



Expanding the EU Internal Market without Enlarging the Union: Constitutional Limitations

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Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 17 September 2015

European University Institute
Department of Law

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Thesis summary

One of the most significant roles of the EU in the world is that of being a norms exporter. The EU has concluded numerous agreements with countries in its neighbourhood with the aim of encouraging third countries to adopt EU *acquis* in exchange for access to the internal market. The most ambitious of these agreements are the three multilateral agreements establishing the European Economic Area, the Energy Community and the European Common Aviation Area, respectively. The common feature of these agreements is the aim of extending to third countries either the entire internal market or a sector thereof. Achieving this objective is, however, challenged by the difficulty of circumscribing precisely the scope of the internal market and delimiting it from other EU policies, the *sui generis* nature of the EU legal order and the proclaimed need to protect its autonomy. An analysis of the concept of the internal market, the EU's foundational principles and the institutions and procedures in place in the EU and in the three agreements for achieving and maintaining homogeneity within the expanded internal market reveals that it is, indeed, possible to extend the internal market to third countries. However, the level of homogeneity in the expanded market depends heavily on the goodwill of third country decision-makers, national administrators and, especially, courts to adopt and give the same effect to rules of EU origin outside the EU as within the Union. The objective of full homogeneity within an expanded internal market inevitably requires a certain transfer of supranational characteristics also to the agreements exporting the *acquis*.

Acknowledgements

The writing of this thesis has been an enlightening and rewarding experience. In addition to my own work the result reflects the insights and support provided by a number of people. First of all, my gratitude belongs to Professor Marise Cremona, my supervisor at the EUI, who has provided useful ideas and wonderful guidance on how to shape the thesis and articulate the arguments, always with enthusiasm, trust and due respect for my own vision and thought. She is a true role model of a respectful, insightful and encouraging supervisor.

Professor Loïc Azoulay, too, has followed the authoring of this thesis from the very beginning. He has provided many helpful and challenging comments and provided ample ground for discussion in seminars and events organised at the EUI. A wonderfully inspiring academic, I greatly appreciate his availability for exchanges of ideas on any matter of EU law and beyond, in academic and non-academic contexts.

I would not have undertaken my PhD project at the EUI without the encouragement of Professor Leonard Besselink who gently pushed me towards applying and has followed my progress ever since with great enthusiasm. I am greatly indebted to his support throughout the past six years, including my studies at the Legal Research Master Programme at Utrecht University.

A great help in finalising the thesis was offered by Jacqueline Breidlid, a former officer at the EFTA Secretariat and a dear friend, who read and commented on chapter 6 thus providing some crucial 'insider information' about the functioning of the EEA Agreement.

A great number of other professors at the EUI, fellow PhD researchers and participants at workshops and conferences have contributed to the thesis with their helpful remarks, fruitful discussions and generous assistance with otherwise inaccessible materials. In no particular order I would like to mention the input of Steven Blockmans, Bart Van Vooren, Christophe Hillion, Adam Lazowski, Skúli Magnússon, Carl-Fredrik Bergström, Ellen Vos, Bruno de Witte, Andrea Ott, Martin Trybus and Luca Rubini.

The quality of the thesis owes very much to the wonderful research environment at the EUI. I am greatly indebted to the EUI Library – probably the best research library in the

world – and its exceptionally kind and helpful staff. Moreover, it is impossible to speak of the unique research environment at the EUI without mentioning the equally kind and helpful administrative staff, including Ken Hulley at the Academic Service and Eleonora Masella, Siobhán Gallagher and Laurence Duranel at the Law Department. For ‘transferable skills’ I owe a great deal to the EUI Language Centre, especially Nicki Hargreaves and Nicky Owtram.

Two persons in particular have shared my experiences at the EUI and provided all the love and support I could ask for. Sara and Jacob have made sure I never felt alone either in- or outside the library. Jacob, in particular, has been on my side from the beginning to the end of the journey, becoming my husband in between and proofreading my thesis at the end. This is what I call true love and I gladly dedicate this thesis to him.

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Abbreviations

ACP	African, Caribbean and Pacific
AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
ALTER-EU	Alliance for Lobbying Transparency and Ethics Regulation
ARSIWA	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts
ATM	Air Traffic Management
BUSINESSEUROPE	Confederation of European Business
CCP	Common Commercial Policy
CEC	European Confederation of Executives and Managerial Staff
CEECs	Central and Eastern European Countries
CEEP	European Centre of Employers and Enterprises providing Public Services
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
DCFTA	Deep and Comprehensive Free Trade Area/Agreement
DG	Directorate General
EA	Europe Agreement
EAEC	European Atomic Energy Community
EC	European Community
ECAA	European Common Aviation Area
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
ECT	Energy Community Treaty
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community

EFTA	European Free Trade Association
EMAA	Euro-Mediterranean Association Agreement
EMU	Economic and Monetary Union
ENP	European Neighbourhood Policy
EREGG	European Regulators Group for Electricity and Gas
ESA	EFTA Surveillance Authority
ETUC	European Trade Union Confederation
EU	European Union
Eurocadres	Council of European Professional and Managerial Staff
FTA	Free Trade Area/Agreement
FYROM	Former Yugoslav Republic of Macedonia
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
IGO	intergovernmental organisation
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MoU	Memorandum of Understanding
NEPIs	new environmental policy instruments
NGO	non-governmental organisation
OMC	Open Method of Co-ordination
P4M	Partnership for Modernisation
PCA	Partnership and Cooperation Agreement
PCIJ	Permanent Court of International Justice
PEC	Pan-European Corridors
PHLG	Permanent High Level Group
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
SCA	Surveillance and Court Agreement
SEA	Single European Act
SEE	South East Europe
SEETO	South East Europe Transport Observatory
SES	Single European Sky

SESAR ATM	Single European Sky Air Traffic Management Research
SGEIs	Services of General Economic Interest
SNE	Seconded National Expert
TCT	Transport Community Treaty
TEC	Treaty establishing the European Community
TEN-T	Trans-European Transport Network
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UEAPME	European Association of Craft, Small and Medium-Sized Enterprises
UN	United Nations
UNMIK	United Nations Interim Administration Mission
VCLT	1969 Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Chapter 1 Introduction

1 Introduction

The competitive position of the European Union (EU) in the world depends not only on pure economic (trade) power but also the regulatory impact of the Union which is ever increasing. The EU's regulatory influence includes both participation in multilateral bodies that create global rules, standards and practices as well as spreading its own norms and values in exchange for access to the internal market.¹ The latter phenomenon of integration through EU *acquis* is most visible in the EU's neighbourhood and exemplified by an array of regulatory tools varying in form and intensity.

The integration of third countries into the EU's internal market has several objectives, ranging from economic development of the neighbouring regions and of the EU to coordinated responses to mutual threats and challenges. It is a challenge for the EU to integrate neighbouring countries and respond to their interests while bearing in mind those of its own.² The Union's reasons to expand its *acquis* to non-Member States are largely twofold: on the one hand, regulatory approximation between the EU and the third countries' legal orders increases political and economic stability in the EU's immediate neighbourhood; on the other hand, the *acquis* serves to help non-member states reach internal policy goals which are beneficial also for the EU.³ The latter holds true especially for those states that are currently in a modernisation or transitional phase, such as the countries of the former Soviet Union. Furthermore, providing third countries an alternative to membership in the form of access to the internal market coupled with

¹ See further: M Cremona, 'The Union as a global actor: Roles, models and identity' (2004) 41 *Common Market Law Review* 553. On the external dimension of the internal market see also Commission, 'The External Dimension of the Single Market Review' (Staff Working Document) SEC (2007) 1519; Commission, 'A single market for 21st century Europe' (Communication) COM (2007) 724 final.

² M Cremona, 'The European Neighbourhood Policy: More than a Partnership?' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008) 244, 245.

³ S Lavenex, 'EU external governance in "wider Europe"' (2004) 11 *Journal of European Public Policy* 680, 694.

financial and technical aid instead of a broad enlargement strategy is a possible means of dealing with the problem of accession capacity.⁴

The depth of cooperation varies considerably in each individual case according to the regions and individual countries involved as well as the types of legal instruments used. A certain group of international agreements employed for regulatory cooperation share the special feature of exporting to third countries EU norms, policies and/or institutions. The scope of the *acquis* and the depth of integration envisaged in each agreement are not identical but depend on a number of factors, such as the broader political aims of the general framework or programme into which the agreement belongs, the specific aim of the particular agreement, the geographical proximity of the contracting parties, the economic situation of the third country, and the latter's prospect of and attitude towards EU membership.

Differently from the enlargement process, agreements that envisage legal approximation⁵ between the EU and neighbouring countries on the basis of EU *acquis* do not target total regulatory convergence to the extent of the entire body of EU *acquis*. Most often the norms export only concerns the *acquis* of the internal market and is, thus, directly connected to granting third countries market access in the EU. Furthermore, in some instances the process of regulatory approximation is based primarily on international or bilateral norms,⁶ in other cases complete legal homogeneity on the basis of internal market *acquis* is sought between the EU and the third countries. The evolution of the role of internal market *acquis* in the EU's external relations is one of deepening and broadening towards a common set of rules, featuring a variety of policy frameworks, types of agreements and objectives in terms of future EU membership.

⁴ The former President of the European Commission Romano Prodi suggested as a solution the creation of a Common European Economic Space based on 'sharing everything with the Union but institutions': R Prodi, 'A Wider Europe - A Proximity Policy as the key to stability', speech held at the Sixth ECSA-World Conference 'Peace, Security And Stability International Dialogue and the Role of the EU', Brussels, 5-6 December 2002, SPEECH/02/619.

⁵ In the context of EU external relations the term refers to alignment with EU law rather than legislative harmonisation involving the participation of the Member States. See M Cremona, 'The New Associations: Substantive Issues of the Europe Agreements with the Central and Eastern European States' in SV Konstadinidis (ed), *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market* (Dartmouth 1996) 141, 154.

⁶ E Barbé and others, 'Drawing the Neighbours Closer... to What?' (2009) 44 *Cooperation and Conflict* 378.

The practice of exporting internal market *acquis* to third states and, especially, the aim of thereby extending the internal market to third countries is an important part of the EU's external action and, in fact, the most extreme case in terms of legal integration. From the perspective of EU constitutional law, the phenomenon raises a set of questions pertaining to the nature of the internal market and the EU legal order and the overall 'expandability' of the internal market separate from the EU's enlargement process. The following analysis serves to illustrate the emergence in the EU's external action of the practice of extending the internal market to the neighbourhood countries through the prism of the different roles played by the internal market *acquis* in the EU's external relations.

2 The evolving role of internal market *acquis* in EU external relations

Close regulatory cooperation between the EU and its neighbouring countries dates back to the early days of the European Communities. The first Association Agreements were signed between the European Economic Community (EEC) and Greece and Turkey already in 1961 and 1963, respectively.⁷ During the next 50 years, the EU has concluded numerous association, cooperation, and partnership agreements with its closer and more distant neighbours. Today, every country in the EU's neighbourhood – a notional area that exceeds the geographical borders of Europe and includes the Mediterranean and the Caucasus regions – has entered into formalised relations with the EU through one or more bilateral or multilateral agreements.

The agreements concluded between the EU and the neighbouring countries vary in terms of the broader political context, their particular aims and the scope of EU *acquis* contained therein. The agreements are concluded on a variety of different legal bases and envisage different levels and forms of political, economic and legal cooperation. There are three broad categories of agreements which export EU *acquis* to the neighbouring countries: association agreements; Partnership and Cooperation Agreements (PCAs) and

⁷ Agreement establishing an association between the European Economic Community and Greece [1963] OJ L26/294; Agreement establishing an association between the European Economic Community and Turkey [1964] OJ L217/3685 (EEC-Turkey Association Agreement).

other agreements belonging to the European Neighbourhood Policy (ENP); and multilateral sectoral agreements.

The majority of association and partnership agreements form part of broader policy frameworks, such as the Europe Agreements (EAs) or the Stabilisation and Association Process (SAP). Next to these ‘macro-policies’, however, regulatory approximation also takes place on the level of ‘meso-policies’ that concern the external dimension of developments within the internal market.⁸ Five principal functions of the internal market *acquis* in the EU’s relations with the neighbourhood can be distilled on the basis of the aims and scope of the agreements as regards legal approximation with the internal market. These five functions include the gradual integration of non-member countries into the wider area of cooperation in Europe; liberalisation of trade in the form of establishing a free trade area or customs union; preparing potential candidate countries for membership in the EU; integrating third countries into the internal market; and as a limited version of the latter, integrating non-member countries into a sector of the internal market. The same third country may have concluded with the EU agreements that envisage different roles of the *acquis*, such as deep sectoral integration in addition to an association agreement with very limited scope for internal market *acquis*. In the same agreement, too, the *acquis* may assume different roles. A generally noticeable trend is towards greater integration through deeper and more legally binding forms of regulatory cooperation over time and across individual countries and regions.

2.1 Gradual integration of third countries into the wider area of cooperation in Europe

The loosest connection between a third country and the single market *acquis* is represented by the model of cooperation between the EU and non-Member States without directly integrating the latter into the internal market. Such cooperation mainly takes place in the framework of PCAs and Euro-Mediterranean Association Agreements (EMAAAs)⁹ but includes also the ENP, the EU-Russia Legal Spaces, the Eastern Partnership

⁸ S Lavenex, D Lehmkuhl and N Wichmann, 'Modes of external governance: a cross-national and cross-sectoral comparison' (2009) 16 *Journal of European Public Policy* 813, 814.

⁹ The EU-Israel relationship is exceptional in this regard. Free trade between the EU and Israel in industrial products has been in place since the 1975 Agreement between the European Economic Community and the State of Israel [1975] OJ L136/3. The EC-Israel EMAA aims to ‘reinforce’ the existing FTA: see Article

and the Union for the Mediterranean. The latter four programmes do not impose specific obligations of approximation with EU *acquis* but instead endeavour to intensify cooperation already started by the conclusion of the PCAs and EMAAs. In all of these frameworks, approximation frequently takes place on the basis of international conventions¹⁰ and World Trade Organisation (WTO) law¹¹ instead of EU *acquis*. In these frameworks, therefore, speaking of a function of internal market *acquis* is often only notional.

PCAs form a large category of agreements. The legal bases for concluding partnership agreements are Article 212 Treaty on the Functioning of the European Union (TFEU), which provides for 'economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries', and Article 209 TFEU providing for the conclusion of agreements on development cooperation. Less elaborate in set-up than association agreements, partnership agreements neither aim at setting up common institutions nor prepare potential candidates for EU membership.

In the beginning of the 1990s, the EU concluded PCAs with the former Soviet Union countries with the exception of the Baltic States. At the time there was no separate legal basis for this type of agreements and instead a combination of the Common Commercial Policy (CCP) provision Article 133 EC Treaty (now Article 207 TFEU) and sectoral provisions was used.¹²

In 2004, the ENP was launched as a framework for the relations between the EU and the southern and eastern neighbouring countries. Implicitly, the ENP provides an alternative to EU membership for countries in the EU's neighbourhood that generally lack a

6(1) of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3. Pursuant to Article 1(2) of the EC-Israel EMAA, the specific aim of the agreement is the setting up of political dialogue and the expansion of trade in goods and services, the liberalisation of the right of establishment and of public procurement, the free movement of capital and the intensification of cooperation in science and technology.

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

¹¹ See, for example, Articles 10(1), 28(1) and 36 EC-Russia PCA.

¹² The legal bases for concluding the EC-Russia PCA were Article 101 European Atomic Energy Community (EAEC) Treaty, Articles 57, 54, 235, 113, 100, 99, 84, 75, 66 EC Treaty, Article 95 European Coal and Steel Community (ECSC) Treaty.

membership prospect and aims at avoiding dividing lines between an integrated and integrating Europe and its further neighbours. The ENP also offers third countries 'a stake in the EU's Internal Market and the promotion of the four freedoms' for the purpose of achieving the primary aim of the ENP – security coupled with stability and prosperity.¹³ Wishing to communicate with the EU on a more equal level than what it considers the ENP to be, Russia does not participate in the ENP. Instead, in addition to the 1997 PCA and a number of sectoral agreements, EU-Russia relations are governed by the Four EU-Russia Common Spaces on economic affairs, area of freedom, security and justice (AFSJ), external security, and research, education and culture; and the EU-Russia Partnership for Modernization (P4M) which builds on the Four Common Spaces.¹⁴ In 2008, negotiations on a new agreement to replace the PCA were launched but have been suspended.

In spite of the PCAs exporting some *acquis* and the *acquis* in some occasions resulting in granting third country nationals equal treatment with EU citizens, the soft nature of the majority of obligations arising from PCAs reveals the flexibility of the agreements and the absence of a deep integration perspective between the EU and the PCA countries as compared to other agreements discussed below, such as the European Economic Area (EEA) Agreement. The objectives of the PCA concluded between the European Community (EC) and Russia, for example, are political dialogue, the promotion of trade and investment, the strengthening of political and economic freedoms, providing an 'appropriate framework for the gradual integration between Russia and a wider area of cooperation in Europe', and the creation of necessary conditions for the future establishment of a free trade agreement (FTA) including the four internal market freedoms and the freedom of establishment except for the most sensitive, the free movement of persons.¹⁵ The PCA does not grant Russia access to the internal market nor

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

¹⁴ Council, 'Joint Statement on the Partnership for Modernisation – 25th EU-Russia Summit, Rostov-on-Don, 31 May-1 June 2010' (Press Release) 10546/10, 1 June 2010.

¹⁵ Article 1 EC-Russia PCA. Russia was, in fact, aiming for the PCA to become something similar to the EAs but the EC was reluctant to establish such close cooperation with an at the time rather unstable country that was, moreover, in a complicated geopolitical situation: M Maresceau and E Montaguti, 'The relations between the European Union and Central and Eastern Europe: A legal appraisal' (1995) 32 *Common Market Law Review* 1327, 1339; Y Borko, 'The New Intra-European Relations and Russia' in M Maresceau (ed), *Enlarging the European Union* (Longman 1997) 376, 384.

does it establish an FTA. The latter is to be concluded separately,¹⁶ taking into consideration, among others, Russia's accession to the WTO in 2012.

In 2009, the EU launched the Eastern Partnership as a special eastern dimension of the ENP, supporting the political and socio-economic reforms of the partner countries and facilitating approximation with EU *acquis*. The outdated PCAs will soon be replaced with new association agreements that include Deep and Comprehensive Free Trade Agreements (DCFTAs). The new integration approach in the Eastern Partnership is two-dimensional. The DCFTAs envisage multilateral cooperation through approximating third countries' legal systems with EU *acquis* and provide for third countries entry into the EU's internal market as well as lead to increased competition within the neighbourhood. The new association agreements coupled with DCFTAs were signed with Georgia, Moldova and Ukraine in 2014. Negotiations with Azerbaijan are currently ongoing. Negotiations with Armenia were finished but the agreement was not initialled or signed because of Armenia's plans to join the Russian-led Customs Union the customs provisions of which are incompatible with those of the envisaged DCFTA.

Following some initial agreements concluded between the EEC and the Mediterranean countries in the 1960's and 70', cooperation between the EU and the southern Mediterranean countries was revived in 1995 within the framework of the Euro-Mediterranean Partnership ('Barcelona Process').¹⁷ Subsequently, EMAAs were concluded with all of the participants of the Euro-Mediterranean Partnership, except for Syria. The level of 'association' envisaged by the EMAAs does not differ considerably from the PCAs despite them being FTAs. In this case, the fact that the agreements were concluded as association agreements suggests the diversity among the latter rather than the depth of the EU's relations with the southern Mediterranean countries as compared to PCAs in the eastern neighbourhood.

In 2008, similarly to the Eastern Partnership for the eastern European neighbourhood, the Union for the Mediterranean was initiated to complement the existing bilateral

¹⁶ Article 3 EC-Russia PCA.

¹⁷ Barcelona Declaration adopted at the Euro-Mediterranean Conference, Barcelona, 27-28 November 1995. The founding members were the EC, Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.

agreements.¹⁸ The specific objective of the Union for the Mediterranean is to liberalise trade in two dimensions – bilaterally between the EU and the Mediterranean countries, and multilaterally among all of the Mediterranean countries. The future perspective for the Union for the Mediterranean is proclaimed in the Euro-Mediterranean Trade Roadmap beyond 2010, which seeks to replace the existing association agreements and South-South Agreements with DCFTAs.¹⁹

Contrary to other association agreements, EMAAs do not endeavour to integrate the southern Mediterranean countries into the Union. The objectives of the EC-Algeria EMAA, for example, are political dialogue, regional cooperation and the promotion of trade, and the establishment of conditions for the gradual liberalisation of trade in goods, services and capital.²⁰ None of these aims is particularly ambitious. Trade liberalisation is to take place on the basis of WTO rules,²¹ although in standardisation and conformity assessment the use of EU standards is encouraged.²² The lack of a membership perspective due to the southern Mediterranean countries' geographical location, as well as the poor economic and turbulent political situations in most countries of the region, lead to a very low scale of alignment with EU *acquis*. The state of affairs may, however, change with the adoption of the new DCFTAs.

2.2 Trade liberalisation through establishing an FTA or customs union

In addition to integration into a broader area of cooperation in Europe the internal market *acquis* also has a role in liberalising trade by means of an FTA or customs union. Examples include, for instance, the EEC-Turkey Association Agreement, the EAs and Stabilisation and Association Agreements (SAAs) – instruments of the SAP. In principle, the new association agreements and DCFTAs concluded in the framework of the Eastern Partnership also belong to this category.

¹⁸ Council, 'Joint Declaration of the Paris Summit for the Mediterranean – 13 July 2008' (Press Release) 11887/08, 15 July 2008, para 13. The founding members were the EU27 and Albania, Algeria, Bosnia and Herzegovina, Croatia, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.

¹⁹ 'Conclusions of the 8th Union for the Mediterranean Trade Ministerial Conference – Brussels, 9 December 2009' (Press Release) MEMO/09/547, 9 December 2009.

²⁰ Article 1(2) of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2. For the exceptional case of the EC-Israel EMAA see above n 9.

²¹ For example, Articles 6, 11, 30(1), 42 EC-Algeria EMAA.

²² Article 55 EC-Algeria EMAA.

The legal basis for concluding association agreements is Article 217 TFEU. Association agreements may have any of the four main objectives: preparing for membership in the European Union, offering an alternative to membership, development cooperation, and inter-regional assistance.²³ The common feature of all current association agreements is reciprocity, especially those that establish an FTA or a customs union by virtue of WTO requirements, although the scope of rights and obligations varies from one agreement to another. The nature of association agreements was clarified in *Demirel*.²⁴ According to the Court, 'an association agreement creat[es] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system'.²⁵ The precise character of these 'special, privileged links' is not specified in the judgment but in practice the reciprocal rights and obligations in association agreements concluded with the neighbouring countries most often include the third countries' adoption of EU *acquis*, or accession to international conventions in exchange for financial and technical assistance and, to varying degrees, access to the internal market.

One of the earliest association agreements, the EEC-Turkey Association Agreement ('Ankara Agreement') which was concluded in 1963 and entered into force in 1964, does not belong to any other overarching policy agendas. The objective of the EEC-Turkey Agreement is to promote trade and economic relations between the EU and Turkey, and to, subsequently, create a customs union covering all trade in goods.²⁶ The specific *acquis* that Turkey is obliged to adopt under the agreement is specified in the ensuing decisions of the Association Council,²⁷ which, together with the Agreement, form the 'law of association'.²⁸ The specific means for approximation include the adoption of legislation 'equivalent' to the EU *acquis* and accession to multilateral conventions on intellectual,

²³ D Hanf and P Dengler, 'Accords d'association' (2004) College of Europe Research Papers in Law 2004/1, 10-14.

²⁴ Case 12/86 *Demirel* [1987] ECR 3719.

²⁵ *ibid* para 9.

²⁶ Article 2 EEC-Turkey Association Agreement.

²⁷ Most importantly, Decision 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union [1996] OJ L35/1 (Decision 1/95); and a number of subsequent decisions of the EC-Turkey Customs Cooperation Committee laying down the detailed rules for the application of Decision 1/95.

²⁸ E Lenski, 'Turkey (including Northern Cyprus)' in S Blockmans and A Łazowski (eds), *The European Union and Its Neighbours: A legal appraisal of the EU's policies of stabilisation, partnership and integration* (T.M.C. Asser Press 2006) 283, 289.

industrial and commercial property rights.²⁹ Harmonisation, however, is only to take place 'as far as possible'. The agreement does thus not aim for complete regulatory harmonisation with EU *acquis*. Although the EU-Turkey law of association comprises extensive parts of internal market *acquis* it falls short of all four free movement rights. Pursuant to the programmatic Article 12 of the EEC-Turkey Agreement,³⁰ for example, the parties are to progressively secure the free movement of workers. To this date, the free movement of workers between the EU and Turkey has 'not at all' been realised.³¹

In the 1990s, the EC concluded almost identical bilateral association agreements – Europe Agreements – with ten Central and Eastern European Countries (CEECs) which all joined the EU during the two consecutive enlargements of 2004 and 2007. Between 2000 and 2005, SAAs were concluded between the Community and six Western Balkan countries Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia (FYROM), Montenegro and Serbia. Just as the EAs, the SAAs, too, are virtually identical in content.

The explicit objective of the EAs was to gradually establish an FTA.³² The agreements provided for the abolishment of quantitative restrictions and, gradually, customs duties,³³ liberalisation of trade in most areas except for agriculture and fisheries,³⁴ and provisions on the movement of workers, capital and services. Eliminating unfair competition in the CEECs prior to their integration into the internal market was of crucial importance.³⁵ None of these policy areas enjoyed a special priority status.³⁶ The

²⁹ Annex 8 to Decision 1/95, Articles 2 and 3.

³⁰ Case 12/86 *Demirel* (n 24) para 23.

³¹ Commission, 'Proposal for a Council Decision on the position to be taken on behalf of the European Union within the EEC-Turkey Association Council with regard to the provisions on the coordination of social security systems' COM (2012) 152 final, 6; Case C-81/13 *United Kingdom v Council* (Court of Justice, 18 December 2014), para 57. Moreover, the opening of labour markets has been stalled on both sides and restrictions are in place also for EU citizens to undertake labour activities in Turkey: *Lenski* (n 28) 294-296.

³² Article 7(1) of the Europe Agreement establishing an association between the EC and their Member States, and Poland [1993] OJ L348/1 (EC-Poland EA).

³³ Article 13 EC-Poland EA.

³⁴ Articles 20(5) and 21(2) EC-Poland EA. Under these provisions, due to the sensitivity of the agriculture and fisheries policies concessions will be made gradually on the basis of negotiations.

³⁵ Commission, 'The Europe Agreements and beyond: A Strategy for the countries of Central and Eastern Europe for Accession' (Communication) COM (94) 320 final, 5.

³⁶ Article 69 EC-Poland EA provides that the approximation of laws shall extend to a number of areas including customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and

EAs also featured a strong social dimension, as well as cooperation in sectors such as industry, investments, science and technology, education, agriculture, energy, environment, transport, telecommunications, financial services, etc.³⁷ The level of legal approximation between the EC and the CEECs envisaged by the EAs was very different from one provision to another. While the rules on trade in goods and on competition and state aid of the EAs reflected the EC Treaty quite exactly, the rules pertaining to the free movement of persons, services, capital and the right of establishment, as well as approximation clauses differed substantially from the EC Treaty.³⁸

The SAAs, too, envisage the establishment of an FTA comprising industrial products and gradual market opening for agricultural and fisheries products. In order to avoid distortions to the internal market that the SAA countries will gradually gain access to, competition provisions play an important role in the agreements.³⁹ The SAAs provide for approximation with the fundamental elements of the internal market *acquis* and certain key policy areas. They include provisions on the free movement of workers, services, and capital and freedom of establishment,⁴⁰ nevertheless subject to a number of restrictions.⁴¹ The overall scope of the *acquis* contained in the SAAs is comparable to the EAs.

2.3 (Pre-) pre-accession

The third function of EU *acquis* in international agreements is to prepare potential candidate countries for future EU candidacy status. The two frameworks to consider

life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.

³⁷ Titles VI-VIII EC-Poland EA.

³⁸ PC Müller-Graff, 'Legal Framework for Relations between the European Union and Central and Eastern Europe: General aspects' in M Maresceau (ed), *Enlarging the European Union* (Longman 1997) 27, 34. An indication of the more restricted scope of the fundamental freedoms in the EAs is provided in the agreements that do not speak of the 'free' movement of persons and 'freedom of establishment' but merely the movement of workers, establishment, and the supply of services: M Cremona, 'The New Associations: Substantive Issues of the Europe Agreements with the Central and Eastern European States' in S V Konstadinidis (ed), *The Legal Regulation of the European Community's External Relations after the Completion of the Internal Market* (Dartmouth 1996) 141, 145.

³⁹ Article 40 of the Stabilisation and Association Agreement between the EC and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/166 (EC-Albania SAA) on state monopolies, Article 71 on competition law, Article 72 on public undertakings.

⁴⁰ Title V EC-Albania SAA.

⁴¹ These restrictions primarily concern the free movement of workers. See, for example, Article 47 EC-Albania SAA.

here are the same as in the previous category – the EEC-Turkey Association Agreement, the EAs and the SAAs.

The aims and contents of the EEC-Turkey Association Agreement together with the political developments following its conclusion rather convincingly demonstrate that while association agreements are a starting point for approximating third countries' legal systems with the EU *acquis*, the conclusion of an association agreement is not strictly connected to the idea of the associated country's future membership in the EU. Among the agreements discussed here, the EEC-Turkey Agreement is the most explicit example as regards the connection between a third country adopting EU *acquis* and the same country's membership prospect. Article 28 of the EEC-Turkey Agreement makes a reference to Turkey's possible future accession to the Community.⁴² At the Helsinki summit in 1999, Turkey obtained the status of a candidate country and started accession negotiations in 2005 as a result of which Turkey is now adopting EU *acquis* as part of the pre-accession strategy.⁴³ The actual accession is, however, not to happen in the near future.

The EAs, on the other hand, were initially not considered part of the pre-accession strategy but rather a means of modernisation and integration without an imminent perspective of membership.⁴⁴ The EAs demonstrate that the role of the internal market *acquis* can change over time within the same instrument, in this case from managing the relationship between the EC and its neighbours to a pre-accession tool. The EAs had broader objectives of integrating the CEECs into the internal market than the EEC-Turkey Agreement. Nevertheless, the first EAs contained no more than a slight indication

⁴² The provision reads as follows: 'As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.'

⁴³ Maresceau defines, despite admitting the difficulty thereof, pre-accession strategies as 'EU initiatives whereby candidate countries for EU membership are brought closer to the EU in political, economic, and legal terms so that, in the end, accession is not too abrupt for both the candidate countries *and* the EU to absorb': M Maresceau, 'Pre-accession' in M Cremona (ed), *The Enlargement of the European Union* (Oxford University Press 2003) 9, 10.

⁴⁴ This was made explicit by the Commission: '[Eventual membership] is not among the objectives of the [EAs]...[which] have a special value in themselves and should be distinguished from the possibility of accession to the Community...', Commission, 'Association Agreements with the countries of central and eastern Europe: a general outline' (Communication) COM (90) 398, 3.

about the associated countries' membership aspirations in their preambles.⁴⁵ Since the EC failed to recognise the CEECs as potential candidates, the category being introduced only later, the EAs were subsequently not perceived as tools for preparing future membership in the Community.

The EU's initial careful approach changed after the 1993 Copenhagen European Council where EU membership was declared to be available for the associated CEECs who so desire after satisfying the relevant economic and political criteria.⁴⁶ The 1994 European Council at Corfu included the EAs into the pre-accession strategy by stating that the full potential of the EAs and the decisions taken in Copenhagen in 1993 must be 'exploited with a view to preparing for accession'.⁴⁷ The following European Council in Essen, furthermore, recognised the preparation of the CEECs for integration into the internal market as the key element of the pre-accession strategy.⁴⁸ The EAs concluded after 1994 already contained an explicit reference to the associated countries' membership perspectives.⁴⁹ The later EAs did not reflect the differences in the political context pre- and post-Copenhagen.⁵⁰

Transforming the EAs into pre-accession instruments was not a difficult task because of their far-reaching substantive content which already set the basis for the application of the four freedoms and legislative approximation, as well as creating a suitable institutional framework.⁵¹ Yet the CEECs' alignment with the internal market by the association process did not replace the accession process. The EAs covered only internal market *acquis* and not the entire accession *acquis*.

⁴⁵ See, for example, Recital 15, Preamble to the EC-Poland EA.

⁴⁶ European Council, 'Conclusions of the Presidency – Copenhagen, 21-22 June 1993' SN 180/1/93 REV 1, 13.

⁴⁷ European Council, 'Conclusions of the Presidency – Corfu, 24-25 June 1994' SN 150/94.

⁴⁸ European Council, 'Conclusions of the Presidency – Essen, 9-10 December 1994' SN 300/94.

⁴⁹ 'Taking into account the accession preparation strategy adopted by the Essen European Council of December 1994, which is being politically implemented by the creation, between the associated States and the institutions of the European Union, of structured relations which encourage mutual trust and will provide a framework for addressing topics of common interest': Recital 23, Preamble to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1998] OJ L68/3.

⁵⁰ K Inglis, 'The Europe agreements compared in the light of their pre-accession reorientation' (2000) 37 *Common Market Law Review* 1173, 1175.

⁵¹ M Maresceau, 'Pre-accession' in M Cremona (ed), *The Enlargement of the European Union* (Oxford University Press 2003) 9, 16-17. In fact, only after 1994 has the EU engaged in genuine pre-accession strategies: *ibid* 9.

In the 1995 White Paper, the Commission sketched out the pre-accession strategy of integrating the CEECs into the internal market.⁵² In terms of content – with the exception of the free movement of persons – the voluntary approximation framework of the White Paper is comparable to the Agreement establishing the European Economic Area.⁵³ The focus of the EAs was on political dialogue and the establishment of an FTA. The White Paper was to fill the gaps in the approximation plan of the EAs to comply with the pre-accession agenda.⁵⁴ The focus of the EAs had never been on fully integrating the CEECs into the internal market – a stage that was instead envisaged and accomplished by the EEA Agreement.

Analogously to the EAs, membership is not an immediate goal of the SAA Agreements. The political contexts surrounding the two groups of agreements are rather similar. However, compared to the EAs the SAAs are more assertive as regards future membership, recognising the contracting parties as ‘potential candidate[s] for European Union membership’⁵⁵ and mentioning their ‘gradual rapprochement with the European Union’,⁵⁶ but this has little impact on the content of the agreements. The pronounced aim of the SAAs is to establish an FTA. The SAAs are, furthermore, used in the pre-pre-accession process in order to prepare future candidate countries for the accession process. The potential candidate status of the SAP countries was recognised by the European Council in 2000.⁵⁷ At this moment, the United Nations Interim Administration Mission in Kosovo (UNMIK) has completed negotiations on an SAA and Bosnia and Herzegovina is recognised as a potential candidate country having not yet submitted a membership application. Macedonia (FYROM) has enjoyed candidate status since 2005 and Albania since 2014. Montenegro and Serbia started accession negotiations in 2012 and 2014, respectively. In 2013, Croatia joined the EU. Finally, the new association agreements/DCFTAs signed with Georgia, Moldova and Ukraine in 2014 are significant in

⁵² Commission, ‘White Paper – Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union’ COM (95) 163 final (CEEC White Paper).

⁵³ M Maresceau and E Montaguti, ‘The relations between the European Union and Central and Eastern Europe: A legal appraisal’ (1995) 32 *Common Market Law Review* 1327, 1336. For a contrasting view of the EEA and the CEEC White Paper see M A Gaudissart and A Sinnaeve, ‘The Role of the White Paper in the Preparation of the Eastern Enlargement’ in M Maresceau (ed), *Enlarging the European Union* (Longman 1997) 41, 66-71.

⁵⁴ *ibid* 66.

⁵⁵ Recital 17, Preamble to the EC-Albania SAA.

⁵⁶ Article 8(2)(1) EC-Albania SAA.

⁵⁷ European Council, ‘Conclusions of the Presidency – Feira, 19-20 June 2000’ SN 200/00.

terms of the adoption of the internal market *acquis* and the objective of a gradual integration into the internal market.⁵⁸

3 Expanding the internal market

The final category of functions of the internal market *acquis* in the EU's relations with the neighbouring countries is that of integrating third countries into the internal market independently of the non-EU contracting parties' membership aspirations. This integration may cover the entire internal market or be limited to one or more specific policy sectors. In spite of the differences in the breadth of the cooperation across policy areas, both categories share the same depth of integration in terms of the free movement provisions.

3.1 Comprehensive integration into the internal market

The only genuine example of an agreement in which *acquis* is exported for the purpose of extending the internal market outside the Union in a comprehensive manner without a membership perspective is the agreement establishing the EEA. The EEA Agreement was signed in 1992 as a multilateral association agreement between the EC, its Member States and the countries of the European Free Trade Area (EFTA) except for Switzerland.⁵⁹ The EEA Agreement entered into force on 1 January 1994. Since most of the former EEA EFTA countries have by now joined the EU,⁶⁰ Iceland, Liechtenstein and Norway are the only non-EU participants in the EEA. Despite the small number of non-EU contracting parties, there are no indications that the EEA would cease to exist in the foreseeable future. Norway's possible accession to the EU was rejected at referenda both in 1972 and 1994. In July 2009, Iceland submitted an application for EU membership and started accession negotiations in 2010 but negotiations were suspended in 2013 and in

⁵⁸ See G Van der Loo, 'The EU-Ukraine Deep and Comprehensive Free Trade Area: A coherent mechanism for legislative approximation?' in P Van Elsuwege and R Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2014) 63.

⁵⁹ Agreement on the European Economic Area [1994] OJ L1/3 (EEA Agreement).

⁶⁰ Austria, Denmark, Portugal, Sweden, United Kingdom, Finland.

March 2015 Iceland withdrew the application. Liechtenstein's EU membership has not been subject to genuine discussion.⁶¹

The objective of the EEA Agreement is to create a 'homogeneous European Economic Area' based on equal conditions of competition and respect for the same rules.⁶² This explicit aim of homogeneity differentiates the EEA Agreement from all other agreements exporting internal market *acquis* discussed above. Instead of gradual cooperation with the EU generally on a political level or particularly in the sphere of the internal market the EEA Agreement aims to integrate EEA EFTA States to the internal market as deeply as EU Member States.

The EEA Agreement covers almost the entire spectrum of internal market *acquis*: the free movement of goods, persons, services and capital; rules on competition; horizontal provisions relevant to the four freedoms covering social policy, consumer protection, environment, statistics, and company law; and flanking provisions falling outside the four freedoms, such as education, small and medium sized enterprises, tourism, the audiovisual sector, and civil protection. The customs union and the CCP, on the other hand, as well as the common agricultural and fisheries policies are not part of the EEA Agreement thus limiting the application of the free movement of goods in the EEA.⁶³ Outside the latter policy areas, EEA EFTA States are fully-fledged participants in the internal market. Schengen *acquis* does not form part of the EEA Agreement but all EFTA states including Switzerland have joined the Schengen area by concluding separate bilateral agreements with the EU. The Schengen and Dublin Agreements are unique in the contexts of cooperation within the EEA and between the EU and Switzerland. The annexes of the Schengen and Dublin agreements are updated dynamically to mirror changes in the respective *acquis*.⁶⁴ In turn, the decision-shaping procedure established

⁶¹ The accession of a micro-state to the EU potentially raises problems on the side of the acceding state as well as the EU, see C Frommelt and S Gstöhl, 'Liechtenstein and the EEA: The Europeanization of a (very) small state' (2011) 18 *Europautredningen*, 54-55.

⁶² Article 1(1) EEA Agreement.

⁶³ Article 8(3) EEA Agreement.

⁶⁴ For example, the transfer to the Swiss legal system of post-signature *acquis* and case law of the Court of Justice is provided by Articles 8-10 of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* [2008] OJ L53/52 (EU-EC-Switzerland agreement on Schengen *acquis*). Analogous rules are in place in the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for

by these agreements allows Switzerland, Norway, Iceland and Liechtenstein to participate in the Schengen and Dublin Mixed Committees where the Schengen *acquis* is developed, albeit without a vote in the Council of the European Union (the Council).⁶⁵

The EEA system of exporting the single market *acquis* to third countries goes well beyond other association agreements. In addition to the extensive scope of *acquis*, the EEA Agreement is unique due to its elaborate institutional framework that allows the adoption of new *acquis* to take place *quasi*-automatically.⁶⁶ According to the EFTA Court, the EEA has, furthermore, become a legal system of its own based essentially on the EU single market *acquis* but with a narrower scope than the EU Treaties.⁶⁷

The preamble to the EEA Agreement specifies that in addition to adopting common rules and provisions on competition the 'dynamic and homogeneous European Economic Area' must also provide for adequate enforcement, including at the judicial level.⁶⁸ Accordingly, the dynamic and homogeneous EEA legal system is based on four pillars of homogeneity – common rules, equal conditions of competition, enforcement, and judicial review. These first of the four pillars refers to the internal market *acquis* contained in the Annexes to the Agreement, the horizontal rules applying to all single market provisions, the institutions and procedures set up by the EEA Agreement as well as the institutions and procedures of the Union, including the Court of Justice.

Switzerland, although a member of the EFTA is not party to the EEA Agreement. Switzerland participated in the negotiations of the EEA Agreement together with the other EFTA members but did not conclude the agreement owing to a negative referendum in 1992. Instead, the EU-Switzerland relationship is governed by over a hundred bilateral agreements. These agreements notably include two packages: 'Bilateral I', signed in 1999 and 'Bilateral II', signed in 2004. Bilateral I and II contain seven and nine agreements, respectively, and cover the fields of free movement of persons, air transport, rail and road transport, trade in agricultural products, public procurement, scientific and technological cooperation, mutual recognition of conformity

establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [2008] OJ L53/5.

⁶⁵ See also below chapter 6 section 3.2.1.

⁶⁶ Articles 102(1), (3), (4) EEA Agreement.

⁶⁷ Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95, para 59.

⁶⁸ Recital 4, Preamble to the EEA Agreement.

assessment, processed agricultural products, environment, statistics, fight against fraud, double taxation of retired EU civil servants' pensions, Schengen/Dublin, etc.

The series of Bilateral I and II have certain differences. The Bilateral I agreements were concluded as association agreements⁶⁹ as a single package. The termination of a single agreement in the package is not possible due to the 'guillotine clause' which requires that all seven agreements enter into force together and that none of them can be terminated individually.⁷⁰ The guillotine clause binds together some of the pieces of *acquis* in the jigsaw puzzle of the EU-Switzerland relationship and helps maintain its uniformity.⁷¹ The Bilateral II agreements are not association agreements⁷² and do not contain a guillotine clause because their subject matters are not connected to each other in a similar manner as Bilateral I. The non-ratification or termination of one or more of the Bilateral II agreements by either party will not, therefore, have a detrimental effect on the application of the others.

The objective of the EU-Switzerland bilateral agreements is to enhance deep sectoral cooperation but not full participation in the internal market on completely equal terms with EU Member States. Similarly to the EEA Agreement, the annexes to the bilateral agreements list applicable EU legislative acts and strive towards homogeneity between EU *acquis* and pre-signature *acquis* in the agreements, leaving the effect of post-signature *acquis* to be decided on an *ad hoc* basis.⁷³ The fact that the provisions of the bilateral agreements are to be interpreted and applied in the light of the case law of the Court of Justice confirms that the nature of the EU-Swiss relationship is, at least to some extent,

⁶⁹ For example, the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6 (EC-Switzerland Agreement on the Free Movement of Persons) was concluded on the basis of Articles 18, 39, 44, 42, 44, 46, 47, 52, 55, 95, 150, 229, 310 EC Treaty. The legal basis for the Agreement between the European Community and the Swiss Confederation on trade in agricultural products [2002] OJ L114/132 was Article 310 EC Treaty.

⁷⁰ See, for example, Article 25 EC-Switzerland Agreement on the Free Movement of Persons. The Bilateral I agreements entered into force simultaneously on 1 July 2002.

⁷¹ See R Schwok, *Switzerland--European Union: an impossible membership?* (P.I.E. Peter Lang 2009) 39.

⁷² For example, Article 285 EC Treaty was the legal basis for concluding the Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics [2006] OJ L90/2; the EU-EC-Switzerland agreement on Schengen *acquis* was concluded on the legal bases of Articles 62, 63, 66, 95 EC Treaty, Articles 24, 38 EU Treaty.

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

comparable to the *sui generis* character of the EU and the EEA legal orders.⁷⁴ On the one hand, Switzerland is adopting all EU *acquis* in the fields covered by the bilateral agreements which points at very deep cooperation. On the other hand, the integration foreseen in the bilateral agreements is less profound than that of the comprehensive EEA Agreement. In addition to lacking cooperation in some policy fields the bilateral agreements notably exclude to a smaller or greater extent the free movement of capital and services and the freedom of establishment.

The objective of the EU-Swiss relationship based on bilateral echoes the negative referendum to participate in the EEA. The cooperation between the EU and Switzerland has rightly been called 'differentiated integration' lying somewhere between cooperation and integration.⁷⁵ On the one hand, the EU-Swiss bilateral agreements envisage much deeper integration with the EU internal market than EAs and SAAs. On the other hand, not all of the four freedoms apply to the bilateral agreements, thus rendering the EU-Switzerland cooperation in the field of the internal market weaker than the cooperation between the EU and the EEA EFTA States. What both (sets of) agreements do share in common is the fact that they provide a comprehensive framework for a particular country's participation in the internal market. This is different from multilateral sectoral agreements discussed in the next subsection that export the *acquis* and aim at homogeneity yet are not intended to govern all aspects of the relationship between the EU and the neighbouring countries in question.

3.2 Sectoral integration into the internal market

Sectoral cooperation between the EU and the neighbouring countries has recently taken on a new form. 'Legally binding sectoral multilateralism'⁷⁶ is providing a successful alternative to bilateral agreements such as those concluded between the EU and Switzerland. Multilateral sectoral cooperation is a means of exporting internal market *acquis* and thus creating 'homogeneous' regulatory spaces that comprise the EU as well as a number of third countries in limited policy areas.

⁷⁴ S Breitenmoser, 'Sectoral agreements between the EC and Switzerland: Contents and context' (2003) 40 *Common Market Law Review* 1137, 1144.

⁷⁵ *ibid*, 1185.

⁷⁶ S Blockmans and B Van Vooren, 'Revitalizing the European 'Neighbourhood Economic Community': The case for legally binding sectoral multilateralism' (2012) 17 *European Foreign Affairs Review* 577.

The function of internal market *acquis* in sectoral integration is significantly different from those discussed above. The previous categories reflected the use of the *acquis* as a tool of EU's external policy⁷⁷ and a platform for political and economic cooperation between the EU and individual third countries or regional groups. Deep sectoral cooperation rests on the foundation of SAP and ENP that have gradually prepared the neighbouring countries for adopting EU *acquis*. In turn, sectoral integration is an important contribution to the overarching policy frameworks. Sectoral cooperation plays a significant role in the new agreements concluded in the framework of the Eastern Partnership, especially in the field of energy policy.⁷⁸ The participants of the 2011 Warsaw Summit agreed to further integrate the energy markets and increase cooperation in the Energy Community Treaty (ECT), which was recently joined by Moldova and Ukraine.⁷⁹ The Euro-Mediterranean framework provides similar examples. In 2006, the first Euro-Mediterranean Aviation Agreement between the EC and its Member States and Morocco was signed and is pending entry into force.⁸⁰ Yet, in addition to strengthening the accession and neighbourhood policies multilateral sectoral agreements also serve the purpose of complementing the EU's internal policies with a structured external dimension.⁸¹ The initial driving force behind deep sectoral cooperation with the neighbouring countries can clearly be traced back to developments in the respective policies of the EU.

The EU has currently concluded two multilateral sectoral agreements – the ECT and the European Common Aviation Area (ECAA) Agreement. The text of a third agreement of the same kind, the Transport Community Treaty (TCT), has been negotiated but not yet signed.

⁷⁷ An extensive analysis of enlargement as foreign policy has been conducted by Cremona in M Cremona, 'Enlargement: A Successful Instrument of Foreign Policy?' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Hart Publishing 2004) 397.

⁷⁸ Third countries engaging in sectoral energy cooperation are mainly interested in the investment opportunities and diversification of their own energy sources: see S Padgett, 'Energy Co-operation in the Wider Europe: Institutionalizing Interdependence' (2011) 49 *Journal of Common Market Studies* 1065, 1072.

⁷⁹ Council, 'Joint Declaration of the Eastern Partnership Summit – Warsaw, 29-30 September 2011' 14983/11, para 13.

⁸⁰ Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part [2006] OJ L386/57.

⁸¹ See, for example, Commission, 'Common Aviation Area with the Neighbouring Countries by 2010 - Progress Report' (Communication) COM (2008) 596 final.

3.2.1 Energy Community

Owing to the fact that the majority of energy resources consumed in the EU, in particular oil and gas, come from producers outside the Union the creation of an internal energy sector inevitably requires a coordinated external action.⁸² Constructing the external dimension of the EU's energy market on bilateral relations carries the risk of fragmenting the market, jeopardising the security of supply and leaving the Union politically vulnerable. A multilateral approach is certainly to be preferred, both on the level of the EU and with respect to the third country partners to energy cooperation.⁸³

Setting up an internal energy market in the EU has not been an easy task. The initial steps towards the creation of a common energy market were to liberalise the internal markets for electricity and gas by enforcing the freedom of establishment, free movement of goods, market transparency and energy efficiency standards, and ensuring the effective implementation of those obligations.⁸⁴ Directive 96/92/EC on common rules for the internal market in electricity was adopted in 1996 with the objective of creating an open internal electricity market.⁸⁵ Two years later, the internal energy market was extended to trade in gas.⁸⁶ In 2003, the two directives were replaced by Directives 2003/54/EC⁸⁷ and 2003/55/EC,⁸⁸ respectively. Their aim was to complete the internal market for energy and gas by the year 2014⁸⁹ but further action is still necessary to meet the target.⁹⁰

⁸² Commission, 'White Paper – An Energy Policy for the European Union' COM (95) 682 final (1995 White Paper), 8.

⁸³ The sensitivities surrounding energy policy do not, in themselves, support a move from bilateralism to multilateralism: K Westphal, 'Energy Policy between Multilateral Governance and Geopolitics: Whither Europe?' (2006) 4 *Internationale Politik und Gesellschaft* 44, 58-60.

⁸⁴ 1995 White Paper (n 82) 16.

⁸⁵ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20.

⁸⁶ Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1.

⁸⁷ Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37.

⁸⁸ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57.

⁸⁹ European Council, 'Conclusions – Brussels, 4 February 2011' EUCO 2/1/11 REV 1, para 4.

⁹⁰ Commission, 'Progress towards completing the Internal Energy Market' (Communication) COM (2014) 634 final, 3.

In 1995, the Commission also pointed at the effect of trans-European energy networks on the neighbouring countries.⁹¹ Action in the external dimension was taken further and in 2002, the EU signed together with nine South East Europe (SEE) countries the Athens Memorandum – a political document in which the parties agreed to work towards establishing an integrated regional energy market in electricity in South-East Europe. The regional market was to be created by 2005 and integrated into the EU’s internal energy market.⁹² One year later, a similar Memorandum of Understanding (MoU) was signed in Athens on the gas market.⁹³ Both of the MoUs are soft law instruments. The importance of giving the Athens Process a legally binding form was recognised as early as in 2002,⁹⁴ and made explicit in 2003.⁹⁵

Subsequently, on 29 May 2006, the EC and Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia (FYROM), Montenegro, Romania, Serbia, and Kosovo (UNMIK) concluded the ECT.⁹⁶ The Treaty entered into force on 1 July 2006. Moldova joined the Energy Community in 2010, followed by Ukraine in 2011. The agreement was initially concluded for a period of ten years with the possibility of extension by a unanimous decision of the Ministerial Council.⁹⁷

The specific aims of the ECT are outlined in Article 2 of the Treaty and include the following: creating a stable regulatory and market framework for ensuring stable and continuous energy supply, creating a ‘single regulatory space’ for trade in Network Energy including the electricity and gas sectors, improving the environmental situation, promoting the use of renewable energy resources, and establishing conditions for trade in energy. These objectives are, according to Article 3 of the Treaty, to be attained via extending the relevant EU *acquis* to all contracting parties, setting up a mechanism for operation of Network Energy Markets, and establishing a single market in electricity and

⁹¹ *ibid* 29-30.

⁹² Memorandum of Understanding on the Regional Electricity Market in South East Europe and its Integration into the European Union Internal Electricity Market, 2002 (The Athens Memorandum 2002).

⁹³ Memorandum of Understanding on the Regional Energy Market in South East Europe and its Integration into the European Community Internal Energy Market, 2003, 15548/03/bis (The Athens Memorandum 2003).

⁹⁴ The Athens Memorandum 2002, para 9.

⁹⁵ ‘The Participants will seek to replace this Memorandum of Understanding with a legally binding agreement as soon as possible.’ The Athens Memorandum 2003, para 9.

⁹⁶ Treaty establishing the Energy Community [2006] OJ L198/18 (ECT). The legal bases for concluding the Treaty were Articles 47, 55, 83, 89, 95, 133 and 175 EC Treaty.

⁹⁷ Article 97 EEC Treaty.

gas. Included is the *acquis* on energy, environment, competition and renewables. The preamble to the Treaty provides for a possibility of expanding the scope of the agreement in the future in order to keep up with developments in the energy sector, including other energy products and carriers such as liquefied natural gas, petrol, hydrogen, and other essential network infrastructures.⁹⁸ The Energy 2020 strategy follows up on the provision and sets the objective of extending the ECT both substantially and geographically.⁹⁹ The Energy Community is thus to closely follow developments in the EU's relations with the neighbourhood and energy *acquis* as well as adapt its scope to developments in the field of energy in a broader sense.

3.2.2 European Common Aviation Area

The logic underpinning the creation of the ECAA is similar to that of the Energy Community. The EU single market for aviation was created in the 1990s by liberalising the air transport sector.¹⁰⁰ In 1999, the European Commission launched the Single European Sky (SES) initiative on air traffic management (ATM) and regulation to reduce delays and congestion in the European airspace and bring ATM under common transport policy.¹⁰¹ The initiative was followed by three legislative packages which came into force in 2004,¹⁰² 2009,¹⁰³

The external aviation policy in the EU was traditionally conducted by Member States' bilateral cooperation with third countries. The *Open Skies* judgments of 2002 represented a revolutionary departure from the practice of concluding bilateral

⁹⁸ Recital 8, Preamble to the ECT.

⁹⁹ Commission, 'Energy 2020 A strategy for competitive, sustainable and secure energy' (Communication) COM (2010) 639 final, 18.

¹⁰⁰ This was achieved by the three market liberalisation packages of 1987, 1990 and 1992: L Butcher, 'Aviation: European Liberalisation, 1986-2002' (2010) House of Commons Library Standard Note SN/BT/182.

¹⁰¹ Commission, 'The creation of the single European sky' (Communication) COM (1999) 614 final.

¹⁰² Commission, 'First Report on the implementation of the Single Sky Legislation: achievements and the way forward' (Communication) COM (2007) 845 final. The 'SES I' package included regulations setting out the general framework, common requirements for the provision of air navigation services, rules on the organisation and use of airspace, and interoperability of the Air Traffic Management Network.

¹⁰³ Commission, 'Single European Sky II: towards more sustainable and better performing aviation' (Communication) COM (2008) 389 final. The 'SES II' package comprised updates to the 2004 legislation, technological regulation of SESAR ATM (Single European Sky Air Traffic Management Research), rules on safety, and an action plan for airport capacity. An Interim update of SES II is envisaged by SES 2+: Commission, 'Accelerating the implementation of the Single European Sky' (Communication) COM (2013) 408 final.

agreements. In this sequence of judgments, the Court of Justice declared that computerised reservation systems, intra-Community tariffs and time slots forming part of the Open Skies Agreements fall within the EU's exclusive competence.¹⁰⁴ As a result, around 2000 bilateral agreements concluded by the Member States so far had to be renegotiated in order to bring them in line with EU law. This marked the start of EU's external aviation policy.¹⁰⁵

According to the Commission, the development and competitiveness of the internal aviation market demand action also in the external sphere.¹⁰⁶ Deep multilateral cooperation was first undertaken with SEE countries whose aviation markets were already inclining towards the EU. The aviation markets of the SEEs were thought to deliver greater operational efficiency, security and safety than other possible markets, as well as contribute in sectoral form to the EU's neighbourhood policy.¹⁰⁷

The Agreement on the Establishment of a Common Aviation Area Agreement was signed on 9 June 2006 between the EC and its Member States, of the one part, and Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia (FYROM), Iceland, Montenegro, Norway, Romania, Serbia and Kosovo (UNMIK), of the other part.¹⁰⁸ The Agreement is pending ratification by all of the contracting parties and has not yet entered into force¹⁰⁹ but is being applied provisionally.¹¹⁰ Pursuant to Article 1(1) of the Agreement, the ECAA is based on 'free market access, freedom of establishment, equal conditions of competition, and common rules including in the areas of safety, security, air traffic management, social and environment'. The relevant *acquis* to be adopted by the non-EU

¹⁰⁴ Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

¹⁰⁵ Commission, 'Developing the agenda for the Community's external aviation policy' (Communication) COM (2005) 79 final, 2.

¹⁰⁶ *ibid* 4.

¹⁰⁷ *ibid* 8.

¹⁰⁸ [2006] OJ L285/3.

¹⁰⁹ In 2013, the Commission issued a reasoned opinion threatening Belgium and Greece with infringement proceedings against them unless they ratify the ECAA Agreement within two months' time: see Commission 'Air transport: Commission urges Belgium and Greece to proceed with ratification of the agreement with the Western Balkans on a Common Aviation Area' (Press Release) IP/13/479, 30 May 2013.

¹¹⁰ Decision of the Council and of the Representatives of the Member States of the European Union meeting within the Council of 9 June 2006 on the signature and provisional application of the Multilateral Agreement on the Establishment of a European Common Aviation Area (ECAA) [2006] OJ L285/1.

contracting parties comprises that of access to the aviation market, aviation safety, aviation security, air traffic management, environment, social aspects, consumer protection, and certain other legislative acts outlined in Annex I of the Agreement.¹¹¹

Similar but bilateral Common Aviation Area (CAA) Agreements were signed on 2 December 2010 with Georgia¹¹² and on 26 June 2012 with Moldova¹¹³ – countries, which do not participate in the ECAA. An analogous agreement with Ukraine is pending signature and negotiations on a CAA with Azerbaijan are currently ongoing. In the southern neighbourhood, the EU has signed Euro-Mediterranean Aviation Agreements with Morocco, Jordan and Israel. Negotiations with Tunisia started in 2013 and the conclusion of a similar agreement with Algeria is envisaged. Integration in the aviation sector is not, therefore, constrained to the multilateral model but features a variety of instruments that group the neighbouring countries according to proximity to the Union and the depth of integration more generally.

3.2.3 Transport Community

Road, rail, inland waterway and maritime transport are further key areas of cooperation between the EU and its neighbouring countries. The focus of EU common transport policy is on integrating transport networks for the benefit of greater cohesion in the internal market as a whole.¹¹⁴ The ambitious Trans-European Transport Network (TEN-T) policy seeks to enhance transport connectivity within the EU to overcome the existing bottlenecks and technical barriers.¹¹⁵ A number of challenges in the internal transport

¹¹¹ Article 3 ECAA Agreement.

¹¹² Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 15 October 2010 on the signature and provisional application of the Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part [2011] OJ L25/1.

¹¹³ Decision of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 7 June 2012 on the signing, on behalf of the Union, and provisional application of the Common Aviation Area Agreement between the European Union and its Member States and the Republic of Moldova [2012] OJ L292/1.

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

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

market remain to be tackled, especially in the fields of environment and sustainability.¹¹⁶ Neighbouring countries have been integrated with the EU transport networks since ten Pan-European Corridors (PEC) and Transport Areas were identified at the Ministerial Conferences on Crete (1994)¹¹⁷ and in Helsinki (1997).¹¹⁸ Following the subsequent enlargement rounds of the EU, most of the PECs are now part of the TEN-T network. The perceived weaknesses of the PEC were to be remedied in the future by regional initiatives. The Pan-European Transport Areas focus on specific regions and include, for example, the South East Europe Transport Observatory (SEETO) in the Western Balkans, operational since 2005; the Euro-Mediterranean Transport Forum in the Mediterranean region, created in 1998; and the TRACECA corridor connecting the EU with Turkey, Southern Caucasus and Central Asia, set up in 1993.¹¹⁹ The extension of EU transport networks to the neighbouring countries has been closely connected with the implementation of the ENP¹²⁰ and the EU's enlargements strategy, and has an important place in the new FTAs.¹²¹

The SEETO was launched in 2004 with the signing of the MoU for the development of the Core Regional Transport Network between the EU and Albania, Bosnia and Herzegovina, Croatia, Macedonia (FYROM), Montenegro, Serbia and Kosovo (UNMIK). The MoU established a transport strategy for the region, including infrastructure programmes and policy cooperation to enhance investment capacity. In order to give transport cooperation in the SEE region a legally binding form and improve the regulatory and investment environment,¹²² in June 2008 the participants of the SEETO started negotiations on a Transport Community Treaty. Negotiations were concluded in 2010

¹¹⁶ Commission, 'White Paper – Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' COM (2011) 144 final, 3-5.

¹¹⁷ Crete Declaration adopted at the Second Pan-European Transport Conference, Crete, Greece, 16 March 1994.

¹¹⁸ Helsinki Declaration 'Towards a European Wide Transport Policy: A Set of Common Principles' adopted at the Third Pan-European Transport Conference, Helsinki, 25 June 1997.

¹¹⁹ Commission, 'Extension of the major trans-European transport axes', 5.

¹²⁰ For this, a High Level Group on the 'Extension of the major trans-European transport axes to the neighbouring countries and regions' was established by the European Commission in 2004.

