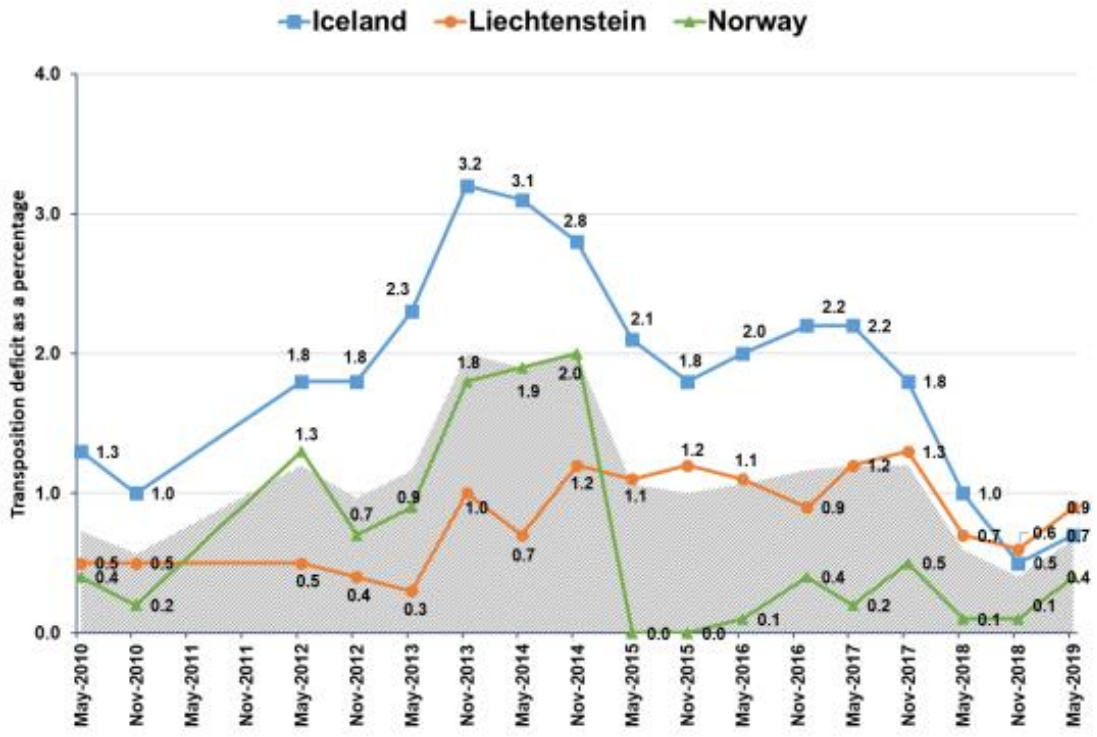


Figure 1: EFTA States' transposition deficit over the past 10 years

Transposition deficit for directives that should have been transposed on or before 31 May 2019