¹²¹ Commission 'The EU and its neighbouring regions: A renewed approach to transport cooperation' (Communication) COM (2011) 415 final, 3.

¹²² SEETO Comprehensive Network Development Plan 2014 <<http://www.seetoint.org/wp-content/uploads/downloads/2013/12/SEETO-Comprehensive-Network-Development-Plan-2014.pdf>> accessed 24 June 2015, 58.

but political reasons have hindered the signing and entry into force of the Treaty.¹²³

The TCT builds on the ECAA Agreement and aims at fully integrating the SEE region to the EU's internal transport market. Similarly to the ECT and the ECAA Agreement, the TCT is based on the alignment of third country legal systems with the EU *acquis* in the field of transport, including infrastructure development, market access, technical interoperability, safety, security, environment, public procurement and social regulation.¹²⁴

4 Aims and scope of the thesis

The above analysis shows that the EU's external action towards the neighbouring countries is not limited to bilateral trade relations, democratisation and improving security at the Union's immediate borders but is to a large degree directed at integrating the neighbouring countries both into a wider area of cooperation in Europe and, more specifically, into the EU's internal market. In the same vein is EU's internal integration mirrored in the Union's external action. Starting already in the 1960s, the gradual integration of the neighbourhood with the EU and especially with the EU's internal market got a kick-start at the end of the 1980s/beginning of the 1990s. Internal market *acquis* takes centre stage in the gradual integration of third countries without (immediate) membership.

The different functions of the *acquis* outlined above generally reflect the 'concentric circles of EUropean integration'.¹²⁵ Firstly, the profundity of integration is strongly correlated with a third country's geographical proximity to the European Union. This holds even true with regard to closeness to the 'core' of European integration – the founding Member States. The current and former EFTA countries, for example, do or have with a few exceptions bordered the European Union. Likewise is integration between the EEA and the EU the deepest among the neighbouring countries. Multilateral

¹²³ On the negotiating history and the difficulties surrounding the conclusion of the Treaty see S Blockmans and B Van Vooren (n 76) 597-598.

¹²⁴ 'Project Fiche No. 9 Support to the Transport Community Treaty' <http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2011/pf_9_ipa_2011_transport_community.pdf> accessed 24 June 2015.

¹²⁵ S Lavenex, 'Concentric circles of flexible 'EUropean' integration: A typology of EU external governance relations' (2011) 9 Comparative European Politics 372, 387.

sectoral cooperation is equally profound as the EEA yet breaks the pattern of concentric circles as it includes not only the EU's closest and economically most developed neighbours but also countries in European periphery and beyond.

The second criterion that largely determines the extent to which non-members are willing to adopt EU *acquis* is the country's membership prospect. An outlook of acceding to the EU provides for non-EU Member States important incentives to align their national regulatory frameworks with the *acquis* of the EU. The examples of the EU-Morocco aviation agreement, the EEA Agreement and the EU-Switzerland bilateral agreements are exceptions. Morocco cannot accede to the Union due to its geographic location and neither the EEA EFTA States nor Switzerland wish to join the EU in the foreseeable future. For the EFTA states, though, this does not exclude participation in the internal market. In fact, the most far-reaching legal approximation projects in terms of aims and scope of the *acquis* have been undertaken by countries that have chosen not to become members to the EU although accession would, at least from the perspective of fulfilling membership criteria,¹²⁶ be largely a technical matter.

In terms of the form of exporting internal market *acquis*, bilateralism is the EU's natural first choice for cooperation with third countries, including the neighbouring countries. This is notwithstanding several multilateral agreements and multilateral policy frameworks. Due to their relative inflexibility, multilateralism is the preferred option for integrating countries who are economically developed to the extent that allows them to successfully participate in the EU's single market, or for less developed countries in sectors which have a strong cross-border dimension such as energy and transport. Multilateral agreements enjoy a particular position among EU's external policy instruments. On the one hand, multilateral comprehensive agreements such as the EEA are a means for countries who wish to participate in the EU's internal market on an equal basis with the EU Member States and could join the EU without much difficulty yet prefer to stay outside. The multilateral scope of the EEA Agreement is due to its origins in the EFTA that is also a multilateral framework. Multilateral sectoral cooperation, on the other hand, is an addition to the existing policy frameworks such as the ENP and the

¹²⁶ 'Countries such as Switzerland and Norway already meet all of the membership criteria': 'Composite Paper on the Commission Reports 1999: Reports on progress towards accession by each of the candidate countries' 13 October 1999, 5.

accession process. Both the EEA and the sectoral agreements also enable the EU to reach its internal policy goals by managing the often indispensable external dimension of the EU's internal policies that have a strong cross-border element.

Some of the third countries that adopt EU *acquis* through multilateral political frameworks, such as the SEE countries, wish and are likely to accede to the EU at some point in time. For others, such as the EEA EFTA States or any country that may wish to leave the EU in the future, deep multilateral cooperation is the preferred option for gaining the economic benefits of participating only in chosen sectors of the internal market. Integrating third countries by multilateral agreements also serves the interests of the Union by creating necessary infrastructure and a safe investment climate in countries that the Union has strong economic and political ties with. Multilateral cooperation is gaining ground as can be witnessed by the negotiation of three multilateral sectoral agreements in the past decade. Comprehensive sectoral cooperation in the form of the EEA, too, appears to be there to stay as it seems to provide a satisfactory alternative to EU membership for the countries involved.

Apart from the different scope in terms of the subject matter, both comprehensive and sectoral multilateral agreements share in common the objective of granting third countries access to a smaller or larger part of the internal market. The aim of the agreements is to encourage non-Member States to adopt a significant amount of EU *acquis* in the fields covered by the agreements and to, thereby, extend the internal market by creating a 'homogeneous' internal market space operating on the basis of EU *acquis* beyond the Union's borders without, however, expanding the Union. Recital 4 of the preamble to the EEA Agreement contains a direct reference to the aim of setting up a 'dynamic and homogeneous' area and the EEA institutional system and procedural framework have accordingly been designed to follow up the development of the *acquis* after the date of signature. The objectives of the ECT and the ECAA Agreement are similar in terms of achieving a level of homogeneity in the interpretation and application of the *acquis* but their institutions and procedures are much less elaborate.

It is not, however, taken as a given that exporting part of the EU's regulatory framework beyond the Union's borders will automatically result in a legal area that is homogeneous to the internal market. The EU's internal market *acquis* has been designed to function in

a supranational legal order with supranational principles and an institutional system to ensure the uniform interpretation and application and effective enforcement of common rules. When extracted from the Union, the framework in which the *acquis* is applied changes from a supranational legal order to one governed by the principles of public international law. Outside the EU internal market *acquis* does not, therefore, enjoy the same guarantees for homogeneity in substance, interpretation, application and enforcement as within the EU.

In broad terms, there are three means for achieving legal homogeneity: legislative, administrative, and judicial.¹²⁷ Legislative means encompass the mechanisms for participation in the decision-making processes, the procedures for keeping the *acquis* up-to-date and the status of EU law in the third countries' legal orders; administrative means include the surveillance and enforcement mechanisms; and judicial means comprise infringement procedures and the possibility to give (binding) interpretations of the *acquis*. The contracting parties to the multilateral agreements are not, however, entirely free in choosing an appropriate institutional design to achieve and maintain homogeneity between the *acquis* contained in the agreements and the *acquis* as in force and applied in the EU.

The main conflict lies in the need to preserve the autonomy of the European legal order – a concept that is keenly protected by the Court of Justice. The question of autonomy *vis-à-vis* international agreements concluded by the EU has been in the focus of the Court's Opinions 1/91¹²⁸ and 1/92¹²⁹ on the draft EEA Agreement, Opinion 1/00 on the draft ECAA Agreement,¹³⁰ Opinion 1/09 on the draft agreement on a unified Patents Court¹³¹ and, most recently, Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR).¹³² In its case law, the Court has distilled a set of conditions which an international agreement and, especially, the institutional and procedural framework

¹²⁷ See A Lazowski, 'Box of chocolates integration: the European Economic Area and the Swiss models revisited' in S Blockmans and S Prechal (eds), *Reconciling the Deepening and Widening of the European Union* (T.M.C. Asser Press 2007) 87.

¹²⁸ Opinion 1/91 *EEA I* [1991] ECR I-6079.

¹²⁹ Opinion 1/92 *EEA II* [1992] ECR I-2821.

¹³⁰ Opinion 1/00 *ECAA* [2002] ECR I-3493,

¹³¹ Opinion 1/09 *Patents Court* [2011] ECR I-1137.

¹³² Opinion 2/13 *ECHR II* (Court of Justice, 18 December 2014).

established, must conform with in order to be regarded as compatible to the principle of autonomy.

The central question that hereby arises is to what extent it is feasible to extend the EU internal market, either as a whole or in the extent of a policy sector, to third countries by exporting EU internal market *acquis* beyond the EU borders rather than in the enlargement process. An answer to this question necessitates an analysis of two broad issues: firstly, the constitutional limitations inherent to the concept of the internal market and, secondly, the institutional limitations to exporting the *acquis* outside the EU and maintaining its homogeneity while at the same time preserving the autonomy of the EU legal order. The first category comprises questions about the concept of the EU internal market in the broadest sense: its substantive content, the idea of the internal market and the EU legal order as uniform constellations, and the effect of uniform rules in the common legal order. The second category pertains to the necessary institutional structures that need to be in place in order to support the aim of extending the internal market, or a sector thereof, to third countries in a homogeneous manner including institutions for ensuring the dynamic export and updating of the *acquis*, and the surveillance, enforcement, interpretation and application of the exported rules. The possibilities to set up any institutional structures by an international agreement concluded by the EU are restricted by the limitations deriving from the principle of autonomy. The thesis aims to provide a legal analysis of the 'exportability' of the concept of the internal market to non-EU Member States, the possible effects of such norms export on the EU's own legal order and the potential challenges for the legal orders of the non-EU Member States. The thesis takes the perspective of EU constitutional law rather than that of the third countries' legal systems and provides a theoretical rather than practical or empirical account of the subject. In other words, the thesis does not focus on the practical challenges associated with the exporting of the EU *acquis* or examine empirical data on the adoption and transposition of EU *acquis* in the multilateral frameworks and national legal orders but concentrates primarily on the legal questions pertaining to the feasibility of the project of extending the EU internal market to third countries from the perspective of the EU legal order generally and the concept of the EU internal market specifically.

Three case studies are used in the analysis to illustrate the challenges of setting up institutions and procedures that respect both the autonomy of the EU legal order and the sovereignty of the contracting parties while seeking to achieve and maintain homogeneity in the expanded internal market. The case studies comprise the EEA Agreement and two multilateral agreements – the agreements establishing the Energy Community and the ECAA, respectively. All of the three agreements demonstrate an aim of achieving a homogeneous market space as well as deep integration into the internal market through extensive commitments assumed by the third country contracting parties to adhere to EU *acquis* in the fields covered by the respective agreements. A fourth multilateral agreement, the TCT, too, exhibits similar characteristics and would be suitable to use in this analysis. However, since the Treaty has not yet been concluded and its text not made publicly available it is not possible to include the TCT in the current study.

The EEA Agreement, which is comprehensive in scope, provides an example of a ‘best case scenario’ in terms of extending the internal market to third countries. The EEA Agreement allows for an analysis as to the general expandability of the internal market in depth as well as breadth. The ECT and the ECAA Agreement that are sectoral in scope provide, on the other hand, a basis for a study into whether and if so, then how the sectoral scope of *acquis* export that pertains to the depth of integration rather than breadth can affect the possibilities of expanding the EU internal market or a sector of the internal market in a homogeneous manner.

The thesis is divided into two parts, each composed of three substantive chapters. The first part deals with the constitutional limitations to expanding the internal market by international agreements as derive from the specificities of the concept of the internal market. The second part of the thesis addresses the institutional limitations to achieving and maintaining homogeneity in the expanded internal market that derive from the need to preserve the autonomy of the EU legal order and the sovereignty of the non-EU states parties to the multilateral agreements.

Chapter 2 identifies the defining features of the internal market – the characteristics that distinguish the internal market from any single market constellation and serve as a possible benchmark for determining the degree of homogeneity in the expanded internal

market. The chapter focuses in particular on the principles that form the traditional core of the internal market, such as the four fundamental freedoms and competition policy, and their interaction with horizontal provisions and fundamental freedoms and the concept specific to EU membership – EU citizenship. In addition to looking at the internal market as a whole, the chapter also explores the cores of specific sectors of the internal market.

Chapter 3 scrutinises both the notion of unity as an essential characteristic of the internal market and of the EU legal order and the aim of the agreements to achieve ‘homogeneity’ in the expanded internal market. The chapter provides a comparative analysis of the notions of ‘unity’ and ‘homogeneity’ and the nature of the homogeneity provision in the multilateral agreements with the aim of establishing the necessary level of legislative commonality – as opposed to flexibility and differentiation – in the extended internal market in order to be able to consider third country market actors equal participants in the internal market alongside EU nationals.

Chapter 4 addresses the role of the foundational principles of EU law – primacy, direct effect, consistent interpretation and state liability – in the definition of the concept of the internal market. The EU-specific principles are compared with their equivalents in public international law and in the EEA, Energy Community and the ECAA legal orders in order to determine which implications a possible absence of the supranational principles in the agreements exporting the *acquis* may have on the effectiveness of the *acquis* exported to third countries by agreements operating under public international law.

Chapter 5 defines the concept of the autonomy of the EU legal order from the perspectives of the EU legal order *vis-à-vis* national legal orders and international law, and examines the specific implications of the concept on the choice of the most effective institutional framework for achieving and maintaining homogeneity in the expanded internal market. The latter part of the analysis is based on the concept of the autonomy of the EU legal order as defined and developed in the case law of the Court of Justice.

Chapter 6 scrutinises the institutional structures necessary for achieving and maintaining homogeneity in the process of exporting the *acquis* to third countries. The analysis is divided into two parts. The first part of the chapter deals with the necessary

institutional and procedural frameworks for dynamically updating the international agreements that export internal market *acquis*. In the second part, specific attention is paid to the modalities of third country participation in the process of defining the *acquis* on the EU level and the implications of the increasing use of new governance methods in EU policy-making on third country actors' possibilities to influence the content of internal market *acquis* and to, thereby, increase the effectiveness of the norms transfer.

Chapter 7 explores the essential institutional characteristics for maintaining homogeneity in the expanded internal market. The analysis focuses on the institutions and procedures in place in the EU and the multilateral agreements, respectively, that are vested with the task of the uniform enforcement and application of the *acquis* in and outside the Union. The chapter is divided into two parts dealing with the centralising and decentralising dynamics, respectively.

The final chapter 8 provides a conclusion on the viability of the idea of a true extension of the internal market to third countries, either in a comprehensive or sectoral manner, by means of exporting internal market *acquis* by multilateral agreements. The chapter addresses both the substantive and institutional aspects of the process of expanding the internal market to third countries without enlarging the Union.

PART I EXPANDING THE INTERNAL MARKET: THE CONCEPT

Chapter 2 Internal market *acquis*: the concept

1 Introduction

The multilateral agreements that export internal market *acquis* to non-EU Member States aim at expanding the internal market beyond the Union's borders. In the centre of the expansion project is the concept of the internal market: the characteristics of the market and the legal order, the substantive content in terms of the *acquis* and its operability and relationship with the national legal orders. The initial European Communities set out to create a multi-state market in which the factors of production can move freely and, thus, be placed around the Union to ensure maximum efficiency. The question of whether the internal market is 'exportable' to non-Member States demands a close look at both the concept of the internal market, the level of compliance with the EU's legal order and the role of the foundational principles therein; in other words, the breadth and depth of integration and the legal context in which the *acquis* operates in the third countries' legal orders.

The object of the *acquis* export is the internal market. The internal market consists of a package of obligations to which the Member States must adhere as part of their membership in the EU. For the purpose of determining whether and to what extent exporting internal market *acquis* to third countries can result in a market space homogeneous to the EU internal market it is essential to delimit and thereby define the distinctive features of the latter.

The internal market is a dynamic rather than a static concept. This chapter sets out to analyse both the 'old' and the 'new' elements of the internal market: the fundamental freedoms and competition policy, on the one hand, and non-economic policy considerations, on the other hand. The analysis seeks to answer the questions of how do various non-economic elements affect the scope of the internal market and whether they can be considered *sine qua non* in order to ensure the setting up and proper functioning of the internal market as envisaged by the contracting parties. Section 2 provides an

insight into the terminology surrounding the internal market project for the purpose of identifying the proper term for the market constellation created by the *acquis* export. Section 3 gives an account of the terminological questions surrounding the notion '*acquis*'. Section 4 discusses the 'traditional' core of the internal market – the fundamental freedoms and competition policy. Section 5 is dedicated to the various roles that non-economic principles play in the internal market *vis-à-vis* economic policy concerns. The choice of non-economic elements discussed in this chapter is limited to the three policy areas with the most profound connection to the internal market as demonstrated by literature and the case law of the Court of Justice – environment, social policy including labour policy, and consumer protection –, and the protection of fundamental rights. The role in the internal market played by EU citizenship, which has constantly been gaining importance in defining the scope of individual rights of movement within the EU, is considered in section 6. Finally, section 7 investigates the examples of two particular policy sectors which have been the subject to norms export – transport and energy – in order to determine whether individual sectors of the internal market may feature a different set of central elements than the internal market as a whole.

2 Defining the internal market

The internal market holds a central position in the European integration project. The EEC Treaty was concluded with the aim of enhancing economic prosperity through 'an ever closer union among the peoples of Europe'.¹ The single European market, based on the removal of barriers to free trade by establishing the free movement of people, goods, services and capital, is not an objective in itself but rather a means for achieving the broader aims of the Union.² Over the decades of existence of the European Union and the Communities, different terms have been employed to denote the unified European market: 'common market', 'internal market' and 'single market'.³

¹ Recitals 1 and 2, Preamble to the EEC Treaty.

² Commission, 'White Paper – Preparation of the associated countries of Central and Eastern Europe for integration into the internal market of the Union' COM (95) 163 final, para 2.1.

³ A fourth term, 'European home market' is used in the meaning of 'a market with a homogeneous legal framework in which it is possible not only to move between Member States but also to operate within

2.1 Common market

The origins of the 'common market' – the original term used in the EEC Treaty – can be found in international trade law. A common market features the removal of barriers to trade, the freedom of movement of people, services and capital, a system of competition law, and a common external trade policy which ensures undistorted competition for common market undertakings also in relation to trade with third countries.⁴ The EEC Treaty envisaged the creation of a common market by removing customs duties and eliminating quantitative restrictions and measures of equivalent effect between the Member States, setting up a common customs tariff and a common external commercial policy, and abolishing restrictions to the free movement of persons, services and capital.⁵ The Treaty also contained common agricultural and transport policies, and a system of competition law. The transitional period for completing the common market was set to end on 1 January 1970. On 1 July 1968, the Customs Union between the EEC Member States entered into force, abolishing customs duties on trade within the EEC and setting up a common customs tariff and a common trade policy.

Neither the EEC Treaty nor the subsequent amending treaties provided a definition of the common market. In literature, the common market has been defined as 'a market in which every participant within the Community in question is free to invest, produce, work, buy and sell, to supply or obtain services under conditions of competition which have not been artificially distorted wherever economic conditions are most favourable.'⁶ The definition includes the aspects of the four fundamental freedoms and undistorted competition but lacks the external aspect – the common external trade policy.

In the case law of the Court of Justice, the focus of the definition of the common market is on its similarity to a national market. The Court elaborated on the objectives of the common market first in *Polydor*:

Member States as constituent parts of one market': K von Wogau, 'Completing the European Home Market by 2009' (2003) 38 *Intereconomics* 63, 64.

⁴ PJG Kapteyn and P VerLoren van Themaat, *The Law of the European Union and the European Communities* (Kluwer Law International 2008) 115, 127.

⁵ Article 2 EEC Treaty.

⁶ PJG Kapteyn and P VerLoren van Themaat (n 4) 127.

... [T]he Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets into a single market having the characteristics of a domestic market.⁷

An almost identical definition was provided in *Gaston Schul*:

The concept of a common market ... involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.⁸

Partial terminological change occurred in 1986 with the Single European Act (SEA)⁹ but the above definitions, insofar as they highlight the depth of market integration in the EU and compare the envisaged situation to that of a domestic market, have not lost relevance.

2.2 Internal market

The SEA gave new breathing to the common market project. It set a deadline for completing the 'internal market' by 31 December 1992.¹⁰ A Commission White Paper identified the measures necessary to complete the internal market and set a precise timetable for meeting the end of 1992 deadline.¹¹ The White Paper was exceptionally detailed containing 279 legislative initiatives for removing barriers to trade between the Member States.

The SEA defined the internal market as 'compris[ing] an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'.¹² This definition has remained virtually untouched by the subsequent treaty amendments and has been repeated in almost identical wording in Article 26(2) TFEU.

⁷ Case 270/80 *Polydor v Harlequin Records* [1982] ECR 329, para 16.

⁸ Case 15/81 *Gaston Schul* [1982] ECR 1409, para 33.

⁹ The SEA entered into force on 1 July 1987.

¹⁰ Article 8a EEC Treaty.

¹¹ Commission, 'White Paper – Completing the Internal Market' COM (85) 310 final.

¹² Article 8a EEC, second paragraph.

A significant difference between the concepts of common market and internal market is the lack of internal frontiers in the latter. A borderless market was novel among the existing FTAs and customs unions and allowed for a true achievement of the free movement of persons and goods between the Member States.¹³ The frontier-free market was accomplished by the creation of the Schengen Area: first by cooperation between EU Member States,¹⁴ and since the entry into force of the Treaty of Amsterdam in 1999 within the framework of the EU. Schengen cooperation provides within the Schengen Area for the abolition of border controls, common rules for crossing the external borders, and common visa rules for third country citizens. The introduction of Schengen rules has changed the substance of the freedom of movement. The right to move freely within the internal market was originally vested with economically active individuals: workers and providers and receivers of services. Now the freedom of movement applies to all individuals in the Schengen Area, including EU citizens as well as non-citizens upon their entry into the area.¹⁵ The changes in the concept of the internal market do not, however, apply to the Member States that have either opted out from¹⁶ or have not yet joined the Schengen framework.¹⁷ As concerns the free movement of persons, in practice, the EU's internal market does thus not correspond to an area without internal frontiers.

Notwithstanding the abolition of internal borders, a comparison of the definitions of the common market and the internal market reveals the strikingly narrower scope of the latter. The Court of Justice has recognised the objective of the common market to resemble a domestic market and identified its three fundamental characteristics: the abolition of barriers to trade, guarantees for undistorted competition and unity of the market.¹⁸ Interestingly, only the first of the three elements is formally included in the

¹³ In the areas of the free movement of goods and services and freedom of establishment the removal of borders has taken place through the shift towards home state control.

¹⁴ In 1985, five of the then ten Member States signed the Schengen Agreement which was complemented by the Schengen Protocol in 1990.

¹⁵ The notion of EU citizenship, too, has an impact on the freedom of movement of persons within the EU. See below section 6. Also S Carrera, 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?' (2005) 11 *European Law Journal* 699; N Reich, 'The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union' (2005) 11 *European Law Journal* 675; JD Mather, 'The Court of Justice and the Union Citizen' (2005) 11 *European Law Journal* 722.

¹⁶ Ireland and the United Kingdom.

¹⁷ Bulgaria, Croatia, Cyprus, Romania.

¹⁸ Case 32/65 *Italy v Council and Commission* [1966] ECR 389; Case 14/68 *Walt Wilhelm* [1969] ECR 1, para 5; P Pescatore, 'Observations critiques sur l' "Acte Unique européen"' in, *L'Acte Unique Européen* (Institut d'Etudes européennes 1986) 39, 61.

definition of the internal market.¹⁹ The definition of the internal market comprises the four fundamental freedoms but excludes competition policy, thus providing for the establishment of the internal market but excluding conditions for its functioning.²⁰ This peculiarity proved, however, not to be decisive practice. The Court's case law as well as legislation implementing the internal market provision of former Article 14(1) EC Treaty (now Article 26(1) TFEU) have recognised that the approximation provision in Article 95(1) EC Treaty (now Article 114(1) TFEU) can be used for adopting measures that aim at preventing distortions of competition.²¹ Both Article 95(1) EC Treaty and Article 114(1) TFEU use the language of approximating measures in Member States which have as their objective the 'establishment and functioning of the internal market'. Since undistorted competition is indispensable for the functioning of the market, the competition element continues to be included in the internal market package despite the restrictive scope of the definition. The role of competition rules in ensuring the operation of the internal market is, furthermore, explicitly provided in Article 3(1)(b) TFEU.²²

The use of terminology in post-SEA Treaties reflects the imprecise but potentially broader scope of the common market as compared to the internal market thus implying that the internal market did not completely replace the common market. Article 2 EC Treaty, for instance, referred to the common market as a stage in market integration alongside monetary and economic union rather than a concept with a specific meaning in the EU context.²³ Other provisions of the EC Treaty point at a more ambiguous use of terminology. Article 3(1) EC Treaty outlined the activities that the Community must undertake in order to achieve the objectives of Article 2. These activities included both 'a

¹⁹ P VerLoren van Themaat, 'The Contributions to the Establishment of the Internal Market by the Case-Law of the Court of Justice of the European Communities' in R Bieber and others (eds), *1992: One European Market?* (Nomos 1988) 109, 124.

²⁰ R Barents, 'The internal market unlimited: Some observations on the legal basis of Community legislation' (1993) 30 *Common Market Law Review* 85, 104.

²¹ PJG Kapteyn and P VerLoren van Themaat (n 4) 127. For example, Case C-300/89 *Commission v Council (Titanium dioxide)* [1991] ECR I-2867; Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-2247.

²² '1. The Union shall have exclusive competence in the following areas: ... (b) the establishing of the competition rules necessary for the functioning of the internal market'.

²³ 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

system ensuring that competition in the internal market is not distorted'²⁴ and 'the approximation of the laws of Member States to the extent required for the functioning of the common market'.²⁵ Several provisions of the EC Treaty mirror this terminological plurality. The two paragraphs of Article 15 EC Treaty (now Article 27 TFEU), for example, referred to both the 'establishment of the internal market' and the 'functioning of the common market'. Articles 94 and 95 EC Treaty (now Articles 115 and 114 TFEU) concerned the approximation of Member States' laws, regulations and administrative provisions which 'directly affect the establishment or functioning of the common market' and 'which have as their object the establishment and functioning of the internal market', respectively.

It became relevant to define the terms 'internal market' and 'common market' for the purposes of delimiting the scope of Articles 94 and 95 EC Treaty. In the Opinion given in the *Titanium Dioxide* case, Advocate General (AG) Tesauro first contended that the 'area without internal frontiers' provided in Article 8a EC Treaty (SEA numbering) must be regarded as 'a truly integrated area where the prevailing conditions are as close as possible to those of a single internal market' including the harmonisation of rules concerning products as well as competition between undertakings.²⁶ Little space was left for a restrictive definition of the internal market. The AG further clarified that the two market concepts 'differ in breadth in that the 'common market' extends to areas which are not part of the 'internal market', but not in depth, in that both concepts relate to the same level of integration'.²⁷ This reasoning suggests that the three elements of the common market – the abolition of barriers to trade, guarantees for undistorted competition and unity of the market – are equally represented in the internal market. In order to discern the real difference between the 'common' and the 'internal' market recourse must be had to the areas to which the common market extends but the single market does not. The AG did not specify these areas but having established that the prevention of distortions to competition is in fact included in the internal market concept they could include, for example, common policies such as environment, energy and

²⁴ Article 3(1)(g) EC Treaty.

²⁵ Article 3(1)(h) EC Treaty.

²⁶ Case C-300/89 *Commission v Council (Titanium dioxide)* [1991] ECR I-2867, Opinion of AG Tesauro, para 10.

²⁷ *ibid.*

transport, or the harmonisation of Member States' legislation for reasons other than the elimination of barriers to trade.²⁸

In connection with the entry into force of the Lisbon Treaty in December 2009, common market terminology was replaced with that of the internal market and the common market/internal market distinction has thus lost its relevance in today's discourse. This is not to say, however, that the concept of internal market itself has become perfectly intelligible or that the term 'common market' has lost significance as a general notion in economic law literature.

Despite the ambitious plans and partial success, the efforts to complete the internal market by the 1993 deadline were unsuccessful. The efforts, nevertheless, continued. On 30 October 1996, the Commission published a Communication on the impact and effectiveness of the single market followed by an Action plan for the single market on 4 June 1997. In the Communication, the Commission emphasised that the legal framework of the Single Market essentially requires the addition of other policy instruments, 'first and foremost, a single currency',²⁹ marking a move from a common market to a monetary union. The Action Plan focused on four strategic targets: increasing the effectiveness of existing rules by improving implementation, enforcement and problem-solving, addressing key market distortions in the fields of taxation and competition, removing sectoral obstacles to market integration, and improving the role of the citizens through eliminating internal borders and, importantly, reinforcing the social dimension of the single market.³⁰

The Commission no longer strives for its original goal of a 'finalised' or 'complete' internal market. In the communication 'A Single Market for 21st Century', the Commission instead highlighted the dynamic character of the internal market and its need to adapt to the changes in time.³¹ The new perspective takes the internal market beyond the idea of eliminating obstacles to cross-border trade and endorses the need to

²⁸ P VerLoren van Themaat (n 19) 111.

²⁹ Commission, 'The impact and effectiveness of the Single Market' (Communication) COM (96) 520 final, para 5.4.

³⁰ Commission, 'Action Plan for the Single Market' (Communication) CSE (97) 1 final ('Action Plan for the Single Market').

³¹ Commission, 'A single market for 21st century Europe' (Communication) COM (2007) 724 final ('A single market for 21st century Europe'), 3.

take into account the consequences for the functioning of the internal market of globalisation and increased competition, new economic, environmental and social challenges, and the enlarged Union.³² While the principles of the single market remain relevant, their application needs to adapt to new realities and right balance must be struck between a market without frontiers, on the one hand, and labour law, health, safety and environmental standards, on the other.³³ The fact that the common policies will never be ‘finalised’³⁴ insofar as they affect the internal market also means that the internal market concept will never lose its dynamic outline.

2.3 Single market

The third term often used in the context of the unified European market is ‘single market’. The notion does not appear in any EU Treaties but is frequently used in the EU’s policy documents. The term ‘single market’ arguably dates back to the SEA which brought together in a single amending act amendments to the EC Treaty and provisions on European Political Cooperation, the predecessor of Common Foreign and Security Policy (CFSP).

Since the early days of the case law of the Court of Justice, ‘single market’ has served as a generic term denoting a commonly organised economic space without barriers and with fair competition between undertakings,³⁵ having conditions similar to a domestic

³² *ibid.* Already the 4 June 1997 communication from the Commission to the European Council stated that the internal market was not ‘simply an economic structure’ but set ‘basic standards of health and safety, equal opportunities and labour law’: ‘Action Plan for the Single Market’ (n 30) 1. As one of the four strategic targets to be pursued, the Action Plan included ‘a single market for the benefit of all citizens’ comprising social, labour and consumer rights as well as health and environment issues. In addition, a number of European Councils, such as Lisbon March 2000, Feira June 2000, Nice December 2000, and Stockholm March 2001 addressed the non-economic dimension of European integration and its effects on the internal market: European Council, ‘Conclusions of the Presidency – Lisbon, 23-24 March 2000’ SN 100/00; European Council, ‘Conclusions of the Presidency – Feira, 19-20 June 2000’ SN 200/00; European Council, ‘Conclusions of the Presidency – Nice, 7-9 December 2000’ SN 400/00; European Council, ‘Conclusions of the Presidency – Stockholm, 23-24 March 2001’ SN 100/01.

³³ ‘A single market for 21st century Europe’ (n 31) 7. Later reports and communications have further elaborated on the non-economic aspects of the internal market, see M Monti ‘A New Strategy for the Single Market at the Service of Europe’s Economy and Society’ report to the President of the European Commission, 9 May 2010; Commission ‘Single Market Act: Twelve levers to boost growth and strengthen confidence; Working together to create new growth’ (Communication) COM (2011) 206 final.

³⁴ PJG Kapteyn and P VerLoren van Themaat (n 4) 137.

³⁵ Case 32/65 *Italy v Council and Commission* (n 18) 405; Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, 249; Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769, 786; Case 270/80 *Polydor* (n 7); Case 15/81 *Gaston Schul* (n 8).

market.³⁶ The single market does not have a specific content, however, and does not refer to any particular degree of integration.

In literature, the terms are often used interchangeably and many authors do not see the terminology question as decisive.³⁷ One observer notes that 'common market' is mainly used in economic context, single market in political discourse, and internal market in EU documentation and legislation.³⁸ The terminological distinction does, however, maintain relevance in the context of exporting the *acquis* to third countries. The creation of a homogeneous EU internal market requires that a similar level of integration as in the EU's internal market is transferred to the non-Member States. The visible difference between the internal market *acquis* in the EU and the *acquis* exported outside is the objective of setting up a borderless area. In the EU, the nature and scope of the internal market are inseparable from the objective of ever deeper integration in Europe, hence the gradual creation and expansion of the Schengen Area that now belongs to the 'package deal' of the internal market. The multilateral agreements exporting the *acquis* have no general objective of ever deeper integration in Europe, parallel to the EU Treaties, but are directly connected to the concept of the internal market in the specific areas covered by the agreements. The export excludes Schengen *acquis* which means that the objective of the agreements cannot strictly be seen as the extension of the EU's internal market but a creation of a single market on the basis of a selection of the internal market *acquis*. For the sake of clarity and simplicity, this thesis uses the term 'internal market *acquis*' to denote the export of EU market norms to non-Member countries notwithstanding the more limited scope of the *acquis* and a lesser degree of market integration as compared to the EU.

3 Defining the *acquis*

In the EU, the term '*acquis*' appears in different contexts. Its scope and meaning varies accordingly. The *acquis* is a 'notion of variable content' – its functions change together

³⁶ Case 26/76 *Metro v Commission* [1977] ECR 1875, para 20.

³⁷ K Mortelmans, 'The common market, the internal market and the single market, what's in a market?' (1998) 35 *Common Market Law Review* 101, 107-108.

³⁸ PP Craig, 'The Evolution of the Single Market' in C Barnard and J Scott (eds), *The Law of the Single European Market* (Hart Publishing 2002) 1, 40.

with the context in which it is used while the concept itself remains the same.³⁹ One talks about the *acquis communautaire*, EU *acquis*, internal market *acquis*, accession *acquis*, EEA *acquis*, and many others. The term is frequently used in EU-internal as well as external contexts.

According to Petrov, the internal and external contexts of the *acquis* reflect the steady development of the EU and the practice of integrating candidate countries into the Union, respectively.⁴⁰ Magen sees the internal and external dimensions of the *acquis* as its two personalities: one, an inward-looking character representing the EU patrimony and the unique features of European integration, the other an outward-looking 'transformative engagement' or 'governance export' personality that advances the EU's norms and interests outside the Union without the aim of integrating future members into the EU.⁴¹ Insofar as it is arguable how much accession policy can be considered an external policy in a truly EU-external sense,⁴² it is reasonable to agree with Magen in his claim that accession *acquis* is an example of the internal rather than external dimension of the EU *acquis*.⁴³

One of the functions of the *acquis*, however,⁴⁴ the one of integrating non-member countries into the EU's internal market without membership in the EU by exporting EU *acquis* does not fit squarely into either the internal or the external dimension. On the one hand, the countries to which the single market *acquis* is exported do not find themselves in the process of acceding to the EU, which suggests the 'governance export' personality of the exported *acquis*. On the other hand, however, the objective of such norm transfer is to extending the internal market to include non-member countries or integrating non-member states into the EU's internal market. Seen from this perspective, the *acquis* serves the purpose of maintaining homogeneity both within this expanded internal

³⁹ C Jarrosson, *La notion d'arbitrage* (Librairie Générale de Droit et de Jurisprudence 1987) 225. Also S Weatherill, 'Safeguarding the *Acquis Communautaire*' in T Heukels, N Blokker and M Brus (eds), *The European Union after Amsterdam* (Kluwer Law International 1998) 153, 161. 'Unitary in language but binary in function': A Magen, 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Influence' (2007) 9 *European Journal of Law Reform* 361, 362.

⁴⁰ R Petrov, *Exporting the Acquis Communautaire through European Union External Agreements* (Nomos 2011) 27.

⁴¹ A Magen (n 39) 392.

⁴² Temporally limited and aimed at internalising something external, enlargement is an unusual form of foreign policy: *ibid* 377.

⁴³ *ibid*.

⁴⁴ See further below section 3.3.

market and between this and the EU's internal market while preserving the key features of the latter.

The following analysis will clarify the different meanings and components of the term '*acquis*' as used in the EU context, in EU external contexts and also, in the context of exporting EU internal market rules to third countries by multilateral agreements.

3.1 *Acquis within the EU*

The origin and content of the term '*acquis*' have been profusely discussed in the literature.⁴⁵ The notion although not defined anywhere in the Treaties signifies the accumulation of rights and obligations that the Member States and their individuals derive from the EU Treaties, whether legally binding or not. Until recently, the most common use of the term was in conjunction with a reference to its Community origin, the '*acquis communautaire*'. The terminological choice does not, however, define the scope of the notion. In the context of accession to the EU, where the term is most frequently used, the obligations deriving from the former non-Community pillars were incorporated in the *acquis communautaire*.⁴⁶ The '*Union acquis*' used in parallel and often interchangeably with '*acquis communautaire*' denoted the rights and obligations conferred by the Treaty on European Union (TEU) which contained provisions of the former second and third pillars. Although Delcourt argues for the possible continuing use of '*acquis communautaire*' in the meaning of a timeless '*fundamental acquis*'⁴⁷ or the EU's

⁴⁵ For a comprehensive overview of the origins of the term see KE Jørgensen, 'The Social Construction of the *Acquis Communautaire*: A Cornerstone of the European Edifice' (1999) 3 *European Integration online Papers*, 8-10 <<http://eiop.or.at/eiop/texte/1999-005a.htm>> accessed 24 June 2015. For the history of the use of the term in the Treaties see C Delcourt, 'The *Acquis Communautaire*: Has the Concept Had Its Day?' (2001) 38 *Common Market Law Review* 829, 829-831; R Petrov (n 40) 29-32.

⁴⁶ For example, the Joint Declaration on Common Foreign and Security Policy attached to the Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union refers to the *acquis communautaire* as the 'content, principles and political objectives of the Treaties, including those of the Treaty on European Union': [1994] OJ C241/381, para 1. For further examples see C. Delcourt (n 45) 832. According to Curti Gialdino '*acquis communautaire*' goes 'beyond the concept of Community law *strictu sensu*' to include measures adopted in the field of external relations and justice and home affairs: C Curti Gialdino, 'Some Reflections on the *Acquis Communautaire*' (1995) 32 *Common Market Law Review* 1089, 1092-1093. The EU Glossary has also contained an entry titled '*Community acquis*' including the Treaties, legislation adopted in the application of the Treaties as well as measures in the areas of CFSP and Justice and Home Affairs: <http://europa.eu/legislation_summaries/glossary/community_acquis_en.htm> accessed 24 June 2015.

⁴⁷ P Pescatore, 'Aspects judiciaires de l'«*acquis communautaire*»' (1981) 20 *Revue trimestrielle de droit européen* 617, 620.

'genetic code' or 'genetic inheritance',⁴⁸ for the purposes of this study such terminological distinction is not necessary and in the context of the *acquis* as it appears within the EU as well as in the accession process the term 'EU *acquis*' will be used.

As mentioned above, there has never been a single definition for the *acquis*, the 'holiest cow of all',⁴⁹ in either the Treaties or in literature. Since the entry into force of the Treaty of Lisbon, references to the *acquis* can be found in only two Articles in the Treaties. Article 20(4) TEU provides that acts adopted in the framework of enhanced cooperation do not form part of the accession *acquis* whereas Article 87(3) TFEU makes a reference to Schengen *acquis*.

The EU *acquis* is a flexible and constantly evolving concept. Its elements can be classified into those of legislative, political and jurisprudential origin pursuant to their function and institutional origin.⁵⁰ Legislative *acquis*⁵¹ includes the body of legally binding and non-binding acts: the Treaties on which the EU is founded and their subsequent amendments; secondary legislative acts including regulations, directives, decisions, recommendations and opinions; the internal acts of the EU institutions and inter-institutional agreements; international agreements concluded by the EU, mixed agreements, and agreements concluded by the Member States in the areas of exclusive EU competence; and possibly also the acts of the representatives of Member States meeting within the Council and measures adopted within the framework of enhanced cooperation.

Political *acquis* generally comprises legally non-binding acts such as the political objectives of the Treaties as well as various resolutions, declarations, positions, guidelines, principles, including decisions and agreements adopted by the European Council and the Council. Although deficient of legal enforceability the political aspects of the *acquis* have some legal implications. Article 3(3) of the Act of Accession of Croatia to the EU, for example, specifies that the principles and guidelines originating from declarations, resolutions and other positions of the European Council and the Council as

⁴⁸ C Delcourt (n 45) 835ff.

⁴⁹ JHH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 Journal of Common Market Studies 97, 98.

⁵⁰ P Pescatore, 'Aspects judiciaires de l'«acquis communautaire»' (n 47) 619.

⁵¹ Also referred to as normative *acquis*: C Curti Gialdino (n 46) 1092.

well as positions ‘concerning the Union adopted by common agreement of the Member States’ must be observed and properly implemented by the Member States as well as the acceding Croatia.⁵²

The third category, jurisprudential *acquis*, consists of the case law of the EU’s judiciary. On the one hand, the case law of the Court of Justice and the General Court can be regarded as acts of an institution of the EU, albeit not one belonging to the category of Article 263 TFEU.⁵³ On the other hand, the case law of the Court is a source of a number of fundamental principles such as direct effect, primacy, efficiency and unity of EU law.⁵⁴ According to Pescatore these principles are more than merely the production of the Court. Instead, the Court could be seen as a mediator expressing the *communis opinio* of the whole body of the European Union.⁵⁵

An inspection of the diverse sources of the acts belonging to the *acquis* and their legal force reveals that all elements of the *acquis* are not equally influential. Certain legislative acts and parts of jurisprudence pertain to the fundamentals of the Union, its institutional structure and legal order as well as its economic and social organisation,⁵⁶ whereas the effect of others is not considerable in establishing the EU’s existence and identity. As a result of a direct link between the Treaties and the foundational principles mentioned above fundamental *acquis* assumes a constitutional rank in the European edifice.⁵⁷ In case of a conflict between ‘fundamental’ and ‘non-fundamental’ *acquis*, therefore, the legislative and political *acquis* including even primary law will have to recede.

In order to distinguish between the ‘privileged’ and ‘unprivileged’ types of jurisprudential *acquis*, Pescatore introduced the categories of ‘ordinary *acquis*’ and ‘fundamental *acquis*’, dividing the latter further into ‘structural *acquis*’ concerning the general characteristics of the EU legal order and ‘material *acquis*’ relating to the choices made with respect to the Union’s economic and social order such as the elimination of

⁵² Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community [2012] OJ L112/21.

⁵³ C Curti Gialdino (n 46) 1098.

⁵⁴ P Pescatore, ‘Aspects judiciaires de l’«acquis communautaire»’ (n 47) 619.

⁵⁵ *ibid.*

⁵⁶ *ibid* 620.

⁵⁷ *ibid* 620.

obstacles to intra-Community free trade.⁵⁸ Only the hard core of the EU's constitutional framework can, therefore, be considered 'the Holy of Holies'.⁵⁹

The Court has on a number of occasions ruled on conflicts between fundamental *acquis* and *acquis* of lesser, unconstitutional rank. In Opinion 1/76, for example, the Court was asked to give an opinion on the compatibility of the Draft Agreement establishing a European laying-up fund for inland waterway vessels with the provisions of the Treaties.⁶⁰ The Court found that the structure of the Supervisory Board which envisaged an 'extremely limited' participation of the Community institutions, and the decision-making procedure in which the Community enjoyed no right to vote were impeding with the Community's independent external action as well as altered the prerogatives of the institutions and the Member States vis-à-vis one another. These consequences, in turn, would affect the 'internal constitution of the Community' and were, therefore, ruled to be contrary to the requirements of unity and solidarity.⁶¹ The protection of the institutional aspects of the fundamental *acquis* has been the subject of a number of cases discussed below⁶² including in addition to Opinion 1/76, notably, Opinions 1/91⁶³ and 1/92⁶⁴ on the Draft Agreement on the EEA, Opinion 1/00 on the proposed Agreement establishing the ECAA,⁶⁵ Opinion 1/09 on the Draft Agreement on the European and Community Patents Court,⁶⁶ and Opinion 2/13 on the EU's accession to the ECHR.⁶⁷

Not only the structural but the material *acquis*, too, has been under the scrutiny of the

⁵⁸ *ibid* 620-621.

⁵⁹ JHH Weiler (n 48) 98.

⁶⁰ Opinion 1/76 *European laying-up fund for inland waterway vessels* [1977] ECR 741.

⁶¹ *ibid* para 12. Not only the composition, structure and powers of the Supervisory Board but also of the Fund Tribunal were considered incompatible with the Treaties: paras 17-22. See in detail below chapter 5 section 3.1.

⁶² See chapter 5 section 3.

⁶³ The Court ruled that the system of courts set up by the envisaged agreement would conflict 'with the very foundations of the Community': Opinion 1/91 *EEA I* [1991] ECR I-6079, para 71.

⁶⁴ The Draft Agreement was approved by the Court on the condition that the competition rules envisaged therein 'do not change the nature of the powers of the Community and of its institutions as conceived in the Treaty': Opinion 1/92 *EEA II* [1992] ECR I-2821, para 41.

⁶⁵ The Court reiterated the considerations expressed in Opinions 1/91 and 1/92 but found the version of the ECAA Agreement submitted not to affect the autonomy of the Community legal order: Opinion 1/00 *ECAA* [2002] ECR I-3493, para 46.

⁶⁶ The envisaged agreement 'would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law': Opinion 1/09 *Patents Court* [2011] ECR I-1137, para 89.

⁶⁷ Opinion 2/13 *ECHR II* (Court of Justice, 18 December 2014).

Court of Justice. In Joined Cases 80 and 81/77, the Court found that the powers conferred upon the Community in the field of Common Agricultural Policy must be exercised with due consideration given to the unity of the market.⁶⁸ Any action incompatible with the pursuance of the objective of the unity of the market would create a risk of 'opening the way to mechanisms which would lead to disintegration contrary to the objectives of progressive approximation of the economic policies of the Member States',⁶⁹ and thus violate an important principle of EU law.⁷⁰

In addition to the EU *acquis* as a whole, frequent references are made to its subdivisions – the sectoral *acquis*. A sector marks out a segment of a broader entity and sectoral *acquis*, therefore, a fragment of the general concept of EU *acquis*. Sectoral *acquis* is often used in connection with policy sectors, such as 'consumer *acquis*', 'energy *acquis*', or 'Schengen *acquis*'. The 'internal market *acquis*' also forms a part of the overall EU *acquis* and can be divided into subsections such as the '*acquis* in the area of free movement of workers' or 'competition *acquis*'. In the absence of a clear definition of the term 'sectoral *acquis*' that, too, can be regarded as a notion of variable content.

If the full EU *acquis* consists of the content, principles and political objectives of the Treaties, secondary legislation, various non-binding acts adopted by the EU's political institutions, as well as case law of the EU's judiciary, what are the components of 'sectoral *acquis*'? Given that all the above-mentioned elements play a role in determining the scope and application of a sector of the *acquis* as well as one sector's interaction with the others, sectoral *acquis* cannot be limited to the primary and secondary law adopted in that particular field only. The composition of a sector of the *acquis* should be regarded as a cross-section of the entire EU *acquis* comprising all elements relevant to the application of the substantive *acquis* in that particular policy area. This includes, indispensably, case law asserting principles that determine, for example, the order of precedence of application between different sectors of the *acquis*,⁷¹ as well as policy documents guiding the development of the sectoral policies.

⁶⁸ Joined Cases 80/77 and 81/77 *Commissionnaires Réunis v Receveur des Douanes* [1978] ECR 928.

⁶⁹ *ibid* paras 35-36.

⁷⁰ W Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27, 42.

⁷¹ See Case C-438/05 *Viking* [2007] ECR I-10779.

Taking account of the definition of the internal market provided above, internal market *acquis* includes all primary and secondary law, political instruments, and case law of the EU Courts pertaining to the establishment and functioning of the internal market, including the four freedoms as well as horizontal provisions on, for example, competition, environment, social policies and consumer protection. As both the internal market and *acquis* are broad and undefined concepts, it is difficult to determine exactly which instruments belong to the internal market *acquis*, but their number can be assumed to be significant.

3.2 Acquis outside the EU

Since the *acquis* became an export article through the EU's external policy, the term '*acquis*' also occurs in EU-external settings. This applies, on the one hand, to the 'internal' *acquis* exported outside the Union as well as, on the other hand, the *acquis* of a particular EU external policy, e.g. trade policy *acquis*. Out of the four categories of *acquis* identified by Curti Gialdino in the pre-Maastricht setting,⁷² two, in fact, the Lomé *acquis* and the EEA *acquis* denote a set of norms of EU origin placed outside the Union.

The Lomé *acquis* consists of the body of shared objectives and principles together with provisions on trade preferences which have governed the relationship between the EU and the African, Caribbean and Pacific (ACP) Countries across the four Lomé Conventions⁷³ and since 2003 their successor, the Cotonou Agreement. Throughout the renegotiations of the Lomé Conventions the existing structure and essential components were carried on. An example of path dependence from a social science perspective,⁷⁴ the preservation of the previous political and legal choices translates into the maintenance of an *acquis* in legal terms. The foundation on which the Lomé *acquis* is constructed is a specific part of EU *acquis* – the *acquis* of EU's external relations towards the ACP countries.

Just as the Lomé *acquis*, the EEA *acquis* relates to the relationship between the EU and the EEA EFTA countries. Differently from the Lomé counterpart, though, EEA *acquis*

⁷² 'Accession' *acquis*, 'institutional' *acquis*, 'Lomé' *acquis*, 'EEA' *acquis*: C Curti Gialdino (n 46) 1090.

⁷³ Signed in 1975, 1979, 1985 and 1989, respectively.

⁷⁴ G Forwood, 'The Road to Cotonou: Negotiating a Successor to Lomé' (2001) 39 Journal of Common Market Studies 423, 438.

consists of the core of the EU *acquis* – the internal market. The EEA *acquis* is composed of all instruments relevant to the establishing and functioning of the EEA including the EEA Agreement together with annexes and protocols, acts referred to or contained in the annexes, decisions taken by the bodies established by the Agreement, and case law of the EFTA Court and the Court of Justice. Owing to the fact that only the first two of the four categories of elements constituting the EEA *acquis* feature a direct link to the EU *acquis*,⁷⁵ the EEA *acquis* as a whole must be considered a separate entity rather than a limited section of the EU *acquis* replicated in the EEA.

From examining the use of the term '*acquis*' in the EU-external context it logically follows that every international agreement concluded by the EU and creating a political and legal framework as a platform for the relationship between the EU and third countries potentially creates a new '*acquis*'. In certain contexts, however, the component of EU *acquis* in international agreements deserves special attention.

3.3 *Acquis expanding the internal market*

On the one hand, multilateral agreements that export entire sectors of EU *acquis* to non-member countries establish a new *acquis* – EEA *acquis* discussed above, Energy Community *acquis*, ECAA *acquis*, Transport Community *acquis*, etc. These agreements, however, contain a special feature in the form of the objective of establishing and maintaining a homogeneous legal area based on EU *acquis* which is absent in other EU external agreements, such as the Lomé and Cotonou conventions or the EU-Switzerland bilateral agreements. This process is sometimes referred to as integrating the EEA countries' economies into the EU internal market,⁷⁶ or 'extending the full rights and obligations of the EU's internal market' to the EEA EFTA countries.⁷⁷

The question refers back to the distinction between 'internal' and 'external' *acquis*.⁷⁸ Seen from the perspective of the EU, exporting the single market *acquis* by multilateral

⁷⁵ The term *acquis* is not mentioned in the EEA Agreement itself.

⁷⁶ Council, 'Conclusions on EU relations with EFTA countries' 3060th General Affairs Council meeting Brussels, 14 December 2010, paras 3 and 7.

⁷⁷ 'The European Economic Area (EEA), Switzerland and the North' (European Parliament website) <http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_6.5.3.html> accessed 24 June 2015.

⁷⁸ See R Petrov (n 40).

agreements is not merely a question of foreign policy towards third states. It is equally a matter of expanding the internal market, albeit incompletely or partially, as a result of which third countries become participants, at least to a limited extent, in the EU internal market. The very aim of the multilateral agreements is to integrate third countries into the EU internal market rather than to create a separate legal order constructed upon norms different from those that apply within the EU. The quest for homogeneity builds a bridge between the EU *acquis* and the *acquis* of the legal order created by the agreement across which parts of the former are transferred to third countries.

4 Economic principles of the internal market

According to AG Jacobs, the underlying economic ideal of the European Union has been the creation of ‘integrated economy in which the factors of production, as well as the fruits of production, may move freely and without distortion, thus bringing about a more efficient allocation of resources and a more perfect division of labour.’⁷⁹ Within the scope of these broad principles, ample room is left both for the Member States and the Court of Justice to carve out the exact shape of the internal market and to, thereby, determine the breadth and depth of the market integration within the EU.

The concept of the internal market is, by and large, made up of rights and principles. The definition of the internal market provided in Article 26(2) TFEU focuses on the four fundamental freedoms – the free movement of goods, persons, services and capital.⁸⁰ Recital 1 of the preamble to Protocol No 27 on internal market and competition annexed to the Treaties and Article 3(3) TEU also refer to equal conditions for competition between undertakings. These elements, in turn, are substantiated by two principles that prescribe the rules governing the relationships between market participants – the principles of non-discrimination and equality. Enshrined in Articles 2 and 3(3) TEU as well as Articles 8 and 10 TFEU as horizontal provisions, these principles are integrated into all EU policies, not only the internal market.

⁷⁹ Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145, Opinion of AG Jacobs, para 10.

⁸⁰ The Commission has proposed to promote the free movement of knowledge and innovation as a ‘fifth freedom’: ‘A single market for 21st century Europe’ (n 31) 9.

In literature, the principles of non-discrimination and equality are often used interchangeably regardless of their noticeable differences. On the one hand, the principle of non-discrimination is an expression of the principle of equality. In the context of the internal market, however, it refers specifically to the prohibition of discrimination on the basis of nationality. Provided in Article 18 TFEU and Article 21(2) of the Charter of Fundamental Rights of the European Union ('the Charter'), the prohibition of discrimination on grounds of nationality, furthermore, has a strong connection to the concept of EU citizenship, applying to all EU citizens regardless of their status as a participant in the internal market.

The principle of equality, on the other hand, in addition to being a general principle of EU law, refers to two kinds of situations. Firstly, it pertains to the idea of competitive equality between undertakings operating in the internal market and provides a justification for the EU's competition policy. Secondly, the principle of equality is a horizontal provision and one of the fundamental freedoms protected by the EU, most prominently in the context of equality between men and women but also age or race. The current analysis focuses on the former function of the principle.

4.1 Non-discrimination

According to AG Jacobs, non-discrimination is a fundamental principle that underlies European integration.⁸¹ It plays more than a formal role:

'[n]o other aspect of Community law touches the individual more directly or does more to foster that sense of common identity and shared destiny without which the 'ever closer union among the peoples of Europe', proclaimed by the preamble to the Treaty, would be an empty slogan.'⁸²

As a principle of national treatment, the principle of non-discrimination has a broad scope of application. It applies 'in every respect and in all circumstances governed by [EU] law to any person established in a Member State'.⁸³ The general prohibition of discrimination on grounds of nationality enables the nationals of a Member State to

⁸¹ *ibid* para 10.

⁸² *ibid* para 11.

⁸³ Case 137/84 *Mutsch* [1985] ECR 2681, para 12.

undertake economic activities in another Member State on equal terms with the nationals of the host Member State.⁸⁴ Due to its residual character, the concrete application of Article 18 TFEU in particular policy areas is specified in other provisions of the TFEU.⁸⁵ In some instances, such as intellectual property or the right to adequate judicial remedies for assisting a person to exercise or enforce his or her fundamental freedoms Article 18 TFEU is applied directly.⁸⁶ The principle of non-discrimination has direct effect⁸⁷ and can even be enforced in disputes between individuals.⁸⁸

The Court of Justice has granted the principle of non-discrimination broad interpretation. In *Luisi and Carbone*, for example, the Court recognised that the freedom to provide services also had a passive dimension – the freedom of persons, including tourists, students and persons receiving medical services, ‘to go to another Member State in order to receive a service there, without being obstructed by restrictions’.⁸⁹ In *Cowan*, other passive receivers of services, such as tourists, were placed under the protection of the principle of national treatment.⁹⁰

Through the link created by the Court of Justice in *Martínez Sala* and subsequent case law between the prohibition of discrimination on grounds of nationality and EU citizenship,⁹¹ the principle of non-discrimination has gained a broader scope of

⁸⁴ Joined Cases C-92/92 and C-326/92 *Phil Collins*, Opinion of AG Jacobs (n 79) para 14; Joined Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5145, para 32.

⁸⁵ Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681, para 37: ‘According to settled case-law, Article 6 of the [EC] Treaty, which lays down as a general principle that there shall be no discrimination on grounds of nationality, applies independently only to situations governed by Community law for which the Treaty lays down no specific rules prohibiting discrimination’. See also Case 305/87 *Commission v Greece* [1989] ECR 1476, para 13; Case C-179/90 *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli* [1991] ECR I-5889, para 11; Case C-379/92 *Peralta* [1994] ECR I-3453, para 18. The policy areas to which the principle of non-discrimination applies include the free movement of goods (Article 36 TFEU), state monopolies (Article 37(1) TFEU), the common agricultural policy (Article 40(2) TFEU), the free movement of workers (Article 45(2) TFEU), the free movement of services (Article 61 TFEU), the free movement of capital (Article 65 (3) TFEU), transport policy (Article 95(1) TFEU), competition policy (Article 172(2)(a) TFEU), approximation of laws (Article 107(6) TFEU), association of overseas countries and territories (Article 200(5) TFEU), humanitarian aid (Article 214(2) TFEU), and enhanced cooperation (Article 326 TFEU).

⁸⁶ Case C-398/92 *Mund & Fester v Hatrex* [1994] ECR I-467, paras 14-15.

⁸⁷ Joined Cases C-92/92 and C-326/92 *Phil Collins* (n 84) para 35.

⁸⁸ Case C-413/95 *Bosman* [1995] ECR I-4921; Case C-281/98 *Angonese* [2000] ECR I-4139.

⁸⁹ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para 16.

⁹⁰ Case 186/87 *Cowan* [1989] ECR 195, para 17.

⁹¹ Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast* [2002] ECR I-7091, para 82.

application in EU law than strictly the internal market.⁹² A citizen of the European Union lawfully resident in the territory of a Member State of which he is not a national can rely on Article 18 TFEU in all situations which fall within the scope of Community law.⁹³

Within the internal market, the application of the principle of non-discrimination is not restricted to grounds of nationality. It applies equally to cases that feature a cross-border element but where the nationality of the freely moving individual plays no role. In *Köbler*, for example, the Court found that the requirement under Austrian law that university professors be employed for 15 years in Austrian universities in order to obtain the right for a higher grade of remuneration and not taking into account periods of employment which the professors may have accumulated in other universities in the EU constitutes discrimination, albeit not on grounds of nationality.⁹⁴ In the internal market, the principle of non-discrimination, in fact, applies to all 'free movers' regardless of their nationality, residence or the direction of their movement.⁹⁵

The principle of non-discrimination requires that comparable situations not be treated differently and different situations not be treated in the same way.⁹⁶ On the one hand, different treatment can only be justified on objective basis independent of the nationality of the persons concerned if the differentiation is proportionate to the objective being legitimately pursued.⁹⁷ On the other hand, different treatment only amounts to discrimination if it is arbitrary, or 'devoid of adequate justification and not based on objective criteria'.⁹⁸

The principle of non-discrimination covers both direct and indirect discrimination. The free movement of goods in the EU is substantiated primarily by Articles 34 and 35 TFEU that stipulate the prohibition of quantitative restrictions on imports and exports and all

⁹² T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) p 132.

⁹³ Case C-85/96 *Martínez Sala* (n 91) para 63; Case C-184/99 *Grzelczyk* (n 91) para 32; Case C-209/03 *Bidar* [2005] ECR I-2119, para 32.

⁹⁴ Case C-244/01 *Köbler* [2003] ECR I-10239. Also: Case C-419/92 *Scholz* [1994] ECR I-505; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paras 30-31.

⁹⁵ N Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 *International and Comparative Law Quarterly* 82, 88-89.

⁹⁶ Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, para 57; Case C-227/04 P *Lindorfer* [2007] ECR I-6767, para 63.

⁹⁷ Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 31; Case C-524/06 *Huber* [2008] ECR I-9705, para 75; Case C-164/07 *Wood* [2008] ECR I-4143, para 13.

⁹⁸ Case 139/77 *Denkavit* [1978] ECR 1317, para 15; Case 106/81 *Kind* [1982] ECR 2885, para 22.

measures having equivalent effect. A definition of measures having an effect equivalent to quantitative restrictions was given by the Court in *Dassonville* and includes 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.⁹⁹ Some commentators argue that *Dassonville* formula was an attempt by the Court to depart from the original logic of non-discrimination,¹⁰⁰ whereas others disagree.¹⁰¹ The forms of possible measures of equivalent effect are numerous and may range from customs measures to national rules on intellectual property.¹⁰² Furthermore, the principles of non-discrimination and effectiveness also apply to procedural law, including remedies and sanctions giving effect to EU law.¹⁰³

Article 49 TFEU stipulates the freedom of establishment, Articles 56 and 62 TFEU the free movement of services, and Article 65 TFEU the free movement of capital. The principle of free movement of persons gives right to both employed workers¹⁰⁴ and the self-employed¹⁰⁵ – the freedom of establishment – to look for and undertake jobs and establish themselves, respectively, in another EU Member State. In this context, the non-discrimination principle prescribes that non-EU national job seekers, employees or the self-employed may not be placed at a disadvantaged position compared with their EU-national counterparts.

The non-discrimination model is strongly present in the design of the free movement of workers and services. Accordingly, workers and service providers from other Member States are not to be treated in a manner discriminatory as compared to their host country counterparts. Nevertheless, the non-discrimination approach is incapable of breaking down barriers that apply to all workers and service providers equally regardless of their nationality but that do, in fact, impede the movement of labour or

⁹⁹ Case 8/74 *Dassonville* [1974] ECR 837, para 5.

¹⁰⁰ JHH Weiler, 'The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 349.

¹⁰¹ For example, N Bernard, 'On the Art of Not Mixing One's Drinks: *Dassonville* and *Cassis de Dijon* Revisited' in M Pórigues Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Hart Publishing 2010) 456, 456-457.

¹⁰² PJ Oliver (ed), *Oliver on Free Movement of Goods in the European Union* (Hart Publishing 2010) 1.

¹⁰³ Case 45/76 *Comet* [1976] ECR 2043; Case 33/76 *Rewe* [1976] ECR 1989.

¹⁰⁴ Articles 45-48 TFEU.

¹⁰⁵ Articles 49-55 TFEU.

services within the internal market. The 'market access approach' introduced by the Court in *Säger* provides that the freedom to provide services includes in addition to a prohibition of discrimination on basis of nationality also measures which are liable to prohibit or otherwise impede the activities of a service provider established in another Member State where he lawfully provides similar services.¹⁰⁶ The same line of reasoning was continued in *Kraus* with respect to restrictions 'liable to hamper or make less attractive the exercise of fundamental freedoms'.¹⁰⁷ This, surely, leads to the potential effect of undermining the position of non-movers to whom national regulations continue to apply despite being declared unsuitable for application to non-nationals or those nationals who have exercised their free movement rights.¹⁰⁸

In sum, the principle of non-discrimination on grounds of nationality provides that all market actors irrespective of their nationality or whether or not they have exercised their free movement rights have free access to enter another Member State in order to trade in goods, provide or receive services, establish an undertaking, take up employment and transfer capital. This principle – together with the principle of equality – is in the heart of the internal market. Yet the actual limits to the application of this provision are determined by the factors discussed below in section 4.

4.2 Equality

The principle of equality is a fundamental principle of EU law. Together with the need to apply EU law uniformly, the principle of equality requires that the provisions of EU law for the interpretation of which Member States have not been expressly authorised be interpreted in an autonomous and uniform manner.¹⁰⁹

¹⁰⁶ Case C-76/90 *Säger* [1991] ECR I-4221, para 12; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, para 28; Case C-255/04 *Commission v France (Performing artists)* [2006] ECR I-5251, para 38.

¹⁰⁷ Case C-19/92 *Kraus* [1993] ECR I-1663, para 32.

¹⁰⁸ C Barnard, 'Internal Market v. Labour Market: A Brief History' in M De Vos (ed), *European Union Internal Market and Labour Law: Friends or Foes?* (Intersentia 2009) 19, 23.

¹⁰⁹ Case 327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, para 11; Case C-287/98 *Luxembourg v Linster* [2000] ECR I-6917, para 43.

The principle of equal treatment carries several functions in EU law: unifying and regulating the market as well as providing constitutional protection.¹¹⁰ The market unification role pertains mainly to the non-discrimination of market participants on grounds of nationality. The market regulation role, on the other hand, concerns equal conditions of competition. The third, constitutional role of equal treatment, refers to EU law provisions on gender equality (Article 8 TFEU) and anti-discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 19 TFEU) for the sake of protecting individual rights affected by market integration. The equality principle is also firmly vested in the EU Charter of Fundamental Rights: in Article 20 as equality before the law, and in Article 23 as equality between women and men.

The focus of this section is on the market regulation role of the principle of equality. As a 'key to the breaking down of protectionist barriers between Member State markets',¹¹¹ the principle of equality aims to ensure the elimination of distortions to competition in the internal market.¹¹² Equal competition is essential to ensure the efficient functioning of the market,¹¹³ as well as the protection of public interest, individual undertakings and consumers and, ultimately, safeguarding the general economic well-being of the European Union.¹¹⁴ In *Continental Can* and subsequent case law, the Court emphasised that free competition is essential for the general functioning of the Treaty and, in particular, for the internal market.¹¹⁵ Conversely, harmonisation in the field of competition policy in the EU is limited by the objective of maintaining in the Union a 'harmonious development of economic activities'.¹¹⁶

The Treaties provide rules on the prohibition of anti-competitive cooperation between undertakings in the form of agreements, decisions or concerted practices (Article 101

¹¹⁰ G More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999) 517, 518.

¹¹¹ *ibid* 522.

¹¹² Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹¹³ Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 36; Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para 20.

¹¹⁴ Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, para 25; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 42; Case C-52/09 *TeliaSonera* [2011] ECR I-527, para 22.

¹¹⁵ Case 6/72 *Continental Can* [1973] ECR 215, para 24; Case C-126/97 *Eco Swiss* (n 113) para 36; Case C-453/99 *Courage and Crehan* (n 113) para 20.

¹¹⁶ Case 6/72 *Continental Can* (n 115) para 24.

TFEU) or the abuse of dominant position (Article 102 TFEU), and state aid (Article 107 TFEU).

Competition law is an example of how individuals who, on the one hand, are empowered as the enforcers of EU law may, on the other hand, impair the functioning of the internal market. Whereas the non-discrimination principles are addressed primarily to the Member States, rules on competition law target private undertakings. Without any regulation of competition private actors are capable of erecting barriers with a comparably detrimental effect on the functioning of the market as obstacles created by states, thus have individual actors become the subjects of the principle of equal treatment.¹¹⁷ The direct role of the individuals in the internal market in the above sense is, however, limited to the sphere of competition law.¹¹⁸

5 Non-economic considerations in the internal market

The internal market is but one – albeit the most significant – means towards achieving the broader aims of the Union. The ‘barriers which divide Europe’ are not only physical or constrained to tariffs and other direct barriers to trade.¹¹⁹ They are increasingly of a social nature, or challenge the legitimacy of the EU legal order. The ‘ever closer union among the peoples of Europe’ proclaimed in Article 1 TEU¹²⁰ inevitably includes cooperation between the Member States in non-economic policy areas in addition to the creation of the internal market.

Changes in the context in which the internal market operates raise questions about how to set up a well-functioning internal market in the EU.¹²¹ For the sake of ensuring the political viability of the Union, the EU legislator and judiciary cannot disregard the non-economic policies that shape the economies and societies of the Member States when defining and implementing EU policies.

¹¹⁷ P Pescatore, 'Public and Private Aspects of European Community Competition Law' (1986) 10 *Fordham International Law Journal* 373, 383.

¹¹⁸ R Lane, 'The internal market and the individual' in N Nic Shuibhne (ed), *Regulating the Internal Market*, (Edward Elgar Publishing 2006) 245, 252.

¹¹⁹ Recital 2, Preamble to the TFEU.

¹²⁰ Initially in the Preamble to the EEC Treaty.

¹²¹ M Dewatripont and others, *Flexible integration: Towards a more effective and democratic Europe* (Monitoring European Integration 1995) 80.

The balance between the economic and the non-economic interests in the internal market is highlighted by the EU Treaties as well as the Charter. The non-economic dimension of the internal market is explicit in Article 3(3) TEU outlining the objectives of the Union. Article 3(3) TEU mirrors the deepening integration in the EU as well as the changing needs of the society. The provision asserts that the aims of the EU go beyond the mere abolition of barriers to the free movement of factors of production and amount to the creation of a 'highly competitive social market economy'. In addition to economic efficiency, this social market economy pursues a number of social and environmental objectives including, for example, full employment and social progress and a high level of protection and improvement of the quality of the environment.

In some instances, non-economic policies have gradually made their way into the functioning of the internal market. In others, such as the example of consumer policy, they have exited the realm of the market. Non-economic policies play a twofold role in the EU. Firstly, the EU pursues a number of non-economic policies in addition to the internal market project – employment, social policy, education and vocational training, culture, public health, consumer protection, environment, etc. Secondly, non-economic considerations affect the establishment and functioning of the internal market. Their influence takes place both on the level of rulemaking via horizontal provisions that require non-economic aspects to be incorporated in the design and implementation of internal market legislation, as well as on the level of derogations granted to Member States to deviate from the fundamental freedoms and rules on competition. In the internal market context, therefore, non-economic principles help shape the nature and scope of the application of the market freedoms.

The original concept of the internal market is subject to transformation. It is characteristic of internal market legislation that it joins together both economic and non-economic aspects.¹²² The limits of the internal market, for example, are determined by economic considerations yet derogations from the four freedoms increasingly take account of non-economic concerns. The case law of the Court of Justice, too, is

¹²² B de Witte, 'Non-market values in internal market legislation' in N Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006) 61, 76.

accommodating towards the changing character of the internal market.¹²³ In the *Viking* case, for example, the Court underlined the importance of balancing free movement rights against social policy objectives owing to the purposes of the Community which are social as well as economic.¹²⁴

The Lisbon Treaty accentuates the relationship between the internal market and non-economic policy aspects even more than Article 2 of the pre-Lisbon TEU on the basis of which the Court ruled in *Viking*. Article 2 TEU (pre-Lisbon) recognised the social and environmental aspects of European integration but referred to their 'promotion' rather than an imperative for the Union.¹²⁵ The integration between economic and non-economic policies is to take place not only with respect to the elaboration of Union policies *vis-à-vis* national regulation but also as regards the design of the Union's own numerous policies. Insofar as many non-economic policies are intangibly attached to the free movement of goods, persons, services and capital and rules on competition policy it is necessary to explore the extent to which they define the scope of the fundamental freedoms and competition rules in the EU internal market.

The Treaty of Lisbon challenged the fundamental position of the four freedoms by placing them, albeit as first, among all other EU policies.¹²⁶ The four fundamental freedoms and competition policy are complemented by a number of horizontal and flanking policies located in other parts of the TFEU. Horizontal provisions are found in Article 8 on equal treatment, Article 9 on social policy, Article 10 on anti-discrimination, Article 11 on environment, Article 12 on consumer protection, and Article 13 on animal welfare. Horizontal provisions require that the relevant policy considerations be taken into account in the definition and implementation of all EU policies and activities, including the internal market. They serve a dual function. Firstly, horizontal provisions such as environmental protection must be taken into consideration by EU institutions in the exercise of the powers entrusted to them; secondly, the measures of environmental

¹²³ I Govaere, 'The Future Direction of the EU Internal Market: On Vested Values and Fashionable Modernism' (2009) 16 *Columbia Journal of European Law* 67, 72.

¹²⁴ Case C-438/05 *Viking* (n 71) para 79.

¹²⁵ Cf 'shall work for' in Article 3(3) TEU (post-Lisbon). I Govaere, 'The Future Direction of the EU Internal Market' (n 123) 70. Article 114(3) TFEU sets high level of protection as the basis for approximation measures in the fields of health, safety, environmental protection and consumer protection.

¹²⁶ R Lane (n 118) 258.

protection may also be adopted on other legal bases than those specifically concerning the environment,¹²⁷ in particular in the exercise of powers relating to the attainment of the internal market.¹²⁸ Internal market harmonisation measures may also take into account other policies in which the Union enjoys no general competence, such as public health, but the measures may not be taken only for the sake of protecting those objectives.¹²⁹

Horizontal provisions may belong to the same fields as flanking policies, which denote cooperation outside the internal market. Examples include environmental and social policy – areas in which the EU enjoys competence but the objectives of which also need to be integrated into EU's other policies, including the internal market. Other flanking policies are common policies in their own right, such as, for example, energy, transport, agriculture and fisheries, consumer policy, education and cultural policy. The rules of the internal market do not apply to flanking policies unless they feature an economic dimension.¹³⁰ Conversely, the fact that an economic activity – one consisting of offering goods or services on a given market – has a relation with a non-economic activity, such as sports, does not preclude the application of internal market rules.¹³¹

Since debate on the internal market almost inevitably concerns matters falling outside the four freedoms, it has been suggested that the internal market has two meanings: a narrow and a broad one. The narrow meaning comprises only the economic whereas the broad meaning covers economic as well as non-economic aspects of integrated Europe.¹³² The emergence of a broader internal market is not, however, unproblematic. It creates a number of tensions between the economic and social policies, such as those at stake in *Viking*.¹³³

The aim of this section is to highlight the changes in the concept of the internal market as a result of the interaction between the economic and non-economic considerations therein. The analysis focuses on three major groups of non-economic considerations –

¹²⁷ Articles 191-193 TFEU.

¹²⁸ Case C-300/89 *Commission v Council (Titanium dioxide)*, Opinion of AG Tesouro (n 26) para 11. This is notwithstanding the EU's competences in the field of environment.

¹²⁹ I Govaere, 'The Future Direction of the EU Internal Market' (n 123) 72.

¹³⁰ *ibid* 74-75.

¹³¹ Case C-49/07 *MOTOE* [2008] ECR I-4863, para 22.

¹³² PP Craig (n 38) 1 and 37-38.

¹³³ PP Craig and G De Búrca, *EU law: Text, Cases, and Materials* (Oxford University Press 2011) 581.

environment, social policy and consumer protection, and fundamental freedoms. The first subsection provides a brief account of their emergence as EU policies and/or components of the internal market *acquis*. The second and third subsections discuss the two levels on which non-economic policies interact with the fundamental freedoms and competition policy: the levels of positive integration, i.e. legislative activity and harmonisation, and negative integration, i.e. justifications to derogations from the fundamental freedoms.

5.1 Emergence of non-economic policies

Initially, the Treaties envisaged the creation of a market on the basis of certain legal principles pertaining to its economic dimension. The non-economic aspects of trade were left to be regulated by the Member States. Even though the core concept of the internal market is exclusively economic in nature, the free movement of the factors of production entails a considerable non-economic dimension. It is impossible to disregard non-economic interests in a union of states that aims ever deeper integration both economically and politically. In the course of developments within the internal market, the EU gradually gained additional competences in areas previously governed by the Member States. From that point on, it fell on the Union to tackle the non-economic issues closely linked to the exercise of the market freedoms.¹³⁴

5.1.1 Environment

Not included in the original Treaties, the first step towards a European environmental policy was taken in 1972 by the Stockholm Declaration, which recognised that the interconnection between the rational management of resources and the objective of improving the environment require a coordination of national environmental policies.¹³⁵ Following the Stockholm Declaration, in 1973, the first European Environmental Action Programme was adopted.¹³⁶ The Action Programme acknowledged that natural environment and its conservation are important to 'the organisation and promotion of

¹³⁴ S Weatherill, 'On the Depth and Breadth of European Integration' (1997) 17 *Oxford Journal of Legal Studies* 537, 546.

¹³⁵ Principle 13, 1972 Declaration of the United Nations Conference on the Human Environment.

¹³⁶ Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment [1973] OJ C112/1.

human progress' and that environmental concerns must, therefore, be integrated into the planning and execution of EU and national policies. The Action Programme further identified the environmental aspect as a necessary corollary to the aims of the EEC regarding the 'harmonious development of economic activities and a continuous and balanced expansion'.¹³⁷ Appreciation was thus given to the importance of integrating environmental policy objectives into the EEC's economic policies.

In 1979, the Court of Justice made an important assertion that provisions on the environment may, indeed, be adopted on the basis of Article 100 EEC Treaty (now Article 115 TFEU) due to the potential adverse effects of diverging environmental standards on competition within the internal market.¹³⁸ Exceptions from the harmonisation provision of the then Article 100a EC Treaty only appeared in the Maastricht Treaty. At the same time, the Union also gained powers in the field of environment in general.

The 1985 White Paper on Completing the Internal Market did not include a full overview of the environmental dimension of the internal market. In 1988, however, a Task Force on the Environment and the Internal Market was established with the specific task of identifying the environmental aspects of the internal market in 1992.

The horizontal provision – integration principle – of environmental policy was first introduced by the SEA in 1987.¹³⁹ In the Maastricht Treaty,¹⁴⁰ the provision was reworded to avoid giving it direct effect.¹⁴¹ Allegedly, the reason for not granting environmental policy direct effect lies in its undetermined scope and nature.¹⁴²

Article 2 of the Maastricht Treaty provided that sustainable growth and respect for the environment must be promoted across the Community. In the Treaty of Amsterdam, 'sustainable growth' was replaced by the principle of 'sustainable development', to the

¹³⁷ Article 2 EEC Treaty.

¹³⁸ Case 91/79 *Commission v Italy* [1980] ECR I-1099, para 8.

¹³⁹ Article 130r(2) EEC Treaty (SEA numbering): 'Environmental protection requirements shall be a component of the Community's other policies.'

¹⁴⁰ Article 130r(2) EC Treaty (Maastricht): 'Environmental protection requirements must be integrated into the definition and implementation of other Community policies.'

¹⁴¹ L Krämer, 'Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies' in S Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2013) 83, 86-87.

¹⁴² M Hession and R Macrory, 'Balancing Trade Freedom with the Requirements of Sustainable Development' in N Emilou and D O'Keeffe (eds), *The European Union and World Trade Law: After the GATT Uruguay Round* (John Wiley & Sons 1996) 181, reproduced in R Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Oxford University Press 2014) 473, 477-478.

content of those who were concerned about the role of environmental policy in the EU.¹⁴³ The principle of sustainable development is now included in Articles 3(3) and 21 TEU.

The Cardiff summit of 1998 heralded a new era in the integration of environmental effects into EU law and policies by setting out to formalise the integration principle in decision-making and implementing processes. Due to, among others, lack of consistency and weak political commitment the Cardiff process has, however, generally been deemed to have failed to reach its goals.¹⁴⁴

Amsterdam Treaty amendments moved the environmental integration principle from the chapter of environmental policy to Article 7 of the 'Principles' section of the EC Treaty. Since the Treaty of Lisbon, a significant number of horizontal provisions are recognised by EU primary law and subject to being integrated into other EU policies. The 'Provisions of General Application' of Title II TFEU include, in addition to the general principle of consistency between all Union policies and activities provided in Article 7 TFEU a number of horizontal provisions. Interestingly, from the perspective of the environmental law, the increase in the number of horizontal provisions brought about by the Treaty of Lisbon has a detrimental effect on the special role previously accorded to environmental policy as the 'original' integration provision.¹⁴⁵ The fact that more aspects are to be considered and weighed against the market objectives has led to the environmental policy losing its special position as the first and, for some time, the only integration principle.¹⁴⁶ The curtailing of the importance and status of the economic integration principle compared to other non-economic principles in the internal market has been feared to lead to a so-called 'minestrone-effect' of 'reversed integration' in which many aspects must be considered but none of them to a particularly large extent, especially *vis-à-vis* one other.¹⁴⁷

¹⁴³ JH Jans, 'Stop the Integration Principle?' (2009) 33 Fordham International Law Journal 1533, 1538.

¹⁴⁴ Commission, 'Integrating environmental considerations into other policy areas- a stocktaking of the Cardiff process' (Working Document) COM (2004) 394 final, 31.

¹⁴⁵ O McIntyre, 'The integration challenge: Integrating environmental concerns into other EU policies' in S Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2013) 125, 125; On the Cardiff process: *ibid* 130-131.

¹⁴⁶ JH Jans (n 143) 1545.

¹⁴⁷ *ibid* 1546-1547; O McIntyre (n 145) 137-138.

5.1.2 Social policy

Albeit appearing after the environmental integration provision, there is little doubt that social policy has taken up a role comparable to environmental policy in the design of the internal market.¹⁴⁸ Initially, social policy considerations played barely any role in the market regulation at all. It was primarily the task of the Court of Justice to balance the growing interest in social policy with market integration. More recently, the Treaty makers and EU legislator, too, have started to insert into EU law the developments of EU social policy and, especially, its effects on the internal market. Social policy concerns are represented by the horizontal provision of Article 9 TFEU, additional provisions on EU social policy in the TFEU, and appear in secondary EU legislation such as the Services Directive.¹⁴⁹

Initially, the economic aspirations driving European market integration forward were aimed at economic development and free competition. These were to steadily lead to the most efficient division of resources and, consequently, the best outcomes for both the economies as a whole and the participating individuals in particular, the latter benefiting from the freedom to take up employment elsewhere in the European Community. Social policy in the EC first included cooperation between the Member States in the fields of employment, labour law and working conditions, equal pay for men and women, social security, vocational training, working hours and holiday pay, etc.¹⁵⁰ Reliance on the Member States was reflected both in the 1956 Spaak Report and the ensuing wording of Article 117 EEC Treaty.¹⁵¹ Social policy traditionally being in the hands of the Member States, there continues to be a certain dualism between the market and social policy. The tensions between the two are demonstrated in Article 151 TFEU.¹⁵² The tensions appear

¹⁴⁸ S Weatherill, 'On the Depth and Breadth of European Integration' (n 134) 547; M Dewatripont and others (n 121) 93ff.

¹⁴⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L367/36 (Services Directive).

¹⁵⁰ Articles 118-120 EEC Treaty.

¹⁵¹ Article 117 EEC Treaty reads as follows: 'Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.'

¹⁵² 'The Union and the Member States [...] shall have as their objectives the promotion of employment, improved living and working conditions [...]. To this end the Union and the Member States shall implement

both in the delimitation of the respective competences of the EU and the Member States in social legislation as well as in the role of social policy in the development and functioning of the internal market.

The difficulty of reaching agreement as to the role of social policy within the EU was demonstrated by the adoption of the Social Protocol in 1991 by eleven of the then twelve Member States. The purpose of the Social Protocol was to accommodate in EU law the 1989 Social Charter. The protocol, attached to the Maastricht Treaty, was a compromise solution to respect the wish of the United Kingdom not to be bound by the envisaged chapter on Social Policy in the EC Treaty. The United Kingdom had the possibility to opt out from the Social Policy protocol. In 1997, the United Kingdom instead opted in to the Social Protocol, the provisions of which were finally incorporated in the EC Treaty by the 1997 Amsterdam Treaty. Even though the EU's competences in the field of social policy are limited, the internal market affects national social policies.

In the famous report dating back to 1956, the Spaak Committee established that efficiency of the common market depends on the free movement of labour in order to secure an optimal allocation of resources. In order to make labour move and, thus, achieve the desirable level of efficiency, two preconditions have to be fulfilled: firstly, the desire of workers to migrate and, secondly, the readiness of host states to receive them by accommodating the freedom of movement in their national legislation.¹⁵³ The dual objectives of the free movement of workers have been affirmed by the Court in *Stanton v INASTI*,¹⁵⁴ *Singh*¹⁵⁵ and *Bosman*.¹⁵⁶

The aims of the free movement of persons go beyond what is necessary for the efficiency of state economy. The social conditions under which labour migration takes place in the EU, too, are frequently under scrutiny.¹⁵⁷ The welfare of the free movers, and even of those who do not move,¹⁵⁸ has been high on the agenda of both the founding fathers of

measures which take account of the diverse forms of national practices [...].’ See H Collins, *Employment Law* (Oxford University Press 2010) 20.

¹⁵³ S O’Leary, ‘Free movement of persons and services’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 499, 502-503.

¹⁵⁴ Case 143/87 *Stanton v Inasti* [1988] ECR I-3877, para 13

¹⁵⁵ Case C-370/90 *Surinder Singh* [1992] ECR I-4265, para 16.

¹⁵⁶ C-413/95 *Bosman* (n 88) para 94.

¹⁵⁷ S O’Leary (n 153) 505.

¹⁵⁸ *ibid* 506.

the EU, the Court of Justice and, surely, also the Member States. This objective of the free movement of workers was made explicit by AG Jacobs in *Bettray*: '[L]abour is not, in Community law, to be regarded as a commodity and notably gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States.'¹⁵⁹ AG Jacobs referred to emphasis in secondary law implementing the free movement provisions on the instrumentality of freedom of movement in allowing the workers to improve their and their families' quality of life and employment and advance their social conditions.¹⁶⁰

In 1999, a call for modernisation of the internal market was launched.¹⁶¹ This call was repeated in 2007¹⁶² and, most recently, in 2010.¹⁶³ The 2007 report put forward that the first step in the creation of the internal market – making operational the fundamental freedoms – was to be complemented by the second, '21st century' step geared towards enhancing the functioning of the internal market in the interest of citizens, consumers and public confidence, among others.¹⁶⁴ Especially for the sake of the latter, sustainability as applies both to the social and environmental dimension of the internal market is the key goal in enhancing the future quality of life in the EU, thus broadening the understanding of the function of the internal market. It is inevitable for a healthy market to demonstrate respect for labour, health, safety and environmental standards.¹⁶⁵ The 2010 Report recognised that in order to consolidate support for the internal market project, there is a need to alleviate the tensions between supranational market integration and national social protection policies.¹⁶⁶ The problem needs to be tackled both by giving greater consideration to Member States' social realities in internal market *acquis* as well as coordinating national regulatory systems in line with EU principles.¹⁶⁷

¹⁵⁹ Case 344/87 *Bettray* [1988] ECR 1621, Opinion of AG Jacobs, para 29.

¹⁶⁰ Recital 3, Preamble to Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L257/2.

¹⁶¹ Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' [1999] OJ C132/1.

¹⁶² 'A single market for 21st century Europe' (n 31). Also Commission, 'Instruments for a modernised single market policy' (Staff Working Document) SEC (2007) 1518 final.

¹⁶³ M Monti (n 33).

¹⁶⁴ Commission 'A vision for the single market of the 21st century' (Press Release) IP/07/214, 21 February 2007.

¹⁶⁵ 'A single market for 21st century Europe' (n 31) 7.

¹⁶⁶ M Monti (n 33) 68.

¹⁶⁷ *ibid.*

5.1.3 Consumer protection

Just as in the cases of environment and social policy, the original Rome Treaty contained little on consumer protection. References to consumer protection were limited to some policies such as agriculture and competition. The need for a separate Union consumer policy emerged in the 1970s. EU consumer protection policy is considered to have been launched at the 1972 Paris Summit where the institutions were called upon to set up a plan for the strengthening and coordination of consumer protection within the Communities.¹⁶⁸ A preliminary programme for consumer protection and information policy was adopted by the Council in 1975,¹⁶⁹ followed by a second programme in 1982.¹⁷⁰ The two initial action plans containing 'soft law' rather than hard legal obligations were followed by a number of others, yet 'hard law' in EU consumer protection policy did not emerge until much later.

Since the EEC Treaty lacked a separate legal basis for EU consumer protection law, legislation in the field was adopted on the harmonisation legal basis of Article 100 EEC Treaty under the guise of maintaining fair conditions for competition. From the very beginning, therefore, consumer protection has been very closely attached to the internal market. In the SEA, consumer protection was inserted into Article 100a(3) EEC Treaty (now Article 114(3) TFEU) providing for a high level of protection in consumer policy but no separate EC consumer policy was created. The situation finally changed with the entry into force of the Maastricht Treaty that included consumer protection among the activities of the Community under Article 3(s) EC Treaty and introduced into the EC Treaty Article 129(a)(1) authorising the Community to pursue a high level of consumer protection. The latter provision enabled the Community either to engage in consumer protection through the internal market legal basis of Article 100a EC Treaty or to take separate action in the field to support and supplement Member State activities. Regardless of the possibility to do so, recourse to the separate consumer protection legal

¹⁶⁸ 'Conclusions of the first Summit Conference of the enlarged Community – Paris, 19-20 October 1972' Bulletin of the European Communities 10-1972.

¹⁶⁹ Council Resolution of 25 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1.

¹⁷⁰ Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy [1981] OJ C133/1.

basis is still seldom had.¹⁷¹ Internal market harmonisation, on the other hand, has assumed the role of 'indirect consumer policy.'¹⁷²

Amsterdam Treaty added a provision on consumer protection in Article 129a(2) (renumbered Article 153(2)) EC Treaty (now Article 169 TFEU). Even the separate provision on EU consumer policy has, nevertheless, not brought about a departure from the internal market legal basis of Article 114 TFEU for adopting consumer protection policy measures.¹⁷³ On a negative side, the continued interconnectedness hinders the development of an EU consumer protection policy independent of market integration.¹⁷⁴

5.1.4 Fundamental rights

Fundamentally, the question of balancing economic rights with those of a non-economic nature translates into an issue of empowering or limiting individual action.¹⁷⁵ The role of individuals in the construction of the European edifice and ensuring its effectiveness affects the development of the internal market. The greater the degree to which individuals are affected by the EU, the greater the need for their protection. Since EU law binds not only the Member States but also individuals by virtue of the direct effect of some of its provisions, it is important that adequate fundamental rights protection be provided also on EU level.

The ever stronger protection of fundamental rights in the EU owes greatly to the Member States' perception of the lack of such protection. National constitutional courts were increasingly taking the matter of ensuring the observance of fundamental rights in the field of application EU law into their own hands. This triggered the EU to create an own catalogue of rights that apply to all EU law in order to avoid national courts undermining the autonomy of the EU legal order by means of relying on the fundamental rights protection accorded by national constitutions and thereby challenging the primacy of EU law.¹⁷⁶ The most active national court in this regard has been the German Constitutional Court. It has frequently made its respect for the jurisdiction of the Court of Justice

¹⁷¹ T Bourgoignie, 'European Community Consumer Law and Policy: from Rome to Amsterdam' (1998) 6 Consumer Law Journal 443, 447.

¹⁷² S Weatherill, *EU Consumer Law and Policy* (Edward Elgar Publishing 2013) 11.

¹⁷³ I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013) 42.

¹⁷⁴ *ibid* 43.

¹⁷⁵ M Hession and R Macrory (n 142) 478-479.

¹⁷⁶ LFM Besselink, *A Composite European Constitution* (Europa Law Publishing 2007) 12.

conditional on whether or not the latter provides a similar degree of fundamental rights protection as the German Basic Law.¹⁷⁷ Allowing national courts to circumvent the Court's interpretation of EU law would, furthermore, undermine both the uniformity and efficacy of EU law.¹⁷⁸

The Lisbon Treaty incorporated the Charter of Fundamental Rights into EU primary law by Article 6 TEU and authorised the EU to join the ECHR. Prior to the Lisbon Treaty, fundamental rights enjoyed in the EU the status of general principles of law and bound both the Member States and the institutions. As general principles, fundamental rights were to be substantiated by constitutional traditions common to the Member States as interpreted by the Court of Justice. Fundamental rights forming part of the Member States' legal orders were, thus, part of the catalogue of fundamental rights applying to EU law, yet only to the extent of broader recognition, i.e. in the legal orders of several Member States. This is provided in Article 6(3) TEU. In the meantime, Member States' fundamental rights protection comprised their international commitments in the field, especially under the ECHR. The fundamental rights provisions of such international agreements, too, have a guiding role in the interpretation of EU law.¹⁷⁹ Following the jurisprudence of the European Court of Human Rights (ECtHR) directly, though, means for the Court of Justice a departure from the autonomy of the EU legal order.¹⁸⁰

The United Kingdom and Poland have an opt-out from the Charter pursuant Protocol No 30 TEU. Insofar as the Charter mainly reiterates general principles of EU law that are already developed and applicable via the case law of the Court of Justice, it is questionable whether the Protocol really constitutes an opt-out from the fundamental rights protection accorded by the EU.¹⁸¹

¹⁷⁷ Case C 29/69 *Stauder* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 2.

¹⁷⁸ Case 11/70 *Internationale Handelsgesellschaft* (n 175) para 3.

¹⁷⁹ Case 4/73 *Nold* [1974] ECR 491, para 13.

¹⁸⁰ LFM Besselink (n 174) 14.

¹⁸¹ M Dougan, 'The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *Common Market Law Review* 617, 667-668.

5.2 Effect of non-economic policies on the internal market: policy-making

In the most direct manner, non-economic policies affect the scope of the economic principles of the internal market by being integrated into internal market legislation, including harmonisation measures. One of the most significant vehicles for that is the integration principle and the integration provisions which give effect to it. The integration principle ensures that horizontal provisions are incorporated into the legislation on free movement and competition policy.¹⁸²

The first integration principle to emerge was that of environmental protection. The Court has deemed it to be an 'essential objective' of the Union.¹⁸³ The importance of the protection of environment in EU law is underscored by the fact that Article 11 TFEU uses significantly stronger language in demanding that environmental protection requirements *must be* integrated into EU policies and activities. Other horizontal provisions are referred to in softer language – 'shall aim/shall be taken into account'.

According to the environmental policy horizontal provision, the aim of integrating environmental concerns into other EU policies is the promotion of sustainable development. The objectives of environmental protection and improvement of the quality of the environment as well as that of sustainable development are all reflected in the objectives of the European Union in establishing an internal market as expressed in Article 3(3) TEU. The principle of sustainable development plays a crucial role in guiding the development of the European Union, integrating economic objectives with social and economic aims.¹⁸⁴ Article 3(3) TEU also identifies a highly competitive social market economy that aims at full employment and social progress as components of the sustainable development of Europe. Environmental and social policy considerations are, therefore, deeply rooted in the context of setting up the internal market.

In addition to Article 11 TFEU, the objectives of the EU's environmental policy are also stated in Title XX of the TFEU, specifically Article 191(1) TFEU. The same applies to EU's social and employment policy provided in Titles IX and X of the TFEU, and consumer protection in Title XV TFEU. The role of the EU's flanking policies in the internal market

¹⁸² S de Vries, *Tensions within the Internal Market* (Europa Law Publishing 2006) 18.

¹⁸³ Case 240/83 *ADBHU* [1985] ECR 531, para 13.

¹⁸⁴ M Hession and R Macrory (n 140) 473.

project is unclear.¹⁸⁵ It is often complicated, yet necessary due to procedural reasons, to distinguish between the various legal bases for adopting environmental policy legislation as it is both an EU policy of its own right and a policy deeply embedded in the internal market.¹⁸⁶

In addition to the dilemma of legal bases, it is also unclear which are the exact environmental protection measures that must be integrated into EU's other policies and activities – the environmental policy objectives of Article 191(1) TFEU, the principles of 191(2) TFEU or the policy aspects of 191(3) TFEU?¹⁸⁷ Practice has proven that the integration principle allows only a partial integration of environmental policy considerations into the internal market, whereas the core of the economic activity remains in place.¹⁸⁸ This outcome is expected as the aim of the horizontal principle is, indeed, to provide a perspective of reviewing the fundamental freedoms through the prism of environmental and other non-economic concerns but not to replace completely the model of the market economy envisaged in the Treaties by an environmental objective. The internal market is, after all, a market project, although social, sustainable, etc.

The integration principle itself does not create conflicts between the internal market and other EU policies as it does not set up a hierarchical system.¹⁸⁹ On the one hand, the integration principle requires that environmental concerns be incorporated in the legislation adopted in any field of EU law. Here, not only the horizontal provisions play a role but also the general principles of consistency in the Treaties, such as Article 7 TFEU. On the other hand, the integration principle requires that all EU law be interpreted in a manner consistent with the objectives of EU's environmental policy.¹⁹⁰ In the landmark judgment of EU environmental law *Waddenzee*, for example, the Court stated that secondary EU law must be interpreted in the light of the precautionary principle – one of the guiding principles of EU environmental policy.¹⁹¹ The objectives and principles of

¹⁸⁵ S Weatherill, 'Safeguarding the *Acquis Communautaire*' (n 39) 163.

¹⁸⁶ S Weatherill, 'On the Depth and Breadth of European Integration' (n 134) 545.

¹⁸⁷ O McIntyre (n 145) 132.

¹⁸⁸ N Dhondt, *Integration of Environmental Protection into other EC Policies* (Europa Law Publishing 2003) 482.

¹⁸⁹ JH Jans (n 143) 1543.

¹⁹⁰ *ibid* 1541.

¹⁹¹ Case C-127/02 *Waddenzee* [2004] ECR I-7405, para 44.

environmental protection under the now Article 191 TFEU can also serve as a ground for judicial review of the validity of an EU measure but judicial review is limited to determining the existence of a 'manifest error of appraisal' of the conditions for applying the environmental policy objectives.¹⁹² Regardless of the fact that the integration principle mainly addresses EU institutions and decision-making processes it must also be observed by the Member States when implementing EU law.¹⁹³

Insofar as different regulation of non-market values by the Member States can constitute a distortion of competition in the internal market or an obstacle to the fundamental freedoms, harmonising measures can be adopted.¹⁹⁴ One of the landmark decisions analysing the interaction between economic and non-economic policies in internal market legislation was given by the Court in *Titanium Dioxide*.¹⁹⁵ In the case, the Court had to consider the appropriate legal basis for adopting Directive 89/428/EEC on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry. Although the envisaged directive pertained both to competition law and the protection of the environment differences in the decision-making procedures rendered it impossible to adopt the directive on a dual legal basis. Article 100a(3) EC Treaty (now Article 114(3) TFEU) did, however, provide for a possibility to adopt internal market harmonisation measures also in the areas of health, safety, environmental protection and consumer protection if, in accordance with paragraph 1 of the same Article, they have as their object the establishment and functioning of the internal market. The Court considered the directive to have falsely been adopted on the environmental policy legal basis and, subsequently, deemed the internal market harmonisation provision of Article 100a EC Treaty to be the correct legal basis. The Court's decision was motivated by a threat of a distortion of competition between undertakings unless provisions stipulating environment and health considerations were harmonised.¹⁹⁶ Article 100a(3) EC Treaty, furthermore, provided that the level of protection accorded to non-economic considerations must be high and in keeping with contemporary scientific facts.

¹⁹² Case C-341/95 *Bettati* [1998] ECR I-4355, paras 33-35.

¹⁹³ N Dhondt, (n 188) 48ff.

¹⁹⁴ A Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113, 120.

¹⁹⁵ Case C-300/89 *Commission v Council (Titanium dioxide)* (n 21).

¹⁹⁶ *ibid* para 23.

In the *Tobacco Advertising* case, the Court cast light on the extent to which non-economic considerations can be incorporated into internal market harmonising measures.¹⁹⁷ The Court affirmed that public health requirements must form part of other EU policies including those for which harmonisation measures are adopted. Insofar as no harmonisation is envisaged in the Treaties for public health, however, other Treaty articles such as Article 100a EC Treaty (now Article 114 TFEU) may not be used to circumvent the absence of an authorisation for harmonisation in the field of public health.¹⁹⁸ The Court concluded that harmonisation measures are merely intended to serve the purpose of facilitating the creation and functioning of the internal market to the extent of what is necessary, not a general power to regulate the internal market.¹⁹⁹

In these two cases, the Court had an important task of not only ensuring that non-economic measures be given due consideration in internal market legislation but also keeping the two apart. In areas, such as public health, where the Union's objectives and, consequently, competences are limited and harmonisation precluded, internal market measures cannot be used to circumvent the division of powers as laid down in the Treaties.²⁰⁰ In the meantime, the Court has importantly noted that where the conditions for relying on Article 100a EC Treaty are fulfilled, recourse to that legal basis must also be had regardless of whether the content of the measure is also determined by a non-economic factor such as public health; this is by virtue of Article 100a(3) EC Treaty which prescribes a high level of protection of health.²⁰¹

Judgment in *Swedish Match* consolidated the Court's previous case law.²⁰² The case concerned the question of whether a public health measure can be adopted under Article 95 EC Treaty (Article 114 TFEU). The Court confirmed that Article 95 EC Treaty was the correct legal basis for adopting Directive 2001/37 concerning the manufacture, presentation and sale of tobacco products, especially considering the high level of

¹⁹⁷ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* (n 21).

¹⁹⁸ *ibid* paras 78-79.

¹⁹⁹ *ibid* para 83.

²⁰⁰ I Govaere, 'Modernisation of the Internal Market: Potential Clashes and Crossroads with Other Policies' in M De Vos (ed), *European Union internal Market and Labour Law: Friends or Foes?* (Intersentia 2009) 3, 8.

²⁰¹ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* (n 21) para 88; Also Case C-491/01 *BAT and Imperial Tobacco* [2002] ECR I-11453, para 62; Case C-380/03 *Germany v Parliament and Council (Tobacco Advertising II)* [2006] ECR I-11573, para 39.

²⁰² Case C-210/03 *Swedish Match* [2004] ECR I-11893.

protection of public health accorded by Article 95(3) EC Treaty.²⁰³ Harmonisation measures must, nevertheless, respect the legal principles provided in the Treaty or identified in the Court's case law, especially the principle of proportionality.²⁰⁴ In *RTL Television*, the Court further reiterated its previous findings that a directive intended to harmonise Member States' legislation in a given field may offer a 'balanced protection' of the economic interests of television broadcasters and advertisers, on the one hand, and the non-economic interests of writers and producers as rights holders and television viewers as consumers, on the other.²⁰⁵

The effect of the integration principle on internal market law has been substantial.²⁰⁶ It surely restricts the freedom of the Union to set up the internal market in the economically most efficient manner. The restrictions are clearly visible, for example, in the preferential conditions provided to the producers of renewable energy,²⁰⁷ and competitive advantages provided to tender participants on the basis of the level of environmental protection offered.²⁰⁸

Horizontal provisions also influence the inherently efficiency-driven competition law. In the EU, non-economic factors arguably play a bigger role in the definition of competition policy goals than in the USA, for example.²⁰⁹ In this regard, competition law only confirms its position in the internal market project integrating non-economic aspects just as the other market-defining factors – the fundamental freedoms.

5.3 Effect of non-economic policies on the internal market: derogations

In addition to being incorporated into the definition and implementation of the fundamental freedoms and competition policy, non-economic concerns also penetrate them as exceptions and justifications. Derogations from the free movement rights as well

²⁰³ *ibid* paras 33 and 42.

²⁰⁴ *ibid* para 33.

²⁰⁵ Case C-245/01 *RTL Television* [2003] ECR I-12489, para 62.

²⁰⁶ *JH Jans* (n 143) 1540.

²⁰⁷ Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

²⁰⁸ Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213. Inevitably, a number of criteria need to be fulfilled: tender participants cannot be subjected to environmental requirements that are not linked to the subject-matter of the contract; the decision-maker cannot be given 'an unrestricted freedom of choice'; the environmental requirements must be notified expressly in the contract documents or the tender notice; and compliance must be ensured with the fundamental principles of EU law, especially the principle of non-discrimination: *ibid* para 64.

²⁰⁹ S Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012) 19.

as mandatory requirements based on case law demonstrate the development of the internal market into a marketplace that encompasses a growing range of values other than economic freedoms. The Treaties, thus, move further and further away from the original perception of creating an economic constitution.²¹⁰

5.3.1 Exceptions in primary law

Justifications on grounds of non-economic considerations allow Member States to surpass the fundamental freedoms as provided in primary and secondary EU law, as well as deviate from EU competition rules.

Each of the specific provisions on the free movement contains a clarification of their scope. While Articles 34 and 35 TFEU prohibit quantitative restrictions on imports and exports in trade between Member States and all measures having equivalent effect, Article 36 TFEU provides for exceptions. Notwithstanding the general principle of non-discrimination enshrined in Article 18 as well as Articles 34 and 35 TFEU, prohibitions or restrictions on imports, exports or goods in transit are *justified* on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. The exceptions to the general rule of national treatment are, nevertheless, subject to the caveat that they do not constitute arbitrary discrimination or a disguised restriction to inter-state trade.²¹¹

The same rule of justification applies also to the free movement of workers by virtue of Article 45(3) TFEU, which provides for exceptions on the basis of public policy, public security or public health. Public service is, moreover, generally excluded from the general freedom of movement for workers by virtue of Article 45(4) TFEU. Article 48 TFEU adds an important qualification to the free movement of workers. The provision deems certain social security measures 'necessary' for the free movement of workers and authorises the EU to adopt social policy measures to enable the aggregation of all periods of employment under the laws of several Member States in order to grant to the

²¹⁰ C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2013) 166-168.

²¹¹ Article 36 TFEU.

moving worker the right to benefit and a proper calculation of the amount of the benefit. Due benefits must be paid also to those workers and their family members who are resident in the host Member State, subject to conditions specified in secondary law. Should draft legislation implementing Article 48 affect important aspects of a Member State's social security system, including its scope, cost or financial structure, or its financial balance, the Member State may suspend the legislative procedure and request the matter to be referred to the European Council for discussion. In individual cases, also non-economic considerations integrated in the free movement provisions may, thus, be limited by economic considerations.

Exceptions from the general principles of the freedom of establishment and the free movement of services are provided in Article 52 TFEU and cover the same areas as in the case of the free movement of workers – public policy, public security and public health. Exceptions from the free movement of capital include taxation and supervision of financial institutions, administrative or statistical information or reasons of public policy or public security. The same rule applies as in the case of the free movement of goods: Article 65(3) TFEU provides that the measures and procedures provided above may not constitute a means of arbitrary discrimination or a disguised restriction to the free movement of capital and payments. Finally, Article 107(2)(a) TFEU provides an exception from the general rule prohibiting state aid by allowing social state assistance to individuals in need provided that no discrimination occurs on the basis of the origin of the products that constitute the aid.

Interestingly, Article 326 TFEU on enhanced cooperation stipulates that advanced cooperation between some of the Member States may not 'undermine the internal market or economic, social and territorial cohesion', result in a barrier to trade or discrimination or have adverse effects on equal opportunities for competition. The provision seeks to avoid situations where differentiation from the common legislative framework of the EU which is generally considered permissible may affect the effective functioning of the internal market. Whatever the provisions adopted by Member States in the framework of advanced cooperation, therefore, the core commitment of the Member States includes 'economic, social and territorial cohesion', the prohibition of barriers to trade and equal opportunities for competition.

The above exceptions demonstrate the incorporation into the internal market of various non-economic concerns – primarily relating to the protection of public policy, public security and public health, and the social security system. The criteria for applying these exceptions are not stipulated by EU law but are, according to the Court of Justice, to be substantiated by the judiciaries of the Member States in interpreting the respective provisions of EU law. The exception of public security, for example, includes both the internal and the external dimensions of security of the Member State in question.²¹² Member States are free to decide on the requirements of public policy and public security according to their ‘national needs’ which may differ across the Member States and over the course of time.²¹³ The EU does not prescribe the values that the Member States must base their considerations on,²¹⁴ but the exceptions must be given strict interpretation and are subject to control by the institutions of the Union.²¹⁵ Invoking the exception of public policy, for example, requires that there exists not only a ‘perturbation of the social order which any infringement of the law involves’ but also ‘a genuine, present and sufficiently serious threat to one of the fundamental interests of society’.²¹⁶

The Court of Justice has also elaborated general rules to govern the application of these restrictions to the free movement. Importantly, while ‘obstacles to trade’ are given broad interpretation derogations to them must be interpreted restrictively.²¹⁷ The restrictive interpretation of Article 36 TFEU exceptions means, for example, that measures which are necessary for the protection of health and life of humans, animals or plants cannot be construed in a broad manner to incorporate general environmental protection objectives.²¹⁸ Also, in order to deviate from the fundamental freedoms, Member States need to take into account general principles of EU law that include fundamental rights,²¹⁹ and demonstrate the proportionality of the national measure to the legitimate

²¹² Case C-273/97 *Sirdar* [1999] ECR I-7403, para 17; Case C-285/98 *Kreil* [2000] ECR I-69, para 17; Case C-423/98 *Albore* [2000] ECR I-5965, para 18; Case C-186/01 *Dory* [2003] ECR I-2479, para 32; Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 43.

²¹³ Case C-348/09 *P.I.* (Court of Justice, 22 May 2012), para 23 and case law cited.

²¹⁴ Case C-268/99 *Jany and Others* [2001] ECR I-8615, para 60; *ibid* para 21.

²¹⁵ Case 36/75 *Rutili* [1975] ECR 1219, paras 26-27; Case 30/77 *Bouchereau* [1977] ECR 1999, paras 33-34; Case C-54/99 *Église de scientologie* [2000] ECR I-1335, para 17; Case C-36/02 *Omega* [2004] ECR I-9609, paras 30-31.

²¹⁶ Case C-33/07 *Jipa* [2008] ECR I-5157, para 23; Case C-434/10 *Aladzhov* [2011] ECR I-11659, para 35.

²¹⁷ I Govaere, ‘Modernisation of the Internal Market’ (n 200) 16.

²¹⁸ J Scott, *EC Environmental Law* (Longman 1998) 68.

²¹⁹ Case C-260/89 *ERT v DEP* [1991] ECR I-2925, para 43.

outcome,²²⁰ and endorse principles of good governance as part of the proportionality test.²²¹ Some limitations apply to both Article 36 TFEU grounds for permissible restrictions and mandatory requirements.²²² Firstly, the exceptions can only be applied in cases where national rules have not been harmonised.²²³ Secondly, Member States bear the burden of proof to demonstrate that the national measure is justified by the derogation²²⁴ and is not a means of arbitrary discrimination or a disguised restriction on trade within the Union.

Although the Member States enjoy relative freedom in determining the extent to which they provide exceptions from the free movement provisions, the conditions attached to the application of these exceptions, in particular the control exercised by the Court of Justice and other 'Union institutions' enable for unity of the internal market to be maintained. It is moreover clear that the harmonisation of Member State laws eventually reduces the scope of application of Article 36 TFEU.²²⁵

In *Hünermund*, AG Tesauo asked whether Article 30 EC Treaty (now Article 36 TFEU) was intended to liberalise intra-Community trade or whether it was directed more generally towards the unhindered pursuit of commerce in individual Member States.²²⁶ The question pertains to the depth of integration in the internal market. In the judgment given in the same case, the Court noted with reference to its previous judgment in *Keck*,²²⁷ that the selling arrangements under scrutiny did not constitute obstacles to inter-state trade in the *Dassonville* meaning²²⁸ since they concerned both domestic and imported products and did not, therefore, impair trade. Selling arrangements would only constitute obstacles to trade between Member States if they indirectly discriminate

²²⁰ Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, para 15; Case C-60/00 *Carpenter* [2002] ECR I-6279, para 42; Case C-109/01 *Akrich* [2003] ECR I-9607, para 59; Case C-17/00 *De Coster* [2001] ECR I-9445, para 37.

²²¹ Case C-19/92 *Kraus* (n 107) paras 37-41.

²²² Further discussed in the next section.

²²³ Case C-39/90 *Denkavit* [1991] ECR I-3069, para 19; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, para 18.

²²⁴ Case 227/82 *Van Bennekom* [1983] ECR 3883, para 43; Case 178/84 *Commission v Germany* [1987] ECR 1227; Case 304/84 *Muller* [1986] ECR 1511; Case C-42/90 *Bellon* [1990] ECR I-4863; Joined Cases C-13/91 and C-113/91 *Criminal proceedings against Michel Debus* [1992] ECR I-3617, para 18.

²²⁵ A Rosas, 'Life after *Dassonville* and *Cassis*: Evolution but No Revolution' in M Poiares Maduro and L Azoulay (eds), *The Past and Future of EU Law* (Hart Publishing 2010) 433, 443.

²²⁶ Case C-292/92 *Hünermund* [1993] ECR I-6787, Opinion of AG Tesauo, para 1.

²²⁷ Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paras 16-17.

²²⁸ Case C-292/92 *Hünermund* [1993] ECR I-6787, para 21.

against the marketing of foreign products as compared to domestic goods.²²⁹ With this judgment, the Court thus established that the aim of Article 30 EC Treaty was to liberalise inter-state trade rather than encourage it in a more general manner.

In addition to the derogations from the free movement and competition provisions, Article 114(4) TFEU includes a possibility for Member States to refrain from a harmonisation measure if they deem so doing necessary for maintaining their national regulations for the purpose of protecting the environment or the working environment. This may happen on the condition that the Commission is notified of the situation according to Article 114(5) TFEU. This is yet another example of the especially strong protection accorded to environmental and social considerations in the context of the internal market.

Finally, the fundamental freedoms are limited by non-economic concerns not only by Member States' legal and political considerations but also by the legislative prioritising of the Union itself. The EU, too, may adopt measures that curtail the economic freedoms of the EU citizens by means of integrating non-economic concerns into EU policies. The limits on the Union are essentially the same as apply for the Member States with respect to maintaining national legislation for the sake of public interest: the measures may not 'substantively impair' the four freedoms, they must be necessary, proportional and non-discriminatory.²³⁰

5.3.2 Mandatory requirements

In addition to the exceptions listed in primary law, the Court has developed a set of justifications for deviations from the fundamental freedoms in the form of 'mandatory requirements', also referred to as 'imperative requirements'²³¹ or 'overriding requirements in the public interest'.²³² In *Cassis de Dijon*, the Court developed the first four mandatory requirements, justifying deviations from the free movement of goods for the sake of effective fiscal supervision, protection of public health, fairness of commercial

²²⁹ Case C-110/05 *Commission v Italy* [2009] ECR I-519, paras 36-37.

²³⁰ Case 240/83 *ADBHU* (n 181) paras 12-13.

²³¹ Case C-524/07 *Commission v Austria* [2008] ECR I-187, para 54.

²³² For example, Case C-224/04 *Commission v Germany* [2006] ECR I-885, para 31; Case C-219/08 *Commission v Belgium* [2009] ECR I-9213, para 14; Case C-577/10 *Commission v Belgium* (Court of Justice, 19 December 2012), para 44.

transactions, and defence of the consumer.²³³ Mandatory requirements provide a certain flexibility to keep up with the changes and needs of the modern society in situations where the exceptions from the fundamental freedoms enshrined in the Treaties are limited. *Cassis de Dijon* was followed by the recognition of a number of other significant public policy derogations, such as the protection of the environment; the protection of working conditions; the prevention of social dumping; the protection of cinema as a form of cultural expression; the protection of national or regional socio-cultural characteristics; the maintenance of press diversity; the protection of books as cultural objects; preventing the risk of seriously undermining the financial balance of the social security system; the protection of fundamental rights; preserving the maintenance of order in society; road safety; protection of children; protection of animal welfare; and the fight against crime.²³⁴

In *Danish Bottles*, the Court recognised environmental protection as one of the mandatory requirements that may be invoked to justify restrictions to trade brought about by indistinctly applicable measures which Member States have adopted in the absence of EU harmonisation.²³⁵ This recognition paved way for even deeper integration of environmental considerations into internal market legislation than what had been achieved by the integration principle.

Initially, mandatory requirements could only be invoked in the case of indistinctly applicable measures,²³⁶ whereas Article 36 TFEU derogations applied to both distinctly and indistinctly applicable measures.²³⁷ Some differences in the application of Article 36 TFEU and other exceptions, on the one hand, and mandatory requirements, on the other, as regards their application to distinctly or indistinctly applicable measures still exists but, gradually, the distinction may be losing its relevance.²³⁸

Mandatory requirements also apply to other fundamental freedoms but the free movement of goods. The freedom to provide television services, for example, can be

²³³ Case 120/78 *Cassis de Dijon* [1979] ECR 649.

²³⁴ C Barnard, *The Substantive Law of the EU* (n 210) 172-173.

²³⁵ Case 302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607, para 9, following Case 302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607, Opinion of AG Sir Gordon Slynn, 4622.

²³⁶ Joined Cases C-1/90 and C-176/90 *Aragonesa* [1991] ECR I-4151, para 13.

²³⁷ PJ Oliver (n 102) 215.

²³⁸ C Barnard, *The Substantive Law of the EU* (n 210) 171, referring to Case C-524/07 *Commission v Austria* (n 231) paras 54-55; PJ Oliver (n 102) 219-220.

limited on considerations of consumer protection or cultural policy.²³⁹ The four fundamental freedoms do not have an identical scope, neither as concerns primary law exceptions nor mandatory requirements. The Court considers the scope of each free movement right individually and in its own context. Compared to the other three, for example, fewer restrictions are permitted in the case of the free movement of persons.²⁴⁰

Neither the exceptions under Article 36 and other provisions of the TFEU nor mandatory requirements are unconditional. Recourse to mandatory requirements must be justified by the Member States as being necessary, proportional and the least restrictive means to achieve the envisaged aim.²⁴¹ In specific cases, other conditions may apply. In *Dassonville*, the Court found that in the absence of Community legislation Member States were allowed to maintain their national consumer protection regulations as concerned the authenticity of a product's designation of origin on the condition that the measures are reasonable, do not constitute a restriction to inter-state trade and are accessible to all Community nationals.²⁴²

Both primary and secondary law provide for possibilities of balancing between fundamental freedoms and non-economic policy considerations but neither deems the one to have absolute advantage over the other.²⁴³ The Court of Justice, too, refrains from establishing pre-determined and absolute hierarchies between different policy objectives.²⁴⁴ The Court's balancing does generally not create a hierarchy of primary and secondary values but instead endorses the plurality of legal principles – according to Azoulai this signifies a 'new type of "constitutionalisation"' where coherence goes before primacy.²⁴⁵

The case *Defrenne I* was the first case to explain the interplay between economic and social policy objectives in internal market. In his Opinion, AG Dutheillet de Lamothe

²³⁹ Case C-288/89 *Collectieve Antennevoorziening Gouda* (n 220) para 27; Case C-6/98 *ARD* [1999] ECR I-7599, para 50; Case C-245/01 *RTL Television* (n 205) para 71

²⁴⁰ PJ Oliver (n 102) 10-11.

²⁴¹ Case 120/78 *Cassis de Dijon* (n 233); Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt* [1982] ECR 3961, para 12.

²⁴² Case 8/74 *Dassonville* (n 99) para 6.

²⁴³ See, for example, Articles 1(6) and (7) of the Services Directive (n 149) which provide that the Directive affects neither labour law nor the exercise of fundamental rights.

²⁴⁴ See also Case C-438/05 *Viking* [2007] ECR I-10779, Opinion of AG Poiares Maduro, para 23.

²⁴⁵ L Azoulai, 'The Court of Justice and the social market economy: The emergence of an ideal and the conditions for its realization' (2008) 45 *Common Market Law Review* 1335, 1336-1337.

suggested that Article 119 EEC Treaty (now Article 157 TFEU) on equal pay for men and women pursued both a social and an economic objective.²⁴⁶ The two are connected by virtue of the link between ‘social dumping’ and undistorted conditions for competition. The Court of Justice took up the AG’s reasoning on the double aims of the equal pay provision in the follow-up case *Defrenne II*. In that judgment, the Court made a special reference to the nature of the Community which was ‘not merely an economic union, but [...] at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples’.²⁴⁷ While the Court attempted to reconcile the economic aims of the Union with its social objectives as they meet within the scope of the internal market, it refrained from granting either of them automatic preference.

The case of public health is exceptional in enjoying almost absolute precedence over fundamental freedoms. In *Artegodan*, the Court found that public health considerations ‘must unquestionably take precedence over economic considerations’.²⁴⁸ The Court relied on the precautionary principle enshrined in Article 174(2) EC Treaty (now Article 191(2) TFEU). The precautionary principle is universal in character – it applies not only in the field of environmental protection but also accords a high level of protection of human health and consumer protection across the whole sphere of EU activities.²⁴⁹ As a general principle of EU law, it requires EU and national authorities to give precedence to the requirements related to the protection of public health, safety and the environment over economic interests.²⁵⁰

At the same time as market integration is one of the driving forces behind EU social policy it also has its limitation. EU’s social policy has been criticised for endorsing the values of market integration rather than its own, as well as having a purpose of market

²⁴⁶ Case 80/70 *Defrenne I* [1971] ECR 445, Opinion of AG Dutheillet de Lamothe, 455. Reiterated in Case 69/80 *Worringham and Humphreys v Lloyds Bank Limited* [1981] ECR 767, Opinion of AG Warner, 802.

²⁴⁷ Case 43/75 *Defrenne II* [1976] ECR 455, para 10.

²⁴⁸ Joined Cases T-74/00, T-76/00, T-83/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan* [2002] ECR II-4945, para 173 (emphasis added), with references to Order of 12 July 1996 in Case C-180/96 R *United Kingdom v Commission* [1996] ECR I-3903, para 93; Case C-183/95 *Affish* [1997] ECR I-4315, para 43.

²⁴⁹ Joined Cases T-74/00, T-76/00, T-83/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan* (n 248) para 183.

²⁵⁰ *ibid* para 184.

integration and not the creation of a general citizenship right.²⁵¹ The criticism resembles that directed against the EU consumer protection policy. In the *Deposit Guarantees* case, the Court was faced with the task of balancing the right of establishment and the freedom to provide services with consumer protection.²⁵² The Court refrained from granting consumer protection overall higher position *vis-à-vis* fundamental market freedoms. Instead, the Court found that a high level of consumer protection, which is one of the objectives of the EU alongside the functioning of the internal market, does not require the highest level of consumer protection that can be found in a Member State. Neither does the lowering of the standards that exist in some Member States affect negatively the overall improvement in the protection of depositors within the EU as a whole.²⁵³ The benefit for the many thus outweighs the disadvantage of some.

The dual purpose of the EU – economic as well as social – extends also to the realm of EU competition and state aid law. In its judgment in the case *3F*, the Court balanced competition law objectives against the Union’s social policy aims including those enshrined in Article 136 EC Treaty (now Article 151 TFEU).²⁵⁴ A similar balancing exercise had previously taken place in the context of the freedom of establishment and the freedom to provide services in the landmark cases *Viking*²⁵⁵ and *Laval*.²⁵⁶ In those cases, the fundamental social right under scrutiny was the right of collective action. The Court concluded that insofar as collective action restricts the fundamental free movement rights it can be justified to the extent that the following conditions are fulfilled: the exercise of the fundamental freedoms would adversely affect jobs or working conditions; collective action is a suitable means for achieving the objectives pursued; and collective action stays within the limits of what is necessary to achieve the objective.²⁵⁷ It is up to the Member States to ensure that the above conditions are

²⁵¹ M Poiares Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in P Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) 449, 455 and 462.

²⁵² Case C-233/94 *Deposit Guarantees* [1997] ECR I-2405.

²⁵³ *ibid* para 48.

²⁵⁴ Case C-319/07 P *3F v Commission* [2009] ECR I-5963, para 58. Article 151 TFEU can, thus, be used to interpret other Treaty provisions. See: F Lecomte, 'Embedding Employment Rights in Europe' (2010) 17 *Columbia Journal of European Law* 1, 13.