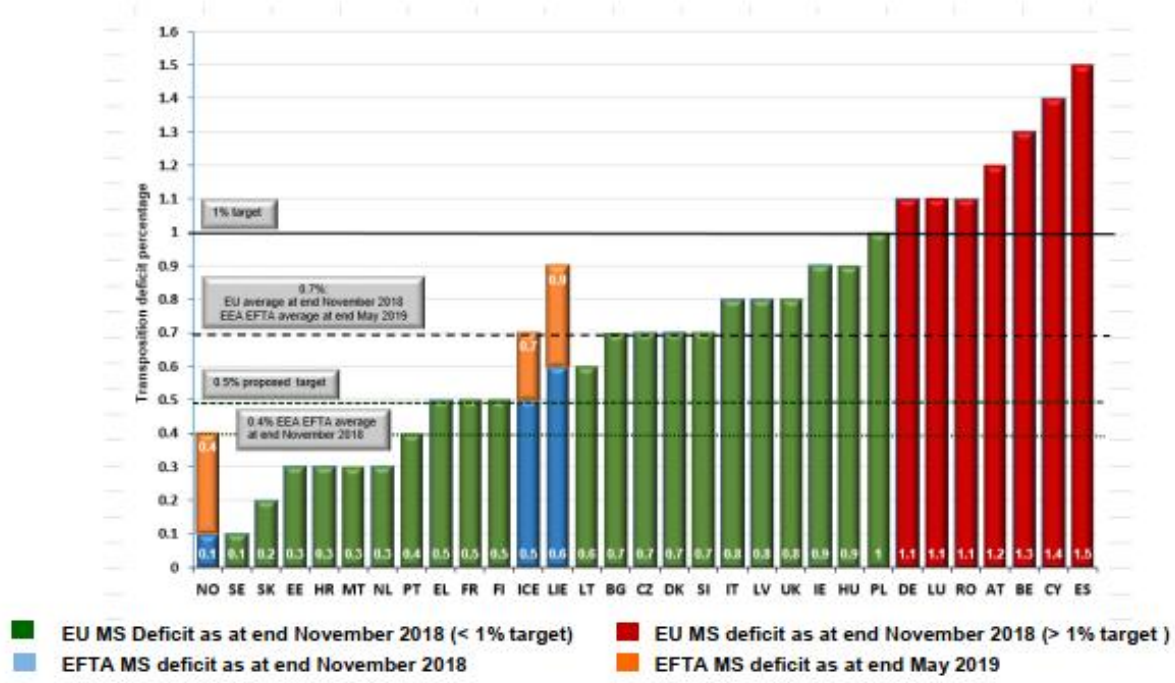


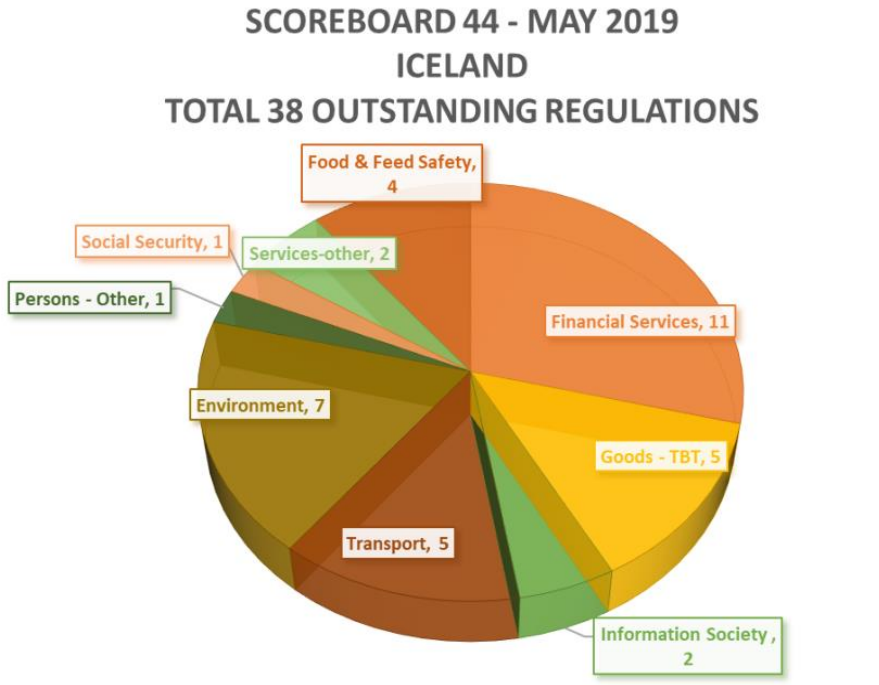
Figure 2: Comparison of transposition deficits between the 31 EEA Member States
Seven EEA States did not meet the 1% target at the end of November 2018 / All EFTA States still remain under the 1% target

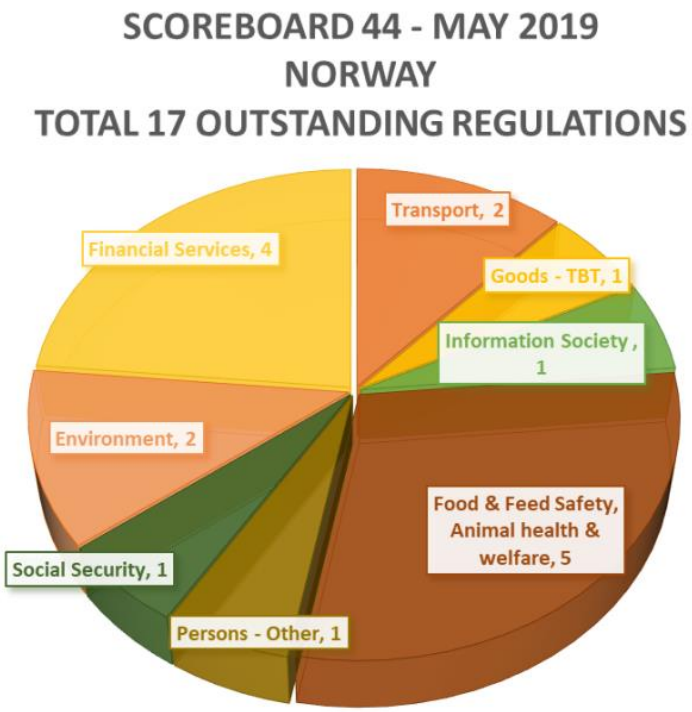
The report also measures the degree of transposition of EU regulation into national law. In Liechtenstein, any regulation that is incorporated into the EEA Agreement automatically becomes part of its internal legal order, so no additional measures need to be taken for transposition. As such, there is perfect transposition. On the other hand, the ESA measures transposition in Norway and Iceland as follows:

- Out of the 3300 regulations incorporated into the EEA Agreement, 38 regulations had not been notified as incorporated in Iceland on the 31 May 2019.

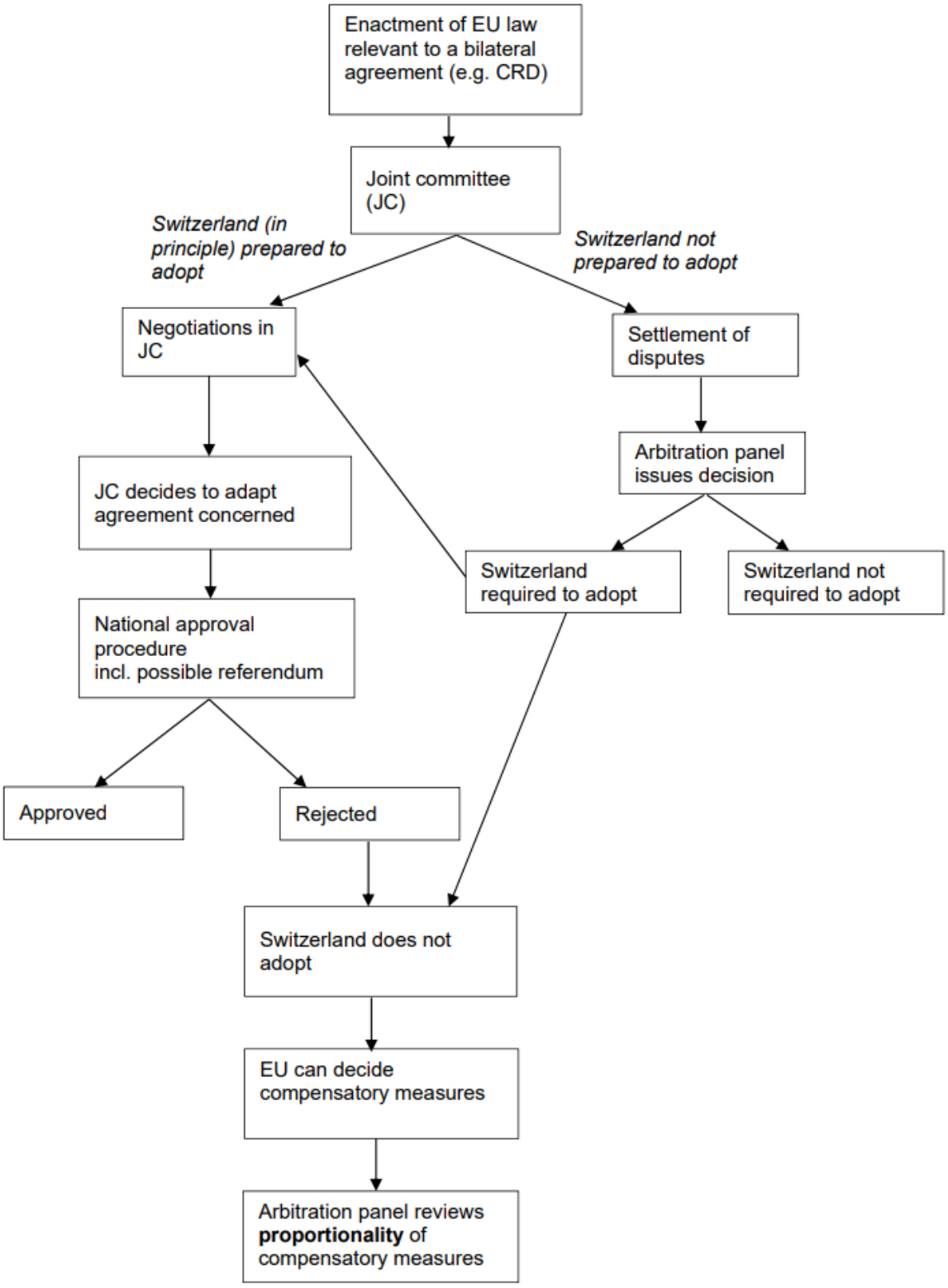
- Out of the same total number, and on the same date, 17 regulations had not been transposed in Norway.