²⁵⁵ Case C-438/05 *Viking* (n 71) paras 78-79.

²⁵⁶ Case C-341/05 *Laval* [2007] ECR I-11767, paras 104-105.

²⁵⁷ Case C-438/05 *Viking* (n 71) para 84; Case C-341/05 *Laval* (n 256) para 101.

fulfilled before they allow for derogations from any of the fundamental freedoms.²⁵⁸ This outcome is in broad terms compatible with the initial rationale behind the creation of the internal market as expressed in the Spaak report, namely the convergence of economic and social standards across the EU which will, eventually, lead to an overall beneficial situation for the citizens of both the economically further and less advanced Member States.²⁵⁹

The balancing of economic interests against fundamental rights deserves special attention, especially as many of the cases where such balancing takes place concern fundamental social rights. While it may have taken the EU legislator a long time to grant social policy a significant role in the internal market, the Court was early to recognise the social dimension of the market. Fundamental rights apply both as general principles of EU law as well as by virtue of Article 51(1) of the Charter of Fundamental Rights. They affect not only the validity of EU or national measures but also their interpretation.²⁶⁰

Fundamental rights can be relied upon as mandatory requirements to justify derogations from the fundamental freedoms. In *Schmidberger*²⁶¹ and *Omega*²⁶², the Court found that a Member State may have recourse to fundamental rights to justify a derogation from the provisions on the free movement of goods and the freedom to provide services, respectively.

However, not even fundamental rights are unrestricted and enjoy automatic primacy over other EU law.²⁶³ Despite being recognised as fundamental principles of EU law, fundamental rights are not absolute.²⁶⁴ They must be viewed in light of their 'social function', i.e. the objectives and general interest of the EU provided that the latter aims are proportionate and do not constitute 'intolerable interference' with the substance of the fundamental right in question.²⁶⁵ As with other derogations and mandatory requirements, the application of the fundamental rights must fall within the scope of the

²⁵⁸ Case C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959, para 32.

²⁵⁹ C. Barnard, 'Internal Market v. Labour Market: A Brief History' (n 108) 43.

²⁶⁰ When transposing and implementing EU law, national authorities and courts must avoid conflicts with both fundamental rights and general principles of EU law: Case C-275/06 *Promusicae v Telefónica de España* [2008] ECR I-271, para 68.

²⁶¹ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 74.

²⁶² Case C-36/02 *Omega* (n 215) para 35.

²⁶³ Case C-438/05 *Viking* (n 71) para 44; Case C-341/05 *Laval* (n 256) para 91.

²⁶⁴ Case C-200/96 *Metronome Musik* [1998] ECR I-1953, para 21.

²⁶⁵ Case 265/87 *Schraeder* [1989] ECR 2237, para 15.

Treaty and, consequently, be balanced against other rights protected under the Treaty and be proportional to the aim pursued.²⁶⁶ A mere reference to the need to protect a fundamental right is, therefore, insufficient to justify restrictions to the fundamental freedoms.²⁶⁷

In *Viking* and *Laval*, the fundamental right under scrutiny – the right of collective action – is also a social right. These cases illustrate how, eventually, the role of fundamental rights protection is similar to the balancing undertaken in the case of other mandatory requirements. The distinction lies in the fact that in the application of fundamental rights the Court may also have recourse to the Member States' common constitutional traditions.²⁶⁸ Whenever a horizontal provision is also deemed a social, environmental, etc. fundamental right their scope of application is, therefore, broadened by the possibility of having recourse beyond the level of protection of the right provided by the EU.

In *Lindqvist*, the Court dealt with a situation where the same legal measure pursues both the aims of the free movement of data between the Member States and the protection of the fundamental rights of individuals.²⁶⁹ The Court recognised that those two aims may also be incompatible with one another. While the particular provision under scrutiny was found not to infringe fundamental rights, it was the task of the national authorities to ensure that in the application of the national provisions implementing the directive a 'fair balance' is struck between the rights and interests at stake, including the fundamental freedoms.²⁷⁰

Fundamental rights can also in themselves pursue both economic and non-economic

²⁶⁶ Case C-112/00 *Schmidberger* (n 261) para 77; Case C-36/02 *Omega* (n 215) para 36; Case C-438/05 *Viking* (n 71) para 46; Case C-341/05 *Laval* (n 256) para 94; Case C-368/95 *Familiapress* [1997] ECR I-3689, para 27.

²⁶⁷ Case C-470/03 *A.G.M.-COS.MET* [2007] ECR I-2749, para 72.

²⁶⁸ Case 4/73 *Nold* (n 179) para 13.

²⁶⁹ Case C-101/01 *Lindqvist* [2003] ECR I-2971, para 79.

²⁷⁰ *ibid* para 90. Other similar cases of the Court have dealt with the balancing of the right of free transit with the protection of the fundamental right to protest and demonstrate (Case C-112/00 *Schmidberger* (n 261)) and the protection of the environment (Case C-320/03 *Commission v Austria* [2005] ECR I-9871). Moreover, the Court has dealt with questions concerning measures having equivalent effect to quantitative restrictions and road safety (Case C-55/93 *van Schaik* [1994] ECR I-4837, para 19; Case C-314/98 *Snellers* [2000] ECR I-8633, para 55; Case C-54/05 *Commission v Finland* [2007] ECR I-2473, para 40; Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467, para 77; Case C-265/06 *Commission v Portugal* [2008] ECR I-2245, para 38; and Case C-170/07 *Commission v Poland* [2008] ECR I-87, para 49.)

aims. In *Schröder*, the Court relied on its earlier affirmations that the principle of non-discrimination is a fundamental right observed by the Court.²⁷¹ As such, the Court deemed the economic aim of Article 119 EC Treaty on equal pay for men and women (Maastricht numbering, now Article 157 TFEU) to be secondary to the social aim pursued by the same provision as the latter constituted 'the expression of a fundamental human right'.²⁷²

It remains questionable, though, whether mandatory requirements constitute an exception from the fundamental freedoms or a clarification of the scope thereof. For example, do collective action or, on the contrary, the practice of social dumping and other social and other non-economic aspects form part of the concept of the internal market or are the latter to be considered restrictions thereof, albeit justifiable?²⁷³ In the example of competition policy, the answer may lie in the assessment of the 'fairness' of competition, i.e. whether fair competition is completely free of restrictions or whether the prevention of social dumping is an inherent component of the concept of fair competition.²⁷⁴ The above examples demonstrate that mandatory requirements play a vital role in clarifying the scope of the internal market in terms of the balance struck between economic and non-economic considerations, including fundamental rights, on many levels.

6 EU citizenship

The original range of free movers in the European Union – the importers and exporters of goods, services and capital, and the mobile labour force – has been gradually widened to include family members, students, old-age pensioners and other economically non-active persons. Maastricht Treaty introduced the concept of EU citizenship. Prior to that,

²⁷¹ Case 149/77 *Defrenne III* [1978] ECR 1365, paras 26-27; Joined Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509, para 16; Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143, para 19.

²⁷² Case C-50/96 *Schröder* [2000] ECR I-743, para 57; Joined Cases C-270/97 and C-271/97 *Deutsche Post v Sievers and Schrage* [2000] ECR I-929, para 57.

²⁷³ B Bercusson, *European Labour Law* (Cambridge University Press 2009) 394-395.

²⁷⁴ F Dorssemont, 'The Right to Take Collective Action v. Fundamental Economic Freedoms in the Aftermath of *Laval* and *Viking*' in M De Vos (ed), *European Union internal Market and Labour Law: Friends or Foes?* (Intersentia 2009) 45, 49.

the free movement rights were extended to the non-economic movers mainly by secondary law and the case law of the Court of Justice.

The Court's judgment in *Lawrie-Blum*²⁷⁵ has been considered one that introduced the concept of EU citizenship even before it appeared in the Treaties. The case was followed by judgments in *Reed*,²⁷⁶ *Cowan*,²⁷⁷ and *Gravier*²⁷⁸ – all dealing with the question of discrimination on grounds of nationality of (unmarried) family members, tourists and students, respectively. In secondary law, the right of non-market participants to move freely within the Union was first granted by three residence directives adopted in 1990.²⁷⁹ These directives provided retired persons, students and other non-workers the right to residence within the EU on the condition that they are covered by comprehensive medical insurance and have sufficient resources so as not to become a burden on the social security system of the host Member State. In 2004, the three directives were replaced by a comprehensive residence directive.²⁸⁰

EU citizenship is the 'fundamental status of nationals of the Member States',²⁸¹ substantiated by the principle of equal treatment of Article 18 TFEU. In *Martínez Sala*, the Court, for the first time, tied Union citizenship to the non-discrimination provision of Article 6 EC Treaty (Maastricht numbering, now Article 18 TFEU) 'in all situations which fall within the scope *ratione materiae* of Community law'.²⁸² By virtue of EU citizenship, persons who are lawfully resident in the host Member State may invoke the principle of non-discrimination.²⁸³ Pursuant to Article 21 TFEU, all European citizens, thus not only those directly participating in the market as traders, workers, service providers or service receivers, are entitled to move and reside freely within the EU, yet subject to limits and conditions elaborated by the Treaties and implementing measures. All EU

²⁷⁵ Case 66/85 *Lawrie-Blum* [1986] ECR 2121.

²⁷⁶ Case 59/85 *Reed* [1986] ECR 1283.

²⁷⁷ Case 186/87 *Cowan* (n 90).

²⁷⁸ Case 293/83 *Gravier* [1985] ECR 593.

²⁷⁹ Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L180/26; Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [1990] OJ L180/28; Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [1993] OJ L317/59.

²⁸⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

²⁸¹ Case C-184/99 *Grzelczyk* (n 91) para 31; Case C-413/99 *Baumbast* (n 91) para 82.

²⁸² Case C-85/96 *Martínez Sala* (n 91) para 63.

²⁸³ Case C-184/99 *Grzelczyk* (n 91) para 32.

citizens also enjoy political rights, such as a right to vote in the European Parliament and local government elections and diplomatic and consular protection of another Member State.²⁸⁴ Citizenship rights comprise a 'genuine enjoyment' of the right, including both the existing right of free movement as well as the protection of a future possibility of movement within the EU.²⁸⁵ Moreover, a Union citizen cannot be expelled from a Member State when that would render the person without EU citizenship altogether.²⁸⁶

The core of the protection accorded by EU citizenship – the principle of non-discrimination – is substantiated identically in citizenship and in free movement provisions, rendering different only the scope of application in personal terms.²⁸⁷ EU citizenship, therefore, provides no rights beyond those granted under the internal market provisions to those who already derive rights from the Treaties via their participation in the internal market.²⁸⁸ In the meantime, the contrary holds true – economic nature brings an activity into the scope of free movement provisions and, thus, accords to it all rights deriving from the Treaties.²⁸⁹

The importance of the potential effect of EU citizenship to the establishing and functioning of the internal market is different, though, in relation to the dimension of EU citizenship as regulating not only cross-border situations but also wholly internal situations. O'Leary has argued that EU citizenship case law has had a 'cross-pollination' effect on free movement case law, particularly in the case of the free movement of workers.²⁹⁰ She presents case law in which the Court has started to search for a real or genuine link between a job seeker or worker and the host Member State in order to decide on the person's entitlement to social benefits in the host state. The requirement for a genuine link first appeared in cases concerning citizenship. Recently, it has also been extended to case law on the free movement of workers where the genuine link has

²⁸⁴ Article 20(2) TFEU.

²⁸⁵ Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, para 42, citing Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449, para 42.

²⁸⁶ Case C-135/08 *Rottmann v Freistaat Bayern* (n 285) para 54.

²⁸⁷ G Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003) 188.

²⁸⁸ Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para 23.

²⁸⁹ Case C-519/04 P *Meca Medina* [2006] ECR I-6991, para 22.

²⁹⁰ S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' (2008) 27 *Yearbook of European Law* 167.

previously been implied to have existed with the host state, thus justifying the extension of social benefits of the host Member State to the non-national worker.²⁹¹ It remains, however, questionable whether there exists a direct link between EU citizenship law and the free movement of persons beyond the Court's shifting interpretation of the requirements imposed on job seekers and workers in specific circumstances, e.g. frontier workers or those in minor employment to demonstrate a degree of integration with the host Member State before such integration is established definitely through an employment relationship. As O'Leary points out, the shift in the Court's case law may be motivated equally by the need to deal with benefit tourism within the EU.²⁹²

It can thus be concluded that EU citizenship shapes the EU legal order as a whole and the rights of EU citizens within the EU legal order but has little effect on either the scope of fundamental freedoms and competition law or the functioning of the internal market. Subsequently, EU citizenship has modest impact on the expandability of the EU internal market beyond the EU. This is notwithstanding the fact that 'Citizenship Directive' 2004/38/EC has been declared EEA relevant and is applied by the EFTA Court to the extent that its provisions are applicable for the free movement of persons within the EEA.²⁹³ Not all parts of the Directive form part of the EEA *acquis* such as EU immigration law, political rights deriving from EU citizenship and the notion of EU citizenship itself.²⁹⁴

7 Sectoral internal market

The internal market consists of a variety of economic sectors. As a general rule, the fundamental freedoms, EU competition law, horizontal provisions and permissible derogations apply to the specific sectors unless exceptions are provided by the Treaties.

²⁹¹ *ibid* 192-193.

²⁹² *ibid* 177.

²⁹³ See, for example, Case E-15/12 *Wahl* [2013] EFTA Ct Rep 534; Case E-26/13 *Gunnarsson* [2014] EFTA Ct Rep 254.

²⁹⁴ Recital 8 of the Preamble to Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement that incorporated the Citizenship Directive into the EEA Agreement [2008] OJ L124/20; Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement [2008] OJ L124/20. See also H Haukeland Fredriksen and CNK Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 *Common Market Law Review* 629, 639; J Breidlid and M Vahl, '20 years on: Current and future challenges for the EEA' (2015) *EFTA Bulletin* (forthcoming), 5.

One example of an economic sector that has been granted special exceptions is the energy sector that has been extended to non-EU Member States by the Energy Community Treaty. In principle, the internal market rules apply to the European energy sector. Article 194 TFEU – the only Treaty article governing EU energy policy – explicitly states that the EU energy policy is to be conducted ‘in the context of the establishment and functioning of the internal market’. This means that the four fundamental freedoms and rules on competition apply to the energy sector without distinction, as well as horizontal provisions, derogations and exceptions from the fundamental freedoms. The specific characteristics of the internal market in energy envisage a special focus on environmental concerns that are manifested in the integration of energy concerns as well as the possibility to undergo more stringent environmental measures for the sake of preserving the structure of the national energy supply sector. Since direct impact on the environment is intrinsic to the energy sector, Article 194(1) TFEU accords special attention to the need to preserve and improve the environment. Article 192(2)(c) TFEU on the EU environmental policy contains a possibility for Member States to object to environmental policy instruments ‘significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply’ by setting up a requirement of unanimity for the adoption of such measures in the Council. Furthermore, pursuant to Article 194(2) TFEU, Member States retain their right to determine how to exploit their own energy resources, which energy sources to use and how to ensure energy supply within the country.

The European common transport policy is expanded to third countries by the ECAA Agreement in the aviation sector and the TCT in the field of land, rail, inland waterways and maritime transport. Common transport policy, the rail, road and inland waterway sectors of which are governed by Articles 90-100 TFEU, forms part of the internal market. Similarly to the common agricultural policy, however, there are many specifications as regards the scope of the free movement rights in the transport sector. The special rules concern, in particular, the freedom to provide services²⁹⁵ and competition law, and are justified mainly on grounds of regional development and the provision of public service.

²⁹⁵ Article 58(1) TFEU.

Pursuant to Article 100(2) TFEU, the specific measures for sea and air transport secondary law will be provided in secondary legislation. The application of the free movement provisions to the transport sector is not always clear. In the *French Seamen* case, which dealt with the question of whether treaty provisions on the free movement of workers apply in the context of maritime transport, the Court established that exceptions from the application of the fundamental freedoms must be provided expressly in the Treaties.²⁹⁶ The exemption was deemed to exist with respect to the common agricultural policy by virtue of Article 38(2) EEC Treaty (Article 38(2) TFEU). Article 38(1) EEC Treaty (Article 38(1) TFEU), moreover, explicitly states that the internal market extends to the field of agriculture. There is no similar provision in the TFEU as regards the common transport policy. However, by virtue of Article 74 EEC Treaty (now Article 90 TFEU), which provides that common transport policy incorporates the pursuit of the objectives of the Treaties as laid out in Articles 2 and 3 EEC Treaty (now Article 3 TEU) – ‘for the attainment of which the fundamental provisions applicable to the whole complex of economic activity are of prime importance’ – the fundamental freedoms apply also in the field of maritime transport.²⁹⁷ Instead of regarding the common transport policy as a departure from the fundamental freedoms, the Court interpreted the objective of common action in the common transport policy as complementary to the fundamental freedoms. The four fundamental freedoms are, thus, applicable insofar as they enable the achievement of the objectives of the common transport policy.²⁹⁸ According to the Court, the rationale behind a separate transport policy lies in the fact that being a service, a separate set of provisions makes it possible to take into consideration its specificities; the common rules apply, however, to the extent that they are not explicitly excluded.²⁹⁹ As concerns sea and air transport in particular, which are exempted from the general regulatory system of the Treaties by Article 84(2) EEC Treaty (Article 100(2) TFEU), the Court confirmed that the aim of the special provision was not to set up a special regulatory framework for these fields in particular but rather to exempt sea and air transport from the specific rules laid down with respect to rail, road and inland

²⁹⁶ Case 167/73 *Commission v France (French Seamen)* [1974] ECR 359, para 21.

²⁹⁷ *ibid* para 24.

²⁹⁸ *ibid* paras 25-26.

²⁹⁹ *ibid* paras 27-28.

waterways transport.³⁰⁰ In *Nouvelles Frontières*, the Court confirmed that the findings with regard to maritime transport apply equally in the case of air transport.³⁰¹

An important aspect to consider with respect to the energy and transport sectors are the derogations accorded to many of the undertakings covered by the common policies by virtue of Articles 93, 106 and 107 TFEU. These articles provide for exceptions from the general rules of competition policy, especially state aid, to the generally Member-State-defined³⁰² 'services of general economic interest' (SGEIs).³⁰³ SGEIs are provided in Article 14 TFEU and Protocol No 26 of the Treaties. They comprise services that must be provided due to public need even if they do not prove economically profitable.³⁰⁴ Pursuant to Article 106(2) TFEU, they are subject to EU competition law to the extent that they do not 'obstruct the performance, in law or in fact, of the particular task assigned to them'. In the energy and transport sectors, this provision concerns, in particular, the Member States' energy monopolies, transport networks, and public transport.³⁰⁵

A similar discussion as regards exceptions from the internal market rules to the provision of public services has taken place in the context of Articles 45(4), 51 and 62

³⁰⁰ *ibid* para 31.

³⁰¹ Joined Cases 209-213/84 *Nouvelles Frontières* [1986] ECR 1425, paras 42 and 45.

³⁰² Subject to a test of 'manifest error of appraisal', see Case T-289/03 *BUPA* [2008] ECR II-741, paras 168-169. Exceptions include sectors which have been harmonised, e.g. postal and telecommunications sectors, harmonised by Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services [2002] OJ L108/51 (Universal Service Directive); Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity [2009] OJ L211/55.

³⁰³ Article 14 TFEU reads as follows: '[...] given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. [...]'

³⁰⁴ H Schweitzer, 'Services of General Economic Interest: European Law's Impact on the Role of Markets and of the Member States' in M Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press 2011) 11, 34. A definition of SGEIs is provided in Commission, 'A Quality Framework for Services of General Interest in Europe' (Communication) COM (2011) 900 final.

³⁰⁵ A separate category among services of general interest are social services of general interest, which may include both economic and non-economic activities; those which are economic in nature are treated as SGEIs. See Commission, 'Implementing the Community Lisbon programme: Social services of general interest in the European Union' (Communication) COM (2006) 177 final; Commission, 'Services of general interest, including social services of general interest: a new European commitment' (Communication) COM (2007) 725 final.

TFEU. It concerns the exemptions from the rules on the free movement of persons and services granted to public service employees and activities in which the state exercises official authority. The exceptions are motivated by the idea of public service being an expression of state sovereignty.³⁰⁶ The general scope of the exception was defined by the Court in *Sotgiu*,³⁰⁷ and the concept of public service in *Commission v Belgium*.³⁰⁸ There has been considerable debate on the range of jobs that fall within the public sector exception. Being vital sectors in a state's economy, it has often been asked whether transport or energy sectors include such activities or positions that must be protected under the public service exceptions. The Court has given the exception a functional rather than institutional interpretation,³⁰⁹ assessing whether the post in question 'involve[s] direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities' and requires 'the existence of a special relationship of allegiance to the state and reciprocity of rights and duties which form the foundation of the bond of nationality'.³¹⁰ Excluded are positions in organisations covered by public law which do not constitute public service 'properly so called'.³¹¹ A number of positions in the national railways have, for example, not been considered to constitute employment in the public service,³¹² nor have positions in public transport; water, gas and electricity supply; and airline and shipping companies done so.³¹³ Captains and first officers on ships may in some circumstances fall within the scope of the exception of Article 45(4) TFEU.³¹⁴

³⁰⁶ Case 307/84 *Commission v France* [1986] ECR 1725, Opinion of AG Mancini, para 2.

³⁰⁷ Case 152/73 *Sotgiu* [1974] ECR 153, para 5.

³⁰⁸ Case 149/79 *Commission v Belgium* [1980] ECR 3881, para 10.

³⁰⁹ Case 307/84 *Commission v France* [1986] ECR 1725, para 12.

³¹⁰ Case 149/79 *Commission v Belgium* (n 308) para 10.

³¹¹ *ibid* para 11.

³¹² Case 149/79 *Commission v Belgium* [1982] ECR 1845.

³¹³ These areas, among others, were pointed out in *Commission, 'Freedom of workers and access to employment in the public service of Member States — Commission action in respect of the application of Article 48(4) of the EEC Treaty'* [1988] OJ C72/2 as generally exempted from the scope of Article 48(4) EEC Treaty (now Article 45(4) TFEU) and confirmed by the Court in Case C-473/93 *Commission v Luxemburg* [1996] ECR I-3207, para 31. For confirmation by the Court in individual cases see Case C-173/94 *Commission v Belgium* [1996] ECR I-3265; Case C-290/94 *Commission v Greece* [1996] ECR I-3285.

³¹⁴ Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391; Case C-47/02 *Anker* [2003] ECR I-10447; Case C-89/07 *Commission v France* [2008] ECR I-45; Case C-447/07 *Commission v Italy* [2008] ECR I-125; Case C-94/08 *Commission v Spain* [2008] ECR I-160; Case C-460/08 *Commission v Greece* [2009] ECR I-216.

The legal content of the sectors of the internal market, including the particular exceptions granted by primary law, are easier to circumscribe in detail than the EU internal market as a whole because of the comparatively narrower scope of the former. However, there is little that distinguishes between the substantive content of the comprehensive and sectoral internal markets except for a limited number of sector specific derogations. There is nothing to exempt from the cores of market sectors the application of horizontal provisions or mandatory requirements motivated by non-market concerns. It, therefore, makes little difference that in some sectors, such as air transport, a significant portion of the *acquis* is specified in secondary law. In the context of exporting the *acquis*, the distinction between primary/secondary law becomes irrelevant as all *acquis* becomes part of an international agreement.

8 Conclusion

Pursuant to its definition, the internal market must warrant the free movement of goods, workers, services and capital within the market while ensuring fair conditions for competition, the protection of fundamental rights and other non-economic interests of the market participants as laid out in the Treaties. Whereas the fundamental freedoms and competition policy have been in the centre of the internal market integration project from its beginning, fundamental rights and non-economic concerns have entered the scene gradually in the course of time. At the same time as they gain importance as EU's objectives aside economic integration, non-economic considerations are embedded in horizontal provisions and various derogations assume ever greater relevance for the internal market. They influence the economic heart of the internal market in various ways, from the policy-making stage to that of implementation and application.

Two main conclusions can be drawn from the developments in the internal market for the purposes of the possibility of extending the internal market by exporting the provisions. Firstly, although the Treaties provide a definition of the internal market its scope remains just as ambiguous as that of the common market. A large part of the balancing between economic and non-economic concerns is conducted by the Court of Justice on a case-to-case basis which renders the actual scope of the economic principles in the internal market difficult to circumscribe with precision. Secondly, the internal

market is a constantly changing notion without a clear final destination. For third countries setting out to align their legal systems with that of the EU, the internal market is not a constant value that can easily be kept within the frames of an international agreement having more limited aims than the EU Treaties. It is demanding both to achieve a homogeneous internal market expanded outside the Union by exporting constantly changing internal market *acquis* that has an ambiguous scope, and to construct an institutional framework that is both capable of indentifying the relevant internal market *acquis* among EU *acquis* in general and incorporating the changes in the *acquis* to the international agreements without delay.

Chapter 3 Internal market: unity

1 Introduction

The broad objective of the European Union is to achieve an ever closer union among the peoples of Europe by, among other means, creating a highly competitive market economy. The objectives of the EU not only influence the concept of the internal market in substantive terms as discussed in the preceding chapter but also prescribe a particular level of uniformity among the elements of the EU legal order generally and the internal market specifically. While substantive aspects of the internal market determine the content of the rights and obligations deriving from the *acquis* and the interaction between the economic and non-economic elements, the uniformity aspect pertains specifically to the notion of *acquis* and asks for what level of adherence in relation to the entire body of internal market *acquis* is necessary in order to be able to consider an expansion of the internal market to third countries by means of exporting EU *acquis* a true extension of the internal market.

The general aim of the multilateral agreements exporting the *acquis* is homogeneity – a term comparable in meaning to uniformity and unity. The aim of homogeneity has two dimensions: firstly, homogeneity within the realm of the particular international agreement in question and, secondly, homogeneity between the market space created by the international agreement and the internal market of the EU. Whereas the question of homogeneity in the former dimension is not problematic it is the latter dimension that raises a number of questions and concerns. In order to be able to determine whether the expanded internal market is, indeed, a genuine extension of the EU internal market it is necessary that the scope of the internal market be delimited with sufficient precision, both in terms of substance and unity. Defining the necessary level of commonality within the EU internal market and legal order generally will serve as a benchmark for the purpose of indicating whether or not a set of *acquis* exported to third countries constitutes a mirror image of the internal market or whether the result is only a type of a single market that operates on the basis of rules originating from the EU.

The level of conformity with the common rules within the EU internal market is not absolute. While unity, and in some circumstances even uniformity, is a crucial element of

the internal market,¹ the internal market also encompasses numerous opt-outs and other types of derogations for the Member States. This chapter endeavours to analyse the concept of the internal market from the perspective of the level of commonality it requires from the Member States and from the third countries in order to retain its specific character as the EU's internal market. Section 2 scrutinises, in the light of the aims of the EU, the concept of unity in the context of the internal market and the legal order of the EU more generally focusing on the level of integration. Section 3 deals with the question of permissible and impermissible disintegration in the internal market and the EU legal order, respectively. Section 4 outlines the exact objectives of the international agreements exporting the *acquis* as regards commonality within themselves and *vis-à-vis* the internal market *acquis*, covering both of the dimensions of homogeneity mentioned above. The chapter concludes with an overview of the legal nature of the homogeneity clauses in the multilateral agreements.

2 Integration in the internal market

The unity of the internal market appears in two contexts. The first concerns the unity of the EU's legal order of which the internal market forms part. It denotes the unity of the parts that form the whole and draws largely on the application of the same legal rules across the geographical borders of the EU. The second is the unity of the market itself, referring to the orderly composition of the constituent elements of the market that must be in place for its optimal functioning. Both contexts are relevant for the purposes of establishing the necessary commonality in the concept of the internal market and will be considered in turn.

2.1 Unity of the internal market

As an essential element of the internal market, unity refers to the 'substance of the common and complete order of the internal market.'² It requires the presence of a set of elements that define the rights and obligations of market participants across the Union territory. The internal market of the EU enjoys a degree of unity by virtue of the common rules that guide the activities of market participants in the common market space.

¹ Case 14/68 *Walt Wilhelm* [1969] ECR 1, para 5.

² R Barents, *The Autonomy of Community Law* (Kluwer Law International 2004) 208.

Unity of the internal market is based on the concept of unhindered movement of factors of production and builds, as such, on the free movement of goods, services, people and capital and rules on competition which support the establishment and the proper functioning of the market. In the most basic terms, the borderless internal market means that undertakings are able to operate and workers take up employment in any of the Member States without discrimination based on their country of origin. Internal market legislation must eliminate any discrimination in a comprehensive and complete manner, meaning that unity is achieved through the application of a common set of rules that regulate all of the relevant aspects of intra-EU trade. The relevant aspects of intra-EU trade are limited by the principle of conferral and the competences of the EU and do not, thus, apply to all fields of life. Neither does the internal market regulate differences in conditions of competition arising from non-human factors, such as natural phenomena, but apply mainly to 'differences in treatment arising from human activity, and especially from measures taken by public authorities'.³ This holds true notwithstanding occasional compensation for natural inequalities.⁴

Pursuant to *Walt Wilhelm*, the backbone of the internal market – the four fundamental freedoms and equal conditions for competition – is the 'primary object' of the EU as well as the means of achieving it.⁵ In the same vein is the creation of the internal market both a separate objective of the EU and a means of achieving the broader aim of an ever closer union among the peoples of Europe. A primary object of the Treaties is, in turn, also 'to confirm and safeguard the unity of that market'.⁶ Consequently, the Court of Justice considers the unity of the market to be a value in itself – a 'fundamental principle'⁷ or an essential characteristic of the internal market that must be preserved by means of a single legislator and various actors implementing, applying⁸ and interpreting⁹ the *acquis*.¹⁰

³ Case 52/79 *Debauve* [1980] ECR 833, para 21.

⁴ *ibid.*

⁵ Case 14/68 *Walt Wilhelm* (n 1) para 5.

⁶ *ibid.*

⁷ Case 193/80 *Commission v Italy* [1981] ECR 3019, para 17.

⁸ Case 324/85 *Foto-Frost* [1987] ECR 4199, para 16; Case 61/79 *Denkavit II* [1980] ECR 1205, para 18.

⁹ Case 299/84 *Neumann* [1985] ECR 3663, para 25.

¹⁰ Case 40/70 *Sirena v Eda* [1971] ECR 69, para 10.

The concept of the internal market, therefore, not only includes the four fundamental freedoms and rules on competition as provided in the Treaties and secondary legislation, interpreted by the Court of Justice and defined and circumscribed by a series of non-economic considerations. It also includes the idea that these elements inherently belong together to make up the very specific 'EU internal market' distinct from any other inter-state single market formation. According to Barents, unity of the internal market is thus not a best efforts obligation of the parties to the EU Treaties but, indeed, the *status quo* of the internal market.¹¹

2.2 Unity of the EU legal order

Very closely connected to the notion of unity of the internal market is the concept of unity of the EU legal order – the idea that EU law has the same effect in all Member States in all circumstances.¹² Differently from the unity of the internal market, the unity of the legal order does not look at the essential characteristics of the legal order but rather the similarity of its component elements. Different terms are used to denote the same set of rules applied across the Union – and beyond in the case of international agreements seeking to extend the internal market to third countries. These notions include 'homogeneity', 'coherence', 'uniformity' and 'unity', each having a slightly different meaning.

The first of the terms – 'homogeneity' – is most frequently used with regard to the EEA.¹³ Integration theorists define 'homogeneous integration' as normative and organisational convergence that leads to a uniform outcome across the Union,¹⁴ but the term is otherwise seldom used in relation to EU law.¹⁵ Instead, the comprehensiveness of the EU legal order is usually described using the notions of 'coherence', 'unity' and 'uniformity'.

'Coherence' generally implies a logical and orderly organisation of the constituent parts

¹¹ R Barents (n 2) 214.

¹² Case 166/73 *Rheinmühlen I* [1974] ECR 33, para 2.

¹³ 'Considering the objective of establishing a dynamic and homogeneous European Economic Area': Recital 4, Preamble to the EEA Agreement, see below section 4.1. In this thesis, 'homogeneity' is used to refer to the objectives regarding unity of all of the three multilateral agreements under scrutiny.

¹⁴ S Andersen and N Sitter, 'Differentiated Integration: What is it and How Much Can the EU Accommodate?' (2006) 28 *European Integration* 313, 321.

¹⁵ The term 'homogeneity' occurs predominantly in the field of competition law and is used to refer to homogeneous markets. Competition law is also regarded as the most 'homogeneous' among the EU's policy fields: see *ibid* 321-322.

of a system, including a legal system.¹⁶ One example of coherence within the EU legal order is the system of EU's judiciary. In this example, competences are allocated systematically between the EU and the national courts leaving, for instance, the procedures for reviewing the legality of the acts of EU institutions exclusively to the Union courts.¹⁷ The 'fundamental mechanism' in maintaining coherence of the EU's judicial system is the preliminary reference procedure provided in Article 267 TFEU.¹⁸ The procedure guarantees coherence in a number of ways: it creates a necessary link between Member States' national courts and the Court of Justice, safeguards the authoritative interpretation of EU law as provided by the Court, and, finally, ensures that the Court's interpretation of EU law is applied in the national legal orders by the referring national court. The expected outcome of the preliminary ruling procedure is the uniform interpretation and application of EU law in the EU and in the Member States.¹⁹ It also serves to protect the autonomy of the EU legal order and especially the role of the Court as the sole authoritative interpreter of EU law.²⁰ The ideas of the uniform interpretation and application of EU law, on the one hand, and autonomy, on the other, are also strongly connected to the ideas of uniformity and unity of the EU legal order. Coherence itself does not, however, concern the application of the same rules in each constituent part of a legal system such as in every Member State of the EU.

'Uniformity', on the other hand, refers specifically to identical quality. In the EU legal order the concept of uniformity manifests itself in the adoption of uniform rules and their subsequent application and interpretation across the Union in a uniform manner. The principal means of achieving uniformity is through positive integration in the form of harmonising laws. Nevertheless, in the United States the first step towards creating a 'more perfect Union' by the Constitution was to eliminate the principal barriers in trade between the states. After that had proven unsuccessful as the single solution, recourse

¹⁶ Balkin distinguishes between logical, narrative and normative coherence, see JM Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105, 114. On whether or not a legal system as a whole can be coherent see BB Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355.

¹⁷ K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625, 1631-1632.

¹⁸ Court of Justice, 'Information Note on references from national courts for a preliminary ruling' [2005] OJ C 143/01, para 1.

¹⁹ Case 166/73 *Rheinmühlen I* (n 12).

²⁰ See further below chapter 5.

was had to the codification of state laws.²¹ Integration in the EU's internal market has in broad terms followed the American example. Initially, market integration in the EU mainly took place by means of negative integration and the elimination of barriers to trade, mainly through mutual recognition. Harmonisation did not pick up until negative integration was perceived as insufficient for reaching the established objectives and the SEA in 1986 introduced qualified majority voting in the Council. Until the Treaty of Maastricht – the so-called 'market-building' stage – harmonisation played a significant role in the European integration process,²² even though recourse was more often had to minimum rather than exhaustive harmonisation. Since after 1992, however, the legislative ambition of the Union has been redirected towards less harmonisation but instead 'better' laws and 'better' enforcement.²³

The development of the EU's legal order in general and the integration in the internal market in particular is, thus, not characterised by uniformity of rules and procedures in the meaning of absolute identical quality or equivalence. The legal order of the EU strives for legal unity but is not and does not intend to be uniform by definition. Rather than being a complete and fully comprehensive legal order of its own, the EU legal order builds upon those of the Member States. None of the Member States, especially the federal states among them, have completely uniform legal orders. Not more can, therefore, be expected from a union comprising 28 states having different legal, political, economic, social, and cultural backgrounds. Because of the two-tier system made up of the EU and its Member States, diversification is inherent to the EU legal order. The unity and uniformity of EU law pertain both to the EU-law dimension of the Member States' legal orders and to the institutional and procedural rules for the Union's own functioning. The non-EU relevant areas of national legal orders, insofar as they do not give effect to EU law, fall outside the outer limits of the EU legal order. The unitary characteristics of those areas are, therefore, a consequence of the national legal and constitutional culture rather than EU membership. The boundaries of the EU legal order within the national legal order are established by the national courts, whereas the

²¹ JAC Grant, 'The Search for Uniformity of Law' (1938) 32 *The American Political Science Review* 1082, 1083-1085.

²² S Weatherill, 'New Strategies for Managing the EC's Internal Market' (2000) 53 *Current Legal Problems* 595, 597-598.

²³ *ibid* 598.

ultimate authority to determine the limits between national and EU law is vested with the Court of Justice.²⁴ Furthermore, the EU's legislative activity in its own areas of competence is restricted by three factors:²⁵ the nature of the competence – exclusive, shared and complementary; the legal basis stipulating either unification of law through regulations, harmonisation through directives or co-ordination of the Member States' policies through recommendations and other soft law instruments; and, finally, the principles of subsidiarity and proportionality. The latter two limit the EU's influence to areas where the goals of the Union cannot be reached by other means than concerted action, as well as determine the choice of the legal instrument to be used. While it is true that the EU is expanding its reach into more and more fields of life, even the most integrated areas feature a certain degree of differentiation.²⁶ Lastly, complete harmonisation of the Member States' laws is seldom the preferred option for integration, leaving the Member States enough leeway to reconcile EU legislation with their national settings in terms of time, degree and/or substance. This renders the EU legal system, as well as the legal systems of the Member States in EU-relevant areas, far from uniform.

The notion of 'unity' indicates harmony and accord between rules in a legal space without putting forward a claim for identical quality as in the case of uniformity. A uniform legal order features unity but unity in a legal order does not require complete uniformity of rules, their application and interpretation. Minor differences between the constituent parts of a system are generally not considered detrimental to the unity of a legal order whereas they would defeat the idea of uniformity. This conclusion is supported by von Bogdandy who finds that 'coherence' is not a precondition for 'unity' in the EU legal order and that, to a certain extent, divergences in the application of EU law among the different Member States do not play a decisive role in the process of identifying the EU legal system as a unitary legal system.²⁷ In this context, von Bogdandy uses 'coherence' in a meaning of 'uniformity' – the general application of identical rules

²⁴ N Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 *European Law Journal* 355, 375.

²⁵ L Senden, 'Conceptual Convergence and Judicial Cooperation in Sex Equality Law' in S Prechal and G van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 363, 366.

²⁶ CD Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two Speeds"' (1984) 82 *Michigan Law Review* 1274, 1281-1282.

²⁷ A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal* 95, 109.

all across the EU. Delving deeper into the concepts of 'unity' and 'uniformity', it becomes clear that the unity of the EU legal order entails, indeed, a great deal of coherence but much less so of uniformity.

The concept of unity has a political as well as a legal dimension. In the EU, legal unity enjoys the central position,²⁸ serving as an intermediary step on the path towards possible political unity in the future.²⁹ The gradual expansion and diversification of the initially small and homogeneous group of Member States, the gradual increase in the Union's competences and the emergence of a number of alternative international legal fora³⁰ have altered the functions of the EU and called for a different approach as regards the level of legal and political integration of the Member States within and non-Member States to the Union. In the early decades of the EU, the ultimate aim of the Union was closer to the ideal situation of uniformity³¹ – at least as concerns the internal market.³² Since a while ago this approach has been deemed both impossible and unnecessary and has, subsequently, been discarded. The 'classic Community method' of uniform legislation and harmonisation has been replaced with more flexible means of legislation that allow the EU legal system to accommodate relevant differences between the Member States. As a result, the Union has become much more diverse but also more fragmented.³³

Legislative integration within the EU can be pictured as an inverted pyramid with unification/full harmonisation on top, followed by harmonisation in the middle and co-operation in the bottom. The inverted pyramid represents the different means of achieving unity in a legal system. Among those, unification (statutory uniformity, 'legal

²⁸ A von Bogdandy, 'Doctrine of Principles' (2003) Jean Monnet Working Paper 9/03, 12; A von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) 36 *Common Market Law Review* 887, 889-890.

²⁹ L Senden (n 25) 364.

³⁰ G De Búrca and J Scott, 'Introduction' in G De Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 1, 2.

³¹ N Walker (n 24) 363.

³² 'The general task of the Union to establish a common market and progressively to approximate the economic policies of the Member States creates a presumption in favour of uniformity – as a result a uniform rule cannot be considered discriminatory': CD Ehlermann (n 26) 1288.

³³ G De Búrca and J Scott (n 30) 1; This fragmentation is characterised by notions such as 'differentiated integration', 'multi-speed', 'variable geometry', 'à la carte'. Within the multitude of terminology, 'differentiated integration' is the general term used to point at the lack of homogeneity within the EU: A Stubb, 'A Categorization of Differentiated Integration' (1996) 34 *Journal of Common Market Studies* 283, 283-284.

homogeneity') is the most intense yet only one means of achieving unity and not its *sine qua non*.³⁴ Instead, the uniformity of laws has to be reconciled with the need for a legal system to retain a degree of flexibility for the sake of its effectiveness. Contrary to Shaw, who perceives flexibility as a sign of the Member States lacking an objective of unity,³⁵ the unity – differently from uniformity – of a legal order cannot be considered to be adversely affected by minor divergences among its constitutive elements. A legal order must demonstrate flexibility to accommodate the differences in society as well as adapt to the changing circumstances in the course of time. Flexibility is even more important to the EU than to the individual Member States. As an evolving system, law must not be uniform in the meaning of identical across its entire field of application but rather have in common certain fundamental qualities.³⁶ The role of unification is, first and foremost, to avoid a mismatch between the parties' rights and obligations owing to a multiplicity of rules regulating a single area.³⁷ As long as the principal components identifying the crucial rights and obligations – the 'fundamental *acquis*' according to Pescatore³⁸ – are in place, a legal order can accommodate some divergence in procedural rules, rule-making and legal instruments without becoming fragmented.³⁹ The current legislative practice in the EU is geared towards differentiated integration, which corresponds much better to the reality of a heterogenic Europe.⁴⁰ In sum, despite the fact that diversification clearly signals the end of the idea of a uniform Europe, it is not the end of a unified Europe.

³⁴ See E Christodoulidis and R Dukes, 'On the Unity of European Labour Law' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 397, 398-399. The lesser of importance of uniformity as compared to unity has been vividly described by Brand: '[...] *uniformity* of EU law is not a sacred value. EU law is not being enforced *coute que coute* and its 'uniformity' is 'sacrificed' in the interests of divergence and, ultimately, unity.' M Brand, 'Divergence, Discretion, and Unity' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 217, 231.

³⁵ J Shaw, 'Relating Constitutionalism and Flexibility in the European Union' in G De Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 337, 341.

³⁶ E Christodoulidis and R Dukes (n 34) 397.

³⁷ R Sacco, 'Diversity and Uniformity in the Law' (2001) 49 *American Journal of Comparative Law* 171, 179.

³⁸ P Pescatore, 'Aspects judiciaires de l'«acquis communautaire»' (1981) 20 *Revue trimestrielle de droit européen* 617, 620.

³⁹ A von Bogdandy, 'The Legal Case for Unity' (n 28) 908.

⁴⁰ A Stubb (n 33) 283.

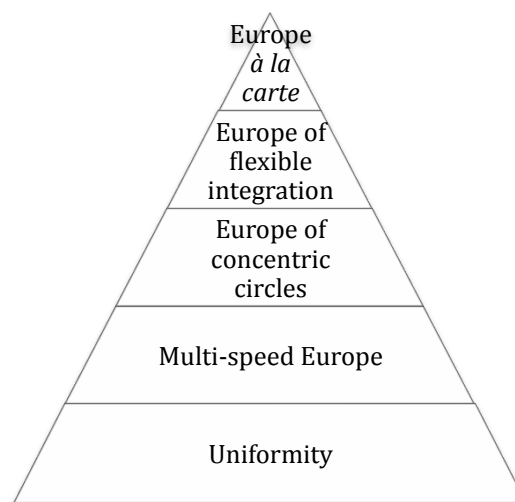
3 Disintegration in the internal market

The above analysis demonstrated not only that the concepts of a unified internal market and legal order differ but also that the level of uniformity in the two varies. This section aims to clarify to which extent diversification can be accommodated within the internal market and the EU legal order, respectively, and what are the possible criteria for distinguishing between divergences that can be accommodated within the EU's internal market and divergences that cannot.

3.1 Differentiation in the EU legal order

Differentiation in the EU takes a number of different forms – temporal, substantive and leads to a number of different outcomes in terms of the depth of integration. Each of the outcomes is an expression of the nature of integration within the EU.

A comprehensive overview of these different outcomes has been provided by Walker who has, in turn, borrowed from Stubb⁴¹ and Dewatripont and others.⁴² The five models of differentiated integration within the EU as identified by Walker are demonstrated in the pyramid below.⁴³



The ideal situation of uniformity pictured at the bottom of the pyramid represents the idea of the European Union with the most commonality, whereas *Europe à la carte*

⁴¹ *ibid.*

⁴² M Dewatripont and others, *Flexible integration: Towards a more effective and democratic Europe* (Monitoring European Integration 1995) 80.

⁴³ N Walker (n 24) 362-363.

characterises the extreme opposite. In between those two models of integration are the following constellations: 'Europe of concentric circles', 'Europe of flexible integration' and 'multi-speed Europe'.

The model of a multi-speed Europe is flexible but only in a temporal dimension – in substantive terms, the aim of a common level of integration is maintained.⁴⁴ Multi-speed Europe refers to a situation where one or more Member States are granted an extension as regards the deadline of implementation or entry into force of common EU standards if they are unable to fulfil the obligations at the time of the adoption of an EU legal act. Postponed deadlines enable those Member States to whom the exceptions apply to enter a 'slow lane' while allowing other Member States to move on with the implementation agenda, hence the various speeds in European integration. Extensions such as mentioned above appear most frequently in the accession process. Additional substantive requirements may apply to the multi-speed model. For example, Article 27 TFEU allows for derogations to be made to internal market legislation with a view to gradually preparing less developed economies for the establishment of the internal market but restricts the possibility of such derogations to temporary measures and those least disruptive to the functioning of the internal market. In such cases, economic and social considerations are acceptable as derogations but political reasons are not.⁴⁵ The model of multi-speed Europe does generally not allow for permanent opt-outs from common rules.

The model of concentric circles represents a less intense model of integration than the previous two. The model is based on dividing Member States into spheres according to their willingness and capability of integration. The core of the most progressive Member States is located in the middle of the circle and at the outer edge one can find Member States with the most loose integration aims. The core is composed of Member States who have not opted out of common policies. Differently from multi-speed integration, the model of concentric circles grants permanent exceptions to the outer layers of Member States. The model of flexible integration is somewhat similar to the model of concentric

⁴⁴ *ibid* 364-365.

⁴⁵ CD Ehlermann (n 26) 1289. As elaborated further below, though, this restriction applies only to derogations from secondary law that are approved by the EU institutions rather than to opt-outs from primary law.

circles but focuses on a substantive common base and voluntary areas of co-operation beyond the common base.⁴⁶ To this category belong also Member States who have entered a 'fast lane' of European integration by engaging in enhanced cooperation under Article 20 TEU.

The most liberal mode of integration in the EU is represented by the model of Europe *à la carte*. It imposes a framework of a few common objectives but leaves free to the Member States the opportunity to 'pick-and-choose, as from a menu' the specific areas in which to co-operate.⁴⁷ Differently from flexible integration, Europe *à la carte* does not envisage a substantive common base, rendering the level of uniformity and, in this case, even unity relatively low.

A further, rather unconventional mode of differentiation is 'structural variability'.⁴⁸ An example of this is the former pillar system of the EU where the organisation of institutions and decision-making of the Union varied according to the policy field and the nature of EU competence. Some differences between the former pillars have survived the changes brought about by the Lisbon Treaty. While the institutional and procedural structure of the EU is not uniform The Lisbon Treaty amendments have certainly increased unity within the EU across the former pillars by merging the former first and third pillars and articulating the overarching objectives of the Union.

3.1.1 Primary law

The models of integration summarised above concern uniformity/flexibility/differentiation on various levels – the adoption, implementation and interpretation of primary law and secondary law as well as procedural law. The uniformity of each has different dimensions. In the case of primary law, for example, the first dimension is that of common values. The common values are provided in Article 2 TEU and have been regarded as representing 'constitutional homogeneity' in the EU.⁴⁹ Authors who refer to the term 'constitutional homogeneity' are generally in agreement that the actual level of

⁴⁶ M Dewatripont and others (n 42).

⁴⁷ A Stubb (n 33) 288.

⁴⁸ N Walker (n 24) 363.

⁴⁹ S Mangiameli, 'The Union's Homogeneity and Its Common Values in the Treaty on European Union' in H-J Blanke and S Mangiameli (eds), *The European Union after Lisbon* (Springer 2012) 21, 21ff.

homogeneity in the meaning of uniformity is low,⁵⁰ owing greatly to the factual diversity among the constitutions of the Member States.⁵¹

The second dimension of uniformity in primary law concerns the provisions of the EU Treaties. Here, the claim for uniformity has a stronger basis but is limited by different flexibility schemes and opt-outs. Ehlermann has provided a detailed categorisation of the diverse appearances of flexibility in primary law.⁵² The first, and very common instance is the transitional period in which flexibility occurs with regard to both substantive and institutional provisions. As mentioned above, though, the differentiation that occurs during the transitional period is usually temporary. Substantive uniformity is, therefore, programmed to be restored within a certain timeframe.

The third example of differentiation provided by primary law is more of an *ad hoc*, yet permanent nature and concerns derogations from internal market harmonisation measures justified 'on grounds of major needs', such as public morality, public policy, public security, public health, protection of the natural environment and of the working environment, and a range of other grounds protected by public interest.⁵³ All of the above are subject to EU control measures.

The fourth example pointed out by Ehlermann's concerns safeguard clauses – flexibility clauses '*par excellence*' – which can be found in several Treaty provisions and which allow the Member States to deviate from harmonisation measures in exceptional circumstances and temporarily, usually during the transitional period.⁵⁴

Further differentiation in primary law appears in the form of procedural differentiation. It is reflected in the composition of the European Parliament and the number of votes allocated to the different Member States in the Council. The numbers of votes and voting majorities are further adjusted pursuant to opt-outs from and opt-ins to certain policies. Furthermore, general exceptions have been laid out in the protocols attached to the

⁵⁰ *ibid* 25. Article 2 TEU reads as follows: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

⁵¹ A von Bogdandy, 'Doctrine of Principles' (n 28) 39.

⁵² CD Ehlermann (n 26) 1279-1281.

⁵³ Article 36 TFEU.

⁵⁴ Articles 114(10), 191(2) TFEU. D Hanf, 'Flexibility Clauses in the Founding Treaties, from Rome to Nice' in B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 3, 9.

Treaties for disadvantaged regions as well as specific derogations from common policies accorded to particular Member States. Finally, Article 184 TFEU provides for supplementary research programmes in which a limited number of Member States may decide to participate and which are subsequently financed by the participating states only. All of the above examples demonstrate that differentiation and flexibility are programmed into the foundations of the EU.

True *ad hoc* differentiation from primary law, as opposed to derogations under Article 36 TFEU, are Member States' opt-outs from entire policy fields for which no legal basis is provided in the Treaties and which are, thus, negotiated separately between the Member States, usually in the course of negotiating Treaty amendments. Before the Maastricht Treaty, amendments to the EU Treaties seldom brought about serious deviations from the commonly agreed policies. The Treaties of Maastricht and Amsterdam, however, heralded a new era of opt-outs.⁵⁵ The Maastricht Treaty granted opt-outs to the United Kingdom and Denmark from the Social Policy Protocol and the third stage of the Economic and Monetary Union (EMU), respectively. These opt-outs have been regarded as examples of 'unreasoned differentiation'.⁵⁶ The criticism is directed towards them representing 'subjective' differentiation between the Member States that wish to participate in common policies and those who do not as opposed to the 'objective' differentiation between the Member States that have fulfilled the necessary economic criteria to participate in the EMU and those which have not.⁵⁷ This distinction also reflects the dichotomy between derogations under Article 36 TFEU and the general *ad hoc* opt-outs mentioned above. Political reasons are generally not considered suitable to justify derogations from the general Union policies. Yet the Maastricht opt-outs assumed great economic and symbolic significance.⁵⁸ Importantly, the examples of the opt-outs from the Social Policy Protocol and the EMU represent divergence from an entire policy field, whereas other notable opt-outs, such as the Protocols on the acquisition of secondary homes in Denmark and on abortions in Ireland, are fairly specific and have

⁵⁵ N Walker (n 24) 355.

⁵⁶ G De Búrca, 'Differentiation within the Core: The Case of the Common Market' in G De Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 133, 148.

⁵⁷ D Hanf (n 54) 14-15.

⁵⁸ G De Búrca (n 56) 148.

little if any effect on other policies.⁵⁹ Developing further the differentiation process that started with the Maastricht Treaty, the Treaty of Amsterdam introduced enhanced cooperation in a number of First, Second and Third Pillar policies as well as granted exceptions to the United Kingdom, Ireland and Denmark as regards the Schengen *acquis*. Other notable examples of general opt-outs include those granted to Denmark from the Common Security and Defence Policy (CSDP), Poland and the United Kingdom from the Charter of Fundamental Rights⁶⁰ and the United Kingdom from the EMU. Denmark, Ireland and the United Kingdom have, furthermore, opted out from the AFSJ although the flexible nature of the opt-outs of Ireland and the United Kingdom allows them to opt in to legislation if they so wish.

Although the Maastricht and Amsterdam opt-outs covered large policy fields they were not considered detrimental to the idea of the unity of the of the EU, this owing to the fact that the opt-outs did not concern the core commitments of the Member States towards the EU – the internal market.⁶¹ The idea of the internal market as the ‘core’ of the EU is further expressed in the example of enhanced cooperation. Both the Treaty of Amsterdam⁶² and the current TEU⁶³ and TFEU⁶⁴ require enhanced co-operation to maintain the unity of principle and institutional framework of the EU, be used to ‘further the objectives of the Union, protecting its interests and reinforcing its integration process’ and to avoid disturbance to the internal market. The Member States are generally free to co-operate outside the framework of the EU, but are restricted from doing so in areas of exclusive EU competence, as well as areas of non-exclusive EU competence, unless absolutely indispensable.⁶⁵

3.1.2 Secondary law

In substantive terms, secondary EU law and all implementing legislation and administrative acts are even less uniform than primary EU law. On the one hand, the

⁵⁹ D Hanf (n 54) 16-17.

⁶⁰ See also above chapter 2 section 5.1.4.

⁶¹ De Búrca (n 56) 149.

⁶² Article K.15(1).

⁶³ Article 20 TEU.

⁶⁴ Articles 326-334 TFEU.

⁶⁵ Article 20(1),(2) TEU; G Edwards and E Philippart, *Flexibility and the Treaty of Amsterdam: Europe's New Byzantium?* (1997) CELS Occasional Paper No. 3, 13.

Member States have claimed many more opt-outs from secondary law, not least because of the quantity of secondary law being significantly larger than primary law. On the other hand, while harmonisation in general and maximum harmonisation in particular are the principal tools for achieving uniformity in the EU legal system and the internal market, not all harmonisation measures envisage maximum harmonisation. Maximum harmonisation is a means of legislative harmonisation – harmonisation occurring as a result of EU legislation in contrast to judicial harmonisation where the Court strikes down incompatible national legislation, or mutual recognition. Minimum harmonisation establishes a common European minimum for national legislation but does not aim at full uniformity.⁶⁶ Generally, ‘positive’ harmonisation by means of EU legislation – regulations and directives – is the method most effective in terms of establishing a uniform legal order. ‘Negative’, or ‘judicial’ harmonisation by which national barriers to trade are removed by the Court,⁶⁷ however, are of a more *ad hoc* nature. Yet one must also question the true uniformity of otherwise uniform rules in the light of their implementation and application.⁶⁸ Ineffective implementation and application of uniform rules does not lead to a uniform outcome. A contrary example is that of voluntary harmonisation whereby Member States voluntarily adhere to non-compulsory EU standards such as recommendations. This frequently takes place in practice and belongs, therefore, to the same category of establishing a level of uniformity through the actual implementation and application of legally binding rules.

Other factors than legislation, too, play role in the creation and, especially, the management⁶⁹ of the EU legal order in general and the internal market in particular. Neither regulations that lay down minimum requirements nor directives lead to a strictly uniform outcome in the EU legal order. Directives are by definition less efficient in creating uniformity than regulations. Neither are decisions and recommendations that are either directed towards a single Member State or only have a soft law nature the proper tools for achieving absolute uniformity in the EU legal order. Recommendations

⁶⁶ For details about the division of minimum harmonisation into sub-groups see S Weatherill, 'Supply of and demand for internal market regulation: strategies, preferences and interpretation' in N Nic Shuibhne (ed), *Regulating the Internal Market* (Edward Elgar Publishing 2006) 29, 46.

⁶⁷ A McGee and S Weatherill, 'The Evolution of the Single Market - Harmonisation or Liberalisation' (1990) 53 *The Modern Law Review* 578, 580.

⁶⁸ S Weatherill, 'New Strategies for Managing the EC's Internal Market' (n 22) 606.

⁶⁹ *ibid* 595.

that are directed to all Member States, albeit not legally binding, may, however, provide an EU policy field with common direction with the help of a sufficient amount of self-regulation. In line with the principle of subsidiarity, EU institutions should prefer, where compatible with the objective and the effectiveness of the outcome the following: minimum harmonisation, measures with a smaller harmonising effect, and soft law instruments rather than binding legislation.⁷⁰ Similarly to primary EU law, secondary law, too, features various methods for differentiation in time and substance, safeguard clauses, quotas and compensation differing from one Member State to another.⁷¹ This kind of differentiation is, nevertheless, limited by the requirement of objectivity of criteria in order to 'ensure a proportionate distribution of advantages and disadvantages' within the Union and the territory of the internal market.⁷² Since these mostly pertain to internal market legislation they will be considered in detail below.⁷³

3.1.3 Interpretation, procedure and implementation

The third large category of divergences in EU law, apart from those in primary and secondary law, comprises the interpretation of EU law. Threats to the uniformity of EU law as concerns its interpretation are twofold. Firstly, divergences in the interpretation of EU law provided by national courts appear in two dimensions: from one Member State to another and between the authoritative interpretations provided by the Court of Justice and the interpretations given by the national courts of the Member States. Secondly, similar and even identical legal concepts often assume different meanings in the different national legal systems. This phenomenon, known as the 'keyword trap',⁷⁴ affects the

⁷⁰ European Council, 'Conclusions of the Presidency – Edinburgh, 12 December 1992, Annex I Overall approach to the application by the Council of the subsidiarity principle and Article 3b of the Treaty on European Union' SN 456/92, 21-22.

⁷¹ For examples see CD Ehlermann (n 26) 1282-1285.

⁷² Case 106/83 *Sermide v Cassa Conguaglio Zucchero* [1984] ECR 4209, para 28. The Court made a reference to the general principle of non-discrimination, which requires that 'comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.'

⁷³ See section 3.2.

⁷⁴ F Chirico and P Larouche, 'Conceptual Divergence, Functionalism, and the Economics of Convergence' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 463, 472-473.

accurate and uniform interpretation of EU law, which occasionally makes use of the same concepts as the national legal systems.⁷⁵

It is important to note that no distinction can be made between the unity and uniformity of interpretation of EU law. Uniform interpretation is indispensable in a uniform legal order but it also, inevitably, leads to the more realistic situation of unity in a legal order. As regards the importance of uniform interpretation of law in the EU legal order, the Court of Justice has stated that '[...] it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied'.⁷⁶ Contrary to legislative exceptions, which are approved and endorsed by the EU institutions, divergences in the interpretation and application of EU law are in most cases unwelcome and difficult for the Union to exercise complete control over. Empirically, the difficulty of enforcing the requirement for uniform interpretation of EU law in the Member States renders the EU legal system inherently non-uniform.⁷⁷

The fourth category of structural divergences in EU law concerns the uniformity of procedure. On the one hand, diverging national procedural rules may hamper both the uniformity and the effective implementation of EU law.⁷⁸ On the other hand, it is necessary that the application and interpretation of procedural and institutional provisions in the Member States mirror the application and interpretation of corresponding EU law just as in the case of substantive provisions.⁷⁹ The uniformity of

⁷⁵ See Case 283/81 *CILFIT* [1982] ECR 3415, para 19.

⁷⁶ Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 40.

⁷⁷ The preliminary ruling procedure has been designed and perfected to the extent of modifying the national court systems. The EU is tied by only being able to give an interpretation on EU law where a national court requests a preliminary ruling. Although infringement proceedings can be brought against a Member State if its national court that must make a reference for a preliminary ruling to the Court of Justice under Article 267 TFEU fails to do so, the question is very sensitive. For discussion see below chapter 7 section 3.2.1.

⁷⁸ K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 109, referring to Case 130/79 *Express Dairy Foods* [1980] ECR 1887 and Case 54/81 *Fromme* [1982] ECR 1449 – 'judgments where the Court has expressed regret at the lack of Union provisions harmonizing procedures and time limits'.

⁷⁹ S Magnusson, 'Procedural Homogeneity v. Inconsistency of European Courts - Comments on Order of the EFTA Court President of 15 June 2012 in Case E-16/11 EFTA Surveillance Authority V. Iceland' (2012), 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140717> accessed 24 June 2015.

procedure is crucial in the EU, setting the foundation for the 'European substantive supremacy'.⁸⁰

Finally, divergences in the application of EU law are caused by unsatisfactory implementation by the Member States. Although there is no longer an intention to 'finalise' the internal market, the Member States still often lack motivation to properly transpose and implement the EU measures already adopted. Paper transposition continues to be a problem as well as uniform application of common rules.⁸¹ The inclusion of new Member States to the Union through the enlargement process,⁸² as well as technical innovations which require legislative plans to be updated on a continuous basis,⁸³ make the task of uniformity ever more difficult in practice.