The outstanding regulations for both countries are classified as follows:

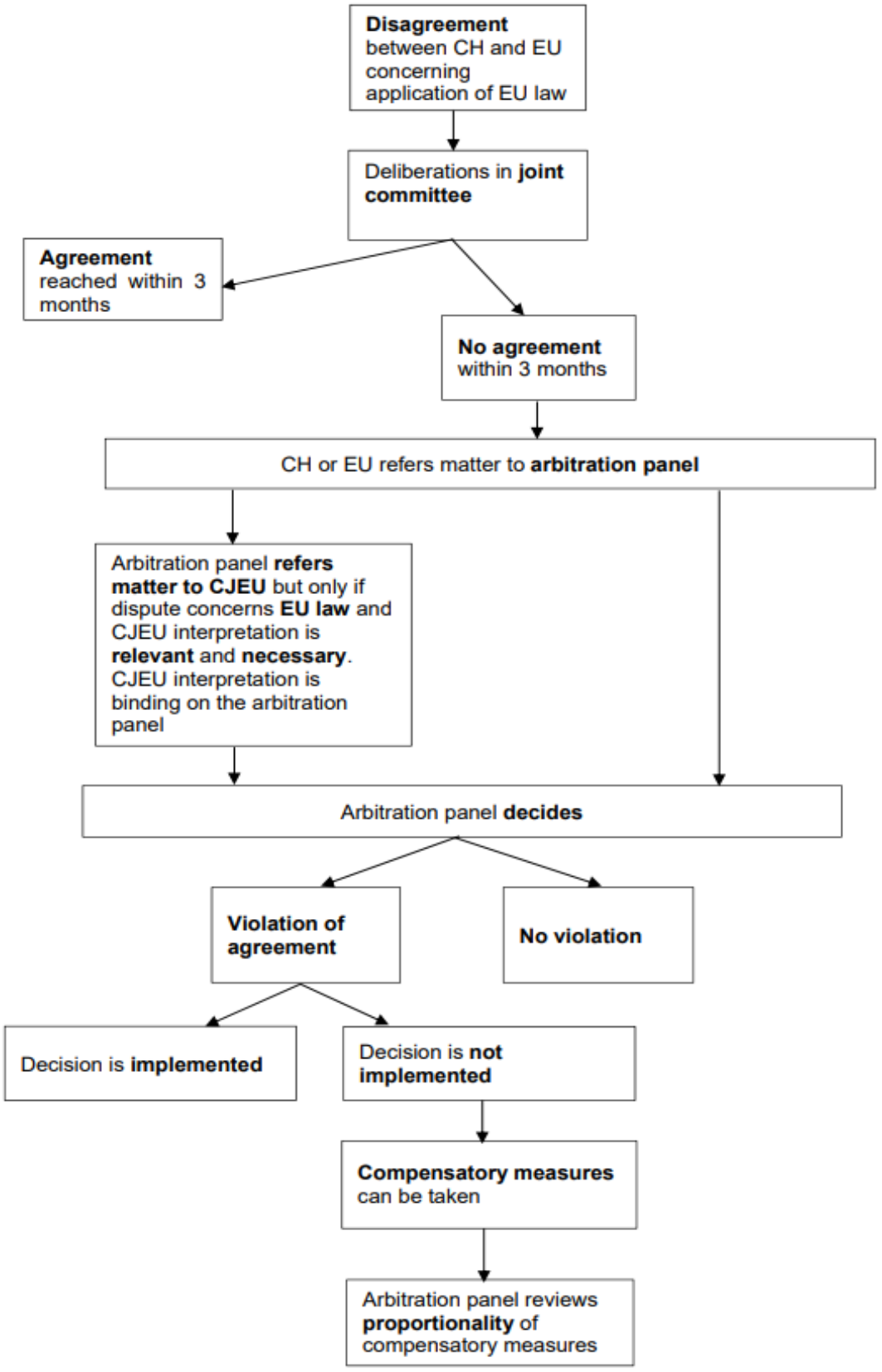




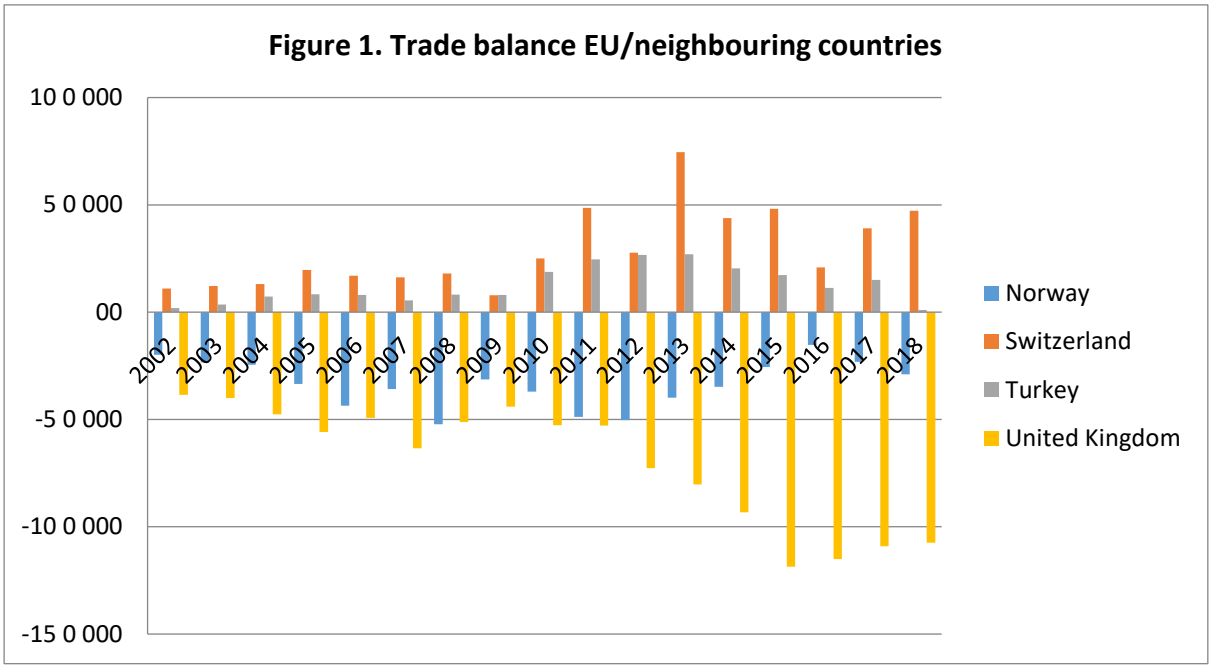
Appendix II: Dynamic adoption of EU law developments