3.1.4 From uniformity to unity: permissible differentiation

Having reached the conclusion that one can hardly speak of uniformity of EU law in the meaning of the identical interpretation and application of identical laws in all EU Member States, one is left to consider what makes the EU legal system a unified one in terms of 'unity' of the system. Von Bogdandy's answer to the question is that principles, specifically those outlined in the pre-Lisbon Articles 2 and 3 EC Treaty and 2 TEU (now Article 3 TEU) create unity as well as necessary flexibility within the EU.⁸⁴ Moreover, the principle of rule of law acts as a creator of unity between the Member States' legal orders in the dimensions of both legal and procedural unity.⁸⁵ Sacco, on the other hand, introduces the concept of cultural unity – the commonality of language, history, traditions, etc., which lays a necessary foundation for uniting peoples by virtue of a uniform body of rules.⁸⁶ The level of cultural unity among the EU member States, especially in a Union composed of 28 nation states can be presumed not to reach a high enough level to sustain uniformity. Whereas the EU is constantly working towards

⁸⁰ JS Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9 *European Law Journal* 599, 609.

⁸¹ S Weatherill, 'New Strategies for Managing the EC's Internal Market' (n 22) 606.

⁸² European Union Committee, *The Single Market: Wallflower or Dancing Partner?* (HL 2007–08, 5-1) paras 29ff.

⁸³ Commission, 'The Internal Market for Goods: a cornerstone of Europe's competitiveness' (Communication) COM (2007) 35 final, 6.

⁸⁴ A von Bogdandy, 'Doctrine of Principles' (n 28) 36-38.

⁸⁵ A von Bogdandy, 'Founding Principles' in A von Bogdandy, J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 11, 28-38.

⁸⁶ R Sacco (n 37) 172.

raising awareness of the cultural and linguistic multitude in the Union it does not, as reflected in its own motto 'United in diversity' aspire to assimilate the Member States into a group of culturally homogeneous states. A certain commonality of values and mutual cultural understanding is necessary for the proper functioning of an economic union, which could then possibly develop into a political union but, equally, there is an economic value to specialisation and decentralisation.⁸⁷ The effects of cultural diversity in the EU lead in the legal sphere to the need to ensure judicial homogeneity, such as through the preliminary reference procedure.

Within the EU legal order, specifically, there is the realm of substantive legal elements that unite the Member States together in the EU. According to De Búrca and Scott, the foundation of unity in the EU is laid by the broad commitments shared by the Member States.⁸⁸ The centre of the Union, the *sine qua non* elements of its legal order, the 'hard core'⁸⁹ of the Member States' commitments towards the Union forms the nucleus of European integration and is the key to maintaining the identity of the Union in the myriad of the different models of flexible integration. In the context of the EU as a whole, defining the core of obligations of membership is necessary mainly in order to delimit the range of acceptable differentiation.

The concept of a 'hard core' of the EU accommodates well the tension between uniformity and unity examined above by limiting flexible differentiation in the EU to the peripheral policy areas only.⁹⁰ What exactly belongs to the hard core of the EU is, in the light of the ever-expanding Union subject to continuous debate yet the general opinion agrees on giving this status to the norms and policies constituting the internal market.⁹¹

⁸⁷ L Bovenberg, 'Unity produces diversity: The economics of Europe's social capital' in W Arts and others (eds), *The Cultural Diversity of European Identity* (Brill 2003) 403, 412-413.

⁸⁸ G De Búrca and J Scott (n 30) 7.

⁸⁹ A Stubb (n 33); S Weatherill, 'On the Depth and Breadth of European Integration' (1997) 17 *Oxford Journal of Legal Studies* 537; N Walker (n 24); A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307; G De Búrca (n 56); W Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27; L Azoulai, 'The *Acquis* of the European Union and International Organisations' (2005) 11 *European Law Journal* 196.

⁹⁰ G De Búrca (n 56) 135.

⁹¹ *ibid* 133.

The elevated position of the internal market is underpinned by the fact that its essential features have never been significantly altered by treaty amendments.⁹²

Similarly to many authors discussed above, Grabitz and Langeheine agree that a 'two-tier system' of flexible integration along the lines of a multi-speed model is acceptable in objectively justifiable circumstances insofar as suitable instruments are employed for pursuing a 'high degree of conformity with the aims of integration'.⁹³ The authors suggest a three-level formula to determine whether or not their proposed two-tier system can be rendered admissible within the EU legal system. The formula includes tests on compatibility with the basic principles of EU law, primary EU law, and the specific policy fields, including the internal market.⁹⁴ Where one cannot agree with Grabitz and Langeheine, though, is their definition of what is acceptable as differentiation – an agreement on the common aim and on the 'preliminary status of differentiation'.⁹⁵ The latter is subject, primarily, to political agreement and is thereby likely to render subjective any objective criteria for the common aim.

Given that the procedures for attaining and discarding Union membership are formalised in the Treaties, the core of the Member States' commitments does not serve as a tool for identifying the membership status of these states. The situation is different as regards the indeterminate notion of an internal market extended to cover non-EU Member States. For the purpose of being able to recognise the internal market which includes EU Member States as well as third countries as an extension of the EU internal market, it is indispensable to identify the defining elements of the latter.

3.2 Differentiation in the internal market

Enjoying the status of the hard core of the EU, the internal market consists of a package of obligations to which the member states must adhere within the limits of their membership. In the case of an expanded market, which includes non-EU Member States, the membership aspect obviously becomes redundant. Instead, identifying the core of

⁹² J Wouters, 'Constitutional Limits of Differentiation: the Principle of Equality' in B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 301, 327.

⁹³ B Grabitz and E Langeheine, 'Legal Problems Related to a Proposed "Two-Tier System" of Integration within the European Community' (1981) 18 *Common Market Law Review* 33, 38.

⁹⁴ *ibid* 39.

⁹⁵ *ibid* 40.

the internal market becomes indispensable for assessing the unity of the expanded internal market *vis-à-vis* the internal market that only comprises EU Member States. Clearly, in order to be considered equivalent to the internal market, the expanded market needs to feature the same key elements as the internal market in the EU.

There is, as of now, no commonly accepted set of criteria for what constitutes the core of the internal market. This is so because flexibility in the EU legal order is most often perceived in the context of membership generally without a need to go beyond establishing that the internal market represents the core of the membership commitments. The core of the internal market can be scrutinised both from an empirical and a functionalist perspective. The first, empirical approach focuses on the internal market relevant legislation that is actually in force in the Member States. Subsequently, the hard core should be constructed on the basis of the highest common denominator of elements empirically applied by all Member States.⁹⁶ Leaving aside the components from which one or more Member States have opted out, the remaining core reflects a fragmentary yet strongest common commitment to the internal market. The weakness of the empirical method is the fact that the hard core of the market changes constantly in time. Neither can the empirical method do entirely without a functionalist understanding of which legislation is relevant to the functioning of the internal market, i.e. which legal acts pertain to the fundamentals of the latter. Better suited for identifying the core of the internal market is, therefore, the second, functionalist approach. This method draws on the objectives of the EU with regard to the internal market and demonstrates the defining features of the internal market through their purpose. As put by Grabitz and Langeheine, ‘uniformity as such cannot be looked upon as an isolated value, but one that has to be weighed in relation to the intended ultimate state’.⁹⁷

The analysis in chapter 2 demonstrated that in addition to the elements found in the definition of the internal market – the fundamental freedoms and equal conditions for competition – the concept of the internal market is interwoven with a number of other, non-economic policies and concepts. From a formal perspective, the economic foundation of the internal market as expressed in the definition should be considered the

⁹⁶ De Búrca has used the empirical approach, see G De Búrca (n 56) 141.

⁹⁷ B Grabitz and E Langeheine (n 93) 41.

hard core of the internal market. Considering the broader aims of the internal market beyond unhindered trade between the Member States, however, the limits of permissible differentiation in the internal market cannot be based on the overly narrow purely economic understanding of the internal market. While the fundamental freedoms and equal conditions for competition form the non-derogable core of the internal market the limits of permissible differentiation must lay much further into the broad concept of the internal market including also the relevant non-economic aspects discussed in the previous chapter.

The establishment of the internal market is the most central aspect of the commitment of the Member States to 'ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe' but being the core of the EU legal order does not mean that no flexibility is allowed from internal market provisions.⁹⁸ Differentiation does not as such conflict with the idea of integration in general or with the internal market concept in particular.⁹⁹ Distinction, however, must be made between the essential principles of the internal market – the fundamental freedoms, the principles of equality and non-discrimination, etc. – and the specific provisions laid down in primary and secondary legislation in which differentiation may occur without necessarily defeating the object and purpose of the internal market. According to de Búrca, the core of the internal market should pertain to both the substance of the specific policies and the 'specific legal and constitutional characteristics of such measures'.¹⁰⁰ Viewing the internal market as a collection of principles brought into effect by secondary law rather than specific policy measures, the substance of the specific policy fields should only play a role in the case of particular sectoral markets and not with respect to the general idea of the internal market.

According to the philosophy underpinning its creation, for the internal market to function properly not all relevant legislation in all Member States needs to be perfectly identical. 'One legislative size cannot fit all'¹⁰¹ nor is it always necessary. Instead, the functionalist approach accommodates well the conclusion reached above on that the idea

⁹⁸ Recital 2, Preamble to the TFEU.

⁹⁹ B Grabitz and E Langeheine (n 93).

¹⁰⁰ G De Búrca (n 56) 135.

¹⁰¹ S Weatherill, 'New Strategies for Managing the EC's Internal Market' (n 22) 600.

of 'common rules for a common market' has been outlived and deemed an unnecessary restriction to the integration process.¹⁰² Some barriers to trade are considered permissible whereas others, notably those that impede with the functioning of the internal market, are deemed incompatible with EU law.¹⁰³ Often, the necessary flexibility of the market can be guaranteed by minimum harmonisation which abolishes the most detrimental barriers to trade while allowing the market to adjust itself to the changing economic and technological conditions.¹⁰⁴ On other occasions, recourse is had to harmonisation through directives or the issuing of decisions directed at one Member State or non-binding recommendations and opinions.

Apart from the legislative means of creating flexibility, most of the differentiation in the internal market occurs in the form of fairly specific opt-outs from secondary law. These opt-outs have to conform to the general principles of EU law as well as to the more specific requirements established by the Treaties. Generally, secondary law has to conform to the objectives and tasks of the Union, the general principles of EU law, and fundamental rights as well as be proportional as to the perceived aims.¹⁰⁵ The same applies to the derogations from secondary law.

The general principles of EU law are generally considered to include, among others, the respect of fundamental rights, proportionality, legal certainty, equality and non-discrimination, effectiveness and subsidiarity. In the context of flexibility within the internal market, the principles most relevant appear to be those of equality and non-discrimination. The principle of equality is connected to the principle of solidarity.¹⁰⁶ This connection is based on the assumption that the Treaties lay out a balanced account of benefits and obligations for the Member States thereby leading to equality between them. A disruption of the equilibrium not only distorts the equality but also the principle of solidarity between the Member States.¹⁰⁷ However, the absoluteness of the principles of equality and solidarity depends on whether one adopts a strict or flexible

¹⁰² S Weatherill, 'On the Depth and Breadth of European Integration' (n 89) 537.

¹⁰³ A McGee and S Weatherill (n 67) 578.

¹⁰⁴ S Weatherill, 'New Strategies for Managing the EC's Internal Market' (n 22) 601-602.

¹⁰⁵ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁰⁶ Laid out in detail with references to case law in J Wouters (n 92) 317.

¹⁰⁷ Case 39/72 *Commission v Italy* [1973] ECR 101, paras 24-25; Case 128/78 *Commission v United Kingdom* [1979] ECR 419, para 12.

understanding of the objectives of the EU.¹⁰⁸ Equality and solidarity between the Member States are endangered primarily by a ‘unilateral [breach]’ of a member State ‘according to its own conception of national interest’.¹⁰⁹ Wherever the flexible approach has become the chosen option in practice and occurs with the approval of the EU and the other Member States, one cannot consider such a unilateral breach to have occurred. This includes derogations explicitly permitted by the Treaties. It follows that differentiation in the internal market is compatible with the principles of equality and solidarity insofar as deviations meet general approval and do not, as unilateral breaches, dilute the commonly agreed core. Whether primary law opt-outs, which are the results of political bargaining and outside the scope of review of the Court of Justice can be justified in the light of the above-mentioned principles is questionable,¹¹⁰ even if one cannot deny the existence of political approval.

Similarly to the case of the EU legal order discussed above, the main question concerning permissible differentiation from the internal market is whether one can ascertain a common set of rules about what constitutes the hard core of the internal market or whether the determination is entirely in the hands of the political actors. The requirement of cohesion in the internal market is qualified by the functionalist claim for establishing a well-functioning market and as established above,¹¹¹ unity itself – but not uniformity – is part of the very concept of the internal market. The unity of the internal market finds expression in its ‘common and complete order’.¹¹² This common and complete order is precisely the objective core from which no derogations can be allowed without the EU’s internal market losing its special character. The limits of permissible differentiation to internal market rules are in practice often elaborated in the political process on the basis of a subjective perception of the Member States as to what level of differentiation they can accept within the framework of the internal market. This does not, however, render all differentiation compatible with the purposes of the internal market as laid out in the Treaties. The core elements include the main principles of the

¹⁰⁸ B Grabitz and E Langeheine (n 93) 42.

¹⁰⁹ Case 39/72 *Commission v Italy* (n 107) para 24; Case 128/78 *Commission v United Kingdom* (n 107) para 12.

¹¹⁰ F Tuytschaever, *Differentiation in European Union Law* (Hart Publishing 1999) 113; G De Búrca (n 56) 143.

¹¹¹ See subsection 2.1.

¹¹² R Barents (n 2) 208, see above n 2.

internal market as well as the concept of its unity. This conclusion about the internal market as a whole applies equally to the cores of the specific sectors of the internal market – any divergences from the common core must be justified in the light of the specific purpose of that particular policy sector in order to fit within the framework of a unified internal market.

4 Integration and disintegration in the expanded internal market

Just as the paradigm of the internal market has changed from a finished project to one that is constantly developing and adapting to changes in time the entire discourse on European integration, too, has turned into one on flexibility and differentiation.¹¹³ The extension of the internal market to non-EU Member States by exporting the *acquis*, which is a wholly new phenomenon of limited and differentiated integration into the EU without formal accession to the Union, is undoubtedly proof of such flexibility. The question that remains is what kind of ‘different ‘Europes’ can the internal market accommodate even in the light of integrating into it third countries.¹¹⁴

While the extension of the *acquis* to third countries constitutes a type of flexibility for integration in the EU, the exported *acquis* and the extended internal market do not necessarily enjoy more flexibility and differentiation than the same *acquis* within the EU. All three of the multilateral agreements which seek to extend the EU’s internal market or a sector thereof to neighbouring countries do so by exporting relevant parts of EU *acquis*. They, thus, share both the objective and the general means of doing so. The concrete objectives of each of the agreements, however, are worded in a slightly different manner. The following analysis focuses on the stated objectives of the three multilateral agreements under scrutiny as regards upholding the unity inherent to the internal market with the aim of establishing the extent of uniformity, unity and permissible differentiation in the internal market extended beyond the borders of the EU.

¹¹³ G De Búrca and J Scott (n 30) 2.

¹¹⁴ ‘[...] a number of different ‘Europes’, their breadth and depth dependent upon the integration arrangements specific to the policy field in question, and embedded in a complex network of relations with one another and with the various Member States’: N Walker (n 24) 356.

4.1 European Economic Area

The EEA EFTA countries are linked to the EU by the legal rules and principles provided in the EEA Agreement. The objective of the latter is to create a 'common economic space' between the EU Member States and the EEA EFTA countries.¹¹⁵ The common economic space of the European Union is the internal market – an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. The EEA was not intended to become a literal extension of the internal market in the current definition of the latter. Rather, the EEA is a common economic space that comprises both the EU and the EEA EFTA States. This is affirmed by Article 2 EEA Agreement and Recital 5 of its preamble which list the free movement of goods, persons, services and capital, rules on competition law and 'strengthened and broadened cooperation in flanking and horizontal policies' such as research and development, the environment, education and social policy as the specific objectives of the EEA. A specific reference to a borderless area – a defining feature of the 'internal market' – is, nevertheless, excluded.

The EEA Agreement further specifies that the legal area thus created is to be 'homogeneous'. Homogeneity is one of the 'fundamental principles' of the EEA Agreement.¹¹⁶ The main question is whether 'homogeneity' in this context is to be understood as uniformity of law within the EEA, uniformity between EEA law and EU law, or rather the chosen and accepted path in European integration – unity constructed around a common hard core while allowing for permissible differentiation. Another question is whether the internal market as extended to third countries retains the same component of unity that is inherent to the EU internal market.

When looking at the uniformity/unity/homogeneity of a legal order that incorporates parts of EU law, such as the multilateral agreements establishing the EEA, the Energy Community and the ECAA, the notion of unity gains two dimensions.¹¹⁷ The first of these dimensions is unity within the legal order that is created by the 'exporting' of the internal

¹¹⁵ A Lazowski, 'Box of chocolates integration: the European Economic Area and the Swiss models revisited' in S Blockmans and S Prechal (eds), *Reconciling the Deepening and Widening of the European Union* (T.M.C. Asser Press 2007) 87, 89.

¹¹⁶ Case E-3/97 *Opel Norge* [1998] EFTA Ct Rep 1, para 30.

¹¹⁷ Haukeland Fredriksen distinguishes between two meanings of homogeneity within the EEA – uniform interpretation of the EEA rules in the EU and in the EEA, and uniform interpretation of EEA rules and the corresponding identical EU rules, see H Haukeland Fredriksen, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area' (2010) 79 *Nordic Journal of International Law* 481, 483.

market rules. From an empirical point of view, it calls for comparing the adoption, implementation and application of the rules in all of the states parties to the respective multilateral agreements. From a functional point of view, it calls for the proper functioning of the legal order in accordance with its stated aims. This dimension of unity is, subsequently, called the uniformity/unity/homogeneity of the EEA, the Energy Community or the ECAA.¹¹⁸ For those parts of the multilateral agreements that do not reproduce EU law, homogeneity cannot assume but this dimension. The second dimension of unity, or homogeneity, pertains to the 'EU—non-EU Member States' axis. This latter situation is roughly similar to the relationship between the EU and its Member States but refrains from looking at the differences in the internal application of rules in the countries parties to the multilateral agreement. To some extent, the two dimensions are intertwined.

Recital 4 of the preamble to the EEA Agreement makes an attempt to clarify the objective of homogeneity in the EEA:

[...] [T]he objective of establishing 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.

On the basis of this provision, the answer to the first question is that 'homogeneous' in the context of the EEA is to be understood as referring to the EEA as a whole, including the EU, its Member States and the EEA EFTA States, and not as creating a direct link of uniformity with the EU legal order. For a common economic space to come into existence no uniformity as between itself and the EU's internal market is necessary by definition because this common space exists independently of the EU. In this respect, it is not relevant to regard the EEA as a legal framework resting on two distinct pillars – the EU and its Member States on the one hand and the EEA EFTA States on the other – as is the case regarding the institutional set-up of the EEA.¹¹⁹ The EEA Agreement is an

¹¹⁸ For example, 'homogeneity in the interpretation and application of the law in the EEA' in S Norberg and others, *The European Economic Area: A Commentary on the EEA Agreement* (Fritz 1993) 187.

¹¹⁹ C Baudenbacher, 'If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjornsdottir Ruling' (2009) 10 *Chicago Journal of International Law* 333, 338. The Court, too,

international agreement that derives its legal context from the EU and has set up mechanisms which allow for a legislative updating in the EEA parallel to the legislative developments in the EU but the EU and the EEA are not identical twins. 'Homogeneity' in the EEA Agreement should, thus, be considered to be referring to the harmony between the different components of the EEA legal order.

On the scale uniformity-unity the homogeneity of the EEA resembles unity of the EU legal order rather than uniformity as both strive towards achieving a particular aim – integration through the creation of a single market – in which total uniformity is not the crucial factor. In Recital 4, the qualities of 'dynamic and homogeneous', which describe the EEA, are presented not as a means of achieving a broader aim as to the level of integration but rather as a description of the economic area. This is similar to the idea of unity forming an inherent part of the internal market. How the homogeneous EEA is to be achieved is explained in the same provision: the EEA is grounded on 'equality and reciprocity' and 'overall balance of benefits, rights and obligations'.¹²⁰

Recital 15 of the preamble to the EEA Agreement further elaborates on the aspect of equality which was first introduced in Recital 4 through the idea of a balance of benefits, rights and obligations: '[the objective] is to arrive at equal treatment of individuals and economic operators as regards the four freedoms and the conditions of competition.' This provision reflects the functional rather than empirical character of the concept of homogeneity. The driving force behind integration in the EEA is the common objective of equality rather than the application of identical legislation that may or may not lead to equality in effect. Further support for the functional aspect of homogeneity in the EEA can be found in Article 1 EEA Agreement, which summarises Recitals 4 and 15 of the Preamble:

The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties

understands the 'twin-pillar' system of the EEA as institutional rather than substantive, see Opinion 1/00 *ECAA* [2002] ECR I-3493, para 7. A complete analysis is provided below in chapters 6 and 7.

¹²⁰ Recital 4, Preamble to the EEA Agreement reads as follows: '... [T]he objective of establishing 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.'

with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area [...]

Recital 15 goes on to link EEA law with EU law by stating the objective of the contracting parties to 'arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement [...]'. The link reflects the choice made of using EU law as a framework of reference on which to base the legal framework of the EEA but it does not create a functional link of uniformity between the two legal orders. Complete uniformity of interpretation would require both the Court of Justice and the EFTA Court to interpret the 'exported' rules in an identical manner and follow in so doing the former's interpretation of 'original' EU law but as demonstrated below,¹²¹ this possibility was never made use of due to the incompatibility of this solution with the autonomy of the EU legal order.

The provisions mentioned above clearly point at the EEA-internal dimension of homogeneity. The EEA legal order is homogeneous with regard to its own constituent elements and their application in the states parties to the EEA Agreement rather than to the legal order of the EU. Equal conditions and the respect for the same rules, for example, do not require that the legal framework of the EEA be based exclusively on EU rules. A choice was made for EU law as the law of integration among the EU Member States to be applied as the substantive regulatory basis for the newly established European Economic Area. It is this choice of regulatory basis that connects the two dimensions – the EEA-internal and the EU-EEA level – of homogeneity.

The normative framework of the EEA originating from the EU is dynamically updated and developed along the three foundations of homogeneity, pertaining to the legislative, enforcement and judicial review procedures. On the one hand, Article 6 of the EEA Agreement provides a mechanism for the dynamic evolution of EEA *acquis* in line with developments in the EU internal market legislation. On the other hand, the EEA rules must be applied and interpreted in conformity with EU law following the procedures of

¹²¹ Chapters 5 and 7.

surveillance and judicial review established under the EEA Agreement.¹²² Contrary to Haukeland Fredriksen,¹²³ this interpretation of Article 6 EEA Agreement does not imply the 'legal homogeneity between the EEA rules and the interpretation of the Court of Justice on underlying EU law' as an objective of the EEA Agreement. Article 6 paves the ground for judicial homogeneity in terms of uniform interpretation of identically worded EU and EEA rules but the uniform interpretation shall be ensured on the EU side by the national courts of EU Member States and the Court of Justice, and on the EEA EFTA side the national courts of the EEA EFTA States and the EFTA Court.

According to Hartley's definition, homogeneity in the EEA means identical quality to EU law.¹²⁴ In a more nuanced contribution, Magnússon has substantiated the concept of homogeneity with the idea of comparable rights and obligations between the EU and the EEA States leading to comparable rights and obligations of individuals regardless on which 'side' of the EEA Agreement they are located.¹²⁵ Magnússon's interpretation constitutes one further example of the distinction made between the EU and the EFTA pillars within the EEA. Strangely enough, neither of the commentators pays any particular attention to the fact that not only the EEA EFTA States but also the EU Member States are bound by EEA rules. Under the EEA Agreement, the latter are not, therefore, subject to rights and obligations different from those conferred upon the EEA EFTA States. Differences can only occur on the institutional level owing specifically to the fact that the Court of Justice interprets the *acquis* in the EU pillar and the EFTA Court in the EFTA pillar of the EEA.

The EEA was created as a separate legal order. It has its own objectives and methods for achieving these objectives, different from those of the EU. According to the EFTA Court in *Sveinbjörnsdóttir*, the EEA Agreement is an 'international treaty *sui generis* which contains a distinct legal order of its own'.¹²⁶ The EEA Agreement is, thus, not only distinct from traditional international agreements but also from the EU Treaties. The EFTA Court

¹²² The EFTA Court recognises these as two foundations. See Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95, paras 52-54.

¹²³ H Haukeland Fredriksen, 'The EFTA Court 15 Years on' (2010) 59 *International and Comparative Law Quarterly* 731, 733.

¹²⁴ TC Hartley, 'The European Court and the EEA' (1992) 41 *International and Comparative Law Quarterly* 841, 845.

¹²⁵ S Magnússon (n 79) 9.

¹²⁶ Case E-9/97 *Sveinbjörnsdóttir* (n 122) para 59.

further specified that the EEA Agreement differs from the EU Treaties by the 'less far-reaching' depth of integration whereas both the scope and objective of the EEA Agreement are more extensive than those of regular agreements concluded under public international law.¹²⁷

Contesting the interpretation of the EFTA Court, Haukeland Fredriksen has contended that if anything, the EEA represents an extension of the EU legal order.¹²⁸ Displaying a high degree of integration, the EEA, indeed, represents an enhanced free trade area the objectives of which go beyond a mere customs union as well as a regular free trade area.¹²⁹ However, the level of integration envisaged by the EEA Agreement is lower than that perceived by the EU Treaties.¹³⁰ In the *Maglite* case, the EFTA Court interpreted the objectives of the EEA Agreement as setting up a 'fundamentally improved free trade area but no customs union with a uniform foreign trade policy.'¹³¹ The EEA EFTA Member States did not, upon concluding the EEA Agreement, adhere to the EU policies on CCP, common customs tariff, borderless area,¹³² agriculture and fisheries, taxation, economic and monetary union, and common foreign and security policy.¹³³ Because of these restrictions in terms of policy areas covered – several of which form if not the core then at least very crucial elements of the EU legal order – one cannot consider the EEA to be a true extension of the EU legal order in the broadest sense of the term. Differences in objectives and substance may in some instances also lead to differences in effect.¹³⁴

The homogeneity claim in the EEA Agreement is not an objective in itself. It is first and foremost a term for describing the common economic space as envisaged by the treaty makers rather than an objective of the Agreement. Admittedly, in terms of common quality the term 'homogeneity' corresponds in the EEA context to unity rather than uniformity. Account here must be taken of the same considerations as were

¹²⁷ *ibid.*

¹²⁸ H Haukeland Fredriksen. 'Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area' (2012) 18 *European Law Journal* 868, 881.

¹²⁹ Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, para 107; Case E-9/97 *Sveinbjörnsdóttir* (n 122) para 59.

¹³⁰ Case E-9/97 *Sveinbjörnsdóttir* (n 122) para 59.

¹³¹ Case E-2/97 *Maglite* [1997] EFTA Ct Rep 127, para 27.

¹³² All four EFTA countries participate in the Schengen area but the Schengen Agreement is not part of the EEA Agreement.

¹³³ W van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (1992) 16 *Fordham International Law Journal* 955, 960.

¹³⁴ See below chapters 4 and 7.

demonstrated above with regard to the EU legal order and the internal market. The establishment and functioning of a single market requires not a set of identical norms but rather a core set of elements representing the defining features of the market and/or legal order in question. There are three possible ways of looking at the defining features of the single market created by exporting EU internal market *acquis*: firstly, the defining features of a single market as such; secondly, the defining features of a single market that includes the four fundamental freedoms and competition policy as in the case of the EEA, the Energy Community and the ECAA; and, thirdly, the core of the EU internal market. The three 'cores' may coincide but may also differ significantly.

The benchmark for determining the existence of unity in the EEA-internal dimension of its legal order is a similar 'core' of the main elements of the agreement as in the case of the EU legal order. In the EU-EEA dimension, the benchmark should be a 'core' consisting of the defining elements commonly shared by both the EU Treaties and the EEA Agreement. Comparing the definitions of the internal market and the common economic space of the EEA it becomes apparent that the concept of homogeneity in the EEA pertains to the core economic freedoms of the internal market. Since the aims of the EU are, still, deeper as concerns integration and unity of the Europe, it is possible that the core of the single market of the EEA, insofar as the latter does not partake in the achievement of the European unity idea but 'merely' cooperation in trade and certain flanking areas, comprises a more limited set of essential elements than the EU internal market, at least as far as policy areas such as agriculture and fisheries are concerned.

It was claimed above that the core of the internal market can be viewed from an empirical or a functionalist perspective. From an empirical point of view, participation in the EEA amounts to a 'quasi- or semi-membership' of the EEA EFTA States in the EU.¹³⁵ On the one hand, the policy areas featured in the EEA Agreement are often harmonised in the EEA EFTA States on a level comparable to that of EU Member States or even more.¹³⁶ Due to the homogeneity requirement the interpreters of EEA law in the EEA EFTA States may, at times, also take account of EU legislation that has not yet been transposed within the EEA. The existing level of harmonisation in the field of competition policy may, for

¹³⁵ M Egeberg and J Trondal, 'Differentiated Integration in Europe: The Case of EEA Country, Norway' (1999) 37 *Journal of Common Market Studies* 133, 134.

¹³⁶ *ibid.*

example, require a consideration of the general context in order to ensure equal conditions of competition.¹³⁷

The objectives of EEA Agreement, however, point at a functional interpretation of the term 'homogeneity' as it is used in the EEA Agreement. In its written observations to Opinion 1/91, the Commission claimed that the EEA was established as '... a homogeneous economic area in which law, substantially identical to that which is in force within the EEC, is to be applied as uniformly *as possible*'.¹³⁸ From this statement it can be deduced that, along the EU-EEA axis absolute uniformity has not been perceived as a goal in itself. The emphasised part of the observation leaves leeway for a functional interpretation of the EEA homogeneity clauses. On the one hand, the Commission calls for homogeneity within the EEA, yet 'as uniformly as possible' suggests unity rather than uniformity in the EU-EEA dimension of the EEA Agreement. This enables the interpreters of the EEA Agreement to take into account the specific aims of the EEA *vis-à-vis* the EU. The benchmark for assessing the level of homogeneity in the EEA along the EU-EEA axis should, therefore, not be considered different from the case of the EEA-internal dimension and amount to unity rather than uniformity. The 'core' that defines the necessary elements of the internal market expanded to the EEA EFTA States must, subsequently, be considered to include the same vertical elements as the core of the internal market with the possibility of excluding certain horizontal policy areas that otherwise belong to the core of the internal market within the EU. The horizontal-vertical division of the core elements of the internal market will be the focus of the next subsections on the homogeneity requirements in the Energy Community and ECAA agreements.

4.2 Energy Community

The Energy Community Treaty is much less elaborate in scope than the EEA Agreement. Being of sectoral remit only, the Treaty aims to establish a 'single regulatory space for trade in gas and electricity'.¹³⁹ This objective is to be achieved by implementing by the

¹³⁷ Joined Cases E-5/04, E-6/04 and E-7/04 *Fesil and Finnffjord* [2005] EFTA Ct Rep 117, para 110.

¹³⁸ General observations submitted by the Institutions and the Governments, Opinion 1/91 *EEA I* [1991] ECR I-6079, 6092 (emphasis added).

¹³⁹ Recitals 10, 13 and 16, Preamble to the ECT; Article 2(1)(b) ECT.

contracting parties of the *acquis communautaire* on energy,¹⁴⁰ and creating for the parties a market in Network Energy without internal frontiers.¹⁴¹ In broad terms, the ECT employs the same type of methods for expanding the EU internal market in energy as does the EEA Agreement in respect of the internal market as a whole. Compared to the EEA Agreement, though, the ECT features much less explicit aims as regards the link of homogeneity between the EU *acquis* and the Energy Community *acquis* and the level of integration envisaged between the EU and the Energy Community treaties that features essentially identical sets of rules. Differently from the EEA Agreement, the Energy Community Treaty is silent on any references to ‘uniformity’, ‘unity’ or ‘homogeneity’ of the Energy Community legal order *vis-à-vis* the EU legal order.

Closest to a reference to homogeneity is the ambitious heading of Title IV of the Energy Community Treaty that reads ‘The Creation of a Single Energy Market’. The Single Energy Market comprises the prohibition of quantitative restrictions and measures having equivalent effect as well as justifications for deviations equivalent to those provided in Article 36 TFEU.¹⁴² Also, the Treaty lays out that the parties may agree upon creating a ‘single market without internal frontiers’ for Network Energy – hence an internal market – and take the necessary measures to that effect.¹⁴³ Yet the creation of an internal market in Network Energy that would constitute a direct extension of the EU’s internal energy market is not the proclaimed objective of the Energy Community Treaty. Being very limited in scope, this sectoral market in energy is not to cover either fiscal measures, the free movement of persons or provisions on the rights of workers.¹⁴⁴ Freedom of establishment may be gradually granted to Network Energy companies upon separate agreement between the parties to the Treaty,¹⁴⁵ but no provision on the free movement of services or capital is included.

Being closest to a true extension of the internal market by the first part of the definition, the limited substantive scope of the envisaged internal market in Network Energy, nevertheless, makes it questionable whether this particular sectoral market would,

¹⁴⁰ Article 3(a) ECT.

¹⁴¹ Article 3(c) ECT.

¹⁴² Article 41 ECT.

¹⁴³ Article 42(1) ECT.

¹⁴⁴ Article 42(2) ECT.

¹⁴⁵ Article 34 ECT.

indeed, correspond to an extension of the EU's internal market. Since it excludes several of the core elements of the internal market – the free movement of persons, services, capital and, unless the contracting parties decide otherwise, the freedom of establishment – it is difficult if not impossible to regard the internal market in Network Energy as an example of true extension of the internal market. The conclusion would be different if the specific nature of both the sectoral market in Network Energy and the EU's internal market in energy did not at all include an element of, for example, the free movement of persons or services. In such a case it would be impossible to regard these fundamental freedoms as an essential element of the core of this sector of the EU's internal market and the internal market in Network Energy could, subsequently, be considered equivalent to the EU internal market. No such exceptions from the fundamental freedoms are, however, explicitly envisaged in the EU's internal market in energy.

Article 5 ECT provides that the Energy Community is to follow the development of EU *acquis* in the relevant areas – energy, environment, competition and renewables. Throughout the Treaty, the term 'extension of the *acquis communautaire*' is used but the reference to the EU *acquis* does not envisage any level of uniformity comparable to the EEA Agreement. The relevant EU *acquis* must be modified before implementation in the Energy Community to suit both the institutional framework of the latter as well as the specific needs of the contracting parties for the sake of investment security and optimal investments.¹⁴⁶

The Single Energy Market set up by the ECT functions separately from the EU legal order. Of sectoral scope and custom designed for the participants of the Energy Community, the Treaty does not present the Single Energy Market as a literal extension of the energy sector of the EU internal market. This approach is in principle similar to the EEA that forms a separate legal order albeit drawing heavily on the regulatory framework of the EU.

Drawing parallels with the EEA Agreement, the ECT seeks to ensure uniformity neither within the Energy Community itself nor between the *acquis* of the EU internal market and the law of the Energy Community. Firstly, the method used by the Energy

¹⁴⁶ Articles 5 and 24 ECT.

Community to update its legal framework to changes in EU law is expressed in a less imperative manner than the equivalent in the EEA Agreement.¹⁴⁷ Although both Article 98 EEA Agreement¹⁴⁸ and Articles 25 and 42(1) ECT¹⁴⁹ state that the respective legal areas *may* amend their legal frameworks to follow changes in the EU *acquis*, the EEA Agreement provides for an extensive procedural framework for the simultaneous updating of EU and EEA law.¹⁵⁰ Secondly, the EEA Agreement does not provide for any possibility to take into account the particular circumstances of the contracting parties in the implementation of new or amended EU *acquis*. The only exception is provided by the procedure in which the EEA Joint Committee approves amendments to the Agreement and its Annexes. Pursuant to Article 102(3) EEA Agreement both the contracting parties and the Joint Committee must make all efforts in order to ensure the homogeneity and proper functioning of the Agreement. The ECT, on the other hand, is ready to take into account any special needs of the contracting parties when updating the Treaty, thus paving way for greater divergences in the Energy Community legal order.

The ‘exceptions clause’ of Article 24 ECT is comparable with Article 27 TFEU, which allows for temporary exceptions from internal market harmonisation measures for developing economies. Considering that the TFEU exceptions clause does not conflict with the idea of the unity of the internal market, especially due to the temporary nature of the derogations allowed by Article 27 TFEU, if the exceptions allowed by Article 24 ECT, too, are only temporary in nature there is little ground to consider them contrary to the idea of a uniform¹⁵¹ Energy Community. As concerns the single market in Network Energy, the ECT refrains from specifying any grounds for deviation by the contracting parties from the Measures that the Energy Community may adopt in order to create the

¹⁴⁷ For details see below chapter 6.

¹⁴⁸ ‘The Annexes to this Agreement and Protocols [...] may be amended by a decision of the EEA Joint Committee [...].’

¹⁴⁹ Article 25 ECT reads as follows: ‘The Energy Community may take Measures to implement amendments to the *acquis communautaire* described in [Title II], in line with the evolution of European Community law’; Article 42(1) ECT reads: ‘The Energy Community may take Measures with the aim of creating a single market without internal frontiers for Network Energy.’

¹⁵⁰ See Article 102 EEA Agreement. Article 102(1) reads: ‘In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement.[...]’

¹⁵¹ In the meaning of unity, not uniformity.

single market. Any further forms of differentiation between the EU and the Energy Community *acquis* are to be introduced via the normal decision-making procedure.

In order for the Single Energy Market to be regarded as an extension of the internal market of the EU, full uniformity is not required. Unity of a true extension of the EU's internal market in energy demands adherence to the basic set of core principles that apply to the overall concept of a single market. In the case of the Energy Community Treaty, the objectives as concern uniformity with EU *acquis* are worded in an ambiguous manner. This imprecision, in turn, is greatly reflected in the limited scope of the application of the fundamental freedoms in the Energy Community as well as in its institutional framework.¹⁵² Differently from the EEA and the ECAA, the Court of Justice has, unfortunately, not yet scrutinised the aims of the Energy Community Treaty with the view of identifying the depth of integration between the two legal orders.

4.3 European Common Aviation Area

Compared to the Energy Community Treaty, the aims of the ECAA Agreement are significantly more ambitious and, indeed, similar to those of the EEA Agreement. The aim of the ECAA Agreement is to create a highly integrated¹⁵³ ECAA based on mutual/free market access to the air transport markets of the contracting parties along with the freedom of establishment, equal conditions of competition, and respect of the same rules.¹⁵⁴ In Opinion 1/00, the Court of Justice has had the opportunity to directly compare the aims of the ECAA Agreement with those of the EEA Agreement. In the Opinion, the Court affirmed the similarity of the aims of the EEA and the ECAA agreements in 'extend[ing] the *acquis communautaire* to new States, by implementing in a larger geographical area rules which are essentially those of Community law' notwithstanding the narrower, sectoral scope of the latter.¹⁵⁵ The text of the ECAA Agreement itself contains no references to 'homogeneity'. In Opinion 1/00, however, the Court refers to the uniformity objectives of the ECAA both in terms of 'uniform interpretation' and 'homogeneous interpretation'.¹⁵⁶

¹⁵² Elaborated below in chapters 6 and 7.

¹⁵³ Opinion 1/00 ECAA [2002] ECR I-3493, para 2.

¹⁵⁴ Recital 1, Preamble to the ECAA Agreement; Article 1(1) ECAA Agreement.

¹⁵⁵ Opinion 1/00 (n 147) paras 3 and 7.

¹⁵⁶ *ibid* paras 11 and 40.

The basic idea of homogeneity in the ECAA, too, lies in equal conditions of access to the aviation markets of all contracting parties, both in- and outside the EU.¹⁵⁷ For this, Article 1 ECAA Agreement envisages free market access, freedom of establishment, equal conditions of competition, and common rules in certain key areas – all based on EU *acquis*. Equal access to the common aviation market requires that the uniform rules as well as the permissible derogations from them, which are considered compliant with the idea of unity of the market, must extend to the third country contracting parties. A case in point are the transitional arrangements provided in Article 27 ECAA Agreement that also occur in the EU Treaties and are generally considered an example of permissible differentiation. Homogeneity in the ECAA does not, therefore, amount to complete uniformity of rules and interpretation as the objective of the agreement – equal market access – can be fulfilled under the conditions of unity, just as in the case of the EU internal market. Alike the latter, the ECAA is constructed upon a core of internal market principles and permissible derogations surrounded by peripheral provisions, the latter of which do not need to be complied with in a uniform manner in order to ensure the proper functioning of the Agreement. As in the case of the Energy Community, however, unless the specificities of the EU aviation market allow for the absence of certain fundamental freedoms, such as the free movement of goods, persons and capital, the lack of these elements in the ECAA is detrimental to the unity of the ECAA *vis-à-vis* the EU internal market in aviation.

4.4 The legal nature of homogeneity clauses

The above analysis demonstrates that each of the three multilateral agreements under scrutiny share a common objective to create a common legal space bringing together the EU and, in some cases, the EU Member States, on the one hand, and third countries, on the other. Another common feature of the agreements is the central method of achieving this common legal space – the export and corresponding adoption of EU *acquis* by third countries. The three agreements, however, differ somewhat as to the breadth of integration – comprehensive or sectoral – and to some extent also the depth of integration as regards the inclusion of all or some of the core elements of the internal market. In the internal dimension, it is reasonable to conclude that the EEA, the Energy

¹⁵⁷ *ibid* para 9.

Community and the ECAA do not diverge from the EU in terms of either the aims of commonness featured in the respective agreements or the efforts to maintain unity within the legal orders. In the dimension of the EU and the multilateral agreements, the connection is not expressed in an explicit but an implicit manner and can be deduced primarily from the specific means adopted to maintain 'homogeneity' between the EU and the EEA, the Energy Community and the ECAA legal orders, respectively. The specific means in question are, primarily, the extension of the EU *acquis* to third countries and, secondly, the institutional and procedural means for ensuring that the exported *acquis* is properly applied and implemented.¹⁵⁸ From the setting up of this particular system of norms export it can be inferred that the objective of the contracting parties to the multilateral agreements has been to create a link of homogeneity also between the EU, on the one hand, and the EEA, the Energy Community and the ECAA, on the other hand.

The question that remains is what exactly is the legal nature of the homogeneity clauses featured in the multilateral agreements, both in the internal and the EU-related dimensions. The question pertains to the existence of an actual and legally enforceable obligation of the contracting parties to uphold homogeneity within the legal orders created by the agreements and between those legal orders and that of the EU.

In sections 2 and 3 of this chapter it was concluded that the internal market enjoys a degree of unity that is inherent to it and forms part of its definition. The unity of a legal order, on the other hand, is necessary for upholding the balance of the rights and obligations among the parties to a common undertaking. The unity in both a legal order and the internal market is determined by the presence of a distinct set of central elements – the core. In the EU-related dimension of homogeneity of the multilateral agreements, the unity of the extended internal market or a sector thereof is determined by the core which is characteristic to the internal market or the particular sector, be it all four fundamental freedoms and competition policy plus the relevant non-economic elements or only those aspects which are relevant for the particular sector of the internal market in question. According to Barents, unity is not 'a legal principle, to be upheld as much as possible' nor an objective but precisely the *status quo* of the internal market in order not to avoid balancing against other interests and, thereby, the dilution of the

¹⁵⁸ These means are discussed in detail below in chapters 6 and 7.

importance of unity.¹⁵⁹ For the idea of an extended EU internal market it is, therefore, important that the extended market in its entirety feature the unity which is inherent to its definition.

With respect to the EEA, Energy Community and ECAA legal orders, it must be asked whether the homogeneity claim is, as with the unity of the EU internal market, an inherent feature of the extended internal market or the respective legal orders or, indeed, an objective to be striven after. As a second aspect it should be asked whether homogeneity in the legal orders created by the multilateral agreements refers to the legal orders themselves as they share broadly the same objectives as the EU internal market, or the relationship between these legal orders and the EU.

In general terms, it is not justified to regard the homogeneity claim put forward in the multilateral agreements any differently from the unity in the EU legal order. As concerns homogeneity of the extended internal market, it requires that all core elements of the internal market be in place as well as the inherent unity of those elements. Whether this is the case in the EEA, the Energy Community and the ECAA is a question of whether, indeed, all the relevant elements are included in the respective agreements. According to a functional approach, homogeneity in the expanded market is guaranteed to the extent that the market features elements which enable the market to fulfil its function. The function of the internal market can be traced back to the definition of the internal market as provided in the EU Treaties, the specific objectives of the EU as regards the internal market, and the general objectives of the Union.

In order to export the EU internal market *acquis* to non-EU Member States it is not necessary to copy all legislation adopted in the EU. For the functioning of the market it suffices if there is unity, i.e. shared core elements surrounded by more or less optional elements connected by means of a dimension of permissible differentiation. Moreover, instead of a collection of individual legal acts in force in the EU that would provide for empirical homogeneity in the market spaces created by the multilateral agreements, it is a set of principles that make up the internal market. The composition of the principles and their interaction with one another is not static. It is subject to modifications in primary and secondary EU law as well as in the case law of the Court of Justice.

¹⁵⁹ R Barents (n 2) 214.

As regards homogeneity of the legal orders set up by the multilateral agreements, in the internal dimension homogeneity should, firstly, be equalised with unity rather than uniformity. Concerning the link between the EEA, the Energy Community and the ECAA and the EU, there is neither any reason to impose on the third-country counterparts a stronger obligation of adherence to EU rules than on EU Member States. Unity should, thus, be the norm even in this dimension of homogeneity.

The final question pertains to the legal nature of the homogeneity claims in the multilateral agreements. It was concluded above that unity of the internal market is not a legal obligation incumbent upon the contracting parties. The provisions of an international agreement lay out obligations as well as the means of achieving them. Both are determined in mutual agreement between the parties. A proper performance of the provisions of the agreement by employing the substantive, institutional and procedural means provided therein should lead to a homogeneous EEA, Energy Community or ECAA. The task of creating homogeneity rests on the treaty fathers and the decision-making bodies of the relevant agreements whereas the obligation to maintain the homogeneity is equally the responsibility of the states parties to the agreement.

The homogeneity clauses can be considered either an obligation of result or best endeavour.¹⁶⁰ Obligations of result set very clear goals to be achieved whereas obligations of best efforts require that all necessary means be employed without an imperative compulsion of actually reach the goal, notwithstanding the legal character of the obligation. The latter type of obligations is particularly characteristic of public international law.¹⁶¹ The distinction between a legal or normative and a non-legal, political or pre-normative obligation lies in the enforceability of the obligation in a court or tribunal and the possibility of incurring responsibility for non-performance.¹⁶² The performance of the substantive provisions of an international agreement is in EU law, with regard to the EU Treaties, further strengthened by the principle of sincere

¹⁶⁰ French law knows *obligations de résultat* directed at achieving a result and *obligations des moyens* concerning the use of appropriate means, see EA Farnsworth, 'On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law' (1984) 46 *University of Pittsburgh Law Review* 1, 3.

¹⁶¹ See P Weil, 'Towards Relative Normativity in International Law' (1983) 77 *American Journal of International Law* 413.

¹⁶² *ibid* 415.

cooperation,¹⁶³ and in public international law by the general principle of good faith.¹⁶⁴ An example of an obligation of result in EU law includes the rule of equal treatment that 'by its nature' is enforceable in a court.¹⁶⁵ An example of an obligation of best endeavour is contained in Article 2 of Annex III to the ECAA Agreement providing that the ECAA contracting parties shall seek to gradually approximate their laws on state aid and competition to the EU *acquis*.

The homogeneity clauses of the multilateral agreements are not as explicit as the latter example and are, moreover, often located in the preambles to the agreements. The homogeneity clauses resemble more closely the general political objectives of the EU found in, for example, Article 3(3) TEU than the concrete legal obligations regarding the means of establishing the internal market provided in the TFEU. The programmatic nature of the homogeneity clauses makes them legally unenforceable. They, therefore, serve primarily as guidance to lawmakers. As such, it is unnecessary to regard the question of homogeneity in the multilateral agreements *vis-à-vis* the EU legal order as a question of compliance but rather as the common objective justifying the means employed for achieving it.

5 Conclusion

The above analysis has demonstrated that both the EU legal order in general and the internal market in particular are to some extent flexible notions. Strict uniformity is neither required nor always desirable in order to accommodate various differences between the EU Member States. Neither is the EU or the internal market a collection of separate national legal orders. A certain, and important, notion of unity is inherent especially to the concept of the internal market but also to the EU legal order as a whole. The perception of unity as part of the definition of the EU and the central part of its legal order – the internal market – is closely related to the functional understanding of the tasks of the Union. In order for the EU to be able to successfully deliver the outcomes expected from it by the contracting parties it is necessary that the legal order and the internal market feature a certain degree of unity. All derogations, in order to comply with

¹⁶³ Article 4(3) TEU.

¹⁶⁴ *Nuclear Tests (Australia v France)*, Judgment, 1974 ICJ Reports 253, 268.

¹⁶⁵ Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301, para 58.

the understanding of unity, must be accepted by the other Member States either in the form of generally agreed derogations provided in the Treaties or individual opt-outs separately negotiated by the individual Member States. The limits of permissible differentiation are found in the core of the EU legal order and the internal market and amount in the latter to the four fundamental freedoms, equal conditions for competition and the relevant non-economic elements that affect the scope of the economic core principles.

As well as EU *acquis*, the international agreements that extend the internal market to third countries also extend the concepts of EU law and the EU's internal market as consisting of a uniform set of rules. The legal orders of the EEA, the Energy Community and the ECAA feature an inherent unity, or homogeneity, as well as a degree of unity *vis-à-vis* the EU internal market. To constitute a real extension of the EU's internal market or a sector, thereof, the EEA, the Energy Community and the ECAA legal orders must also comprise the same core set of indispensable elements that are characteristic of the internal market as a whole or the corresponding sector of the EU's internal market in the case of sectoral agreements. Without a sufficient link between the international agreements exporting the *acquis* and the EU internal market to the extent of the core elements of the internal market these extensions cannot, however, neither empirically nor functionally, be equalised with the conditions offered to market participants by the internal market of the EU.

In addition to substantive provisions, the equality of the conditions for market participation and, thereby, unity of the enlarged market depends also on the special principles giving effect to EU law, the foundational principles, which are considered in the following chapter.

Chapter 4 Internal market: the context

1 Introduction

Before the famous assertion of the Court of Justice in *Van Gend en Loos* that the EEC constituted a ‘new legal order of international law’,¹ there must have been little doubt that the European Communities as established by the European Coal and Steel Community (ECSC) Treaty and the Rome Treaties were yet another example of international organisations established under public international law and functioning under the rules of the latter. It took, however, little time for the Court of Justice to confirm that the legal character of the Communities, and especially of the rules created by it went, in fact, beyond the traditional concept of an international organisation. Subsequently, the traditional conception of the effect in the national legal orders of rules developed on the international plane underwent a significant change.

Countless scholarly works have been dedicated to the foundational principles of the EU, including their emergence, their application and their reception by the Member States. The following analysis is dedicated to the question of how the changing nature of the Union from an international organisation to a ‘new legal order’ created by a ‘constitutional charter’² affects the internal market. Focusing on four of the constitutional principles – direct effect, primacy, state liability and consistent interpretation – comparisons are made between the potential operation of internal market rules in legal settings governed by public international law, EU law, and the multilateral legal orders of the EEA, the Energy Community and the ECAA, the latter operating in the grey area somewhere in between the former two.

2 The effect of internal market provisions in national legal orders

2.1 Public international law

The EU has not been a supranational organisation since the very foundation of the European Communities. The founding Treaties were concluded as ordinary multilateral

¹ Case 26/62 *Van Gend en Loos* [1963] ECR 1, para 3.

² Opinion 1/91 *EEA I* [1991] ECR I-6079, para 21.

international agreements between the six original members of the original European Communities – sovereign states exercising their sovereign powers. Being regular international agreements, their operation was determined by the rules of international treaty law and the domestic effects of their provisions by the national legal systems. Pursuant to one of the most fundamental provisions of the international law of treaties the states by concluding international agreements bind only themselves with respect to one another. This is an expression of the concept of international legal personality and the idea that the subjects of international law can assume rights and obligations only *vis-à-vis* other subjects of international law. Consequently, the responsibility for breaches of international obligations rests with states as the bearers of the obligation in question and not with the citizens of that state. Neither can the aggrieved individuals generally³ have recourse to remedies such as bringing a case against the breaching state, either their own or another, to an international court or tribunal. The foregoing reflects the traditional idea of national states as sovereign and autonomous in relation to one another.

The concept of state sovereignty has generally been the primary factor shaping the relationship between international law and national law and determining the effect of rules of international law origin in the national legal orders. Insofar as individuals are traditionally not seen as subjects of international law, international agreements cannot usually bind them directly either in the form of rights or obligations. In order to fulfil the obligations arising from the treaty *vis-à-vis* the other contracting parties, the state in question in most cases needs to, first, give effect to the provisions of international law by translating them into the national legal system. Whether there exists a general constitutional provisions giving effect to all international agreements on the basis of a set of predetermined criteria or whether each treaty needs to be introduced to the national legal order separately is a question left to be determined the constitutions of each individual state. The existence and effect of international law in the national legal orders is, thereby, always to be determined by a provision of national constitutional law.

International law does not prescribe the methods by which international law should be made part of the national legal order. The choice of methods for introducing

³ Unless the particular agreements so provide, for example the ECHR and bilateral investment treaties.

internationally binding norms into the national legal orders and thereby giving them effect is up to the states and their constitutional law and practice to determine. On the international plane, states are bound by the principle of *pacta sunt servanda* established by Article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT) and recognised as a general principle of international law, to perform every treaty in force in good faith as it is binding upon the parties.⁴

The two well-known positions on the relationship between international law and national law – monism and dualism – and their many variations have been widely discussed in literature.⁵ In states which adhere to the Kelsenian model of monism the international obligations assumed by the state become part of national law from the moment the treaty enters into force for that state. Strict adherence to the constitutional law of the state in question is required at the moment the international obligations are assumed. Treaties which have been concluded *ultra vires* do not become legally binding for the individuals of the country because the national constitutional law requirements have not been met. Generally, no further national legislation needs to be adopted in order to render the rules binding on the state and on its citizens.

The fact that the rules of an international agreement have become ‘the law of the land’⁶ does not, on the other hand, give definite information about the possibility for citizens to extract from the provisions of the agreement specific rights and obligations. The status of ‘the law of the land’ is inconclusive as to the judicial enforceability of the international norm. In reference to the latter, the terms ‘self-executing’ and ‘non-self-executing’ treaties are often used.⁷ Self-executing treaties, originating in the United States (US) legal system,⁸ grant rights and obligations to individuals directly from the moment the treaty has been ratified by the state. For that effect, no further legislation on behalf of the state

⁴ Recital 3, Preamble to the VCLT.

⁵ See, for example, A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013); J Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012); MD Evans, *International Law* (Oxford University Press 2014); MN Shaw, *International Law* (Cambridge University press 2014); FG Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* (Sweet & Maxwell 1987).

⁶ Article VI US Constitution reads as follows: ‘[...] all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land’.

⁷ In fact, what should be considered self-executing or not are the separate provisions of an international agreement and not necessarily the agreement in its entirety.

⁸ See Y Iwasawa, ‘The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis’ (1985) 26 *Virginia Journal of International Law* 627, 627-628.

is required. Non-self-executing treaties, such as all international agreements in dualist legal systems, on the other hand, require implementing legislation to take effect in relation to individuals. Their position in the national legal systems – directly applicable or not – is subject to debate.⁹

Questions often asked are what determines the self-executing character of a treaty and whether that character depends on the nature of the provisions of the treaty or a formal determination by the legislature or the judiciary. There is no single answer to these questions. In the case of self-executing treaties in the US, the answer incorporates both elements. Both the provisions of the treaty that may require implementing legislation as well as the subject matter of the treaty insofar as it falls within the realm of Congress powers¹⁰ play a role in determining whether the concrete provisions of an international agreement is self-executing and thus directly incorporated into US law or not.¹¹ In determining whether a treaty is self-executing or not the separation of powers between the legislative and the judiciary is the key issue.¹² Aust adds to this list of characteristics also those specific to the treaty on question: the language and purpose of the treaty, the specific circumstances of its conclusion, and the question of whether further specification is needed in order to grant a right enforceable by individuals from the treaty.¹³ The latter point, however, departs from the idea that monism and dualism are used in order to denote the ‘validity’ or ‘existence’ of international law norms in the national legal orders, as compared to the ‘applicability’ of the provisions.¹⁴ The monism-dualism divide provides no information as to the possibility for individuals to extract rights from those provisions. Vazquez, instead, classifies as non-self-executing treaties on the basis of which individuals would otherwise have no course of action to claim their

⁹ D Sloss, 'Domestic Application of Treaties' in DB Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 367, 386-388.

¹⁰ The executive cannot, by adopting an international agreement, circumvent the powers of the Congress to legislate in a given area.

¹¹ RE Dalton, 'United States' in DB Hollis, ML Blakeslee and LB Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff Publishers 2005) 765, 788. For a comprehensive list of criteria for determining the self-executing character of treaties, see Y Iwasawa (n 8) 653ff.

¹² C Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 *American Journal of International Law* 695, 696.

¹³ A Aust (n 5) 176.

¹⁴ RA Wessel, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 7, 13; Y Iwasawa (n 8) 643.

rights under the treaty as such.¹⁵ The existence of a particular 'cause of action',¹⁶ or the existence of a private right is not indispensable because not all provisions require a private right of action to exist in order for the treaty to be enforced by the courts.¹⁷ Winter finds that the defining feature of a self-executing treaty is the creation of individual rights without prior legislative action,¹⁸ while Koller adds that the creation of rights for individuals does not stand in the centre of the concept of self-execution in the US.¹⁹

In dualist systems, the state assumes the rights and obligations conferred by the international agreement upon expressing its consent to be bound by the agreement and the entry into force of the latter. In order for the treaty to assume effect in the national legal order further national legislative action is needed in accordance with national constitutional law. In dualist legal systems, the rights and obligations which can be assumed by citizens are provided in national law and not in the international agreement itself. The means of transposing or incorporating international law provisions into national law differ from one dualist country to another. In some states, it is common practice to adopt laconic legislation stating only that the international agreement in question has been ratified according to the domestic procedures – approval by the legislature – and includes the text of the agreement as an attachment. This procedure exemplifies the division of powers between the executive and the legislature. In these cases, the treaty is domestically 'valid' but little is revealed about the effect of its provisions and their justiciability by individual actors. In other dualist states, provisions of international agreements are transposed into national legislation in their entirety, their international law origin of the provisions subsequently losing all relevance. Whether the particular provision in question confers rights and obligations on individuals that the latter can invoke in courts depends on the provision at hand. The pure dualist model does not recognise the effect of unincorporated treaties in the national legal order. In practice hybrid states exist including, for example the United

¹⁵ C Vazquez (n 12) 697.

¹⁶ S Prechal, 'Does Direct Effect Still Matter?' (2000) 37 *Common Market Law Review* 1047, 1053-1054.

¹⁷ C Vazquez (n 12) 719-720; also Y Iwasawa (n 8) 631.

¹⁸ JA Winter, 'Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law' (1972) 9 *Common Market Law Review* 425, 429.

¹⁹ AE Evans, 'Self-Executing Treaties in the United States of America' (1953) 30 *British Yearbook of International Law* 178, 190.

Kingdom where, being a dualist state, unincorporated treaties can be used for interpreting domestic statutes.²⁰

The self-executing character of a provision of an international agreement is generally determined by a court, either national or international, with the exception of treaties that explicitly require implementation by national legislation.²¹ In monist legal systems it is most often the judiciary that decides whether a provision of a treaty should be considered directly applicable or not. In dualist legal systems the analysis is rather the task of the legislature that has to establish whether precise implementing legislation is needed.²² In some instances, the provisions of a treaty are generally regarded as self-executing, also in the meaning of creating private rights that individuals can invoke directly on the basis of the treaty. This is increasingly the case for human rights and environmental treaties that create individual rights, such as the ECHR.²³ The task of creating appropriate remedies in the national legal system rests with the national legislature but by virtue of Article 13 ECHR, which states that the contracting parties must ensure that 'effective remedies before a national authority' are in place. Depriving individuals of such effective recourse will constitute a direct breach of the international law obligation that the contracting states have assumed upon concluding the convention. Another example of international agreements that contain specific provisions allowing individuals to bring claims against States for breaches of the treaty obligations are bilateral investment treaties which establish tribunals for the settlement of disputes.²⁴

Rightly so, a number of authors have considered the monist-dualist dichotomy both unnecessary and uninformative.²⁵ A reasonable alternative to this formalistic

²⁰ Examples of United Kingdom case law: *James Buchanan & Co. Ltd. v Babco Forwarding and Shipping (UK) Ltd.* [1978] AC 141; *Fothergill v Monarch Airlines Ltd.* [1981] AC 251; TC Hartley, *The Foundations of European Union Law* (Oxford University Press 2014) 204.

²¹ A distinctive case is that of 'non-self-executing declarations' issued by the US Senate and subject to great controversy because of their effect on the domestic application of the treaties subject to the declaration, see LF Damrosch, 'Role of the United States Senate Concerning Self-Executing and Non-Self-Executing Treaties' (1991) 67 *Chicago-Kent Law Review* 515.

²² A Aust (n 5) 174.

²³ EB Weiss, 'Invoking State Responsibility in the Twenty-first Century' (2002) 96 *American Journal of International Law* 798, 809ff.

²⁴ G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121, 129.