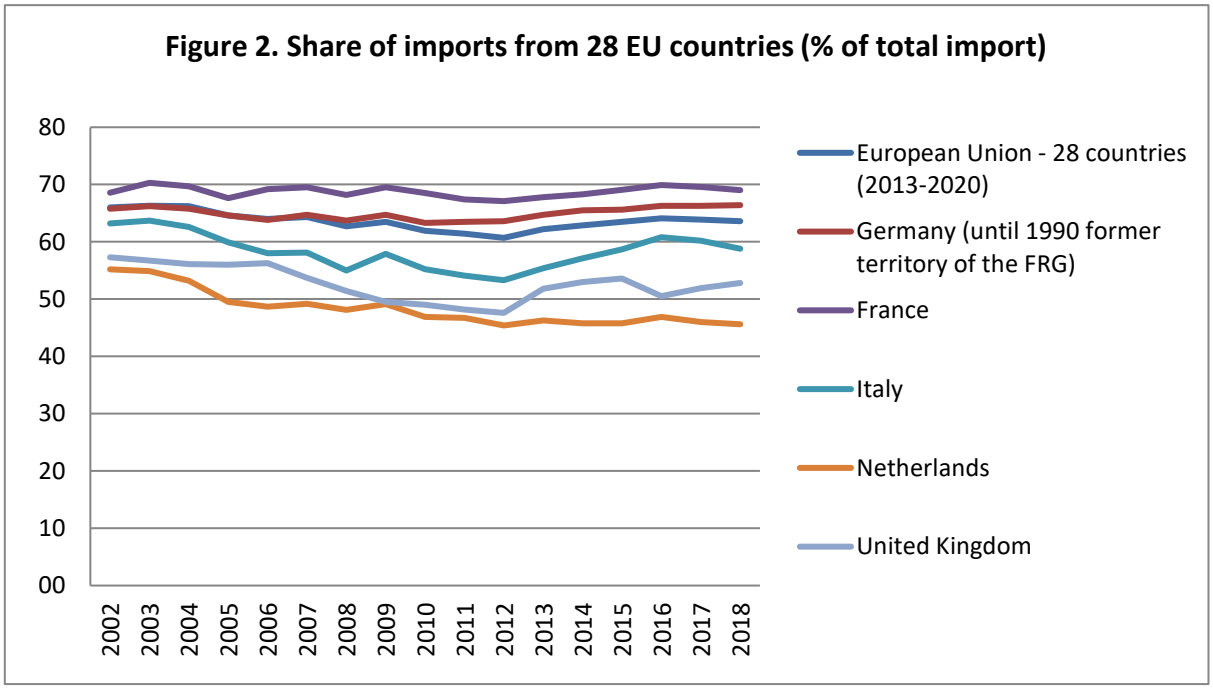
Appendix III: Example of dispute settlement procedure