²⁵ 'There are almost as many ways of giving effect to international law as there are national legal systems.': E Denza, 'The Relationship between International and National Law' in MD Evans (ed), *International Law* (Oxford University Press 2006) 423, 429. According to von Bogdandy, they constitute 'intellectual zombies

construction has been offered by Sloss who takes a functional approach and asks how national courts actually deal with treaty obligations and the situations of granting individuals the rights provided to them by an international agreement.²⁶ The functional approach asserts that judges in dualist systems often find ways to incorporate international agreements concluded by the state whether incorporated in the national legal order or not; judges in monist legal systems, in the meantime, seek possibilities to avoid applying ratified treaties relying on their non-self-executing character.²⁷ The growing inclination of national courts to give effect to unincorporated international norms has been called 'creeping monism'.²⁸ Courts are most likely to apply the functional approach in cases where an international agreement creates rights either between individuals within one country or between individuals in different countries – vertical and transnational provisions, respectively.²⁹ To denote the monist-dualist dichotomy, Sloss instead refers to 'transnationalist and 'nationalist' decisions which describe the inclination of national courts towards fulfilling international obligations or the prescribed division of powers, respectively; on the one hand, one needs to safeguard the rights of private actors whereas, on the other hand, one needs to duly respect the separation of powers within the state.³⁰ When it comes to the recognition of the 'validity' or 'existence' of international norms, the transnationalist judges are more keen to approve such validity than their colleagues representing the nationalist camp.

Not only national courts but also international courts deal with the question of the domestic effect of international rules, albeit in a more implicit form. The first international court to recognise the direct effect of the provisions of an international agreement was the Permanent Court of International Justice (PCIJ). In the case *Jurisdiction of the Courts of Danzig*, the PCIJ was asked to determine whether the 'Beamtenabkommen' concluded between Poland and the Free City of Danzig provided the Danzig railway officials who had passed to the Polish railway service the right to bring

of another time and should be put to rest': A von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 *International Journal of Constitutional Law* 397, 400.

²⁶ D Sloss (n 9) 368.

²⁷ *ibid* 376.

²⁸ For definition, see MA Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628, 633.

²⁹ D Sloss (n 9) 377-378.

³⁰ *ibid* 378-379.

claims against the Polish Railways Administration.³¹ The question did not concern the validity of the agreement in Poland or the Free City of Danzig but rather, the direct effect of those provisions in the meaning of whether or not they confer rights on individuals. In other words, and as submitted by the Free City of Danzig during the proceedings, the question was about whether the domestic effect of the provisions of an international agreement should be determined by each contracting party on the national plane or whether the effect of the provisions could be ascertained internationally and, thus, extracted from the intention of the parties and the wording of the treaty.³² The PCIJ affirmed the latter.

In its reasoning, the PCIJ restated the general principle of international law according to which international agreements only bind the contracting parties yet recognised that if the contents of the agreement showed that the essence of the international obligation is to grant rights and obligations to individuals that the latter can enforce in national courts then this must be considered to be the very substance of the obligation.³³ The PCIJ found that the object of the agreement and the intention of the parties was the establishment of 'a special regime governing the relations between the Polish Railways Administration and the Danzig officials, workmen and employees' – thus, individuals – and also identified the practice of the parties of giving effect to the provisions of the agreement.³⁴ What sufficed for the PCIJ in order to establish the direct effect of the *Beamtenabkommen* were, firstly and implicitly, the sufficiently clear and unconditional wording of the provision to create rights for individuals that renders a different interpretation impossible and, in fact, amounting to a breach of the treaty; and, secondly, that the contracting parties through the execution of the provisions of the agreement had given effect to them even in the absence of implementing legislation.

Among international agreements, the doctrine of direct effect has been most carefully carved out in the case of the EU.

³¹ *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ Series B No 15, 17.

³² *ibid* 17.

³³ *ibid* 17-18.

³⁴ *ibid* 18.

2.2 EU law

The introduction of the principle of direct effect of international law in national legal orders is not attributable to the EU. There was, however, one substantive aspect introduced by the founding Treaties that gave the European Communities an impetus for a development that was fundamentally different from other international organisations created to that date. This distinctive element was of an institutional nature and provided for the setting up of a Court of Justice to adjudicate on disputes arising from the application of the Treaties as well as to give binding interpretations of the rules contained therein. As concerns the principle of direct effect, the role of the Court was not to introduce it to the international scene but to lay down the criteria for its application coherently across the EU.³⁵ The domestic effect of EU law provisions is determined by one authoritative source, although in practice the principle is mainly enforced by the national courts of the Member States.

Already the founding fathers of the European Communities had the intention of going beyond what was offered by international law at that moment, namely the *ad hoc* recognition of the direct effect of international law by international courts and tribunals. The original contracting states envisaged a different type of an international organisation – one which would not only comprise interaction and cooperation between the Member States but go beyond and penetrate the sovereignty of the Member States to a degree until then unprecedented in international law. The founding members of the EU aimed at joining together not only the Member States but also their citizens. The ‘ever closer union between the peoples of Europe’ as articulated in the preamble to the EEC Treaty has proven crucial to the development of EU law. In the course of the decades that have passed since the founding of the Communities, the ‘peoples of Europe’ have progressively become the European individuals. This difference between the actors – the states and the peoples – is at the first sight just about noticeable. Yet it has assumed great importance in the narrative of the EU and may prove to be one of the main reasons for why rules of EU origin, such as those of the internal market, may function differently in the EU than outside.

³⁵ E Denza (n 25) 437-438.

From the perspective of international treaty law, EU Treaties are not completely revolutionary. They are concluded under international law by subjects of international law – states – and are, as well as amendments to them, subject to the conventional rules of international treaty law. This includes both the rules of customary international law as well as the VCLT which largely codifies the former. As a result, the Member States determine the international validity of the provisions of the treaty and their constitutional law the validity of the provisions in the national legal orders. The national legal orders fall either into the category of a monist or a dualist state or a hybrid between the two. For the monist Member States, the introduction of EU law into the national legal order was uncomplicated whereas the dualist states needed to adopt implementing legislation or even amend their constitutions. Unsurprisingly, the provisions of EU Treaties are binding on all Member States and their applicability – direct or indirect –, therefore, not subject to discussion. Questions as to the direct effect or the justiciability of the provisions, on the contrary, continue to be subject to a debate. The effect which provisions that are identical to the EU internal market *acquis* have in the legal orders of non-EU Member States is also a crucial aspect in determining whether the concept of the EU internal market can be extended beyond the EU while maintaining its effectiveness.

Despite some opinions to the opposite,³⁶ the distinction between ‘direct application’ and ‘direct effect’ of EU law is, indeed, relevant for the present discussion. In the first place, the difference between the two terms is a linguistic one. Since one of them appears in the language of the Treaties and both can be found in the case law of the Court of Justice, there arose a need to also substantiate them differently.³⁷ ‘Direct applicability’ is generally used to denote the immediate legal force that a provision, or a legal act as a whole, assumes in the legal orders of the Member States. Direct applicability entails that the Member States do not need to take further legislative action, nor are they in some instances allowed to,³⁸ in order to make the rules ‘the law of the land’. The provisions of the Treaties are directly applicable because all Member States have fulfilled the

³⁶ TC Hartley (n 20) 215.

³⁷ *ibid* 215; A Dashwood, ‘The Principle of Direct Effect in European Community Law’ (1977) 16 *Journal of Common Market Studies* 229, 230.

³⁸ Case 39/72 *Commission v Italy* [1973] ECR 101, para 17. Unless the regulation explicitly or implicitly allows for implementing measures. See, respectively, Case 128/78 *Commission v United Kingdom* [1979] ECR 419; and Case 31/78 *Bussone* [1978] ECR 2429, para 32.

requirements under their national constitutional law to give force to them domestically. The direct applicability of regulations has never been subject to controversy because of Article 288 TFEU. Decisions, too, can be directly applicable.³⁹ Neither is there a problem as regards the enforceability of recommendations which have no binding force at all. It is in the case of directives that both the notions of direct applicability and direct effect assume great relevance.

The direct applicability of directives was not envisaged by the founders of the EU who intended directives to reflect more general policy objectives whereas the Member States retain under the now Article 288 TFEU 'a choice of form and methods' to achieve the results envisaged by the directives. This idea, also expressed by the subsidiarity principle provided in Article 5(3) TEU is, however, without prejudice to the fact that the Member States are not entirely free to choose whatever implementation methods available.⁴⁰ Until the implementation deadline of the directive has passed it is neither directly applicable nor directly effective. Direct applicability of EU law serves to give the same binding force to EU provisions in all Member States, thus leading, ideally, to uniform application.

Differently from direct applicability, direct effect concerns the objective 'nature' of the legal provisions, subject to defined criteria, and not the effect attributed to them by the constitutional law of the Member States.⁴¹ Not all directly applicable regulations have direct effect.⁴² Some decisions that do not have direct applicability may, however, have direct effect.⁴³ Direct effect can be classified in two ways. The one called 'objective direct

³⁹ LJ Brinkhorst, 'S.A.C.E. v. Ministry of Finance of the Italian Republic. Case 33/70. Decision of December 17, 1970. Preliminary ruling on request of the District Court of Brescia, Italy' (1971) 8 Common Market Law Review 384, 388. For direct effect of decisions, see Case 20/70 *Transports Lesage & Cie* [1970] ECR 861, para 10; Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825, para 5.

⁴⁰ For restrictions in the form of 'guidelines', effectiveness and appropriateness, see case law indicated in D Curtin, 'Directives: The Effectiveness of Judicial Protection of Individual Rights' (1990) 27 Common Market Law Review 709, 715-716.

⁴¹ For example, Case 26/62 *Van Gend en Loos* (n 1) para 11: 'The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.'; Case 13/68 *SpA Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 453, 461: '[...] this provision lends itself of its very nature to producing identical effects on the legal relationships between member states and those subject to their jurisdiction'.

⁴² JA Winter (n 18) 435.

⁴³ LJ Brinkhorst (n 39) 390.

effect' refers to the obligations that bind the authorities of the Member States.⁴⁴ The other, called 'subjective' direct effect of EU law, pertains to the possibility for individuals to derive rights from the directive that can be invoked before a court.⁴⁵ In other words, going beyond the question of incorporating EU law into the national legal order, which is, first and foremost, for the constitutional law of a particular state to determine, for the direct effect of a provision one has to look at the specific provision at hand. Despite the distinction made between the 'objective' and 'subjective' dimensions of direct effect on the basis of the German model of *Schutznorm*, the question of whether a particular provision has direct effect or not does not depend on whether it is intended to confer rights on individuals.⁴⁶ The reason for why an individual may rely on a provision conferring individual rights is that the obligations have become binding on the Member States from the date of the implementation deadline.⁴⁷ It is, moreover, not only individuals who need to take action in order to ascertain the direct effect of EU law. The somewhat disputed 'administrative direct effect'⁴⁸ requires national administrations as well as national courts to enforce the provisions that have direct effect.⁴⁹

The direct applicability of EU law includes the obligation to apply directly effective provisions of EU law and to refrain from applying conflicting provisions of national law.⁵⁰ The obligation exists even in the absence of an individual claim that has been brought to a court.⁵¹ According to Prechal, the direct effect of EU law is generally applied in two sets of circumstances.⁵² In the first type of a situation, the directly effective provisions take the place of incompatible national legislation; in the second, inconsistent national law

⁴⁴ E Klein, 'Objektive Wirkungen von Richtlinien' in O Due, M Lutter and J Schwarze (eds), *Festschrift für Ulrich Eveling I* (Nomos 1995) 641, 642; W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501, 506.

⁴⁵ M Ruffert, 'Rights and Remedies in European Community Law: A Comparative View' (1997) 34 *Common Market Law Review* 307, 320.

⁴⁶ *ibid*, 321.

⁴⁷ Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, para 30.

⁴⁸ M Verhoeven, 'The 'Costanzo Obligation' of National Administrative Authorities in the Light of the Principle of Legality: Prodigy or Problem Child?' (2009) 5 *Croatian Yearbook of European Law and Policy* 65.

⁴⁹ B de Witte, 'Direct effect, primacy, and the nature of the legal order' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 323, 333; Case 103/88 *Fratelli Costanzo* (n 47) paras 31-32; Case C-431/92 *Grosskrotzenburg* [1996] ECR I-2189, para 26; Case C-224/97 *Ciola v Land Vorarlberg* [1999] ECR I-2517, para 33.

⁵⁰ Case 103/88 *Fratelli Costanzo* (n 47) para 31.

⁵¹ Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v SPF* [1995] ECR I-4705, para 13; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 21; Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para 57.

⁵² S Prechal, 'Does Direct Effect Still Matter?' (n 16) 1059.

must be disregarded. Both of these, in fact, are expressions of the principle of primacy of EU law.

The three traditional criteria for determining the existence of direct effect – the provision being clear, unconditional and not requiring any further legislative action – were developed by the Court of Justice in *Van Gend en Loos*.⁵³ A margin of discretion left for the Member States in the implementation of a directive may render it without direct effect.⁵⁴ Even where national authorities enjoy a margin of appreciation in their choice of implementing a directive, the limits of this margin still remain subject to judicial review.⁵⁵ The above criteria refer to the ‘justiciability’ of the directly effective provisions rather than to the substantive characteristics of the respective provision.⁵⁶ The EU system of protection of individual rights is constructed upon the individuals’ ability to enforce their rights through having recourse to national courts.

The reasoning of the Court leading to the possible direct effect of EU law was not the result of the ‘new legal order’. As discussed above, the recognition of direct effect by the Court was not unprecedented in international law.⁵⁷ Rather, the rationale behind the proclamation that the EU constitutes a ‘new legal order’ followed from the fact that it was the Court and not the constitutional law of the Member States that could make such determination. The factor that triggered the Court’s recognition of the direct effect of EU law was, as said above, the idea of the EU being founded for the benefit of the European peoples. The spirit and nature of the treaties, implicitly and echoing the will of the contracting parties as interpreted by the Court, required that EU law become enforceable directly by the EU individuals without, in certain cases, the prior action of the Member States. In the words of Winter, the Court thus interpreted the Treaties not by ‘what the drafters of the Treaty had in mind but what they ought to have had in mind’.⁵⁸ The Court’s teleological approach to interpreting the Treaty provisions have equipped the EU

⁵³ Case 26/62 *Van Gend en Loos* (n 1) paras 11-12.

⁵⁴ Case 13/68 *SpA Salgoil v Italian Ministry of Foreign Trade* (n 41) 461.

⁵⁵ Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paras 27-29.

⁵⁶ P Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’ (1983) 8 *European Law Review* 155, 176-177.

⁵⁷ O Spiermann, ‘The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order’ (1999) 10 *European Journal of International Law* 763, 766.

⁵⁸ JA Winter (n 18) 433.

with a set of concepts and principles characteristic of a federal system and have, thereby, removed the EU legal order from a pure international law setting.⁵⁹

The functional purpose of direct effect in EU law and the fact that the existence of direct effect is determined by the Court is primarily to maintain unity in the EU legal order and ensure the uniform application of EU law throughout the Union. Direct effect contributes to the 'operability' of EU law, which, through the principle of effectiveness,⁶⁰ is 'the very soul of legal rules'.⁶¹ Since the EU aims at a level of integration unprecedented among other international organisations it is of paramount importance that the rules adopted by the organisation be applied uniformly across the Union. For the internal market, the idea of uniform application of rules is central for the task of abolishing the barriers to trade that exist between the Member States, especially non-tariff barriers. There are three fundamental functions of the internal market which direct effect has made a significant contribution to: liberalisation, harmonisation and equal competitive conditions.⁶² The effective application of EU law is paramount to the achievement of the ambitious objectives of the Union. Yet what is missing from a full effect of EU law in the national legal systems is the horizontal direct effect of directives – the possibility for individuals to enforce directly effective provisions of directives in disputes between themselves and other individuals rather than the state.⁶³

The direct effect of EU law, moreover, establishes a division of powers between the institutions of the EU – on the one hand, the legislative and the executive and, on the other, the judiciary.⁶⁴ While the former determine the content of EU law the latter determines its effect. By vesting the Court of Justice with the task of determining the effect of the EU Treaties – a task which the Court itself implied from the Treaties – the Member States, furthermore, gave the national courts the possibility to establish the limits of their powers *vis-à-vis* their legislature and executive by means of the

⁵⁹ A Dashwood (n 37) 245.

⁶⁰ Case C-213/89 *Factortame* [1990] ECR I-2433, paras 20-22.

⁶¹ P Pescatore (n 56) 177.

⁶² A Dashwood (n 37) 232.

⁶³ D Curtin (n 40) 738.

⁶⁴ See submissions of the Commission during the oral procedure: Case 270/80 *Polydor v Harlequin Records* [1982] ECR 329, 343.

preliminary reference procedure.⁶⁵ The latter aspect has rendered Prechal to conclude that since the national courts have gained more powers over the national parliaments and governments, the value of the doctrine of direct effect might even have lost its function.⁶⁶

The principal rationale behind the emergence of the doctrine of direct effect arises from the question of individual rights that give 'concrete meaning' to EU citizenship.⁶⁷ In a broad sense, direct effect serves to ensure Member States' compliance with EU law. The obligation of the Member States to observe EU law includes, among others, the duty to grant rights to individuals which the latter derive directly from EU law.⁶⁸ The fact that individuals have the possibility to hold the Member States liable for breaches of EU law before national courts is a greater contributor to the due observance of EU law than decisions of the Court.⁶⁹ This, in turn, has advanced integration in the internal market and the EU more generally.⁷⁰

The scope of the provisions of EU Treaties granting rights to individuals were at the time of the conclusions of the founding Treaties unprecedented under international law. In *Van Gend en Loos*, the Court stated that individuals enjoy rights – and not just obligations – 'not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community'.⁷¹ In a sense, the recognition of individual rights was a result of the direct applicability of EU law.⁷² The position of the individuals in the European Union is, moreover, strengthened by their participation in the activities and the governance of the EU via, for example, the European Parliament and the Economic and Social Committee.⁷³

⁶⁵ D Edward, 'Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations' in, *Scritti in onore di Giuseppe Federico Mancini, Volume II* (Dott. A. Giuffrè 1998) 423, 442-443.

⁶⁶ S Prechal, 'Does Direct Effect Still Matter?' (n 16) 1065-1066.

⁶⁷ A Dashwood (n 37) 244.

⁶⁸ Case C-213/89 *Factortame* (n 60) para 19; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v SPF* (n 51) para 14; Case C-72/95 *Kraaijeveld* (n 51) para 58.

⁶⁹ D Curtin (n 40) 712.

⁷⁰ A Dashwood (n 37) 232.

⁷¹ Case 26/62 *Van Gend en Loos* (n 1) para 9.

⁷² C Kilpatrick, 'Turning Remedies Around: A Sectoral Analysis of the Court of Justice' in G de Búrca and JHH Weiler (eds), *The European Court of Justice* (Oxford University Press 2001) 143, 143.

⁷³ Case 26/62 *Van Gend en Loos* (n 1) para 8.

The fact that EU law confers rights on individuals directly without requiring further implementation by the Member States meant that an appropriate system had to be set up for pursuing those rights. In fact, according to the Court in *Van Gend en Loos*, the setting up of the system of national courts that ensure the uniform interpretation of EU law via the preliminary ruling procedure enshrined in Article 177 EC Treaty was an expression of the Member States' will to grant their nationals the possibility to rely directly on EU law.⁷⁴ In turn, this leads to the other, connected doctrines of primacy of EU law, indirect effect/consistent interpretation and state liability.

A slightly different issue than the direct effect of EU law is the possible direct effect of international agreements concluded by the EU. The Court of Justice determines the existence of direct effect of international agreements in the EU legal order⁷⁵ whereas the Member States, in the instance of mixed agreements,⁷⁶ and third country contracting parties make their own determination *vis-à-vis* their own constitutional law. Uniformity in the EU legal order, though, is guaranteed by the fact that the provisions of international agreements that fall within the scope of EU law are given the same effect across the Union regardless of who, the EU or the Member States, give effect to its provisions.⁷⁷

The EU may, together with the other contracting parties, determine the effect of the provisions of an international agreement during the negotiations. If the agreement is silent on the effect of its provisions then it is the Court of Justice that determines the effect of the provisions of the agreement in the EU legal order.⁷⁸ However, the Court is not bound to recognise direct effect even if the other contracting parties do so.⁷⁹ Since the effect of treaty provisions is a matter of national constitutional law and serves as a protector of the sovereign rights of a state, granting automatic direct effect to all international agreements that satisfy the criteria for direct effect of EU law, the EU may place itself in a less favourable position in comparison to the other contracting parties.

⁷⁴ *ibid* para 9.

⁷⁵ Case C-240/09 *Lesoochránárske zoskupenie VLK* [2011] ECR I-1255, para 33.

⁷⁶ Joined Cases C-300/98 and C-392/98 *Dior* [2000] ECR I-11307, para 48.

⁷⁷ Case 104/81 *Kupferberg* [1982] ECR 3641, para 14.

⁷⁸ Case 270/80 *Polydor v Harlequin Records* (n 64) para 17.

⁷⁹ Case 104/81 *Kupferberg* (n 77) para 18.

The court uses a two-stage test to determine the existence of direct effect of the provisions of international agreements. In the first stage, 'the spirit, the general scheme and the terms of the general agreement' are considered.⁸⁰ In *Kupferberg*, the Court found that the facts of reciprocity, possibility of consultations and the existence of safeguard clauses do not, in themselves, preclude the existence of direct effect of those provisions,⁸¹ but that the direct effect of the particular provisions of the agreement has to be determined in the context of the agreement, taking into account its object and purpose.⁸² Once it has been confirmed that the purpose and nature of the agreement allow for direct effect the *Van Gend en Loos* criteria are applied.⁸³

Generally, the Court has been accommodating as concerns the direct effect of the provisions of association agreements.⁸⁴ Firstly, in *Haegeman*, the Court considered the association agreement concluded between the EEC and Greece to form an integral part of Community law.⁸⁵ In *Kziber*, the Court gave direct effect to the national treatment provisions of the EEC-Morocco Cooperation Agreement.⁸⁶ For the purposes of establishing direct effect, the objectives of the agreement do not, however, have to amount to setting up association with the EU or referring to future membership in the Union.⁸⁷ In *Simutenkov*, the Court found that the narrower scope of PCAs as compared to association agreements and the EU Treaties does not necessarily limit the effect of its provisions in the EU legal order. *Simutenkov* concerned the possible direct effect of an equal treatment provision in the EC-Russia PCA. AG Stix-Hackl found that the PCA 'lags behind' the EAs with respect to its substantive content by not establishing an FTA and providing only for a limited freedom of movement; the institutional set-up including the dispute resolution mechanism; as well as the fact that the PCA does not aim at an

⁸⁰ Joined Cases 21-24/72 *International Fruit Company* [1972] ECR 1219, para 20.

⁸¹ Case 104/81 *Kupferberg* (n 77) paras 18 and 20-21.

⁸² *ibid* para 23.

⁸³ Case 104/81 *Kupferberg* (n 77) para 23; Case 12/86 *Demirel* [1987] ECR 3719, para 14. See also P Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 337. In the particular case of *Kupferberg*, the Court confirmed the direct effect of Article 21(1) of the EEC-Portugal FTA.

⁸⁴ PJ Kuijper, 'Customary International Law, Decisions of International Organisations and Other Techniques for Ensuring Respect for International Legal Rules in European Community Law' in J Wouters, A Nollkaemper and E De Wet (ed), *The Europeanisation of International Law* (T.M.C. Asser Press 2008) 87, 98.

⁸⁵ Case 181/73 *Haegeman* [1974] ECR 449, paras 4-5.

⁸⁶ Case C-18/90 *Kziber* [1991] ECR I-199, paras 15-22.

⁸⁷ See, for example, *ibid* paras 21-22.

association with the EU let alone accession to the Union.⁸⁸ The Court confirmed the findings of the AG and, recalling the more limited purpose of PCAs as compared to association agreements, concluded that the PCA was limited to setting up a partnership entailing 'the gradual integration between [a third country] and a wider area of cooperation in Europe'⁸⁹ without a further association or accession of the Russian Federation into the EU.⁹⁰ When considering the legal effect of the provisions of the PCA within the EU legal order, however, the Court disregarded the disparities and accorded the same direct effect to the PCA provision of non-discrimination on the basis of nationality as to the corresponding provisions in association agreements or in the EC Treaty.⁹¹

In the case law of the Court dealing with the recognition of direct effect of international agreements concluded by the EU, one of the fundamental aspects has been determining whether the system of reciprocal rights and obligations set up by the agreement would preclude the recognition of direct effect on behalf of the EU because of the EU losing a certain advantage. This is specific to the General Agreement on Tariffs and Trade (GATT) and WTO agreements that are characterised by 'reciprocal and mutually advantageous arrangements' allowing for considerable flexibility of its provisions.⁹² Negotiations between the contracting parties and countervailing measures form a crucial part of these agreements and the EU would place itself in a less advantageous position by granting direct effect to their provisions in the EU legal order. This flexibility was the reason for the Court denying the direct effect of the provisions of the 1947 GATT.⁹³ In the landmark case *Portugal v Council*, the Court held that the provisions of the WTO agreements cannot be given direct effect as this would not enable the EU to adequately respond to the

⁸⁸ Case C-265/03 *Simutenkov* [2005] ECR I-2581, Opinion of AG Stix-Hackl, paras 33-34.

⁸⁹ Case C-265/03 *Simutenkov* [2005] ECR I-2579, para 35.

⁹⁰ *ibid* paras 27-28.

⁹¹ C Hillion, 'Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*' (2008) 45 *Common Market Law Review* 815, 827. The possible grounds for derogations from the general non-discrimination clause, nevertheless, differ. This suggests that the function of the non-discrimination clause in the EC Treaty is not the same as in the PCA, referring in turn to the distinct objectives of the two agreements: *ibid* 830. This reasoning is in line with the Court's ruling in Case 270/80 *Polydor v Harlequin Records* (n 64) paras 14-21, for detailed discussion see below section 4.1.3.

⁹² Joined Cases 21-24/72 *International Fruit Company* (n 80) para 21.

⁹³ *ibid* para 27.

actions of the other contracting parties and, thus, upset the balance of reciprocal relations within the WTO.⁹⁴

Not always, though, is the question of reciprocity in the relations between the contracting parties been decisive in recognising direct effect. This concerns in particular development cooperation agreements where the nature of the agreement already determines that the one party is at the giving and the other at the receiving end. The Yaoundé Convention, for example, is a development cooperation agreement that sets up an unbalanced relationship between the contracting parties yet the Court deemed its provisions to have direct effect.⁹⁵ The same holds true for the Lomé Convention.⁹⁶

In general, the determination as to the direct effect of international agreements concluded by the EU is subject to the same test as the direct effect of EU law whereas in the case of the latter the Court already in *Van Gend en Loos* recognised that the EU Treaties pass the first step of the test. The only major difference between the procedures is, therefore, the occasional consideration of whether the granting of direct effect to a particular agreement at hand may adversely affect the reciprocal relations between the parties. The following subsection analyses whether or not the multilateral agreements exporting EU internal market *acquis* guarantee the exported rules the same effect in the third country legal orders as EU law in the legal orders of the EU Member States.

2.3 Multilateral agreements exporting EU internal market acquis

As discussed above, the sovereignty of states is not absolute as regards giving effect to international law in domestic legal orders. Determining the direct effect of international agreements by authorities other than the national judiciaries is a growing trend in the light of ever increasing regulatory cooperation between states. Most clearly this can be witnessed in the case of the EU but it is not impossible that direct effect be granted also to the provisions of the multilateral agreements that export the internal market *acquis* to non-EU Member States by bodies other than the third country national courts. Two dimensions of direct effect are relevant here: firstly, the possible direct effect of the

⁹⁴ Case C-149/96 *Portugal v Council* [1999] ECR I-08395, paras 45-47.

⁹⁵ Case 87/75 *Bresciani* [1976] ECR 129, paras 22-23.

⁹⁶ Case C-469/93 *Chiquita Italia* [1995] ECR I-4533, para 35.

provisions of the agreements in the EU legal order and, secondly, in the legal orders of the third countries.

The EU stands out among other international organisations by the fact that its legal order affects directly not only its Member States but also the peoples and, subsequently, individual actors. Internal market rules can in some circumstances be enforced directly by individuals without prior implementation action undertaken by the Member States. When it comes to the direct effect of the provisions of international agreements in the EU, it is the aspects of the nature and structure of the particular agreement including the question of reciprocity that require special attention before one can proceed with an analysis of whether the conditions for clarity, unconditional nature and the absence of a need to adopt further implementing measures have been fulfilled.

Reciprocity is crucial also in the EEA Agreement. As regards the free trade agreements concluded between the EEC and the former EFTA countries, the Commission considered the 'balance of advantages and disadvantages' is especially disturbed as the EFTA states assumed all advantages but rejected all disadvantages associated with Community membership.⁹⁷ The preamble to the EEA Agreement speaks of 'the objective of establishing a dynamic and homogeneous European Economic Area' that is grounded on 'equality and reciprocity and [...] an overall balance of benefits, rights and obligations for the Contracting Parties'. The overall balance mentioned in the preamble is significant from the point of view of establishing direct effect of its provisions, at least within the EU. The EEA Agreement does not contain a reference to the peoples of the EU and the EFTA as did the original EEC Treaty yet the preamble recognises in Recital 8 'the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights'. This is a textbook example of the connection between the rights conferred to individuals, the individuals exercising those rights, and the subsequent direct effect of the provisions which the Court has used in establishing the direct effect of EU law.

Although the EEA agreement does not, similarly to the EU Treaties, determine the direct applicability of its provisions in the national legal orders, or the incorporation of the

⁹⁷ Submissions of the Commission during the oral procedure, Case 270/80 *Polydor v Harlequin Records* (n 64) 343.

rules of international law in general, the last cited recital contains an explicit reference to the potential direct effect of the provisions of the EEA Agreement in the EU legal order. As concluded above, this is a result of the nature of the provisions seen in the context of the object and purpose of the agreement. Just as in the case of the EU Treaties, the direct applicability - but not necessarily the direct effect - of the EEA Agreement in the legal orders of the contracting parties is uncontroversial because the national procedures for making the provisions of the agreement valid in the national legal orders have been complied with upon conclusion. Clearly, the preamble to the EEA Agreement expresses the explicit will of the contracting parties to a similar degree as in the case of the EU to confer rights on the individuals as well as the 'judicial defence of these rights'. This grants perfect potential for the recognition of the direct effect of the provisions of the EEA Agreement for the purposes of protecting individual rights and, possibly beyond to achieve effectiveness of the EEA Agreement more generally provided that the *Van Gend en Loos* conditions are fulfilled.

In *Sveinbjörnsdóttir*, the EFTA Court acknowledged that the depth of integration envisaged by the EEA Agreement is less far reaching than that provided by the EC Treaty.⁹⁸ The degree of integration in the EEA is, however, higher than in a customs union or a regular free trade area,⁹⁹ even though the EEA itself is not a customs union.¹⁰⁰ The Court of Justice, too, contended in the landmark Opinion 1/91 that no parallel can be drawn between the objectives of the EU Treaties and the EEA Agreement which has a more limited scope.¹⁰¹ The more limited scope of the EEA Agreement is, however, not conclusive as to the potential direct effect of its provisions. Article 6 EEA Agreement, in fact, precludes consideration being given to the different scopes of the two agreements. The reason for this is well articulated by van Gerven who considers that the direct effect of EU law, also when extended to third countries, which is connected to the fundamental freedoms should not be affected by the broader scope of the legislative activity of the EU

⁹⁸ Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct Rep 95, para 59.

⁹⁹ *ibid* para 59; Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, para 107.

¹⁰⁰ Case E-2/97 *Maglite* [1997] EFTA Ct Rep 127, para 27.

¹⁰¹ Opinion 1/91 *EEA I* (n 2) paras 15-16.

which includes positive integration in a number of various areas even outside the internal market.¹⁰²

As a preliminary remark, it can be mentioned at this point¹⁰³ that the requirement of homogeneous interpretation of EU law and the identically worded EEA rules formally only applies to case law dating prior to the date of signature of the EEA Agreement on 2 May 1992. One further formal requirement but one containing more flexibility is contained in Article 3(2) of the EFTA Surveillance and Court Agreement (SCA). According to that provisions, the EFTA Court and the EFTA Surveillance Authority must pay due account to the principles laid down by the Court's case law on identical provisions in EU law given after 2 May 1992 when interpreting and applying the EEA Agreement.

In Opinion 1/91, the Court found that because of the Sole Article of Protocol 35 of the EEA Agreement on the Implementation of EEA Rules, which provides that the EEA EFTA States are to introduce in their national legal orders 'a statutory provision to the effect that EEA rules prevail' in cases of conflict between the EEA and national law, the homogeneity requirement in Article 6 EEA Agreement which provides for the homogeneous interpretation of identically worded EU and EEA provisions does not convey to the EEA legal order the 'essential elements of that case law which are irreconcilable with the characteristics of the agreement'.¹⁰⁴ A question that remains, still, is whether the principles of direct effect and primacy really are irreconcilable with the characteristics of the EEA Agreement.¹⁰⁵ Van Gerven, for example, finds that a broad interpretation of Article 6 EEA can also accommodate foundational principles of EU law such as primacy and direct effect insofar as Protocol 35 of the EEA Agreement so allows.¹⁰⁶ He rightly asserts that the principles of direct effect and primacy form the core of the EU legal order in the absence of which in the EEA one can hardly speak of a legal

¹⁰² W van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (1992) 16 *Fordham International Law Journal* 955, 977.

¹⁰³ Further discussed below in chapter 7.

¹⁰⁴ Opinion 1/91 *EEA I* (n 2) paras 27-28; for support of this opinion on the EFTA side, see S Magnússon and Óí Hannesson, 'State Liability in EEA Law: Towards Parallelism or Homogeneity?' (2013) 38 *European Law Review* 167, 168.

¹⁰⁵ Van Gerven believes this is not the case, see W van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (n 102) 971.

¹⁰⁶ *ibid* 971.

order 'homogeneous' with the EU.¹⁰⁷ This interpretation is backed up by Baudenbacher who has in the context of the EEA offered an alternative classification of the types of homogeneity adding to the groups of substantive and procedural homogeneity 'homogeneity with regard to effect' which pertains to the implicit application in the EEA legal order of the foundational principles of the EU – primacy, direct effect and state liability.¹⁰⁸

In answer to the Court's reasoning in Opinion 1/91, van Gerven claims that the 'essential characteristics' of the constitutive instruments of the EU and the EEA are, indeed, equivalent.¹⁰⁹ The argumentation used by the Court to establish the direct effect of EU law in *Van Gend en Loos* and the aims of the EEA Agreement regarding the position of individuals in its legal order, as well as the homogeneity claim put forward by the Agreement, its characteristics should certainly support the recognition of direct effect for its provisions under the *Van Gend en Loos* conditions. Noteworthy is the Court's statement in Opinion 1/91 according to which the EEA is established by an international agreement that 'essentially, merely creates rights and obligations as between the contracting parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up'.¹¹⁰ As discussed above, the preamble to the EEA Agreement makes it explicit that the Agreement does not merely create rights and obligations as between the contracting parties but also confers rights on individuals in a similar manner as the EU Treaties. In the case of the EU, the sovereign rights were transferred to the institutions of the Union as a consequence of the Treaties directly conferring rights and imposing obligations on individuals. The question of setting up the institutions vested with supranational powers in the EEA is a different yet important matter and will be further discussed below.¹¹¹

The practice of the Court of Justice demonstrates clearly the Court's willingness to extend the interpretation of EU law, including on the question of direct effect, to the

¹⁰⁷ *ibid* 973.

¹⁰⁸ C Baudenbacher, 'The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together' in, *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (T.M.C. Asser Press 2013) 183.

¹⁰⁹ W van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect' (n 102) 979.

¹¹⁰ Opinion 1/91 *EEA I* (n 2) para 20.

¹¹¹ Chapters 6 and 7.

identical provisions found in the EEA Agreement. The first of these cases was the decision of the Court of First Instance (CFI, now General Court) in the case *Opel Austria* where the CFI accorded direct effect in the EU legal order to Article 10 EEA Agreement drawing directly on the case law setting out the conditions for direct effect in the EU.¹¹² *Opel Austria* has been followed by a number of other cases¹¹³ that prove that the recognition of identical interpretation as well as the direct effect of exported *acquis vis-à-vis* EU law has not been problematic since Opinion 1/91.

The monopoly of determining the effect of the provisions of the EEA Agreement in the national legal orders of the EEA EFTA States does not rest with the Court of Justice of the EU but with the national courts of the EEA EFTA States and, eventually, the EFTA Court independently of the Court of Justice. In the *Restamark* case, the EFTA Court for the first time established that a provision of EEA law fulfils the conditions for being unconditional and sufficiently precise to have direct effect.¹¹⁴ The EFTA Court argued that it is 'inherent in the nature of [the primacy provision contained in Protocol 35 EEA] that individuals and economic operators in cases of conflict between implemented EEA rules and national statutory provisions must be entitled to invoke and to claim at the national level any rights that could be derived from provisions of the EEA Agreement, as being or having been made part of the respective national legal order, if they are unconditional and sufficiently precise'.¹¹⁵ In determining the latter two criteria, the EFTA Court referred to the *Manghera* decision of the Court of Justice¹¹⁶ in which the Court established the direct effect of 37(1) EC Treaty, the equivalent of Article 16 EEA Agreement which was the subject of the *Restamark* case.¹¹⁷ With its decision in *Restamark*, EFTA Court filled the gap in the EFTA pillar of the EEA Agreement as concerns the direct effect of the provisions of the latter, yet with respect to rules that had already been implemented in the national legal order, hence the notion 'quasi-direct

¹¹² Case T-115/94 *Opel Austria v Council* (n 99) paras 100-102.

¹¹³ See, for example, Case C-355/96 *Silhouette* [1998] ECR I-4799, para 36; Case C-465/01 *Commission v Austria* [2004] ECR I-8291; Case C-85/12 *LBI v Kepler Capital Markets* (Court of Justice, 24 October 2013).

¹¹⁴ Case E-1/94 *Restamark* [1994-1995] EFTA Ct Rep 15.

¹¹⁵ *ibid* para 77.

¹¹⁶ Case 59/75 *Manghera* [1976] ECR 91.

¹¹⁷ Case E-1/94 *Restamark* (n 114) para 79.

effect'.¹¹⁸ The relationship between non-implemented EEA law and national law, including the possible direct effect of the former, is subject to a decision of the EEA EFTA States and their wish to, thereby, avoid a violation of EEA law should such a situation arise without escaping the obligation to duly transpose directives into domestic law.¹¹⁹ The EEA is generally characterised by a cooperative relationship between the Court of Justice and the EFTA Court rather than an authoritative position taken by the Court of Justice. Officially, the cooperation between the two courts is facultative, yet functions well in practice.¹²⁰

The other multilateral agreements that export internal market *acquis* to non-EU Member States and their application to date have been less explicit as to the possible direct effect of the exported *acquis* both in the EU and its Member States and in the domestic legal orders of the third country contracting parties. The preamble to the ECT makes no reference to the role of individuals. Recital 7 of the preamble states that the 'Parties', i.e. the Union and the non-EU contracting parties have resolved to 'establish an integrated market in natural gas and electricity, based on common interest and solidarity'. It may, nevertheless, be possible to extract the creation of individual rights from Recital 12 of the preamble which expresses the aim of furthering 'high levels of gas and electricity provision to all citizens based on public service obligations' whereas the overall aim of the agreement is to create 'a single regulatory space'.¹²¹ Article 94 ECT provides for consistent interpretation of the terms and concepts of the Treaty with the interpretation provided by the Court of Justice, yet the limited reference to 'terms' and 'concepts' makes it doubtful whether the Treaty is able to convey a similar degree of homogeneity between EU law and the exported *acquis* as the EEA Agreement.

The case of the ECAA Agreement is, again, slightly different from that of the ECT. Recital 2 of the preamble to the ECAA Agreement provides that 'the rules concerning the ECAA are to apply on a multilateral basis within the ECAA'. The preamble does not make any reference to individuals specifically, yet mentions that the Agreement is concluded in order to provide 'mutual market access to the air transport markets of the Contracting

¹¹⁸ C Baudenbacher, 'If Not EEA State Liability, Then What: Reflections Ten Years after the EFTA Court's Sveinbjornsdottir Ruling' (2009) 10 Chicago Journal of International Law 333, 358.

¹¹⁹ Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct Rep 246, para 41.

¹²⁰ See further below chapter 7.

¹²¹ Recital 13, Preamble to the ECT.

Parties and freedom of establishment, with equal conditions of competition, and respect of the same rules'.¹²² Insofar as the agreement is aimed at regulating market relations among the specific group of air transport companies the latter can be considered as the economic operators who could, possibly, enjoy the direct effect of the provisions of the ECAA Agreement. Furthermore, Article 16 ECAA Agreement copies, in essence, Article 6 EEA Agreement as concerns the conform interpretation of identical provisions. As a difference, the sources of the authoritative interpretations are in the ECAA not only the Court of Justice but also the European Commission.

What is important to bear in mind is that the object and purpose of a treaty cannot be derived from its stated objectives only. The nature of the provisions of each agreement, too, is an important source of information as to the intention of the contracting parties. In the cases of the ECT and the ECAA Agreement, the intention of the contracting parties must, therefore, also be deducted from the nature of the provisions of the agreement, i.e. the *acquis* that in the EU legal order can have direct effect. This is apparent from the fact that the agreements strive after a certain level of homogeneity with the original EU *acquis*. In conclusion, therefore, it should be assumed that the provisions of the ECT and the ECAA Agreement, too, can in the light of the objectives of the agreements potentially have direct effect under conditions comparable to those invoked in the EU and the EEA. The fundamental difference between the EU and the EEA, on the one hand, and the Energy Community and the ECAA, on the other, lies in the institutional framework set up by the agreements, especially the (non-) existence of a court endowed with jurisdiction to determine the effect of the rules in the national legal orders. In the EEA there is the EFTA Court but the treaty bodies of the Energy Community and the ECAA are not provided such judicial functions. In the non-EU contracting states, therefore, the determination as to direct effect is largely for the national courts to make.¹²³

¹²² Recital 1, Preamble to the ECAA Agreement.

¹²³ Unless the third countries have agreed to binding preliminary rulings from the Court of Justice: see below chapter 7.

3 The hierarchy of norms and rules of conflict between internal market rules and national legislation

3.1 Public international law

Differently from the effect of international law in the national legal orders, the hierarchy of norms cannot be determined by the international rules themselves or by international courts but falls exclusively within the realm of national constitutional law. For example, some monist countries, such as the Netherlands, grant international treaties a rank higher than ordinary national laws, whereas some, such as the USA, do not. In dualist countries where international agreements are incorporated into the national legal system by national laws, the rank assumed by the international law provisions is usually equal to the act giving force to it domestically. In consequence, a later statute can override an earlier one according to the principle of *lex posterior derogat prior* unless the international law instrument itself establishes its rank. The fact that international law obligations can thereby be infringed assumes relevance primarily on the international plane, where the principle of *pacta sunt servanda* will be violated, and not the national plane.

The responsibility of states is to give effect to the obligations they have assumed under international law. They are, thus, bound to ensure that the provisions which they have incorporated in their national legal systems are given proper effect domestically. As in the case of direct effect, the concrete measures for doing so are to be determined by national law. If a state fails to fulfil its obligations under international law, the state will assume international legal responsibility for breach of the international obligation. The failure to correctly implement the provisions of international law by duly amending or repealing domestic law where necessary is under Article 27 VCLT not a justification for a breach of an international law obligation. The breach can be enforced by other states or international organisations or, in some cases such as the ECHR and investment tribunals, also by individuals. If another party incurs damage as a result, the state may also be held liable for damages.¹²⁴

¹²⁴ A Aust (n 5) 161.

The actual rank of international law in a national legal order assumes significance only in cases where the international law instrument provides concrete implementation methods. If the parties to the agreement are only bound by the result to be achieved and are free to choose the methods as to how to achieve the results, there is little difference as to what means the state employs.¹²⁵

3.2 EU law

In the European Union, the hierarchical relationship between EU law and national law was, to a certain extent, left for the national legal orders to determine. In *Costa v ENEL*, the Court ruled that EU law takes precedence over conflicting national law.¹²⁶ Together with direct effect, primacy of EU law is a key principle in the constitutional set-up of the Union, even suggested to be the foundation of the constitutional order of the EU.¹²⁷ The principle appears in Declaration No 17 attached to the Treaty of Lisbon. The Declaration substantiates the principle of primacy with references to the case law of the Court. The fact that the Court determined a rule for conflict situations and established precedence rather than a general rule and invalidity of conflicting national rules means that the primacy of EU law does not constitute an absolute rule of hierarchy.¹²⁸ The EU is separate from the Member States yet 'intimately and even organically tied to it'.¹²⁹ The reasoning of the Court, once again, drew on the 'terms and the spirit of the Treaty' and established that the reciprocal system of the EU cannot allow national measures to prevail over the EU legal system. The reasoning of the Court rests on the need to attain the objectives of the Treaties and to avoid discriminatory behaviour prohibited therein.

The primacy principle was established with reference to Article 189 EEC Treaty (now Article 288 TFEU), which grants direct applicability to regulations.¹³⁰ The conclusion of the Court is easily explainable in the light of the general logic discussed above according to which the provisions that determine the means to be employed in order to introduce

¹²⁵ TC Hartley (n 20) 206.

¹²⁶ Case 6/64 *Costa v ENEL* [1964] ECR 585, 594.

¹²⁷ B de Witte, 'International Agreement or European Constitution?' in JA Winter and others (eds), *Reforming the Treaty on European Union: The Legal Debate* (Kluwer Law International 1996) 3, 12-13.

¹²⁸ 'Primacy of application' compared to 'primacy of validity', see FC Mayer, 'Supremacy - Lost? Comment on Roman Kwiecien' in P Dann and M Rynkowski (eds), *The Unity of the European Constitution* (Springer 2006) 87, 88.

¹²⁹ Case 6/64 *Costa v ENEL* [1964] ECR 585, Opinion of AG Lagrange, 605.

¹³⁰ Case 6/64 *Costa v ENEL* (n 126).

an international law measure into the EU legal order should not be overridden by national legislation. Adopting additional national measures would, possibly, defeat the objective of the measure which includes uniform application. Giving effect to conflicting national legislation, in any respect, constitutes a violation by the Member State of the *pacta sunt servanda* principle of international law. Importantly, the primacy rule, too, is enforced by the Court of Justice, thereby distinguishing the EU legal order and judicial structure from other international organisations established to the date of the founding of the European Communities. In *Simmenthal*, the Court extended the primacy formula developed in *Costa v ENEL* to also preclude the Member States from adopting new legislation which would conflict with EU law.¹³¹

The principle of primacy, too, has emerged from a teleological interpretation of the Treaties by the Court. The teleological and effectiveness-driven approach is characteristic not only to the EU but to international organisations and multilateral cooperation schemes more generally.¹³² The rationale of the primacy principle was recalled in *Simmenthal* as ensuring the effectiveness of EU law and forming the very foundations of the Union.¹³³ In *Internationale Handelsgesellschaft*, the Court explained that the ‘uniformity and efficacy of Community law’ demand for the latter to be given precedence over conflicting national laws.¹³⁴ In the latter case, the Court also ruled that the primacy of Community law requires that the validity of EU rules be only determined with relation to Community law itself and not any national law, including even the fundamental principles of national constitutional law by ‘the very nature’ of the Treaty.¹³⁵ The primacy of EU law *vis-à-vis* provisions of national constitutions has been established in a number of cases.¹³⁶ The most significant concern of the Member States – the protection of fundamental rights by their constitutions – is to a large part resolved by Article 6(3) TEU which provides that the protection of fundamental rights is guaranteed in the EU legal order by both the ECHR as well as the ‘constitutional traditions common to the Member States’. The primacy of EU law accommodates fundamental rights also as

¹³¹ Case 106/77 *Simmenthal* [1978] ECR 629, para 17.

¹³² O Spiermann (n 57) 788.

¹³³ Case 106/77 *Simmenthal* (n 131) para 18.

¹³⁴ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3.

¹³⁵ *ibid.*

¹³⁶ For example, Case C-285/98 *Kreil* [2000] ECR I-69; Case C-462/99 *Connect Austria v Telekom-Control-Kommission* [2003] ECR I-05197; Case C-213/07 *Michaniki* [2008] ECR I-9999.

general principles of EU law¹³⁷ and as part of the EU *acquis* via the Charter of Fundamental Rights. The Court is, thus, not absolute in disregarding national protection of fundamental rights.

The principle of primacy does not constitute complete supremacy over national laws. The national legal systems are protected, firstly, by the initial adoption or transposition of the EU Treaties into their legal orders, by which they have accepted the EU legal order and which has taken place pursuant to the national constitutions; secondly, by the principle of conferral which means that the Union does not have more powers than what have been conferred upon it by the Member States; thirdly, by the fact that EU law which is adopted *ultra vires* is invalid; and, fourthly, by the fact that the Court cannot declare national law invalid. Importantly, though, national courts although they may be faced with situations where the validity of an EU legal act is in question cannot themselves declare those acts invalid.¹³⁸ The exclusive jurisdiction to do so is vested with the Court of Justice under Article 263 TFEU.¹³⁹

As is the case with direct effect, the real effect of the principle of primacy of EU law is, in practice, subject to its acceptance by national courts.¹⁴⁰ This is even more relevant in the case of primacy than direct effect because while the latter is, at least to some extent, dependent on the nature of the international rules itself, the hierarchy of sources of law in a national legal order is determined solely by that legal order. In addition, the principle of direct effect does not infringe national legislation in a negative way because it does not affect the application of national law. Primacy, on the other hand, does exactly that by rendering conflicting national law inapplicable. It is not surprising, therefore, that the primacy of EU law in relation to national law has been brought up in national courts prompting the latter to condition their acceptance of EU law in the light of the national

¹³⁷ Case 11/70 *Internationale Handelsgesellschaft* (n 134) para 4.

¹³⁸ Case 314/85 *Foto-Frost* [1987] ECR 4199, para 20.

¹³⁹ See also Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, para 17; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 27.

¹⁴⁰ F Morgenstern, 'Judicial Practice and the Supremacy of International Law' (1950) 27 *British Yearbook of International Law* 42, p 91.

constitutions. This is especially the case when the Court challenges the applicability of national constitutional law.¹⁴¹

To summarise, the Court has deemed EU law to prevail over national law to the extent of rendering the latter inapplicable and not invalid, applying automatically without a prior ruling of the Court or a national constitutional court and constituting a duty of every national court and, finally, applying to national law adopted prior and after the particular rule of EU law and to all levels of national courts.

3.3 Multilateral agreements exporting EU internal market acquis

Whether the EU internal market *acquis* takes precedence over conflicting national norms in the states parties to the multilateral agreements exporting the *acquis* depends, first and foremost, on the domestic legal orders of the non-EU contracting parties to the agreements. This is so primarily because of the limits of the jurisdiction of the Court of Justice as regards these agreements.

In Opinion 1/91, the Court of Justice found that the principles of primacy and direct effect did not necessarily form part of the EEA legal order. Contrary to the EU where the Member States have given up part of their sovereignty and the Treaties bind not only the states but also their nationals, the EEA was, according to the Court, considered to be founded by an international agreement that only affects the contracting parties and not their nationals.¹⁴² As demonstrated above, though, this is not exactly the case with the EEA.¹⁴³

Protocol 35 on the implementation of EEA rules provides that the EEA Agreement does not entail a transfer of legislative powers to any institutions of the EEA yet the effectiveness of EEA law is to be ensured by the obligation of contracting parties to introduce in their national legal orders a statutory provision to give precedence to EEA rules in cases of conflict.¹⁴⁴ It must be noted that the direct effect of EEA law is only fully

¹⁴¹ For example, 2 BvR 197/83 *Solange II* [1986] BVerfG 73, 339; 2 BvR 2134, 2159/92 *Maastricht* [1993] BVerfG, 89, 155; 2 BvE 2/08 et al *Lissabon* [2009] BVerfG 123, 267; see J Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 *European Law Journal* 389.

¹⁴² Opinion 1/91 *EEA I* (n 2) para 21; Case 26/62 *Van Gend en Loos* (n 1).

¹⁴³ See above section 2.3.

¹⁴⁴ The Sole Article of Protocol 35.

realised when the EEA rules also enjoy primacy in the EEA.¹⁴⁵ The EFTA Court has, however, established a 'quasi-primacy'¹⁴⁶ of the EFTA pillar of the EEA Agreement in *Einarsson*.¹⁴⁷ Naturally, this only affects EU provisions that have been implemented in the national legal orders of the EEA EFTA contracting parties.¹⁴⁸ The EFTA Court made a qualification of the provisions to which the primacy rule applies: it includes only those provisions that have been implemented in the legal orders of the EEA EFTA States, and create rights for individuals.¹⁴⁹ Importantly, the EFTA Court did not, in the case of primacy, need to analyse the nature of the EEA as was the case with the Court of Justice. Instead, the EFTA Court could base its argumentation on Protocol 35 and its own prior recognition of the 'quasi-direct effect' of the provisions of the EEA Agreement that have been implemented by the EEA EFTA States.

The ECT and the ECAA Agreement are silent on the question of primacy. The non-EU and non-EEA EFTA contracting parties of these agreements are, thereby, bound by the provisions of the agreements to implement the latter in good faith.¹⁵⁰ The relationship between these multilateral agreements and the respective national laws is governed by the rules of public international law and, eventually, national constitutional law.

The one and significant limit to extending the principle of primacy to the non-EU EEA contracting parties to these agreements is the fact that there is no court to establish the principle in an authoritative manner except for the Court of Justice with respect to the application of the agreements in the EU legal order and the domestic legal orders of the EU Member States, where applicable.¹⁵¹ International law that is binding on the EU forms part of the EU legal order without any implementing legislation.¹⁵² International law assumes a rank higher than secondary EU law yet lower than the EU Treaties and the general principles of EU law.¹⁵³ The jurisdiction of the Court with respect to the

¹⁴⁵ V Kronenberger, 'Does the EFTA Court Interpret the EEA Agreement as If It Were the EC Treaty? Some Questions Raised by the Restamark Judgment' (1996) 45 *International and Comparative Law Quarterly* 198, 210.

¹⁴⁶ C Baudenbacher, 'If Not EEA State Liability, Then What' (n 118) 358.

¹⁴⁷ Case E-1/01 *Einarsson* [2002] EFTA Ct Rep 1, paras 51-55.

¹⁴⁸ *ibid* para 52.

¹⁴⁹ *ibid* paras 52-53.

¹⁵⁰ Article 6 ECT; Article 4 ECAA Agreement.

¹⁵¹ Institutional aspects are discussed in detail below in chapter 7.

¹⁵² Case 181/73 *Haegeman* (n 85) paras 3-6.

¹⁵³ Case T-201/04 *Microsoft Corp. v Commission* [2007] ECR II-3601, para 798.

application of the ECT and the ECAA Agreement in the non-EU contracting states is very limited.

Another issue related to the primacy of the exported *acquis* concerns the possibility of inserting the principle of primacy into the framework of those agreements at all. When establishing the principle of primacy the Court of Justice relied on the nature of EU law that demanded the primacy of application *vis-à-vis* national law as well as the effectiveness and uniformity of EU law. The effectiveness and uniformity of the multilateral agreements could, possibly, also justify the principle of primacy in those agreements. As in the case of the EEA, it is not impossible to insert the primacy rule in the provisions of the actual Treaty. The reason for why no such provision exists in the ECT or the ECAA Agreement must be due to the narrower scope and simpler institutional structure of the latter two that, in turn, reflects the more limited degree of integration envisaged by them.

One significant problem that may arise with respect to a primacy principle applying to the multilateral agreements is its potential conflict with the constitutional law provisions of the non-EU treaty partners. Since the EU Treaties do not apply to the third countries, they are not protected by Article 6(3) TEU, which means that their constitutional traditions fall outside the range of principles which affect the application of the internal market *acquis* in the EU legal order.¹⁵⁴ The protection of fundamental rights accorded to EU legislation by the EU Charter of Fundamental Rights as well as possibly the ECHR in the future, on the other hand, could be considered adequate even by the third states. It may be possible to ensure the application of fundamental rights, although neither the EU Charter nor the ECHR form part of the EEA Agreement itself, via the homogeneity clauses of Articles 1 and 6 EEA Agreement; or to derive from the fact that the EEA Agreement creates individual rights an interpretation of the identical *acquis* that is homogeneous with the interpretation provided by the Court of Justice and takes account of the protection of fundamental rights.¹⁵⁵ The EFTA Court does so in practice.¹⁵⁶ Furthermore,

¹⁵⁴ H Haukeland Fredriksen, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area' (2010) 79 *Nordic Journal of International Law* 481, 491.

¹⁵⁵ W Kälin, 'The EEA Agreement and the European Convention for the Protection of Human Rights' (1992) 3 *European Journal of International Law* 341, 341-342 and 347-348.

¹⁵⁶ E-U Petersmann, 'Human Rights, International Economic Law and 'Constitutional Justice'' (2008) 19 *European Journal of International Law* 769, 785.

in the Oporto Protocol which guides the interpretation of the EEA Agreement it was agreed that insofar as and until the EEA Agreement does not provide for the fulfilment of the existing treaty obligations of the contracting parties including those providing for individual rights, the latter agreements continue to be applied.¹⁵⁷ This concerns most directly human rights treaties and the protection of fundamental rights.

In conclusion, nothing in the multilateral agreements precludes the principle of primacy from being applied the only guarantees for that are currently provided by Protocol 35 of the EEA Agreement.

4 The effective application and enforcement of internal market rules

Under the effective enforcement of internal market rules, two aspects will be considered – the principles of state responsibility and consistent interpretation. Both are in place to ensure the effectiveness of EU law and are determined by courts. This section does not, however, address questions related to administrative bodies and administrative decisions.

4.1 Consistent interpretation

4.1.1 Public international law

One further possibility of increasing the effectiveness of a legal system is through the choice of interpretative methods. The rules for interpreting international agreements are laid down in Articles 31-33 VCLT, resulting from comprehensive analysis conducted by the International Law Commission and reflecting customary international law.¹⁵⁸ The general rules of provided in Article 31(1) VCLT read as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹⁵⁷ Joint Declaration on the relation between the EEA Agreement and existing agreements, annexed to the EEA Agreement [1994] OJ L1/3.

¹⁵⁸ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 1999 ICJ Reports 1045, 1059; *Territorial Dispute (Libyan Arab Jarnahiriya/Chad)*, Judgment, 1994 ICJ Reports 6, 21; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, 1996 ICJ Reports 803, 812; *Golder v United Kingdom* (1975) Series A No 18, para 29.

Furthermore, as a secondary means of recourse, should the result of the interpretation carried out on the basis of Article 31 prove inadequate or when the situation requires that the preliminary interpretation be confirmed Article 32 VCLT lists the 'preparatory work of the treaty and the circumstances of its conclusion' as additional means of interpretation.

Lauterpacht has divided the principles guiding the interpretation of treaties into two categories – literal interpretation, which is restrictive, and teleological interpretation, which promotes the principle of effectiveness.¹⁵⁹ The former means of interpretation is strongly connected with the idea of state sovereignty. It helps ensure that no encroachment upon state sovereignty to which the contracting parties have voluntarily consented will go beyond a literal analysis of what was established at the stage of concluding the treaty. The latter, teleological interpretation seeks to go beyond the textual construction of the treaty provisions and draws on the objective and purpose of the treaty, which may or may not be explicit in the actual wording of the treaty provisions.¹⁶⁰

The textual method of interpretation looks strictly at the provisions of a treaty and constructs the meaning of the provisions on the basis of the written words. When the provisions of a treaty are worded in a clear manner there is no need to go beyond a textual interpretation for reasons other than to confirm its correctness.¹⁶¹ The teleological method of interpretation is more proactive because it takes into consideration also the context and the objectives of the treaty. In public international law, it is difficult to construct a hierarchy between these methods of interpretation as both include consideration for the other.¹⁶² In fact, as can be seen from the wording of Article 31(1) VCLT, the ordinary meaning of the terms of the treaty is to be interpreted in the light of the object and purpose and the context of the agreement, thus

¹⁵⁹ H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 *British Yearbook of International Law* 48.

¹⁶⁰ E Gordon, 'The World Court and the Interpretation of Constitutive Treaties: Some Observations on the Development of an International Constitutional Law' (1965) 59 *American Journal of International Law* 794, 796.

¹⁶¹ *Acquisition of Polish Nationality*, Advisory Opinion, 1923 PCIJ Series B No 7, 20; *Aegean Sea Continental Shelf*, Judgment, 1978 ICJ Reports 3, 22; *Territorial Dispute (Libyan Arab Jarnahiriya/Chad)* (n 158) 25-26; ILC Draft Articles on the Law of Treaties with commentaries, (1966) II *Yearbook of the International Law Commission*, 220, para 11.

¹⁶² DP O'Connell, *International Law* (Stevens & Sons 1970) 254.

accommodating both methods,¹⁶³ yet a certain priority is given to textual interpretation.¹⁶⁴

Article 27(1) VLCT codifies the maxim *ut res magis valeat quam pereat* which reflects the principle of effectiveness. The principle requires that whenever there is a choice between two possible interpretations of treaty out of which one gives effect to the provision and the other does not, a solution should be preferred which gives effect to the provision due to the principles of good faith and the object and purpose of the treaty.¹⁶⁵ The interpretation should not, however, lead to a result that does not correspond to the intention of the parties as expressed in the 'letter and spirit' of the treaty, or amount to a revision of the treaty.¹⁶⁶

Whether one uses a textual or teleological method of interpretation is not decisive as to the outcome in terms of the scope of a broad or narrow approach to the application of the agreement. The latter depends on both the legal and institutional context surrounding the interpretation of the treaty by national courts.¹⁶⁷ Furthermore, different courts, both international and national, employ different procedures and seek guidance in different principles of treaty interpretation.¹⁶⁸ Interestingly, in dualist legal systems where international agreements are transposed into national legal orders by means of domestic legislation, national courts are faced with a need to combine the national procedures and principles of interpretation with the requirement to ensure compliance

¹⁶³ RY Jennings, 'Treaties' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers 1991) 135, 145.