Appendix IV: UK–EU trade balance

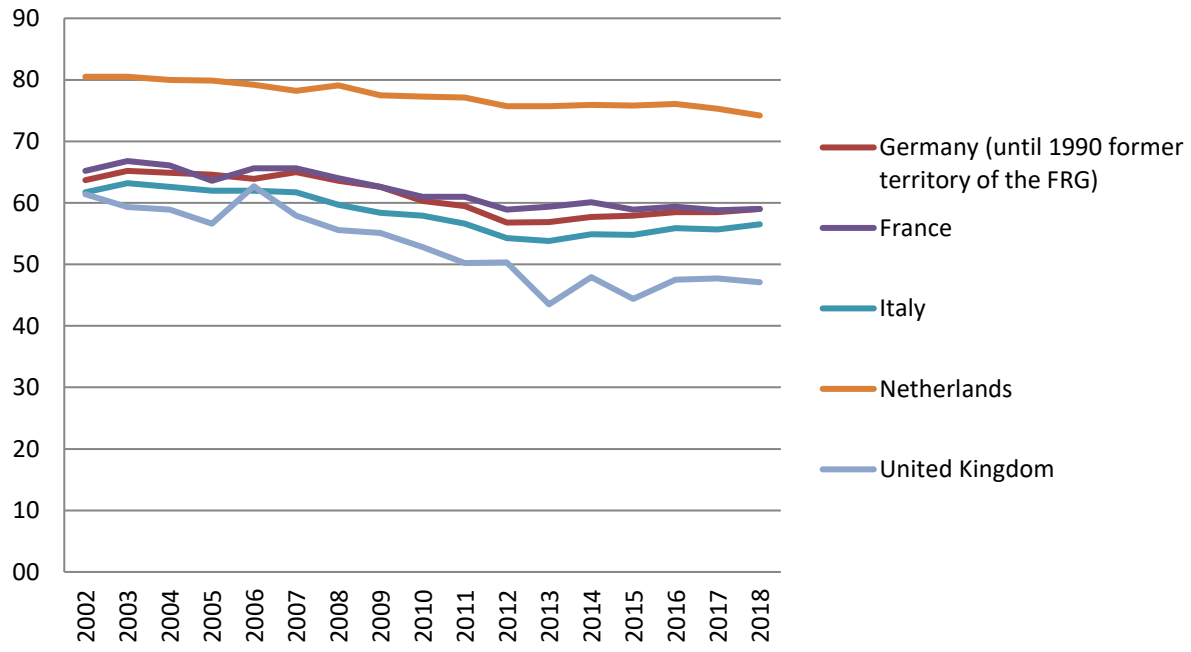


In comparison with other EU countries, we see that while the share of UK imports from EU countries has decreased over the last 15 to 20 years, the decrease is not exceptional. In fact, the share of imports of the Netherlands has been decreasing more steadily and it is lower than that of the UK (See figure 2)



A more marked difference is with exports: the share of UK's exports to other EU countries is the lowest of all EU countries. While intra EU exports have decreased significantly in all EU member states over the last 15 to 20 years, it is more steeply in the UK case (See Figure 3)

Figure 3. Share of intra EU exports by EU members and the UK



Appendix V: Opt outs

PROTOCOL (No 21) ON THE POSITION OF THE UNITED KINGDOM AND IRELAND IN RESPECT OF THE AREA OF FREEDOM, SECURITY AND JUSTICE, of the Treaty on the Functioning of the European Union establishes that the UK and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part III of the TFEU, on Freedom, Security and Justice.

PROTOCOL (No 22) ON THE POSITION OF DENMARK of the Treaty on the Functioning of the European Union establishes that Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part III of the TFEU, on Freedom, Security and Justice. It also establishes that Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications (Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union).

Both protocols establish that, when the Council meetings deal with these policy areas, Denmark, the UK and Ireland will not take part in the meetings. Decisions of the Council that must be adopted unanimously will require unanimity of the members of the Council (without accounting for the opt-out member states). When a qualified majority is necessary, legal provisions establish the equivalent voting weights of the EU member states, without the opt-out members.

The PROTOCOL (No 19) ON THE SCHENGEN ACQUIS INTEGRATED INTO THE FRAMEWORK OF THE EUROPEAN UNION of the Treaty on the Functioning of the European Union refers to the special arrangements made for Denmark, the UK and Ireland. As a result of this protocol, Denmark decides on a case-by-case basis whether to participate in the further development of the Schengen acquis under international law (not EU law) and whether to incorporate into its national law EU law developed without its participation. Thus, Denmark does not participate in any Council meetings that concern the Schengen acquis. Ireland and the United Kingdom are not parties to the Schengen Agreement. However, with the approval of the EU Council, they can participate in the development of the Schengen acquis (opting-in) as Council members, and can apply the Schengen acquis in whole or in part.

With regards to the Euro-group, the TFEU refers to it (protocol (No 14) ON THE EURO GROUP). Article 1 says: 'The Ministers of the Member States whose currency is the euro shall meet informally'.

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