¹⁶⁴ A Aust (n 5) 209.

¹⁶⁵ ILC Draft Articles on the Law of Treaties with commentaries (n 161) 219, para 6; *Free Zones of Upper Savoy and the District of Gex*, Order, 1929 PCIJ Series A No 22, 13; *Acquisition of Polish Nationality* (n 161) 16-17; *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925 PCIJ Series B No 10, 25; *Lighthouses Case between France and Greece*, Judgment, 1934 PCIL Series A/B No 62, 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Reports 16, 35; *Aegean Sea Continental Shelf* (n 161) 22.

¹⁶⁶ *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, 1950 ICJ Reports 221, 229; ILC Draft Articles on the Law of Treaties with commentaries (n 161) 219, para 6.

¹⁶⁷ MA Rogoff, 'Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court' (1996) 11 *American University Journal of International Law and Policy* 559, 568-569.

¹⁶⁸ *ibid*, 609-610.

with the international law obligations of the state.¹⁶⁹ As long as the former can accommodate the latter and the real intent of the parties is not obscured in the interpretation process no problems will arise on the international plane. English courts, for example, have been able to have recourse to the international law instrument itself when interpreting international agreements incorporated in English law.¹⁷⁰

The cases in which the choice of interpretative methods is between those that have an effect and those that have none at all are much fewer in number than those in which different interpretations lead to a different level of effectiveness.¹⁷¹ Treaties establishing international organisations – constitutive treaties – are special in this regard because of the evolving nature of the legal regime they create and the fact that the contracting parties are often not the original signatories whose intent should be looked for.¹⁷²

The interpretation of constitutive treaties falls within the realm of ‘international constitutional law’.¹⁷³ In the case of such treaties, the intent of the parties is usually the most important factor for the development of the legal order created by them, yet it fails to take into account the distinction between the effective and restrictive approaches.¹⁷⁴ Rogoff, however, justifies the search for the intent of the parties in cases of uncertainty of interpretation in cases of comprehensive agreements the subject matters of which cover a whole area of legal relationships. When finding an appropriate solution, the ambiguous provision should be construed in a way to allow for fulfilling the purpose of the agreement by, firstly, seeking a way to extend the application of the agreement over the specific legal question and, secondly, to consider the agreement as an authoritative source for dealing with the issue in question.¹⁷⁵

In the interpretation of constitutive treaties special attention is given to the competences attributed to the international organisation or other international regime; this leads to a

¹⁶⁹ MF Sturley, 'International Uniform Laws in National Courts: The Influence of Domestic Laws in Conflicts of Interpretation' (1986) 27 *Virginia Journal of International Law* 729; AM Donner, 'National Law and the Case Law of the Court of Justice of the European Communities' (1963) 1 *Common Market Law Review* 8, 9.

¹⁷⁰ CH Schreuer, 'The Interpretation of Treaties by Domestic Courts' (1971) 45 *British Yearbook of International Law* 255, 256.

¹⁷¹ H Lauterpacht (n 159) 70.

¹⁷² E Gordon (n 160) 797.

¹⁷³ T Opsahl, 'An International Constitutional Law?' (1961) 10 *International and Comparative Law Quarterly* 760, 768.

¹⁷⁴ E Gordon (n 160) 798.

¹⁷⁵ MA Rogoff (n 167) 570.

frequent use of teleological interpretation by courts, especially where the competences have to be asserted by implication.¹⁷⁶ This observation goes hand in hand with the modern regime theory of international relations that focuses on international regimes as opposed to international organisations. Kratochwil and Ruggie define international regimes as 'governing arrangements constructed by states to coordinate their expectations and organize aspects of international behaviour in various issue-areas'.¹⁷⁷ International regimes consist of principles and norms, specific rules, and procedures and programs.¹⁷⁸ Regime theory influences the interpretative methods of international agreements by leading the interpreters towards a broader perspective of maintaining and developing the regime.¹⁷⁹ This approach is most clearly reflected in the case law of the Court of Justice of the EU. In turn, the national courts of the EU Member States must, when interpreting EU law, depart from the national canons of interpreting national legislation and bear in mind the broader integration objectives enshrined in the EU Treaties. In international law, it is generally unusual for treaties themselves to create an interpreting mechanism; in some instances, however, bodies established under the treaty may deal with questions of interpretation.¹⁸⁰ The ECHR, the EU Treaties and the EEA Agreement are among the limited number of treaties that set up a court and provide it with the express mandate to interpret the constitutive instrument.

4.1.2 EU law

In order to avoid fragmentation of interpretations of EU law and to preserve the autonomy of the EU legal order, the Treaties provide a stable framework for the interpretation of the Treaties. The interpretation of EU law is carried out by EU institutions and the Court of Justice as well as national authorities and national courts. Article 19 TEU places on the Court the task of ensuring that the law is observed in the interpretation and application of the EU Treaties. This applies to primary and secondary EU law alike. Even more important in this context is Article 267 TFEU that provides for

¹⁷⁶ E Gordon (n 160) 816.

¹⁷⁷ F Kratochwil and JG Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 *International Organization* 753, 759.

¹⁷⁸ MA Levy, OR Young and M Zürn, 'The Study of International Regimes' (1995) 1 *European Journal of International Relations* 267.

¹⁷⁹ OR Young, 'Regime dynamics: the rise and fall of international regimes' in SD Krasner (ed), *International Regimes* (Cornell University Press 1983) 93.

¹⁸⁰ A Aust (n 5) 207.

the preliminary reference procedure in which the national courts may, and highest courts must when unsure about the correct interpretation of EU law have recourse to the Court for an authoritative interpretation. Furthermore, under Article 267(b) TFEU the Court of Justice is the only judicial body that may rule on the validity of secondary EU law.¹⁸¹ The Court, moreover, holds a monopoly of interpretation of the Treaties by virtue of Article 344 TFEU which precludes the Member States from submitting a dispute arising from the Treaties to a dispute settlement mechanism other than one provided in the Treaties. All of the above applies equally to international agreements concluded by the EU.

It appears from the analysis above that the Court of Justice frequently endorses a teleological method of interpretation.¹⁸² One of the specific methods of ensuring effectiveness of EU law, but also coherence of the legal order, is consistent interpretation that the Court has deemed to be 'inherent in the system of the Treaty'.¹⁸³ Consistent interpretation incorporates a method of interpreting a rule in the light of another, hierarchically higher-standing rule, thus avoiding a conflict between the two but not calling into question the validity of the one or the other. In EU law consistent interpretation can, in general terms, be witnessed on three levels: national law-EU law; secondary-primary EU law; and EU law-public international law.¹⁸⁴

Directive-conform interpretation, also called indirect effect, is the most prominent field of application of consistent interpretation of EU law. The doctrine of direct effect emerged in the Court's case law out of a need to ensure adequate protection of the rights of individuals in the event of a Member State not fulfilling its obligation to transpose a directive in a timely manner.¹⁸⁵ As stated by the Court in *Pfeiffer* it is, first and foremost, the task of the national courts to grant individuals the necessary legal protection that the latter derive from EU law and to ensure the effectiveness of EU law.¹⁸⁶ Nevertheless,

¹⁸¹ Case 66/80 *International Chemical Corporation* [1981] ECR 1191; Case 314/85 *Foto-Frost* (n 138).

¹⁸² Case 283/81 *CILFIT* [1982] ECR 3415, para 20. JHH Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) 61 *Washington Law Review* 1103, 1108.

¹⁸³ Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, para 114.

¹⁸⁴ G Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' (2002) 22 *Oxford Journal of Legal Studies* 397, 398.

¹⁸⁵ See above section 2.2.

¹⁸⁶ Joined Cases C-397/01 to C-403/01 *Pfeiffer* (n 183) para 111.

unimplemented or wrongly implemented directives are not entirely without effect due to the doctrine of direct effect, state liability for breaches of EU law, as well as the doctrine of consistent interpretation.¹⁸⁷ Consistent interpretation, in particular, assumes relevance in cases where a directive lacks direct effect, i.e. when the *Van Gend en Loos* criteria do not apply,¹⁸⁸ or in horizontal relations between individuals.¹⁸⁹

The doctrine of consistent interpretation entails an obligation of the national courts when applying national law, whether or not adopted for implementing the directive, to interpret national law 'in the light of the wording and the purpose of the directive' in order to achieve the objectives of the latter.¹⁹⁰ The duty of consistent interpretation extends to all national legislation,¹⁹¹ and even the case law of national courts.¹⁹² Originating from the principle of sincere cooperation enshrined in Article 4(3) TEU, the principle of consistent interpretation obliges national courts to construe national legislation in the light of EU law in instances where, for example, EU law does not have direct effect due to a failure of the Member State to implement a directive. The *effet utile* of unimplemented directives which do not have direct effect needs to be achieved by 'all appropriate measures, whether general or particular', including obligations resting upon the courts of the Member States. Both the doctrines of direct effect and that of consistent interpretation concern the effective judicial protection granted to individuals, which can be considered a general principle of EU law.¹⁹³ The duty of consistent interpretation also applies to national legislation that has duly implemented a directive because the mere fact that the latter has been transposed into national legislation does not rule out entirely the possibility of a national court 'de-implementing' the directive by means of interpretation.¹⁹⁴ In order to distinguish between consistent interpretation for the purpose of providing a correct interpretation of a piece of national legislation that has

¹⁸⁷ V Skouris, 'Effet Utile Versus Legal Certainty: The Case-law of the Court of Justice on the Direct Effect of Directives' (2006) 17 European Business Law Review 241, 247.

¹⁸⁸ Case 14/83 *von Colson* [1984] ECR 1891, paras 27-28.

¹⁸⁹ Joined Cases C-397/01 to C-403/01 *Pfeiffer* (n 183) para 119.

¹⁹⁰ Case 14/83 *von Colson* (n 187) para 26.

¹⁹¹ Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8.

¹⁹² Case C-456/98 *Centrosteeel v Adipol* [2000] ECR I-6007, para 17.

¹⁹³ W van Gerven, 'Non-Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe' (1994) 1 Maastricht Journal of European and Comparative Law 6, 11-12.

¹⁹⁴ JDN Bates, 'The Impact of Directives on Statutory Interpretation: Using the Euro-Meaning?' (1986) 7 Statute Law Review 174, 185.

correctly implemented a directive and consistent interpretation which, in a temporary fashion, seems to compensate faulty or lacking implementation, Prechal has introduced the terms 'judicial implementation' and 'remedial interpretation', respectively.¹⁹⁵

By the duty of consistent interpretation, the Court imposes upon national courts an obligation to apply teleological interpretation that takes account of the objectives sought by the directive. The possibilities of a national court to interpret national law in conformity with EU law are limited by the national legislation. Firstly, there needs to be national law in place and, secondly, it must be possible to interpret the national provision in a directive-conform manner.¹⁹⁶ Furthermore, the national legal traditions play a role, notably in the form of the methods of interpretation that are recognised by the national legal system¹⁹⁷ and within the limits of discretion provided in national law.¹⁹⁸ A method of interpretation cannot, after all, replace legislative action. As a next step of giving effect to a directive that has no direct effect and for the effective implementation of which national law cannot be interpreted in a consistent manner, recourse must be had to state liability.¹⁹⁹

Further limitations to implementing the duty of consistent interpretation are of a more substantive nature. They arise from general principles of law and serve to protect individuals. The Court uses the same motivation to deny horizontal direct effect of directives.²⁰⁰ These general principles include, for example, those of legal certainty and non-retroactivity.²⁰¹ Crucial in the context of criminal law by virtue of the principle *nulla poena sine lege*, the applicability of these principles in cases involving administrative and civil law is, however, less clear. In the latter instances it must be ensured that an individual is not placed in a situation that is less favourable as a result giving effect to a directive which is otherwise not intended to have effects on individuals.²⁰²

¹⁹⁵ S Prechal, *Directives in EC law* (Oxford University Press 2006) 190-191.

¹⁹⁶ T Tridimas, 'Horizontal Effect of Directives: A Missed Opportunity?' (1994) 19 *European Law Review* 621, 624.

¹⁹⁷ Joined Cases C-397/01 to C-403/01 *Pfeiffer* (n 183) para 116.

¹⁹⁸ Case 14/83 *von Colson* (n 187) para 28.

¹⁹⁹ Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, para 27.

²⁰⁰ Case 152/84 *Marshall* [1986] ECR 723, para 48.

²⁰¹ Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, para 13.

²⁰² G Betlem (n 184) 407.

In addition to directive-conform interpretation, the EU also faces the question of accommodating international law within its legal system. Pursuant to Article 216(2) TFEU, international agreements concluded by the EU are binding upon the institutions of the Union and on the Member States. The Court has extended a formula similar to *von Colson* to the consistent interpretation of EU secondary law in the light of international law. In *Commission v Germany*, the Court drew parallels between the consistent interpretation of EU secondary law in relation to EU primary law, implementing regulations in relation to basic regulations and, finally, secondary EU law in relation to international agreements concluded by the EU.²⁰³ The latter aspect emerges from the fact that in the EU legal order, international agreements enjoy primacy over secondary EU law but not over the Treaties.²⁰⁴

Notably, in the case law referred to the Court developed the duty of consistent interpretation from the rank of the international law obligation *vis-à-vis* secondary EU law rather than from the need to guarantee the *effet utile* of binding international law in the EU legal order. The Court did, however, adopt a teleological approach. For example, in *Walz* the Court made an explicit reference to the aim of the Montreal Convention to unify the rules of international carriage by air and the respective obligation of the contracting parties to give the term ‘damage’ ‘a uniform and autonomous interpretation’ irrespective of the different meanings that the concept has in the national legal systems.²⁰⁵ Following an analysis of the correct interpretation of the term in the light of Article 31 VCLT, the Court concluded that ‘damage’ should be given the meaning which is not laid down in an international agreement but which instead is ‘common to all the international law sub-systems’, referring to Article 31(2) of the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).²⁰⁶

The duty of consistent interpretation is not limited to international agreements but applies equally to other sources of international law, such as the decisions of

²⁰³ Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, para 25; Joined Cases C-447/05 and C-448/05 *Thomson and Vestel France* [2007] ECR I-2049, para 30.

²⁰⁴ See above section 3.2.

²⁰⁵ Case C-63/09 *Walz v Clickair SA* [2010] I-4239, para 21.

²⁰⁶ *ibid* para 27.

international organisations or treaty bodies which are binding on the EU either directly or through the Member States;²⁰⁷ customary international law;²⁰⁸ and even non-binding recommendations.²⁰⁹ In analogy to the doctrine of consistent interpretation of national law with EU law, the latter even applies, and assumes special relevance, when the international law rule is not directly effective²¹⁰ because international law obligations have to be performed in accordance with the principle of good faith.²¹¹

All in all, the requirement of consistent interpretation accorded by the Court to international law is a sign of respect of the Union towards international law and towards the commitments it has assumed under international law.²¹² This applies especially to the direct references to Article 31 VCLT that binds the EU and some of its Member States only by virtue of the customary law nature of the provision.²¹³

4.1.3 Multilateral agreements exporting EU internal market acquis

The interpretation of international agreements, including those that contain EU *acquis*, by national courts is subject to the choice of interpretation methods and procedures of the states in question. Since the multilateral agreements exporting the *acquis* can be considered to be 'regimes' under the regime theory of international relations, one can assume that the states parties to the agreements, as well as the EU, would be more inclined to adopt a teleological approach when interpreting the agreements. There is, however, no guarantee for the national courts to do so. This can be witnessed in the example of the EU and the practice of the Member States interpreting national law in the light of EU law. The development of the doctrine of consistent interpretation

²⁰⁷ Case 30/88 *Greece v Commission* [1989] ECR 3711, para 13; Case C-192/89 *Sevinco* [1990] ECR I-3461, para 14.

²⁰⁸ Case C-286/90 *Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para 9.

²⁰⁹ Case C-188/91 *Deutsche Shell* [1993] ECR I-363, para 18.

²¹⁰ Case C-335/05 *Řízení Letového Provozu ČR* [2007] ECR I-4307, para 16.

²¹¹ Case C-308/06 *Intertanko* [2008] ECR I-4057, para 52.

²¹² F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012) 395, 405-406.

²¹³ Opinion 1/91 *EEA I* (n 2) para 14; Case C-312/91 *Metalsa* [1993] ECR I-3751, para 12; Case C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, para 47; Case C-268/99 *Jany and Others* [2001] ECR I-8615, para 35; Case C-386/08 *Brita* [2010] ECR I-1289, paras 39-42; Case C-63/09 *Walz v Clickair SA* (n 205) para 23; Case C-410/11 *Espada Sánchez* (Court of Justice, 22 November 2012), paras 20-21. The EU is not party to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

demonstrates that the Court perceived it necessary to enhance the qualitative level of implementation, or the effectiveness, of EU law by placing on the Member States an explicit obligation to adopt conforming interpretation rather than relying on the interpretative practices of the national courts. In this vein, it is perhaps unreasonable to expect a level of market integration similar to the EU to be achieved in an extended EU internal market without the multilateral agreements featuring similar duties and enforcement mechanisms as concerns consistent interpretation.

The question of interpreting the multilateral agreements exporting the internal market *acquis* has two dimensions. The first concerns the consistent interpretation of national legislation in the light of the multilateral agreements, and the second the uniform interpretation and application of the agreements and the corresponding EU law. The EEA Agreement, the ECT and the ECAA Agreement all provide rules on interpretation for the purpose of preserving homogeneous interpretation of the agreements.²¹⁴ In the absence of guidelines to the contracting parties as regards consistent interpretation, it is for the national courts to decide which approach they adopt when interpreting the provisions of the agreements in the national legal orders.

In the EFTA pillar of the EEA, the EFTA Court has adopted a similar effectiveness-driven approach to interpreting EEA law as the Court of Justice. In *Karlsson*, the EFTA Court ruled that although EEA law does not prescribe the direct effect of unimplemented EEA rules before national courts because the EEA lacks legislative powers the domestic courts of EEA EFTA States must, nevertheless, take into consideration ‘any relevant element of EEA law, whether implemented or not when interpreting national law’.²¹⁵ The direct effect of unimplemented EEA law is, therefore, replaced by the duty of consistent interpretation. This duty derives from the ‘general objective of the EEA Agreement of establishing a dynamic and homogeneous market, in the ensuing emphasis on the judicial defence and enforcement of the rights of individuals, as well as in the public

²¹⁴ Recital 15, Preamble to the EEA Agreement and Articles 6, 58, 105, 106, 111 EEA Agreement; Article 94 ECT; Articles 16, 18, 20 ECAA Agreement as well as a number of references in the Annexes to the ECAA Agreement.

²¹⁵ Case E-4/01 *Karlsson* [2002] EFTA Ct Rep 240, para 28.

international law principle of effectiveness'.²¹⁶ In this judgment, the EFTA Court followed closely the case law of the Court of Justice on consistent interpretation.

In *Criminal proceedings against A*, the EFTA Court reiterated its argumentation in *Karlsson*. The EFTA Court took a result-oriented approach towards the interpretation of the EEA rule in question by employing to the largest extent possible the methods of interpretation recognised by national law.²¹⁷ The EFTA Court has, however, restricted the possibility of relying on provisions of EU law that have not been made part of EEA law.²¹⁸ The possibility of considering EU law is limited to considering the level of harmonisation reached in the EU legal order for the sake of ensuring homogeneity and uniform conditions for competition in the EEA but not allowing for individuals to 'normally' invoke provisions of EU law.²¹⁹

Neither the ECT nor the ECAA Agreement establish a supranational judiciary endowed with the powers to enforce the principle of consistent interpretation of national laws with EU *acquis*,²²⁰ yet it must be borne in mind that non-performance of the obligations assumed under the agreements will entail the responsibility of the state *vis-à-vis* the other contracting parties.

The consistent interpretation of EU law and the identical *acquis* exported by the multilateral agreements is best exemplified by the *Polydor* doctrine and the subsequent case law. The *Polydor* case concerned the interpretation of a provision of the 1972 EEC-Portugal FTA. The case concerned two British companies that were selling in the United Kingdom records imported from a Portuguese producer. The records did not comply with United Kingdom copyright laws and, subsequently, a copyright infringement action was brought against the companies. The defendants relied on the provision in the FTA on the abolition of restrictions to trade in goods that have been lawfully placed on the market in Portugal that replicated provisions of the EEC Treaty. The Court of Justice, however, refused to interpret the provision of the FTA in a manner identical to the corresponding provisions of the EEC Treaty. The *Polydor* case, thus, demonstrated that

²¹⁶ *ibid.*

²¹⁷ Case E-1/07 *Criminal proceedings against A* (n 119) para 39.

²¹⁸ Joined Cases E-5/04, E-6/04, and E-7/04 *Fesil and Finnffjord* [2005] EFTA Ct Rep 117, para 110.

²¹⁹ *ibid.*

²²⁰ The exception is the possibility of the Court to give a preliminary ruling on the interpretation of the ECAA Agreement. See further below chapter 7 section 3.2.4.

identical wording of provisions contained in the EU Treaties and in international agreements does not entail automatic uniformity of interpretation.

The Court maintained that the interpretation of the EEC Treaty follows from its objectives and purpose.²²¹ The provisions of the FTA, on the other hand, must be given an interpretation in the light of its own specific objectives. A comparison between the objectives of the EEC Treaty and the FTA revealed the narrower scope of the latter.²²² Subsequently, a mere similarity between the provisions of the two agreements did not justify an extension of the interpretation given in the context of the EEC Treaty to the provisions of the FTA.²²³ The *Polydor* doctrine is fully in line with Article 31 VCLT pursuant to which the provisions of an international agreement must be interpreted in the light of objectives of that agreement specifically.

The *Polydor* doctrine has had a crucial impact on all attempts to extend the actual effect of EU law beyond the Union by means of exporting internal market *acquis*. In order for third country nationals to enjoy the same rights as conferred by the Treaties on EU citizens, the international agreements exporting the *acquis* must contain similarly worded provisions as well as demonstrate a similarity of objectives as concerns the internal market. A mere free trade agreement does not entail such similarity of objectives nor does it provide a guarantee for identical interpretation.

In a number of subsequent cases, the Court has elaborated on the principle that evolved in *Polydor* with the aim of establishing whether provisions identical to EU law contained in international agreements should be given the same interpretation as the *acquis* within the Union. The Court has done so by assessing the aims pursued by each provision of the international agreement in question in its particular context and making a comparison between the objectives and context of the agreement and the EU Treaties. In some instances the Court has considered that provisions of FTAs and association agreements have satisfied the above criteria and have, thus, been interpreted in a manner identical to the provisions of the EU Treaties,²²⁴ in others it has not.²²⁵ The determination is always

²²¹ Case 270/80 *Polydor v Harlequin Records* (n 64) para 16

²²² *ibid* paras 16-18.

²²³ *ibid* paras 15 and 18.

²²⁴ For example, Case C-207/91 *Eurim-Pharm* [1993] ECR I-3723 concerning the EEC-Austria FTA; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049 concerning the EC-Poland EA; Case C-438/00 *Deutscher*

made with reference to a particular provision and does not extend to any international agreement in its entirety.

In *Pabst & Richarz*, for example, the Court contended that a provision of the EEC-Greece Association Agreement, which was similar in wording to Article 95 of the EEC Treaty on the prohibition of fiscal barriers to trade, ‘fulfils, within the framework of the Association between the Community and Greece the same function as that of Article 95’ due to its purpose of preparing the entry of Greece into the EEC.²²⁶ Consequently, the Court ruled that the ‘objective and nature’ of the EEC-Greece Association Agreement and the wording of the specific provision required that within the Community spirits originating from Greece must be treated equally *vis-à-vis* spirits originating from the Member States.²²⁷

In some instances, the institutional context of the international agreement, too, plays a role in establishing the equivalence of the legal contexts of the EU Treaties and the agreement. In *A*, the Court claimed that the same interpretation of the provisions on the free movement of capital within the Community cannot be extended to capital movements between the Community and third countries insofar as the mutual assistance between competent authorities does not extend to the third countries in question.²²⁸ The Court maintained this requirement even with respect to the EEA Agreement.²²⁹

There is abundant case law of the Court on the interpretation of provisions of international agreements including those that replicate EU *acquis*. The Court’s interpretation of three (sets of) agreements – the EEC-Turkey Association Agreement, the bilateral agreements concluded between the EU and Switzerland and the EEA Agreement – illustrate this point. Each of these agreements has a different scope and aim at a different level of integration.

Handballbund [2003] ECR I-4135 concerning the EC-Slovakia EA; Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301 concerning the EEC-Turkey Association Agreement; and Case C-265/03 *Simutenkov* (n 89) concerning the EC-Russia PCA.

²²⁵ For example, Case C-312/91 *Metalsa* (n 213) concerning the EEC-Austria FTA; Case C-63/99 *Gloszczuk* [2001] ECR I-6369 concerning the EC-Poland EA; Case C-235/99 *Kondova* [2001] ECR I-6427 and Case C-101/10 *Pavlov and Famira* [2011] ECR I-5951 concerning the EC-Bulgaria EA; and Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557 concerning the EC-Czech EA.

²²⁶ Case 17/81 *Pabst & Richarz* [1982] ECR 1331, para 26.

²²⁷ *ibid* para 27.

²²⁸ Case C-101/05 *A* [2007] ECR I-11531, paras 60-63.

²²⁹ Case C-72/09 *Établissements Rimbaud* [2010] ECR I-10659, para 40; Case C-48/11 *Veronsaajien oikeudenvallontayksikkö* (Court of Justice, 19 July 2012), para 34. In the former, the conditions for administrative assistance were not satisfied, in the latter they were.

The *Polydor* doctrine established that in order for the Court of Justice to interpret similarly worded provisions in international agreements in line with the interpretation of EU law, the substantive content of the respective provisions, the objective of the agreement and the institutional and procedural context must be comparable. On several occasions, the Court has ruled that the free movement of Turkish workers in the EU as provided in the EEC-Turkey Agreement is limited and does not comprise a general freedom of movement that applies to EU citizens.²³⁰ Third country nationals may, in general, enjoy the same freedom from discrimination on grounds of nationality provided that they belong to the privileged categories of long-term residents or family members or that the principle extends to them by virtue of an international agreement.²³¹

Demirkan is a good example of how the Court delimits the scope of the free movement provisions in the EEC-Turkey Agreement.²³² *Demirkan* concerned a standstill clause in the Additional Protocol to the EEC-Turkey Agreement that restricted the contracting parties to adopt new barriers to the freedom to provide services after the conclusion of the agreement. The standstill clause became binding on Germany in 1973 but, nevertheless, in 1980 Germany introduced a visa requirement for Turkish nationals travelling to Germany. In *Soysal*, the Court found that the visa requirement infringed the standstill clause by erecting new barriers to the freedom of Turkish nationals to provide services in the EU.²³³ *Demirkan*, a Turkish national, applied for a German visa to visit a relative in Germany but her application was rejected by the German authorities. The applicant challenged the rejection in a German court arguing that because the visa requirement restricted her freedom to receive services in Germany it also violated the standstill clause. This argument was rejected by the Court. Previously, in *Luisi and Carbone* the Court had interpreted the 'freedom to provide services' as entailing a passive dimension – the freedom of movement for the purpose of receiving rather than

²³⁰ For example, Case C-171/95 *Tetik* [1997] ECR I-329, para 29; Case C-37/98 *Savas* [2000] ECR I-2927, para 59; Case C-171/01 *Wählergruppe Gemeinsam* (n 224) para 89; Case C-325/05 *Derin* [2007] ECR I-6495, para 66.

²³¹ See S Boelaert-Suominen, 'Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals who are Long-term Residents: Five Paces Forward and Possibly Three Paces Back' (2005) 42 *Common Market Law Review* 1011.

²³² Case C-221/11 *Demirkan* (Court of Justice, 24 September 2013).

²³³ Case C-228/06 *Soysal and Savatli* [2009] ECR I-1031, paras 57-58.

providing services.²³⁴ In *Demirkan*, the Court decided not to extend the interpretation given in *Luisi and Carbone* to the EEC-Turkey Agreement. Resorting to the *Polydor* doctrine, the Court found that the 'purely economic purpose' of the EEC-Turkey Agreement fell short of the purpose of the EU Treaties to 'bring [...] about freedom of movement for persons of a general nature'.²³⁵ Pursuant to the Court, the protection of passive freedom to provide services is part of the specific internal market objective – one which distinguishes the EU Treaties from the EEC-Turkey Agreement.²³⁶ *Demirkan* clearly demonstrates that it is not a given that a fundamental freedom retains the same scope as within the EU when exported to third countries and extended to non-EU nationals.

There are two possibilities for analysing the application of the *Polydor* doctrine to the EU-Switzerland bilateral agreements. On the one hand, the bilateral agreements are separate from one another and pursue their own objectives. On the other hand, however, each bilateral agreement contributes to the comprehensive management of EU-Switzerland relations and must, thus, be seen in the overall context of the set of agreements.²³⁷ In *Grimme*, the Court adopted the latter, comprehensive way of analysis.²³⁸ The Court found that the objectives of the EU-Swiss bilateral agreements as regards the internal market were not comparable to those of the EEA Agreement. The Court noted that by rejecting the EEA Agreement and refraining from implementing the free movement of services and establishment Switzerland did not 'join the internal market of the Community' which is an 'area of total freedom of movement analogous to that provided by a national market'.²³⁹ Therefore, the provisions of the EU-Switzerland bilateral agreements cannot automatically be interpreted in line with the corresponding provisions of EU Treaties unless the agreement in question provides so explicitly.²⁴⁰ In *Bergström*, AG Mazák referred to *Grimme* to conclude that there is no automatic

²³⁴ Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, para 16.

²³⁵ Case C-221/11 *Demirkan* (n 232) paras 44, 51 and 53.

²³⁶ *ibid* para 56.

²³⁷ This applies in particular to the 'Bilateral I' set of seven agreements which are bound together by a so-called 'guillotine clause'. All of the agreements entered into force together and none of them can be terminated individually, see above chapter 1 section 3.1.

²³⁸ Case C-351/08 *Grimme* [2009] ECR I-10777.

²³⁹ *ibid* para 27.

²⁴⁰ *ibid* para 29; Case C-541/08 *Fokus Invest* [2010] ECR I-1025, para 28; Case C-70/09 *Hengartner and Gasser* [2010] ECR I-7233, para 42.

equivalence of interpretation between the EU internal market provisions and the provisions of the EC-Switzerland bilateral agreements but that the latter instead need to be interpreted in the light of the objectives of the bilateral agreements.²⁴¹ Surely, this does not preclude the possibility of identical interpretation provided that in the relevant fields the objectives of the Treaties and of the bilateral agreements are comparable.

In his Opinion in *Ettwein*,²⁴² AG Jääskinen reiterated the Court's reasoning in *Grimme*. The AG found that as regards the internal market and the four freedoms the aims of the EEA Agreement are identical to those of the EU Treaties; identically worded provisions of the EEA Agreement should, therefore, be given the same interpretation as the underlying EU rules.²⁴³ By rejecting the EEA Agreement in 1992, Switzerland also discarded the 'project of creating an integrated economic whole with a single market based on common rules between its members'.²⁴⁴ Instead, the EC-Switzerland agreement on the free movement of persons, which was the subject of the Opinion, merely aims at the strengthening of relations 'without any prospect of extending the application of the fundamental freedoms *in toto* to the Swiss Confederation', thus excluding identical interpretation from taking place automatically.²⁴⁵ The Court in *Ettwein* interpreted the relevant provisions of the EC-Switzerland agreement in the light of the agreement itself without comparing the objectives of the agreement with those of the EU Treaties or the EEA Agreement.²⁴⁶ In spite of the lack of automaticity the Court deemed the objectives in the particular case comparable and interpreted the relevant provisions of the EC-Switzerland agreement in light of the previous judgments it had given in the context of the EU.

Among all international agreements concluded by the EU, the EEA Agreement comes closest to the level of integration demonstrated by the EU internal market. Homogeneous interpretation of EEA *acquis* with EU *acquis* is, moreover, pursued by Article 6 EEA Agreement which provides that provisions of the EEA Agreement which are identical in substance to EU *acquis* must be interpreted in conformity with the pre-1992 case law of

²⁴¹ Case C-257/10 *Bergström* [2011] ECR I-13227, Opinion of AG Mazák, para 45.

²⁴² Case C-425/11 *Katja Ettwein* (Court of Justice, 18 October 2012), Opinion of AG Jääskinen.

²⁴³ *ibid* para 39.

²⁴⁴ *ibid* para 36.

²⁴⁵ *ibid* paras 36-37 and 65.

²⁴⁶ Case C-425/11 *Katja Ettwein* (Court of Justice, 18 October 2012).

the Court. Already before the conclusion of the EEA Agreement its objectives were subject to scrutiny by the Court. In Opinion 1/91, the Court, implicitly referring to the *Polydor* doctrine, found that the identical wording of the provisions of the EC Treaty and the EEA Agreement does not necessarily lead to their identical interpretation unless the objectives of both treaties justify such analogous interpretation.²⁴⁷ Even though the internal market objectives of the EU and the EEA are roughly identical the Court found that the free trade and competition rules in the EEC Treaty 'far from being an end in themselves' serve the purpose within the Community of 'making concrete progress towards European unity'.²⁴⁸ Provisions 'identical in their content or wording' by themselves do not guarantee homogeneity between the EEC Treaty and the EEA Agreement.²⁴⁹

The conclusions that the Court made in Opinion 1/91 regarding homogeneity were, however, not fully endorsed by subsequent case law. In *Opel Austria*, the CFI rejected the Council's argument on the existence of major differences between the EU Treaties and the EEA Agreement that would preclude an identical interpretation of Article 10 EEA Agreement and the corresponding provision in the EC Treaty.²⁵⁰ The CFI recognised the difference between the aims and context of the EEA Agreement and Community law yet did not perceive them as standing in the way of a homogeneous EEA. Instead, the CFI deemed the integration objectives of the EEA Agreement to 'exceed those of a mere free-trade agreement', thus justifying the inapplicability of the *Polydor* doctrine.²⁵¹ The CFI argued that the conclusions of Opinion 1/91 referred to the envisaged judicial system of the EEA and its effect on the autonomy of the EU legal order rather than the identical interpretation of similar provisions.²⁵² The EEA Agreement contains certain safeguard clauses that allow the Joint Committee to refuse the entry of post-1992 *acquis* into the EEA legal order, thus leading to derogations from substantive uniformity between the EU and the EEA legal order. The CFI, however, regarded the possibility of derogations not to

²⁴⁷ Opinion 1/91 *EEA I* (n 2) para 14.

²⁴⁸ *ibid* paras 15-18.

²⁴⁹ *ibid* para 22.

²⁵⁰ Case T-115/94 *Opel Austria v Council* (n 99) paras 105-106.

²⁵¹ *ibid* paras 106-107.

²⁵² *ibid* para 109.

be of importance for the purpose of interpreting Article 10 EEA Agreement.²⁵³ Certain substantive derogations in the composition of the *acquis* should not render the objectives of the EEA Agreement incomparable to EU law.

The arguments of the CFI in *Opel Austria* were refuted by AG Cosmas in *Andersson*.²⁵⁴ The case concerned the interpretation of Article 6 EEA Agreement with a view to determining whether secondary EU law and principles established in the case law of the Court of Justice – in this case the *Francovich* doctrine – can be applied in the EEA legal order. Noting the ‘fundamental differences’ between the EU and the EEA legal systems the AG contended that the contexts are too different to transfer to the EEA the fundamental principles of primacy, direct effect and state liability.²⁵⁵ The analysis of AG Cosmas can be considered correct but must be viewed in the specific context of the applicability of the fundamental principles of the EU in the EEA Agreement that pertain to the effect of the *acquis* outside the Union rather than the identical set of rights and obligations which both EU and EEA EFTA citizens receive from the EU Treaties and the EEA Agreement, respectively. As concerns the comparability of the objectives of the EEA Agreement and the EU Treaties for the purpose of interpreting Article 10 EEA Agreement, AG Cosmas fully endorsed the conclusions of the CFI in *Opel Austria*.²⁵⁶

The ‘notorious’ differences in character between the EU and the EEA Treaties once noted by AG Fennelly²⁵⁷ have not been upheld in subsequent case law. In *Ospelt*, both AG Geelhoed and the Court agreed that the objective of ‘the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area’ adds up to an extension of the EU internal market to the EEA EFTA States.²⁵⁸ Exceptions occur only in situations where not all relevant rules that are

²⁵³ *ibid* para 110.

²⁵⁴ Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, Opinion of AG Cosmas.

²⁵⁵ *ibid* para 49.

²⁵⁶ *ibid* n 44.

²⁵⁷ Case C-110/95 *Yamanouchi* [1997] ECR I-3251, Opinion of AG Fennelly, para 30.

²⁵⁸ Case C-452/01 *Ospelt* [2003] ECR I-9743, Opinion of AG Geelhoed, para 69; Case C-452/01 *Ospelt* [2003] ECR I-9743, para 29. The Court’s ruling in *Ospelt* has been confirmed in a number of subsequent judgments, see H Haukeland Fredriksen, ‘Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area’ (2012) 18 *European Law Journal* 868, 873-875.

relevant to the identical interpretation and application of a provisions of EEA law and the underlying EU law provisions have been made part of the EEA legal order.²⁵⁹

Several authors have shared the view that the internal market has been 'extended' to the EEA EFTA States.²⁶⁰ To the extent that the EU Treaties and the EEA Agreement feature similar provisions on the free movement of capital as well as similar objectives and context, the provision itself and permissible restrictions must 'as far as possible' be given identical interpretation.²⁶¹ Commentators, too, agree that the *Polydor* doctrine does not apply to the EEA Agreement to the effect of precluding identical interpretation of provisions which are identical in substance.²⁶² On the one hand, compared to the EEC-Portugal FTA, the EEA Agreement envisages much deeper cooperation. On the other hand, Article 6 EEA Agreement precludes conflicting interpretations, at least with regard to pre-signature case law. Moreover, although the EEA Agreement does not include a reference to the peoples of the EU and the EEA EFTA States as did the original EEC Treaty, the preamble to the EEA Agreement does speak of 'the important role that individuals will play in the European Economic Area through the exercise of the rights conferred on them by this Agreement and through the judicial defence of these rights'.²⁶³ Importantly, Recital 8 was only added to the preamble to the draft EEA Agreement after the Court had given its Opinion 1/91.²⁶⁴ Compared to both the EEC-Turkey Agreement and the EU-Switzerland bilateral agreements, therefore, the objectives of the EEA Agreement do, indeed, to the extent of the internal market constitute a pre-determined guarantee for identical interpretation of identically worded *acquis*. The type of the

²⁵⁹ Case C-540/07 *Commission v Italy* [2009] ECR I-10983, paras 68-75.

²⁶⁰ C Baudenbacher, 'If Not EEA State Liability, Then What' (n 118) 333; H Haukeland Fredriksen, 'Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area' (n 258) 883.

²⁶¹ Case C-452/01 *Ospelt*, Opinion of AG Geelhoed (n 258) paras 69-71.

²⁶² S Norberg, 'The European Economic Area' in PJ Oliver (ed), *Oliver on Free Movement of Goods in the European Union* (Hart Publishing 2010) 487, 493; C Baudenbacher, 'The EFTA Court and Court of Justice of the European Union' (n 108) 191.

²⁶³ Recital 8, Preamble to the EEA Agreement.

²⁶⁴ H Haukeland Fredriksen, 'The EFTA Court 15 Years on' (2010) 59 *International and Comparative Law Quarterly* 731, 750.

agreement plays no particular role here as all of the agreements discussed above have been concluded as association agreements.²⁶⁵

Three recent judgments in cases *United Kingdom v Council* provided a unique occasion to compare the objectives of the EEA Agreement,²⁶⁶ the EC-Switzerland Agreement on the Free Movement of Persons,²⁶⁷ and the EEC-Turkey Agreement.²⁶⁸ Although the judgments do not concern the interpretation of identical provisions they illustrate the considerations of the objective and context of the international agreements which can and certainly will be taken into account should a question of identical interpretation arise at a later point. Each of the cases concerned an annulment action brought by the United Kingdom Government against a Council decision on the position to be taken on behalf of the EU in accordance with Article 218(9) TFEU by the bodies that amend the three international agreements. The amendments in question concerned the adoption into the EEA Agreement, the EC-Switzerland Agreement and the EEC-Turkey Agreement of Regulation No 883/2004 on the coordination of social security systems that replaced Regulation No 1408/71. The United Kingdom Government claimed that the decisions were adopted on a wrong legal basis. Instead of the internal market legal basis of Article 48 TFEU, the United Kingdom argued that the contested Council decisions should have been adopted on the basis of Article 79(2) TFEU regulating EU immigration policy. The United Kingdom may exercise an opt-out from the latter.

In all of the three cases, the Court firmly overruled the United Kingdom's arguments that the amendments constituted immigration policy measures. The first judgment delivered in Case C-431/11 concerned the EEA Agreement. The Court, firstly, cited its earlier judgment in *Ospelt* on the objectives of the EEA Agreement to extend the internal market to EEA EFTA States and found that the contested Regulation served precisely the purpose of providing to EEA citizens the same social conditions for the exercise of their free movement rights as those enjoyed by EU citizens.²⁶⁹ In the case of the EC-

²⁶⁵ Among the bilateral agreements concluded with Switzerland, agreements belonging to 'Bilateral I' are association agreements but not those of the 'Bilateral II' package. The Agreement on the Free Movement of Persons is part of 'Bilateral I'. See above chapter 1 section 3.1.

²⁶⁶ Case C-431/11 *United Kingdom v Council* (Court of Justice, 26 September 2013).

²⁶⁷ Case C-656/11 *United Kingdom v Council* (Court of Justice, 27 February 2014).

²⁶⁸ Case C-81/13 *United Kingdom v Council* (Court of Justice, 18 December 2014).

²⁶⁹ Case C-431/11 *United Kingdom v Council* (n 266) paras 50 and 58.

Switzerland agreement, the Court did not use the language of extending the internal market to Switzerland, probably due to the Swiss refusal to become party to the EEA Agreement. Instead, the Court referred to the objective of the agreement to 'bring about between [the EC and Switzerland] the free movement of persons on the basis of the rules applying in the Community'.²⁷⁰

Both the EEA and the EC-Switzerland agreements already contained EU *acquis* on the approximation of social security systems with a view to ensure the effectiveness of the free movement provisions. An update in EU *acquis* was necessary to incorporate changes introduced by the Lisbon Treaty. In order to ensure the balance of rights between EU citizens and the citizens of Iceland, Liechtenstein, Norway and Switzerland and 'with the result that nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU citizens' required a due update in the EEA and EU-Swiss *acquis* on the free movement of persons but the scope of the amendment in itself was not significant.²⁷¹

The same does not hold true for the EEC-Turkey Agreement. The objective of the EEC-Turkey Agreement is narrower than the fullest possible realisation of the free movement of persons, stating merely the wish of the contracting parties to secure between them the freedom of movement for workers in progressive stages, one of the stages being the incorporation of the contested Regulation into the Agreement.²⁷² As set out in *Demirkan* and other case law on the EEC-Turkey Agreement, there is no general freedom of movement between the EU and Turkey nor have the contracting parties completed the progressive introduction of the free movement of workers provided in Article 12 of the Agreement. In the judgment, the Court referred extensively to the previous judgments in the cases concerning the EEA Agreement and the EC-Switzerland Agreement. The comparison of the three agreements led to a conclusion that as concerns the free movement of persons the objective of the EEC-Turkey Agreement was neither comparable to the aims of the EEA Agreement nor those of the EC-Switzerland Agreement.²⁷³

²⁷⁰ Case C-656/11 *United Kingdom v Council* (n 267) para 55.

²⁷¹ *ibid* para 58.

²⁷² Case C-81/13 *United Kingdom v Council* (n 268) paras 43 and 45.

²⁷³ *ibid* para 57.

The Court contended that the EEA EFTA States and Switzerland can be 'equated with a Member State for the purposes of the application of those regulations' whereas Turkey cannot.²⁷⁴ Even the fact that Regulation No 1408/71 had been incorporated into the EEC-Turkey Agreement and the Additional Protocol similarly as to the EEA and the EC-Swiss agreements, it did not have the same effect of extending to Turkey the rules on the coordination of social security systems.²⁷⁵ As a result, Turkey was not covered by the extension of the internal market in the way of the EEA EFTA States and Switzerland. In the case at hand this meant that the Council decision in question could not be adopted solely on the internal market legal basis of Article 48 TFEU but in conjunction with Article 217 TFEU which is the legal basis for association agreements.²⁷⁶ The additional legal basis was intended to emphasize the distinction between the EEC-Turkey Agreement and the EEA and EC-Switzerland agreements yet is somewhat puzzling as all of the agreements are association agreements. The Court highlighted that the legal basis of Article 48 TFEU may only be used on its own for adopting internal market measures within the EU or in external action *vis-à-vis* non-EU Member States that 'can be placed on the same footing' as EU Member States.²⁷⁷ The difference between the decisions does not lie within actual divergences in the application of Regulation 883/2004 in the third countries concerned but rather in the perceived differences in the level of integration of the third countries into the internal market. Both AG Kokott²⁷⁸ and the Court²⁷⁹ made it explicit that the idea of extending the internal market to non-EU Member States includes not only the extension of free movement rights within the EU to the third country nationals but also the free movement of EU nationals in the third countries in question. Nationals of the EEA EFTA countries, furthermore, enjoy the internal market freedoms even *vis-à-vis* each other. In this case, the individuals of Iceland, Liechtenstein, Norway and Switzerland have, indeed, been placed on an equal footing with EU citizens. In the case of Switzerland, this generalisation cannot automatically be carried on to all of the

²⁷⁴ *ibid.*

²⁷⁵ *ibid* para 58.

²⁷⁶ *ibid* paras 59-66.

²⁷⁷ *ibid* para 59.

²⁷⁸ Case C-431/11 *United Kingdom v Council* (Court of Justice, 26 September 2013), Opinion of AG Kokott, para 42.

²⁷⁹ Case C-431/11 *United Kingdom v Council* (n 266) para 55.

bilateral agreements because the EU-Swiss cooperation lacks uniformity in the core elements of the internal market – the four fundamental freedoms.

In Opinion 1/91, the Court held that the fundamental freedoms were only one of several possible means to achieve the internal market and economic and monetary union and, eventually, greater European unity.²⁸⁰ A reading of Opinion 1/91 in combination with the judgments in the above-mentioned cases *United Kingdom v Council*, however, reveals that the Court is not likely to restrict the application of EU *acquis* in countries covered by agreements that envisage deep regulatory integration. By 2014, the Court's careful approach towards the EEA Agreement has been replaced by recognition of the possibility of truly extending the internal market beyond the EU also in the light of the *Polydor* principle. The facts of the cases above did not require the Court to comment on the interpretation of EU *acquis* in the respective agreements yet the Court's affirmation of an extended internal market encourages one to assume that it is unlikely for the Court to impede the functioning of the expanded internal market by refusing to interpret EEA or even EU-Swiss *acquis* which is identical in substance to the underlying EU *acquis* differently from the latter.

The EFTA Court is very accommodating towards identical interpretation of identical provisions of EU and EEA law. On the one hand, this friendliness can be derived from Article 6 EEA Agreement that explicitly requires that the provisions of the EEA Agreement which are identical to those of the EU Treaties be interpreted and applied in a manner uniform with the pre-signature case law of the Court of Justice. Article 3 of the SCA provides that the EFTA Court also has to pay due account to later case law. On the other hand, the duty of uniform interpretation stems from the 'main objective of the EEA Agreement [...] to create a homogeneous EEA' as provided by the EEA Agreement.²⁸¹ The reasoning of the EFTA Court is effectiveness-driven, thus corresponding to the teleological approach of the Court of Justice.²⁸² According to the EFTA Court, the homogeneity principle sets the foundation for a presumption that identical provisions of

²⁸⁰ Opinion 1/91 *EEA I* (n 2) para 19.

²⁸¹ Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct Rep 259, para 27.

²⁸² 'Homogeneous interpretation and application of common rules is essential for the effective functioning of the internal market within the EEA': *ibid.*

EU and the EEA treaties are to be interpreted in a similar manner.²⁸³ Diverging interpretations are justified only in cases where the differences in the scope and purpose of the respective treaties so demand.²⁸⁴ Justification cannot, however, be granted on the basis of any unilateral expression of understanding made by the contracting parties.²⁸⁵ The threshold for the EEA EFTA States to prove the compelling circumstances that would justify diverging interpretation of EEA law from EU law is very high rendering the homogeneity guarantee on behalf of the EFTA Court, in turn, very strong.²⁸⁶ Neither does the EEA legal order accommodate endless stretching in substantive terms. In *Pedidel*, the EFTA Court noted that dynamic interpretation of the EEA Agreement does not entail an expansion of the scope of the Agreement to cover agricultural products that were originally excluded from its application.²⁸⁷

Importantly, the EFTA Court has, even though it is not legally bound to, extended the principle of uniform interpretation also to procedural rules including, for example, rules on costs which are recoverable from the party ordered to pay the costs that are worded identically in the Rules of Procedure of the EFTA Court, the Court of Justice and the General Court.²⁸⁸ As the reasons for such voluntarily homogeneous interpretation the EFTA Court stated equal treatment and foreseeability for the parties appearing before the courts.²⁸⁹

The provisions of the ECAA Agreement, too, are to be given an interpretation uniform with the underlying EU *acquis*. The ECAA Agreement generally fails to distinguish between the ECAA-level homogeneity and the ECAA-EU homogeneity. Article 16(1) of the ECAA Agreement provides the standard clause of conforming interpretation of identical *acquis*. In Opinion 1/00 on the compatibility of the ECAA Agreement with the EU Treaties, the Court was firm to make a distinction between the EU and the ECAA legal orders and reassured that identical rules are to be given autonomous interpretation.²⁹⁰

²⁸³ Case E-2/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Ct Rep 164, para 59.

²⁸⁴ Case E-3/98 *Rainford-Towning* [1998] EFTA Ct Rep 205, para 21, referring to the *Maglite* case in which such different circumstances did, indeed, occur: Case E-2/97 *Maglite* (n 100) para 27.

²⁸⁵ Case E-2/06 *EFTA Surveillance Authority v Norway* (n 283) para 59.

²⁸⁶ H Haukeland Fredriksen, 'The EFTA Court 15 Years on' (n 264) 743.

²⁸⁷ Case E-4/04 *Pedidel* [2005] EFTA Ct Rep 1, para 28.

²⁸⁸ Order in Case E-9/04 *European Banking Federations* [2007] EFTA Ct Rep 74, para 16.

²⁸⁹ *ibid.*

²⁹⁰ *ibid* para 41.

Autonomous interpretation, which the Court refers to for the purposes of safeguarding the autonomy of the EU legal order does not, however, exclude identical interpretation but enables the Court to take due account of differences in the objectives and context of the separate legal orders that may affect the interpretation of individual provisions, just as in the case of the EEA Agreement.

It is likely that the rules which the Court considers ‘identical as to substance but distinct as to form’²⁹¹ will receive exactly the same kind of uniform interpretation as EEA law provided that the identically worded provisions pursue the same objectives in the EU and in the ECAA legal orders. Article 94 ECT provides in the absence of a judiciary set up by the agreement that the institutions of the Energy Community must ensure conforming interpretation of Energy Community *acquis* with the case law of the Court of Justice. There is not case law of the Court that would shed light on the interpretation of the objectives and purpose of the ECT *vis-à-vis* the EU Treaties. Nevertheless, the Court’s rulings on international agreements that ‘extend’ the internal market to third countries clearly indicates that in general terms the broad objectives of both the ECAA Agreement and the ECT should be considered equivalent of the EU Treaties for the purposes of granting similar interpretation to identical *acquis*.

4.2 Responsibility of the state for violation of EU acquis

4.2.1 Public international law

In public international law, the responsibility for a failure to properly fulfil international law obligations is vested with the subjects of international law – states, international organisations, and to a very limited degree individuals. In case of a breach of an international agreement, the rules first invoked will be those provided in the treaty itself. Secondly, a breach of a treaty triggers responsibility under the international law of treaties, and in particular the rule of *pacta sunt servanda*. The violation of a primary obligation, i.e. of the treaty provisions, entails in the case of states responsibility under the VCLT. Thirdly, the breach can entail state responsibility as a secondary obligation, following a breach of the primary obligation. Article 1 ARSIWA provides that every internationally wrongful act of a State entails the international responsibility of that

²⁹¹ *ibid.*

State. In order to invoke state responsibility as a secondary obligation, there needs to be a breach of a primary obligation,²⁹² such as a breach of a treaty.²⁹³ International law does not distinguish between responsibility arising from a breach of contract or tort.²⁹⁴

The main reaction to treaty breach under the law of treaties is non-performance in the form of suspension or termination of the treaty,²⁹⁵ either on the basis of the treaty or the general law of treaties under Articles 65-68 and Annex of the VCLT. Invalidation of consent to be bound is also possible under Articles 49-52 VCLT. If these remedies have not been used, the aggrieved party may invoke state responsibility under Articles 23 and 25 of the ARSIWA,²⁹⁶ while the procedures provided in the VCLT and the ARSIWA differ as to their complexity.²⁹⁷

The possibilities for individuals to enforce international law against the violating state are extremely limited. Even though many treaties create rights for individuals that can be invoked in national courts, individuals themselves are not subjects of international law and do not, therefore, enjoy standing in the International Court of Justice (ICJ).²⁹⁸ In the case of agreements that are concluded by states a breach of an international law obligation can, thus, only be invoked by the contracting parties. The situation is different in cases where the international law instrument itself creates remedies that can be invoked by individuals, such as access to dispute settlement mechanisms in the case of the ECHR and bilateral investment treaties that have established an arbitral tribunal. In these cases, individuals can rely on the provisions of international law directly, provided that the treaty has become part of the national legal order and that its provisions confer rights on the individual. Regardless, the possible recourse to international courts and other dispute settlement mechanisms is complementary to the legal remedies provided

²⁹² ILC Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, (2001) II Yearbook of the International Law Commission Part II, 59.

²⁹³ For discussion, see: J Verhoeven, 'The Law of Responsibility and the Law of Treaties' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 105, 107.

²⁹⁴ *Rainbow Warrior Affair (New Zealand v France)* (1990) 20 RIAA 217; J Verhoeven (n 293) 106.

²⁹⁵ B Simma and CJ Tams, 'Reacting against Treaty Breaches' in DB Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2012) 576, 580.

²⁹⁶ C Binder, 'Does the Difference Make a Difference? A Comparison between the Mechanisms of the Law of Treaties and of State Responsibility as Means to Derogate from Treaty Obligations in Cases of Subsequent Changes of Circumstances' in M Szabó (ed), *State Responsibility and the Law of Treaties* (Eleven International Publishing 2010) 1, 17.

²⁹⁷ *ibid* 22-23.

²⁹⁸ Articles 34(1) and 65 ICJ Statute.

by national law, provided that the rules on state immunity so permit.²⁹⁹ Individuals can, in certain circumstances, also invoke international law in national disputes where a rule of international law that is binding on the state covers an aspect of the situation of the individual.³⁰⁰ In the same vein, should individuals incur damages as a result of a state breaching an international law obligation they can claim these in national courts or, exceptionally, before the ECtHR and the Court of Justice of the European Union.³⁰¹

International liability³⁰² for injuries occurs in the relationship between subjects of international law, thus primarily states and international organisations. Liability for damages can occur either as a result of injurious consequences of acts prohibited by international law³⁰³ or acts not prohibited by international law.³⁰⁴ Determining whether the conduct of a state in a particular situation is unlawful or not rests with international law solely,³⁰⁵ following the principle of 'cognitive indetermination' of national and international law.³⁰⁶

According to the distinction made in international law between both state responsibility and state liability, and primary and secondary obligations, the obligation to make

²⁹⁹ J Crawford, 'The System of International Responsibility' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 17, 21.

³⁰⁰ See I Brownlie, *Principles of Public International Law* (Oxford University Press 2008) 35.

³⁰¹ G Van Harten and M Loughlin (n 24) 131.

³⁰² The distinction between international responsibility and international liability is relatively ambiguous. The simplest explanation offered by the International Law Commission assigns to the category of international responsibility acts which constitute a breach and to the category of international liability acts which are not unlawful yet produce adverse consequences (see (1973) II Yearbook of the International Law Commission, 169, para 38), though liability is also used to denote the occurrence of damages. For more uses of the terms see AE Boyle, 'State responsibility and international liability for injurious consequences of acts not prohibited by international law: a necessary distinction?' (1990) 39 *International and Comparative Law Quarterly* 1, 8-10. International liability, as opposed to responsibility may, for example, be considered to fall into the categories of either 'objective responsibility' without fault; 'absolute responsibility' for cases where damages occur; or 'causal responsibility' where a link exists between the act and the resulting damage. See J-M Sorel, 'The Concept of 'Soft Responsibility'?' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 165, 166.

³⁰³ ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, (2001) II Yearbook of the International Law Commission Part II.

³⁰⁴ International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, sub-divided into Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, (2001) II Yearbook of the International Law Commission Part II; and Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, (2006) II Yearbook of the International Law Commission Part II.

³⁰⁵ P-M Dupuy, 'Relations between the International Law of Responsibility and Responsibility in Municipal Law' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 173, 181.

³⁰⁶ C Santulli, *Le statut international de l'ordre juridique étatique* (Editions A. Pedone 2001) 31.

reparation for damage constitutes a secondary obligation in the former category and primary obligation in the latter.³⁰⁷ The means at the disposition of an injured state under ARSIWA include reparation, countermeasures, cessation of the wrongful conduct, and assurances and guarantees of non-repetition.

4.2.2 EU law

In the case of the EU and the treaties concluded by the EU, the matter of responsibility and liability of international organisations comes into play. The EU has not yet signed the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and neither has the Convention entered into force but the EU is, nevertheless, bound by those provisions of the Convention that have been recognised as international customary law. The responsibility and liability of the EU as an international organisation are, moreover, regulated by the ILC Draft Articles on the Responsibility of International Organizations,³⁰⁸ which, in essence, impose conditions identical to the ARSIWA for invoking the responsibility of an international organisation for its internationally wrongful conduct. Account, though, must in the case of the EU also be taken of the special characteristics of the EU as a supranational, or 'regional economic integration' organisation.³⁰⁹ Article 340(2) TFEU provides that in the case of non-contractual liability, the Union shall make good the damage caused 'in accordance with the general principles common to the laws of the Member States' regardless of whether the damage is caused by legislative, administrative or judicial activities of the Union's institutions or,³¹⁰ in the opinion of those who criticise this distinction, regardless of whether the act was discretionary or not.³¹¹ As concerns the liability of the Member States for infringements of international agreements concluded by the EU, including mixed agreements, the Court found in *Commission v Ireland* that Ireland, by not fulfilling its obligations under the EEA Agreement in an area

³⁰⁷ (1970) II Yearbook of the International Law Commission, 179, para 11; (1980) II Yearbook of the International Law Commission Part I, 253, para 21. See AE Boyle (n 302) 10.

³⁰⁸ (2011) II Yearbook of the International Law Commission Part II.

³⁰⁹ For the specificities of the EU as a subject of international responsibility see E Paasivirta and PJ Kuijper, 'Does one size fit all?: The European Community and the responsibility of international organizations' (2005) 36 Netherlands Yearbook of International Law 169.

³¹⁰ Case C-352/98 P *Laboratoires pharmaceutiques Bergaderm and Goupil* [2000] ECR I-5291, para 46.

³¹¹ PP Craig, 'Once more unto the breach: the Community, the State and damages liability' (1997) 113 Law Quarterly Review 67, 72-73.

that falls within the scope of EU law, has subsequently failed to fulfil its obligations under EU law.³¹²

The EU Treaties being governed by international law, the Member States of the EU, too, owe to each other obligations under international law. Under the VCLT, the Member States must, firstly, perform the obligations assumed under the Treaties; secondly, do so in good faith; and, thirdly, not invoke national law as a justification for a failure of performance.³¹³

The EU Treaties also envisage sanctions for the non-performance of Treaty obligations. A Member State may bring a case of non-performance by another Member State to the Court of Justice under Article 259 TFEU. Before recourse can be had to this provision, the Member State must first have brought the matter to the attention of the Commission. If the infringement is established by the Court, the infringing Member State must to remedy the breach by means of a financial penalty under Article 260 TFEU. A special provision provided in Article 7 TEU establishes a procedure for dealing with 'serious and persistent breaches' by a Member State of the values enlisted in Article 2 TEU on which the EU is founded by which the infringing Member State may temporarily lose certain rights under the Treaties, including voting rights in the Council.

The Member States may not adopt any countermeasure they wish against a breaching Member State. The Court has clarified this in the *Hedley Lomas* case.³¹⁴ The case concerned a general ban that the United Kingdom had placed on exports of live animals to Spain – itself a quantitative restriction on trade in goods prohibited by the EU Treaties – upon conviction that Spain had failed to properly implement an EU directive. The Court found that a Member State may not adopt 'on its own authority, corrective or protective measures' in reaction to a breach of EU law by another Member State.³¹⁵ Recourse must instead be had to infringement proceedings under Article 259 TFEU or to the possibility of filing a complaint with the Commission.

³¹² Case C-13/00 *Commission v Ireland* [2002] ECR I-2943.

³¹³ Articles 26 and 27 VCLT.

³¹⁴ Case C-5/94 *Hedley Lomas* [1996] ECR I-2553.

³¹⁵ *ibid* para 20, with reference to Joined Cases 90/63 and 91/63 *Commission v Luxembourg and Belgium* [1964] ECR 625; and Case 232/78 *Commission v France* [1979] ECR 2729, para 9.

Significantly more often than the question of the responsibility of the Member States for breaches of EU Treaties *vis-à-vis* one another does one encounter the issue of the 'domestication' of responsibility – the responsibility of the Member States for breaches of EU law towards individuals. In such instances, national courts are faced with the complex task of adjudicating on disputes that involve international law including, in this case, EU law.³¹⁶

The direct access to courts that individuals enjoy under of EU law to defend their rights against a breaching Member State makes the EU almost unique among other international organisations. Additional remedies are in the hands of the individuals in the form of bringing complaints to the Commission in order to encourage the latter to initiate infringement proceedings against the Member State in a procedure of non-compliance regulated by Article 258 TFEU. Furthermore, individuals can seek reparation for damages that have incurred as a result of the breach.

The principle of state liability in EU law is a direct consequence of the doctrine of direct effect that was established by the Court to ensure the protection of individual rights and the effective application of EU law. In the meantime, the doctrine of direct effect has assumed a more general importance, primarily with respect to a general 'invocability' of EU law in proceedings other than those strictly concerned with the creation of individual rights.³¹⁷ Yet, as argued by Eilmansberger, the invocability of EU law on its own is limited in value where the individual rights have no particular content, including 'offensive remedies'.³¹⁸ The lack of the latter is explained by the fact that the initial cases of EU state liability concerned mainly the 'negative' integration rules, i.e. the rules of the internal market on prohibitions on restrictions of free movement.³¹⁹ When 'positive' integration gained ground in the EU in the form of increased standard-setting by the

³¹⁶ J Crawford, 'The System of International Responsibility' (n 299) 21.

³¹⁷ CWA Timmermans, 'Directives: Their Effect within the National Legal Systems' (1979) 16 Common Market Law Review 533, 539; S Prechal, *Directives in EC law* (n 195) 240-241.

³¹⁸ T Eilmansberger, 'The relationship between rights and remedies in EC law: In search of the missing link' (2004) 41 Common Market Law Review 1199, 1229.

³¹⁹ S Weatherill, 'Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective' in C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 87, 89.

Union the Court recognised the need, in addition to establishing the direct effect of EU provisions, to also provide for sufficient remedies.³²⁰

In *Francovich*, the Court established state liability for breaches of EU law as ‘a matter of principle’, much like the ascertainment of direct effect and primacy. The Court found that one further piece missing from the effectiveness puzzle was the possibility for individuals to obtain redress for the infringement of their rights under EU law.³²¹ State liability is a means of redress for the aggrieved individuals who have suffered a loss because of a Member State’s failure to correctly implement EU law and, thereby, grant the individuals the possibility to use the rights that have been conferred upon them. In *Francovich*, the Court defined the three conditions for establishing state liability for a failure to properly implement a directive: firstly, the directive confers individual; secondly, these rights can be identified in the directive; and, thirdly, there is a causal link between the breach of EU law by the Member State and the loss and damage incurred by the individual.³²² In the Joined Cases *Brasserie du Pêcheur and Factortame*,³²³ the Court extended the application of the doctrine also to directly applicable Treaty provisions. The direct effect of the provision in question is, however, not required in order to ascertain state liability of a Member State.³²⁴

State liability in EU law requires extensive interface between the EU and the national legal systems. In *Rewe*³²⁵ and *Comet*,³²⁶ the Court established that while the Treaties and secondary law create rights for the individuals, the legal remedies in the event of breach of those rights must, in the absence of relevant EU rules, be established by national law. The Member States, therefore, enjoy a certain procedural autonomy³²⁷ to set up a system of national courts or tribunals for the protection of the rights of individuals in cases where the Member State or any other actor has failed to fulfil its obligations under EU

³²⁰ T Eilmansberger (n 318) 1217.

³²¹ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357, paras 33-34.

³²² *ibid*, para 40.

³²³ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

³²⁴ S Prechal, 'Does Direct Effect Still Matter?' (n 16) 1067.

³²⁵ Case 33/76 *Rewe* [1976] ECR 1989, para 5.

³²⁶ Case 45/76 *Comet* [1976] ECR 2043, para 13.

³²⁷ Also called ‘remedial autonomy’, see C Kilpatrick, 'The Future of Remedies in Europe' in C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 1, 4.

law. Due to the requirements of equivalence³²⁸ and effectiveness³²⁹ of the remedies,³³⁰ this should rather be called procedural competence.³³¹ The uniform application of EU law, however, would in the light of the variety of remedies in place in the Member States necessitate that the Court also define the substantive conditions for the remedies.³³²

Effectiveness is the principal argument behind the principle of state liability, and state liability is the most important factor ensuring the effectiveness of EU law.³³³ It is, moreover, an important element in substantiating the principle of primacy of EU law with more concrete content.³³⁴ An extension of the internal market to third countries should, therefore, necessarily also include the principle of state liability to ensure comparable effectiveness of the internal market *acquis* in the third countries' legal orders.

4.2.3 Multilateral agreements exporting EU internal market *acquis*

Similarly to the regime of international law or EU law, the grounds for state liability for breaches of EU *acquis* contained in multilateral agreements must either be established by the agreements themselves or remain to be determined by the rules of international and national law.

The responsibility of EEA contracting parties is governed by Articles 108-110 EEA Agreement. Similarly to the EU, a breach of an obligation under the EEA Agreement entails a pecuniary penalty. As concerns the possibility of individuals to invoke their rights under the EEA Agreement, the EFTA Court has recognised the doctrine of state liability in the EEA alongside those of direct effect and primacy. In the EFTA Court proceedings in *Sveinbjörnsdottir*, the Commission as well as three EEA EFTA States argued that as a matter of principle, state liability cannot be recognised in the EEA on equal grounds as in the EU owing to the fact that the EEA legal order lacks 'important principles of Community law such as transfer of legislative powers, direct effect and

³²⁸ EU rights must be granted a protection equivalent to the rights established under national law.

³²⁹ Member States must ensure the protection of EU rights.

³³⁰ See Case C-312/93 *Peterbroeck* (n 51) para 12; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v SPF* (n 51) para 17 and case law cited.

³³¹ W van Gerven, 'Of Rights, Remedies and Procedures' (n 44) 502.

³³² W Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie' (1996) 45 *International and Comparative Law Quarterly* 507, 515.

³³³ T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 498.

³³⁴ *ibid* 500.

primacy of Community legislation'.³³⁵ The EFTA Court, however, introduced the principle of state liability into the EEA legal order through the back door. Drawing upon the example of *Francovich*, the EFTA Court found that the homogeneity objective and the establishment of individual rights by the EEA Agreement justify a similar doctrine of state liability for injuries suffered by individuals as a consequence of a Member State's breach of EEA rules as in the case of the EU.³³⁶ Moreover, the EFTA Court held that the principle of state liability constituted nothing less than an 'integral part of the EEA Agreement as such'³³⁷ and was justified under the obligation of the EEA contracting parties under Article 3 EEA Agreement to take all appropriate measures to ensure the fulfilment of their obligations under the Agreement, including remedies for loss or damages incurred as the result of a failure to implement a directive.³³⁸ Some commentators believe that in the EEA the principle of state liability even takes over the position of both the principle of primacy and of direct effect.³³⁹

The EFTA Court has defined the three conditions for state liability that are identical to the conditions developed by the Court of Justice: firstly, the infringed provision must be intended to confer rights on individuals; secondly, the breach must be sufficiently serious; and, thirdly, a direct causal link must exist between the breach of the obligation vested with the State and the damage sustained by the injured party.³⁴⁰ The Court of Justice later confirmed the existence of the principle of state liability in the EEA in *Rechberger*, referring to the objective of uniform interpretation and application of the EEA Agreement and EU law.³⁴¹

A critical approach to the EFTA Court's ruling on state liability is provided by Magnússon and Hannesson who argue that the absence of a sovereign rights transfer from the EEA EFTA States to the EEA results in a similar absence of direct effect and primacy in the EEA.³⁴² The authors claim that the 'new legal order of international law' of the EU follows

³³⁵ Case E-9/97 *Sveinbjörnsdóttir* (n 98) para 44.

³³⁶ *ibid* para 60.

³³⁷ *ibid* para 63.

³³⁸ *ibid* para 61. See also Case E-7/97 *EFTA Surveillance Authority v Norway* [1998] EFTA Ct Rep 62, para 16.

³³⁹ C Baudenbacher, 'If Not EEA State Liability, Then What' (n 118) 357-358.

³⁴⁰ Case E-9/97 *Sveinbjörnsdóttir* (n 98) para 66.

³⁴¹ Case C-140/97 *Rechberger* [1999] ECR I-3499, para 39.

³⁴² S Magnússon and Óí Hannesson (n 104) 170.

from the limitation of sovereignty and the recognition in the EU legal order of the principles of direct effect and primacy – elements that in their opinion are missing the EEA legal order.³⁴³ It must be recalled, however, that the Court's doctrines of direct effect, primacy and, consequentially, state liability are founded on the fact that the EU Treaties create rights for individuals which must be protected by the Member States for the sake of effective and uniform implementation of EU law. Insofar as the founding fathers of the EEA intended the EEA to extend the EU internal market to the EEA EFTA States, it follows that in the EEA, too, necessarily entails the conferral of rights to individuals and that, in result, the development of principles such as the EU foundational principles is inevitable to maintain true uniformity between identical *acquis* in the EU and in the EEA EFTA States. The absence of the foundational principles could be the case if there were no supranational institutions at all to establish the principles and if the principle of state liability, for example, were left exclusively for the national courts to determine. In such a situation the solution would undoubtedly have been found on the basis of public international law and, in the absence of rules in the latter as concerns the possibility of individuals to invoke international law, in reference to the national rules of tort law. Insofar as the EFTA Court and the Court of Justice have, in fact, recognised the principles of direct effect and primacy in EEA and EU law, respectively, there is little reason to claim the opposite. Beyond the questions of the role granted to the EFTA Court by the EEA Agreement and the status of the EFTA Court's judgments in the legal orders of the EEA EFTA States, the issue of the EEA Member States' courts' acceptance and implementation of the foundational principles is a separate matter and falls within the realm of enforcement rather than the recognition of the principle. When applying the principle of state liability, the national courts of the EEA EFTA States have relied both on the rulings of the EFTA Court as well as on national provisions of non-contractual liability of the state.³⁴⁴

In *Karlsson*, the EFTA Court extended the principle of state liability to all breaches of primary and secondary EEA law.³⁴⁵ As concerns parallels between the foundational principles in the EU and the EEA, the EFTA Court added that contrary to the connection

³⁴³ *ibid*, n 16.

³⁴⁴ For examples see C Baudenbacher, 'If Not EEA State Liability, Then What' (n 118) 347-354.

³⁴⁵ Case E-4/01 *Karlsson* (n 215) para 32.

between the principles of direct effect and state liability in EU law no such connection necessarily exists in the EEA legal order.³⁴⁶ The EFTA Court claimed that the principle of state liability exists in the EEA legal order regardless of the fact that direct effect has a smaller scope in the EEA than in the EU.³⁴⁷ When it comes to ensuring the effectiveness of EEA law, the principle of state liability, therefore, also fulfils the tasks of primacy and direct effect that are not given full application in the EEA legal order.³⁴⁸

In the Energy Community and the ECAA, the responsibility of the contracting parties for breaches of the agreements is regulated by the rules of international law as well as national tort laws. Procedural rules for non-performance are provided by Articles 90-93 ECT and Article 20 ECAA Agreement.³⁴⁹

5 Conclusion

One of the most important cornerstones of the EU legal order is the principle of effectiveness.³⁵⁰ The principle is a guarantor of unity and coherence of the EU legal order insofar as it emerges from the principle of sincere cooperation enshrined in Article 4(3) TEU.³⁵¹ Since the subjects of the rights and obligations arising from the EU Treaties are not only the Member States but also their nationals the principle of effectiveness is, respectively, transformed into a question of equal rights and obligations of individuals. The Member States must grant the individuals access to the rights that they derive from the Treaties by virtue of the duty to take all appropriate measures to ensure the fulfilment of the obligations under EU Treaties, facilitate the achievement of the objectives of the Union and refrain from jeopardising their attainment.

The effectiveness of EU law is to be secured by a set of principles of a constitutional nature – direct effect, primacy, consistent interpretation and state liability. All of these

³⁴⁶ *ibid* para 27.

³⁴⁷ *ibid* para 29.

³⁴⁸ C Baudenbacher, 'If Not EEA State Liability, Then What' (n 118) 358.

³⁴⁹ Discussed in detail below in chapter 7.

³⁵⁰ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* (n 323) para 95. See also Joined Cases 281/85, 283/85, 284/85, 285/85 and 287/85 *Germany and others v Commission* [1987] ECR 3203, Opinion of AG Mancini, paras 16 and 18; Case 301/87 *France v Commission* [1990] ECR I-307, Opinion of AG Jacobs, para 39.

³⁵¹ Case 33/76 *Rewe* (n 325) para 5; Case C-213/89 *Factortame* (n 60) paras 19-21; Case C-312/93 *Peterbroeck* (n 51) para 12.

are functional in nature as they serve to regulate the relationship between the legal orders of the EU and of the Member States. Consequently, their application depends greatly on the cooperative spirit of the Member States and is, thus, vulnerable to the attitudes of national legislatures, administrations and judiciaries.

Effectiveness is a principle that also applies to public international law. In the light of the growing trend of international regimes effectiveness is gaining ever more relevance just as the teleological interpretation of the rules of international law and organisations. Teleological, effect-giving interpretation is frequently employed by the Court of Justice and was of key importance in the creation of the foundational principles in EU law. Extending substantive parts the EU legal order such as the internal market *acquis* to third countries amounts, in essence, to the act of creating new international regimes or expanding existing ones, which, too, strive towards effectiveness.

The Court's initial 'objective and context'-based construal of the transfer of constitutional principles to the EEA legal order in Opinion 1/91 was soon replaced by a more accommodating approach towards the principle of direct effect. Operating in the EFTA pillar of the EEA, the EFTA Court has been far more result-oriented in terms of creating a 'homogeneous legal order' on both substantive and procedural levels. The practice of the EFTA Court reflects a sincere devotion to an effectiveness-based interpretation of the EEA Agreement in the light of the EU Treaties and the foundational principles developed by the Court of Justice. Although detailed case law and empirical data may show differences in the application of the *acquis* in the EU and the EFTA pillars of the EEA this has little relevance. The possibilities of uniform interpretation of identical *acquis* in the EU and the EEA legal orders are not dangerously hampered by the fact that the EFTA states are not directly bound by the constitutional doctrines developed by the Court of Justice.

The 'European substantive supremacy',³⁵² however, relies on the interpretation adopted by the national courts and the remedies provided by the national legal systems. On the one hand, the expansion of the EU internal market is strengthened and sustained by the

³⁵² JS Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9 European Law Journal 599, 609.

autonomous adoption of EU *acquis* by non-member states.³⁵³ On the other hand, the unity in the extended market is jeopardised, just as in the EU, by national legislatures, administrations and judiciaries. These actors both uphold and challenge the effective application of EU rules through possible inconsistent implementation of the *acquis* and deficient procedural homogeneity.

In the EU, the Court of Justice enjoys the position of an authoritative interpreter and engine for the development of legal doctrines. It holds this position despite the occasionally critical approaches of the Member States and, especially, the national constitutional courts. The EFTA Court serves essentially the same purpose in the EEA as the Court of Justice in the EU. When it comes to the other multilateral arrangements, such as the Energy Community and the ECAA, it becomes apparent that in the absence of a strong judicial body comparable to either the Court of Justice of the EU or the EFTA Court, the burden of ensuring the effectiveness of the regime outside the EU and the EEA falls primarily on the national courts. The questions of the applicability of international law in municipal law, the rank provided to the *acquis* in the national legal order and the legal remedies available to individuals for enforcing their rights under EU *acquis* are to be determined by national constitutional systems. Likewise are the recognition of the direct effect of a provision of EU origin, unless the legal instrument itself specifies its effect, and the methods for interpreting treaties to be determined by the national judiciaries and national law. While there is nothing in international law to prevent a state from independently adopting an accommodating approach to EU *acquis* as international law, the institutional guarantees that ensure the authority of the Court of Justice in the EU are considerably weaker in the multilateral agreements. As a result, the effectiveness of the expanded internal market and the protection of the individual rights embedded in the exported *acquis* depend to a significantly larger degree on the third countries' legal orders and practices than what is the case within the EU. The following chapters will explore the institutional and procedural frameworks of the multilateral agreements and evaluate their effectiveness as compared to the corresponding frameworks set up in the EU. The following chapter, however, is dedicated specifically to the barriers that the EU

³⁵³ S Kux and U Sverdrup, 'Fuzzy borders and adaptive outsiders: Norway, Switzerland and the EU' (2000) 22 *Journal of European integration* 237, 253.

legal order itself erects due to the necessity to uphold its own autonomy to the possibility of effectively extending the internal market to third countries.

PART II EXPANDING THE INTERNAL MARKET: INSTITUTIONAL IMPLICATIONS

Chapter 5 Autonomy of the EU legal order

1 Introduction

Achieving and preserving homogeneity in the expanded internal market inevitably calls for an appropriate institutional and procedural framework. It is necessary that mechanisms exist for creating and maintaining an identical body of rules across the territory of the expanded market space, as well as for implementing and interpreting the rules in a uniform manner. The claim of homogeneity in the project of extending the EU internal market to non-EU Member States pertains merely to the substantive dimension of the outcome of the rules transfer. The aim of homogeneity itself does not prescribe any particular institutional design by which the desired level of uniformity is to be reached and maintained. The appropriate institutional and procedural structures are, therefore, to be determined by the contracting parties.

The parties to the relevant international agreements are, however, restricted by certain imperative features of the EU legal order pronounced by the Court of Justice. These restrictions include, for example, the need to comply with the Treaties in the most general sense and with the limits to the competence of the EU and the different institutions via using the correct legal basis more narrowly. The most relevant of these limitations in the present context is, however, the need to preserve the autonomy of the EU legal order. This chapter will, firstly, scrutinise the concept of autonomy of the EU legal order in general and in the particular case of expanding the internal market to third countries by multilateral agreements. Secondly, the chapter will examine the application of the concept by the Court and, thirdly, provide a general evaluation of the relevance of the autonomy principle on the possibility of expanding the internal market without enlarging the Union.

2 Autonomy of the EU legal order: the concept

The autonomy of a legal order is not EU-specific but has developed in reference to national legal systems and international law. The following analysis highlights, firstly, the general concept of autonomy and its application in the EU *vis-à-vis* the legal orders of the Member States. The second subsection examines the scope, effects and rationale of the concept of autonomy in the EU legal order with respect to international law.

2.1 Autonomy in relation national legal orders

The concept of an autonomous legal order refers, first and foremost, to its self-referential character. An autonomous legal order is able to create, validate, apply, and interpret legal rules on the basis of the tools found within the legal order itself without constant validation by another legal order.¹

There is more than one interpretation of the concept of autonomy. According to Schilling's classification, autonomy can refer either to the absolute, original constituent power ('original autonomy'); independent power that is, however, accorded by another, original constituent power ('derivative autonomy'); or the power to interpret the highest rules in a legal order ('interpretive autonomy').² The latter, according to Schilling, belongs to the concept of original autonomy but not necessarily to the legal orders that enjoy derivative autonomy.

In his analysis of the possible foundations of the claim for autonomy of the EU legal order, Schilling claims that the EU does not constitute an exercise of original constituent power nor has it gained the constituent power from the European peoples following the conclusion of the founding Treaties. Neither can the claim of autonomy in the EU be based on natural law foundations. As international treaties, though, the EU Treaties possess 'derivative autonomy' by virtue of the Member States.³ When it comes to the existence and degree of interpretive autonomy in the EU legal order, the practice of autointerpretation of EU law by the Member States' national courts indicates that the interpretive

¹ R Barents, *The Autonomy of Community Law* (Kluwer Law International 2004) 172.

² T Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations' (1996) 37 *Harvard International Law Journal* 389, 389-390.

³ *ibid* 404.

autonomy of the EU is not absolute.⁴ Given that national courts, especially the highest courts may decide to contest the Court's interpretation of the compatibility of a national rule with EU law, the Court lacks an authoritative final word in questions regarding the relationship between the EU and the national legal orders.

Weiler and Haltern forcefully contested Schilling's argumentation, especially as concerns the effect of Member States' autointerpretation of EU law on the EU's interpretive autonomy.⁵ The authors argued that regardless of the practice of the Member State judiciaries' to delimit the competences between the EU and the Member States in the light of the national constitutions the Member States do not possess the right of 'auto-decision' over the meaning of the Treaties.⁶ Weiler and Haltern further claimed that the Court is, indeed the 'ultimate umpire' in the EU legal system. This position of the Court is enshrined in the Treaty articles that require Member State compliance with the Court's judgments under Article 260(1) TFEU; the jurisdiction of the Court to review the validity and legality of EU measures under Article 263 TFEU, among others on grounds of a lack of competence; and the obligation of the Member State's courts and tribunals against whose decisions there is no judicial remedy under national law under Article 267 TFEU to bring before the Court any matter on the interpretation of the Treaties or the validity or interpretation of an EU legal act for the purpose of obtaining a preliminary ruling.

As regards the question of *Kompetenz-Kompetenz* – the power to determine the limits of one's own competences – Weiler and Haltern distinguished between two applications of the notion. On the one hand, the term refers to the legislative *Kompetenz-Kompetenz* to delimit the competences, whereas, on the other hand, it concerns the judicial *Kompetenz-Kompetenz* to adjudicate on the limits of EU competences.⁷ In relation to legislative *Kompetenz-Kompetenz*, according to MacCormick the limited political and normative power of the EU renders it not even 'remotely to resemble in itself a sovereign state or sovereign federation of

⁴ *ibid* 405-407. In the same vein, see R Barents (n 1) 178.

⁵ JHH Weiler and UR Haltern, 'The Autonomy of the Community Legal Order—Through the Looking Glass' (1996) 37 *Harvard International Law Journal* 411.

⁶ *ibid* 424-425.

⁷ *ibid* 436-437.

states'.⁸ Indeed, with respect to legislative *Kompetenz-Kompetenz*, the EU is restricted by the principle of conferral provided in Articles 5 TEU. Article 267 TFEU allocates judicial *Kompetenz-Kompetenz* to the Court to provide authoritative interpretations of EU law and rule on its validity. Finally, the question comes down to who may rule on the limits of conferred powers – the institutions of the EU or the Member States, and whether the power is, thus, vested with the Court or the constitutional courts of the Member States.⁹ Weiler and Haltern conclude that the ultimate authority in this regard is exercised by the Court of Justice.¹⁰

The notion of autonomy originates from the idea of sovereignty. The allocation of competences – and thereby powers – between the EU and the Member States is ultimately a question of dividing sovereign powers.¹¹ The founding treaties of the EU are concluded under public international law and in accordance with national constitutional requirements as regards their negotiation, signature, conclusion and application. By virtue of the international agreements, the Member States have set up a number of institutions tasked with decision-making, administrative and judicial duties. Although based on an original recognition by the Member States, the institutions of the EU enjoy the powers conferred on them to the extent specified by the Treaties. Once established, the institutional framework, thus, operates independently of the Member States. This is without prejudice to the fact that the Member States can amend or even repeal the Treaties and thereby modify or end the existence of the Union; or the fact that the Union

⁸ N MacCormick, 'Beyond the Sovereign State' (1993) 56 *The Modern Law Review* 1, 16.

⁹ I Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010) 187, 188-189.

¹⁰ As concerns EU law or the Court's rulings adopted *ultra vires*, in violation of fundamental rights and infringing national constitutional identity, the German Constitutional Court and the Czech Constitutional Court beg to differ. See M Payandeh, 'Constitutional review of EU law after *Honeywell*: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 *Common Market Law Review* 9; J Komárek, 'Czech Constitutional Court Playing with Matches: the Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*' (2012) 8 *European Constitutional Law Review* 323.

¹¹ P Pescatore, *The Law of Integration* (Sijthoff 1974) 30.

answers to the Member States for the manner in which it executes the powers delegated to it.¹²

A number of judgments of the Court as well as national courts confirm that the Member States have transferred part of their sovereignty to the EU. This, in turn, is a crucial element in making the determination that the EU legal order really is one of autonomous character,¹³ recognised both by the supranational legal order itself and the national legal orders from which the EU derives its autonomy.

The German Constitutional Court stated as early as in 1967 that '[t]he organs of the EEC exercise sovereign rights that the Member States have relinquished to them in favour of the Community they have founded' and that this has taken place by virtue of a 'transferral' of sovereign rights from the Member States to the EEC.¹⁴ Furthermore, the Constitutional Court affirmed the autonomy of the EU and the Member States' legal orders from one another as well as the status of the EEC Treaty as an 'autonomous source of law' separate from national law.¹⁵ In reference to the latter claim the Constitutional Court followed the judgments of the Court of Justice in *Van Gend en Loos* and *Costa v ENEL*. While in the former the Court of Justice proclaimed that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields',¹⁶ the Court was considerably more assertive in the latter decision. In *Costa v ENEL*, the Court stated in response to a submission by the Italian Government as to the 'absolute inadmissibility' of a request for preliminary ruling insofar as a national court is obliged to apply national law.¹⁷ The Court asserted that the EU legal system is independent of the national legal systems and that the latter cannot by its own rules alter the system of legal protection provided by the Treaties such as, in the case at hand, the right and in some instances obligation of national courts to make requests for

¹² D Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government' (2003) 25 Michigan Journal of International Law 1107, 1133-1134.

¹³ FC Mayer, 'Van Gend en Loos: The Foundation of a Community of Law' in M Poiars Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Hart Publishing 2010) 16, 5.

¹⁴ 1 BvR 248/63, 216/67 *EWG-Verordnungen* [1967] BVerfGE 22, 293, para 15.

¹⁵ *ibid.*

¹⁶ Case 26/62 *Van Gend en Loos* [1963] ECR 1. Regarding the careful language used by the Court, see FC Mayer (n 13) 21.

¹⁷ Case 6/64 *Costa v ENEL* [1964] ECR 1141.

preliminary reference when faced with a question about the interpretation of EU law.

The autonomy of the EU legal order is grounded on the special nature of the EU Treaties as compared to other agreements concluded under public international law. The Member States have an obligation under international law to apply the Treaties, including respect for the legal mechanism for settling disputes established therein. For the EU Member States, this duty entails a partial loss of sovereignty insofar as the Union has been set up for 'unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, *real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community*'.¹⁸ The Court found that it would be incompatible with the terms and spirit of the Treaty as well as the obligation of the Member States to give effect to the Treaties in their national legal orders were the Member States to overrule the authority of the EU legal system by giving precedence to their own unilateral acts,¹⁹ and, thereby, exercise autodecision. Barents has explained this in terms of the EU legal order not existing completely independently of the Member States' legal orders yet being independent of 'unilateral influence from national law'.²⁰ The authority of the EU is, after all, based on reciprocal acceptance by all Member States of the permanent limitation of their sovereign rights'.²¹ Consequently, the Court concluded that a Member State cannot unilaterally restrict recourse of the courts operating in its jurisdiction to the preliminary reference procedure which they can access under Article 177 EEC Treaty (now Article 267 TFEU).

The rationale behind the claim for autonomy of the EU legal order is the desire to uphold the unity of the legal order and, consequently, to ensure its proper functioning.²² Unity is closely related to primacy. Were one legal order to penetrate the interpretation or application of the rules of another legal order, the latter could not justify its independent existence nor could the objectives of the Union be reached in the absence of a corresponding conferral of powers by the

¹⁸ *ibid* (emphasis added).

¹⁹ *ibid*.

²⁰ R Barents (n 1) 239.

²¹ Case 6/64 *Costa v ENEL* (n 17).

²² R Barents (n 1) 171-172.

Member States to the Union. The latter inevitably leads to the creation of a supranational legal order characterised by the notion of autonomy and serving the common aims of the Member States²³ – the ‘intrinsic unity’ of the EU.²⁴

The concept of autonomy entails in addition to the EU Treaties determining the legal remedies available under EU law also the content of the rights and obligations arising from the Treaties. In *Internationale Handelsgesellschaft*, the Court found that for the sake of ensuring the uniformity and efficacy of EU law, the validity of the measures adopted by EU institutions may only be judged in the light of EU law itself and not on the basis of national laws and legal concepts.²⁵ Moreover, the Court confirmed that recourse to a national interpretation is impossible due to the Treaties being an ‘independent source of law’ and thereby autonomous from the national legal orders. As such the validity of the Treaties cannot be questioned by national courts without questioning the very foundations of the EU legal order as a whole, not even on grounds of an alleged violation of fundamental rights as recognised by the national constitutions or national constitutional principles.²⁶ A review of the compatibility of an EU measure with fundamental rights must, therefore, be based on the analogous guarantees found in the EU legal order as fundamental rights form part of the general principles of EU law in addition to being integrated into the EU legal system by virtue of the EU Charter of Fundamental Rights. This approach allows the protection of fundamental rights to be considered in the broader framework of the structure and objectives of the EU,²⁷ and, thus, reach the common aims of the EU and its Member States rather than the particular demands of individual Member States. The latter situation would jeopardise the unity of the internal market and cohesion in the EU as a whole.²⁸ Neither do provisions of national law constitute a valid excuse for a failure to properly apply international law under Article 27 VCLT.

Even earlier had the Court overruled the attempts of Member State governments to challenge the refusal of EU institutions to take account of national laws and,

²³ P Pescatore, 'The Law of Integration' (n 11) 50-51.

²⁴ R Barents (n 1) 252-253.

²⁵ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para 3.

²⁶ *ibid.*

²⁷ *ibid* para 4.

²⁸ Case 44/79 *Hauer* [1979] ECR 3727, para 14.

thus, the autonomy of those institutions.²⁹ The autonomy of the EU legal order has mutual application in the sense that neither does the EU possess the power to annul national rules that conflict with the obligations of the Member States under EU law.³⁰

The self-referential character of the EU legal order is inextricably linked to the EU's institutional framework that upholds the independence of the legal order from external claims of authority and ensures that the rules of the legal order are interpreted and applied consistently with the principles inherent to the legal order.³¹ This does not mean that the EU institutions are the only ones endowed with the task of giving effect to EU law. National institutions and judiciaries form part of the general institutional framework of the EU whereas the ultimate authority to give binding interpretations of EU law and to declare the latter invalid rests pursuant to Article 267 TFEU with the Court of Justice.³² The autonomy of the EU legal order inevitably requires that the Court of Justice be the ultimate umpire of EU law.

2.2 Autonomy in relation to international law

The second aspect of the autonomy of the EU legal order is its application *vis-à-vis* international law. The EU is active on the international stage, interacting with other states and international organisations as well as fostering international cooperation to develop common responses to global challenges. The EU is, thus, not isolated from other international actors, processes, and decision-making and dispute settlement mechanisms. However, the fact that the EU, too, derives its competence from an international legal instrument and is, thus, both a creature of and an actor in international law may give rise to complex issues concerning the relationship between EU law and international law.

From the external perspective, the autonomy of the EU legal order is as a means of controlling the normative influence of legal norms and principles that emanate

²⁹ Case 1/58 *Stork v High Authority* [1959] ECR 17, 26; Joined Cases 7/56 and 3-7/57 *Alegra v Common Assembly* [1957-1958] ECR 39, 57; Case 30/59 *Gezamenlijke Steenkolenmijnen* [1961] ECR 1, 22.

³⁰ Case 6/60 *Humblet* [1960] ECR 559, 568.

³¹ R Barents (n 1) 262-263.

³² Case 314/85 *Foto-Frost* [1987] ECR 4199, para 17; G Bebr, 'The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis' (1958) 58 *Columbia Law Review* 767, 769-770.

from outside the EU.³³ This is not to say that the EU legal order exists outside the international community. Rather, the autonomy of the legal order precludes the authoritative influence of international norms that have not become part of the EU legal order, thus rendering the EU independent to determine the applicability and the legal effect of international law on its territory. The Court has generally had an accommodating approach towards the influences of international law on EU law. The Court does not preclude an interpretation of EU law in the light of the general principles of international law or customary international law, the provisions of international agreements to which the EU is a party itself or by proxy of the Member States, or the decisions of international courts and tribunals the jurisdiction of which is binding on the Union.

The CFI ruled in *Kadi* that the Member States' obligations under the Charter of the United Nations (UN), including the resolutions of the Security Council, enjoy primacy over all domestic and international law obligations including the EU Treaties by virtue of international customary law and Articles 5, 27 and 30 VCLT as well as under Article 103 UN Charter and the case law of the ICJ.³⁴ Furthermore, since the Member States' obligations under the UN Charter predate the conclusion of the EU Treaties, the Member States must give precedence to the application of the Charter.³⁵ Consequently, in cases of conflict arising between the obligations of the Member States under the UN Charter and the EU Treaties, respectively, the former must prevail over the latter and conflicting measures of EU law be left unapplied.³⁶ Since the EU itself is not a member of the UN, the obligations of the UN Charter do not bind the EU directly.

In the appeal to *Kadi* brought before the Court of Justice,³⁷ the Court ruled that in its legislative action, including when implementing UN anti-terrorist sanctions on the EU territory, the EU is bound by the requirements of international fundamental rights protection. In addition to the EU's own Charter of Fundamental Rights, Article 6 TEU and the case law of the Court as part of the EU

³³ R Barents (n 1) 261.

³⁴ Case T-315/01 *Kadi* [2005] ECR II-3649, paras 181-184; Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533, paras 231-234.

³⁵ Case T-315/01 *Kadi* (n 34) paras 185-188; Case T-306/01 *Yusuf and Al Barakaat* (n 34) paras 235-238.

³⁶ Case T-315/01 *Kadi* (n 34) paras 189-190; Case T-306/01 *Yusuf and Al Barakaat* (n 34) paras 239-240.

³⁷ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351.

legal order, the general principles of law inspired by the constitutional traditions common to the Member States, the code of fundamental rights of the Union is influenced by the international human rights instruments that bind the Member States or on which the latter have 'collaborated'.³⁸ In the light of these considerations, and the fact that the EU legal order is an autonomous one, the Court concluded that international obligations cannot prevail over the constitutional principles of EU Treaties including respect for fundamental rights which is a precondition for the lawfulness of EU measures.³⁹ Neither can measures adopted by the Member States for the purpose of maintaining peace and international security or international agreements concluded before accession to the EU be given precedence under Articles 347 and 351 TFEU, respectively, at the expense of the protection of fundamental rights by the EU.⁴⁰ The Court does not, however, review the lawfulness of the international measure itself.⁴¹

The Union courts most frequently deal with the interaction between EU and international law in cases concerning the interpretation of EU or national rules in the light of international law, including EU law of international law origin. The latter includes international agreements concluded by the EU or by the Member States in instances where the EU as an international organisation cannot accede to an international instrument in its field of competence because of restrictions imposed by the international agreement. In *Cipra and Kvasnicka*, for example, the Court examined its own jurisdiction to interpret the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (the AETR Agreement). The Agreement was concluded only by the EU Member States and not the EEC. The agreement covers an area of shared competences between the EU and the Member States. During the time when the initial negotiations took place the EEC had not yet legislated in the field.⁴² Since the EU adopted Regulation No 543/69 on the harmonisation of certain social legislation relating to road transport the subject matter of the Agreement fell

³⁸ Case 4/73 *Nold* [1974] ECR 491, para 13.

³⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* (n 37) paras 282 and 285; Case 5/88 *Wachauf* [1989] ECR 2609, para 19.

⁴⁰ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* (n 37) paras 302-304.

⁴¹ *ibid* para 286.

⁴² Case 22/70 *AETR* [1971] ECR 263, paras 82-83.

within the scope of exclusive EU competence.⁴³ In order not to undermine the ongoing negotiations it was decided by the Commission and the Council that the Member States could conclude the agreement.⁴⁴ In so doing, however, the Member States acted ‘in the interest and on behalf of the [Union]’⁴⁵ and the provisions of the AETR Agreement, subsequently, form part of EU law.⁴⁶ As a consequence, the Court of Justice has jurisdiction to interpret the agreement,⁴⁷ even though the Union is not formally a party to the agreement.

Close cooperation between the Member States and the EU is required in the stages of negotiation, conclusion as well as the fulfilment of the commitments entered into on the international plane,⁴⁸ including both AETR-type situations and mixed agreements. The duty of cooperation serves the purpose of maintaining unity in the international representation of the EU.⁴⁹ In fact, it is ‘the inherent nature of the system’⁵⁰ of the EU to strive for unity in operation and representation through the cooperation between Union institutions and the Member States, including their judiciaries.

As regards mixed agreements, the Court has generally held that it has jurisdiction to rule on their validity and interpretation at least regarding those parts of the agreement that fall within the scope of Union competence because agreements concluded by the Union are acts of EU institutions.⁵¹ The Member States, in turn, have under Article 216(2) TFEU a duty *vis-à-vis* the EU to ensure the proper fulfilment of the obligations arising from international agreements concluded by the Union.⁵² The question of the Court’s jurisdiction to interpret those provisions of mixed agreements that deal with issues falling within a sphere of shared competences in which the EU has not yet legislated first arose in the context of the Agreement on Trade-Related Aspects of Intellectual

⁴³ *ibid* paras 30-31.

⁴⁴ *ibid* paras 86-87.

⁴⁵ *ibid* para 90; Case C-439/01 *Cipra and Kvasnicka* [2003] ECR I-745, para 23.

⁴⁶ Case C-439/01 *Cipra and Kvasnicka* (n 45) para 24.

⁴⁷ *ibid*.

⁴⁸ Opinion 1/94 *WTO* [1994] ECR I-5267, paras 108.

⁴⁹ *ibid*.

⁵⁰ Case C-53/96 *Hermès v FHT* [1998] ECR I-3603, Opinion of AG Tesauro, para 21.

⁵¹ See, for example, Case 181/73 *Haegeman* [1973] ECR 449, paras 4-6; Case 12/86 *Demirel* [1987] ECR 3719, para 7.

⁵² Case 104/81 *Kupferberg* [1982] ECR 3641, para 2.

Property Rights (TRIPs). In the cases *Hèrmes*⁵³ and *Dior*⁵⁴ the Court found that the jurisdiction to interpret the provisions of the TRIPs Agreement, which was concluded jointly by the EU and the Member States, requires for the purpose of unity a uniform interpretation by both the judiciaries of the Member States and of the EU.⁵⁵ In order to ensure this uniformity, the Court in *Dior* extended its jurisdiction to interpret Article 50 of TRIPs regarding intellectual property law beyond issues of trade mark regulation which fell within the scope of Community competence.⁵⁶ The Court thereby overstepped the competence boundaries between the EU and the Member States in a mixed agreement without, however, clarifying the exact link between jurisdiction and competences.⁵⁷ Finally, in *Merck Génériques*, the Court established that while the Member States' courts have the jurisdiction to interpret those provisions of mixed agreements that fall within their sphere of competence, the assessment on the exact division of competences must for the purposes of ensuring uniformity on EU level be made by the Court of Justice.⁵⁸ This includes the question of determining whether a provision of a mixed agreement has direct effect – in areas that fall within the Member States' sphere of competence the determination is for the national courts to make.⁵⁹

Other situations in which the interaction between international law and EU law can give rise to conflicts concern the interpretation of EU law by international actors. An example is provided by the *MOX Plant* case,⁶⁰ which concerned a non-EU judiciary – an international arbitral tribunal – being asked by an EU Member State to rule on the application and interpretation of EU law.

The case concerned infringement proceedings initiated against Ireland. The Irish government had submitted a case against the United Kingdom to an arbitral tribunal established under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic which the EU, too, has concluded. In

⁵³ Case C-53/96 *Hèrmes v FHT* [1998] ECR I-3603.

⁵⁴ Joined Cases C-300/98 and C-392/98 *Dior* [2000] ECR I-11307.

⁵⁵ *ibid* paras 37-38; Case C-53/96 *Hèrmes v FHT* (n 53) para 32.

⁵⁶ Joined Cases C-300/98 and C-392/98 *Dior* (n 54) para 39.

⁵⁷ Case C-240/09 *Lesoochránárske zoskupenie VLK* [2011] ECR I-1255, Opinion of AG Sharpston, para 50.

⁵⁸ Case C-431/05 *Merck Génériques* [2007] ECR I-7001, paras 33-38.

⁵⁹ Joined Cases C-300/98 and C-392/98 *Dior* (n 54) para 48; *ibid* para 34;

⁶⁰ Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635.

addition, Ireland submitted a request for provisional measures to the International Tribunal for the Law of the Sea (ITLOS). The arbitral tribunal, recognising that it would have to rule on matters of EU law including the division of competences between the Union and the Member States and the exclusive jurisdiction of the Court of Justice decided to suspend the proceedings and await the Court's decision as to the exclusive jurisdiction of the Court to adjudicate on the matter.⁶¹

The Court considered the fact that the Tribunal was to interpret EU law constituted a threat to the autonomy of the EU legal order. The legal rules that were the subject of Ireland's submission fell within the scope of EU competence and only the Court, therefore, enjoyed jurisdiction to rule on the matter.⁶² The Court pointed out that the division of competences in the EU legal order between the EU and the Member States cannot be altered by an international agreement as that would adversely affect the autonomy of the EU legal order.⁶³ The Court's judgment is based on Article 344 TFEU pursuant to which Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided in the Treaties.⁶⁴ This rule is closely connected to the duty of sincere cooperation between the Member States under Article 4(3) TEU.⁶⁵ In the case at hand, though, a solution to the question of conflicting jurisdictions was provided in the United Nations Convention on the Law of the Sea (UNCLOS) itself. Both the EU and its Member States are parties to the UNCLOS. Pursuant to Article 282 UNCLOS, if the parties to the Convention have agreed to submit disputes arising between them to a procedure that results in a binding decision, that procedure shall take precedence over the dispute settlement mechanisms provided by the UNCLOS. The Convention, therefore, pays full respect to the autonomy of the EU legal order in terms of not exercising jurisdiction over EU law which, in the case at hand, concerned both the provisions of an international agreement concluded by the EU and the Member States as well as EU directives. Given that the matter under dispute fell within the competence of the EU by virtue of Ireland relying in

⁶¹ *ibid* paras 42-46.

⁶² *ibid* paras 120-121.

⁶³ *ibid* para 123.

⁶⁴ *ibid* para 123.

⁶⁵ *ibid* para 169.

its argumentation before the tribunal on EU directives⁶⁶ and the Convention being a mixed agreement and the EU enjoying exclusive competence in the relevant areas, the Court deemed the case to be decided on the basis of the EU Treaties, including the Court's exclusive jurisdiction.⁶⁷ Ireland was, subsequently, held to have breached its obligations under EU law.⁶⁸

The case law discussed above illustrates well the perception of the EU as an autonomous legal order – ‘municipal’ in the words of AG Poiares Maduro,⁶⁹ yet not as one completely separate of the international legal regime. Whilst respect for international law is deeply rooted in the EU legal order the Court is keen to protect the autonomy of the legal order, and alongside that, its own jurisdiction in interpreting and adjudicating on EU law including, especially, the parts of mixed agreements that fall within the scope of EU competence. The following section will consider the specific limitations imposed by the autonomy concept on the practice of exporting EU internal market *acquis* to third countries and, in particular, the objective of extending the internal market beyond the borders of the EU while achieving and maintaining the homogeneity of the market.

3 The implications of autonomy for expanding the internal market

Whereas, generally, the effectiveness of EU law is maintained by the various legal principles,⁷⁰ the safeguards of the autonomy of the EU legal order lie, primarily, in institutional arrangements and the legal rules that ensure its proper functioning.⁷¹ By upholding the authority to determine its institutional structure, the EU is able to preserve its ‘independence of action’ or, in other words, ‘autonomy’.⁷² In a sequence of cases, the Court has identified and deemed either compatible or incompatible with the idea of the EU as an autonomous legal order a number of institutional arrangements, especially as regards the judiciary. Many of the cases are opinions provided by the Court pursuant to the procedure under

⁶⁶ *ibid* paras 119-121.

⁶⁷ *ibid* paras 126-127.

⁶⁸ *ibid* para 182.

⁶⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, Opinion of AG Poiares Maduro, para 21.

⁷⁰ Considered above in chapter 4.

⁷¹ See Opinion 2/13 *ECHR II* (Court of Justice, 18 December 2014), para 158.

⁷² Opinion 1/76 *European laying-up fund for inland waterway vessels* [1977] ECR 741, para 12. In the original French text the ‘independence of action’ is referred to as ‘l'autonomie d'action’.

Article 218(11) TFEU according to which a Member State, the European Parliament, the Council or the Commission may request the Court for an opinion as to the compatibility with the Treaties of an envisaged agreement.

The conditions for deeming the institutional framework established by an international agreement compatible with the EU legal order can be divided into two distinct groups and have been summarised by the Court in Opinion 1/00.⁷³ The first requirement of preserving the autonomy of the EU legal order is that the essential character of the powers and the institutions of the EU remain unaffected so as not to necessitate an amendment of the Treaties. The second requirement is that the EU and its institutions maintain their independence in interpreting EU law in the exercise of their internal powers and not be bound by an interpretation given to identical *acquis* in the context of an international agreement rather than the EU Treaties.

Maintaining the essential character of the EU's powers and institutions concerns a number of different issues: firstly, the relationship between the Member States in the context of the EU including the 'mutual trust' between them; secondly, the idea that the objectives of the EU must be obtained by 'common action' of the Member States; and, thirdly, the understanding according to which the EU institutions may not transfer to 'non-EU organisms' powers of the Union. The fourth category of essential elements in safeguarding autonomy relates to the nature of the powers of the EU and of its institutions as conceived in the Treaties: on the other hand, the powers of the Commission may be extended to third countries provided that the nature of the powers remains intact; on the others, EU representatives cannot be replaced by those of the Member States in the organs of international organisations; and, moreover, the 'nature of the function of the Court' requires that its judgments be binding. The fifth and sixth aspect concern the role of national courts as 'ordinary' courts in the 'complete system of legal remedies and procedures' and remedies to individuals following an infringement of EU law by a Member State, respectively.

Safeguarding the independence of the EU's institutions when interpreting EU law includes the following elements. The first concerns the exclusive jurisdiction of the EU judiciary to interpret and apply EU law including the obligation of the

⁷³ Opinion 1/00 *ECAA* [2002] ECR I-3493, paras 12-13.

Member States under Article 344 TFEU not to submit disputes relating to the interpretation or application of EU law to other methods of adjudication than the one provided in the Treaties. The second issue relates to the exclusive jurisdiction of the Court of Justice to delimit the competences between the EU and its Member States and to declare invalid an act of EU institutions under Article 276 TFEU. The third aspect requires that the judges of the Court maintain 'open minds' and 'complete independence' when interpreting EU law, and the fourth pertains to the idea that if not the Court then no international court may conduct a judicial review of CFSP acts. The following analysis examines each of the elements outlined in the context of the case law of the Court.

3.1 Opinion 1/76 European laying-up fund

The very first case to deal with the question of international agreements threatening to distort the institutional system of the EU was Opinion 1/76 on the Draft Agreement establishing a European laying-up fund for inland waterway vessels.⁷⁴ The draft agreement under scrutiny sought to establish an international organisation to regulate inland waterway navigation on the river Rhine. While the Court endorsed, generally, the establishment of such an international organisation, it contested certain solutions proposed for the institutional design of the organisation. The draft agreement intended to privilege the participation in the organs of the organisation of some Member States over other. This, according to the Court, was to 'alter in a manner inconsistent with the Treaty the relationships between Member States within the context of the Community'.⁷⁵ More precisely, pursuant to Recital 2 of the preamble to the EEC Treaty, the objectives of the Community must be obtained by 'common action'. 'Common action' requires the participation of all Member States without even a voluntary exclusion of one or more Member States, as well as that in decision-making procedures of an international agreement the same participation rules of individual Member States apply as determined by the Treaties in the respective policy field.⁷⁶ Together these factors constitute, according to the Court, 'a surrender of the independence of action of the Community in its external relations' as well as an alteration in the 'internal

⁷⁴ Opinion 1/76 *European laying-up fund for inland waterway vessels* (n 72).

⁷⁵ *ibid* para 10.

⁷⁶ *ibid* para 11(b).

constitution of the Community' by virtue of a change in the essential elements of the Community structure concerning the powers of the institutions as well as the relationship between the Member States.⁷⁷ In turn, these factors conflict with the principles of unity and solidarity in the Community. Today, common action has, in the light of the increased use of flexibility, especially opt-out, become accepted as compatible with both the unity and, subsequently, even autonomy of the EU legal order. The absence of one or more Member States in any other policies or decision-making procedures that are not subject to opt-outs would hardly be considered compatible with the Treaties even today.

Regarding decision-making procedures, the Court considered incompatible with the EEC Treaty provisions of the draft agreement that replaced the EEC institutions with the Member States in the treaty organisations dealing with matters that fell within the competences of the EEC and restricted, thereby, the powers of the Commission.⁷⁸ In the same Opinion, regarding decision-making procedures, the Court had to analyse the compatibility with the EEC Treaty of a provision of the draft agreement by which direct applicability would be granted to all decisions of the organs of the fund in the territories of the contracting parties, including the Community. Here, a peculiar question of *Kompetenz-Kompetenz* arose. The question referred to the authority of EU institutions to transfer to 'non-Community organisms' the powers of the Community and thus subject the Member States to the direct applicability of rules created by this international body outside the decision-making framework of the EEC Treaty.⁷⁹ Indeed, a logical conclusion would be that a transfer of such powers to another international organisation would render the Community legal order subject to the authority of another legal order and thus deprive it of its autonomous nature. The situation is different when the international agreement itself specifies the possible direct effect of its provisions.⁸⁰ The Court, however, refrained from answering the question because according to the provisions of the draft agreement the powers to be transferred were of executive nature only and thus

⁷⁷ *ibid* para 12.

⁷⁸ *ibid* paras 10-11(a).

⁷⁹ *ibid* para 15.

⁸⁰ Case 104/81 *Kupferberg* (n 52) para 17.

not liable to bind the contracting parties, including the Community, to supra-supranational rules.⁸¹

As concerns the judicial system envisaged by the draft agreement in Opinion 1/76, the Court considered that the inclusion in a legal system of a non-member state would preclude an effective legal protection of the rights of individuals.⁸² The participation of the judges of the Court of Justice in the fund tribunal would, according to the Court, prejudice their impartiality in deciding cases brought before the Court after the same legal question has already been considered by the fund tribunal in the presence of the same judges and vice versa. Whereas homogeneity would be preserved, the uniformity of interpretation was not considered by the Court to outweigh the value of a development of EU law in a manner completely independent of external influences beyond those that are considered compatible with the Treaties by the Court.⁸³ The only acceptable solution from the perspective of the autonomy of the EU legal order would, therefore, be for the judges of the Court not to participate in judicial institutions established by EU international agreements at least in situations where the envisaged court or tribunal could potentially be faced with a task to interpret or apply EU law.

The Court did, however, recognise the value of the draft agreement as an example for future agreements concluded by the EU and/or the Member States and third countries and rejected the proposed institutional structure with the additional purpose of avoiding a progressive and irreversible weakening of the Union action. All future agreements, therefore, must conform to the requirements pronounced by the Court of Justice in order to receive a green light in the preliminary opinion procedure.

3.2 Opinion 1/91 EEA I

Some of the issues that arose in Opinion 1/76 recurred in the landmark Opinion 1/91 concerning the compatibility with the Treaties of the EEA Agreement.⁸⁴ In the Opinion, the Court confined its analysis of the compatibility of the draft

⁸¹ Opinion 1/76 *European laying-up fund for inland waterway vessels* (n 72) para 16.

⁸² *ibid* para 21.

⁸³ *ibid* para 22.

⁸⁴ Opinion 1/91 *EEA I* [1991] ECR I-6079.

agreement with the autonomy of the EU legal order to the proposed judicial architecture only. What is remarkable in this opinion are the explicit references that the Court made to the notion of autonomy of the EU legal order in the context of international agreements exporting EU *acquis* – a terminological affirmation which the Court has continued to use in subsequent case law.

The judicial autonomy of the EU legal order, as elaborated in Opinion 1/91, rests on two main premises – Articles 19(1) TEU and 344 TFEU asserting the exclusive jurisdiction of the EU judiciary to ensure that in the interpretation and application of the Treaties the law is observed, and the obligation of the Member States not to submit EU law disputes to external fora, respectively. The envisaged EEA Court would have been conferred jurisdiction to hear disputes between the contracting parties. Subsequently, the EEA Court would have had to interpret the term ‘Contracting Party’ in the context of the EEA Agreement and thereby determine who – the EU, the Member States or the EU and the Member States together – were contracting parties in a particular matter brought before the EEA Court. The tasks of the EEA Court would, therefore, have entailed a delimitation of competences between the EU and its Member States that constitutes interpretation of the Treaties by a judicial body other than the Court of Justice.⁸⁵ The Court maintained, however, that the creation of an international court the decisions of which are binding on EU institutions including the Court itself is not *per se* contrary to the Treaties.⁸⁶ Yet the Court made a distinction with respect to ‘an essential part of the rules – including the rules of secondary legislation – which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order’.⁸⁷ A homogeneous interpretation of the exported *acquis* that is identical to EU provisions would, according to the Court, add up to an interpretation of EU law itself. In the absence of an obligation of the EEA Court to provide an interpretation of EEA law identical with the interpretations provided by the Court of Justice after the signature of the EEA Agreement, the mechanism for maintaining homogeneity would have threatened the independence of the Court to determine the meaning and application of EU rules and thus the ‘very

⁸⁵ *ibid* paras 31-35.

⁸⁶ *ibid* paras 39-40.

⁸⁷ *ibid* para 41 (emphasis added).

foundations' of the EU and the autonomy of the EU legal order.⁸⁸ It is interesting to note that the Court did not consider in this respect its own freedom to deviate from the homogeneity objective in favour of preserving autonomy in case a conflict between an interpretation given by the EEA Court or the Court of Justice should arise. With this Opinion, the Court endeavoured to ensure that the draft EEA Agreement comply fully with the requirements of the Treaties to the effect that safeguarding the autonomy of the EU legal order would not propel the Court to breach its own obligations under the EEA Agreement to maintain homogeneity within the EEA.

In terms of the composition of the EEA Court, as in Opinion 1/76, the Court considered it in Opinion 1/91 incompatible with the concept of autonomy that judges of the Court of Justice sit on the EEA Court.⁸⁹ The Court was concerned that its own judges would need to juggle between different methods of interpretation when applying and interpreting identical rules in two different treaty contexts that also feature different objectives as regards the depth of integration.⁹⁰ According to the Court, this task would challenge the 'open minds' and 'complete independence' of the judges when interpreting EU law and thus jeopardise the idea of autonomy as independence from legal sources external to the EU.⁹¹ While the Court has generally not been averse towards drawing inspiration from public international law or national legal systems for the purpose of interpreting EU law the problematic aspect here was the perception of the Court that the judges would, in a situation of multiple loyalties, not be fully independent to interpret EU law on the basis of the objectives and context of the EU Treaties only.

Finally, the Court considered in Opinion 1/91 the compatibility with the Treaties of the system of preliminary rulings under the draft EEA Agreement. According to the draft Protocol 34, the courts of the EEA EFTA States would have been conferred a right to make references for a preliminary ruling to the Court of Justice. In the meantime, each of the contracting parties could determine the extent to which the protocol applies to the courts and tribunals under its

⁸⁸ *ibid* paras 44-46.

⁸⁹ *ibid* para 47.

⁹⁰ *ibid* para 51.

⁹¹ *ibid* paras 52-53.

jurisdiction, whether there is an obligation for the highest courts to make a referral and whether the Court's rulings have binding effect or not.⁹² According to the Court of Justice, it is not contrary to the Treaties to confer on the Court the task to provide preliminary rulings to third country courts on the basis of an international agreement or to leave it for the third countries to decide whether or not to allow their courts tribunals to make use of the preliminary ruling procedure. It is, however, incompatible with the Treaty structure if in instances where the Court has given a preliminary ruling the binding force of the preliminary ruling is not guaranteed.⁹³ According to the Court, the lack of binding force of its preliminary rulings would defeat 'the nature of the function of the Court of Justice [...] namely that of a court whose judgments are binding'.⁹⁴ It is remarkable that the Court considered only the binding effect of the preliminary rulings an issue and not the lack of a general obligation of highest courts to request a preliminary ruling as if the latter did not belong to the 'nature of the function of the Court of Justice'. The first concerns the function of the Court as not being an advisory body and the other the function of the procedure that might not guarantee unity if requests for preliminary rulings are optional. As a clarification, the Court noted that all preliminary rulings, even those given in response to possible requests by the EEA EFTA countries, are binding on the Member States yet confusion could arise among Member State courts as to the general effect of preliminary rulings when applying preliminary rulings that are not binding on the courts of the EEA EFTA States who are the possible direct addressees of the rulings.⁹⁵

3.3 Opinion 1/92 EEA II

Having struck down the first version of the EEA Agreement, the Court was given a possibility to assess the lawfulness of the second version of the draft agreement in Opinion 1/92.⁹⁶ Firstly, the second version of the EEA Agreement no longer envisaged the creation of an EEA Court but an EFTA Court that would only adjudicate on disputes between the EEA EFTA States and on which only

⁹² *ibid* paras 56-58.

⁹³ *ibid* paras 59-61.

⁹⁴ *ibid* para 61.

⁹⁵ *ibid* paras 62-63.

⁹⁶ Opinion 1/92 *EEA II* [1992] ECR I-2821.

judges from the EEA EFTA countries would sit. The concerns raised by the Court in the previous Opinion 1/91 were, thus, met. Secondly, the Court of Justice may be involved in the dispute settlement procedure by giving a ruling on the interpretation of rules identical to those of the Treaties. Thirdly, the EEA EFTA States were given an opportunity to decide on whether they wished to receive binding preliminary rulings from the Court of Justice on the interpretation of provisions of the EEA Agreement. And finally, there was no longer a requirement for the Court of Justice to take account of decisions of other courts.⁹⁷

Instead of a common EEA Court, the updated EEA Agreement provides for the creation of a political body – the Joint Committee – to track the development of the case law of the Court. The Court deemed this solution to be compatible with the Treaties insofar as it does not alter the binding force of the rulings of the Court within the EU.⁹⁸ It is slightly peculiar that the Court dismissed the previous solution that did not alter the effect of the Court’s rulings within the EU either simply because of a potential confusion among national courts. This can be considered a small overreaction on the Court’s behalf. Since the decisions of the EEA Joint Committee were declared not to affect the case law of the Court of Justice, the Court considered the autonomy of the EU legal order to thereby be preserved.⁹⁹

As concerns the Joint Committee, the Court established that the only autonomy-conform solution would be to give binding force to the dispute settlement procedure envisaged in Article 105 EEA Agreement.¹⁰⁰ In addition, the Joint Committee could not in the course of the dispute settlement procedures under either Article 105 or 111 EEA Agreement issue a decision that would render the case law of the Court of Justice inapplicable on the territory of the non-EFTA contracting parties.¹⁰¹ The hands of the Joint Committee are, therefore, tied to taking decisions that conform to the case law of the Court of Justice.

The Court further affirmed that it was in keeping with the Treaties to confer on the Court of Justice additional powers only pursuant to the Treaty revision

⁹⁷ *ibid* paras 13-16.

⁹⁸ *ibid* paras 22-23.

⁹⁹ *ibid* paras 24 and 29.

¹⁰⁰ *ibid* para 25.

¹⁰¹ *ibid* paras 26 and 28-30.

procedures unless the new powers do not alter the 'nature of the function of the Court' such as that the decisions of the Court are always binding.¹⁰² The new preliminary ruling procedure envisaged by the updated EEA Agreement, however, only concerns dispute settlement procedure of Article 111(3) EEA Agreement which accords binding force to the interpretation provided by the Court and does not, therefore, affect the nature of the function of the Court in an adverse manner.¹⁰³ The contracting parties also have a possibility to request binding preliminary references from the Court of Justice.¹⁰⁴ The arbitration procedure, on the other hand, cannot be used in cases on the interpretation of the identical *acquis* which means that EU law will not be given authoritative interpretation by non-EU judicial mechanisms, thus upholding the autonomy of the EU legal order.¹⁰⁵ The Commission and the Member States' and the EEA EFTA States' governments succeeded in walking a tightrope between arriving at a homogeneity mechanism while maintaining a close relationship between the EU and EEA institutions without compromising the autonomy of the EU. From the perspective of the EU, the balance is about a 'comfortable duality' whereby third countries are given the opportunity to participate in a common project without, however, deciding on its 'nature, scope, development or authoritative interpretation'.¹⁰⁶

In addition to the judicial mechanisms, the autonomy of the EU legal order also requires the preservation of other institutional arrangements established by the Treaties to the extent of maintaining the 'nature of the powers of the Community and of its institutions as conceived in the [Treaties]'.¹⁰⁷ The sharing of surveillance tasks in the field of competition between the Commission and the EFTA Surveillance Authority is, according to the Court, compatible with the Treaties.¹⁰⁸ All in all, the Court deemed the new version of the EEA Agreement to conform to the requirements of the Treaties, especially as concerns the guarantees for preserving the autonomy of the EU legal order.

¹⁰² *ibid* paras 32-33.

¹⁰³ *ibid* para 35.

¹⁰⁴ *ibid* para 37.

¹⁰⁵ *ibid* para 36.

¹⁰⁶ A Magen, 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Influence' (2007) 9 *European Journal of Law Reform* 361, 388.

¹⁰⁷ Opinion 1/92 *EEA II* (n 96) para 41.

¹⁰⁸ *ibid* paras 38-42.

3.4 Opinion 1/00 ECAA

In the subsequent Opinion 1/00 on the Draft ECAA Agreement, the Court consolidated its previous case law and summarised the main requirements on international agreements as concerns compatibility with the autonomy claim. In the forefront of a test for compatibility stands the essential character of the powers of the Community and its institutions and the canons of interpretation of EU law.¹⁰⁹ An alteration of the foundations of the EU would inevitably require an amendment of the Treaties and international agreements cannot be used to circumvent the regular Treaty amendment procedures provided in Article 48 TEU.¹¹⁰ This was also the reason for the Court in Opinion 2/94 to consider the planned accession by the Community to the ECHR incompatible with Community law on institutional as well as substantive grounds concerning the lack of competence of the EU under the now Article 352 TFEU.¹¹¹ With respect to the ECAA Agreement, the Court considered that for the institutional solutions of the ECAA to be compatible with the Treaties there must either be a clearer separation between the EU and non-EU pillars of contracting parties or that all contracting parties must be placed together in one single organisation with distinct organs that functions parallel to those of the EU, such as in the case of the EFTA.¹¹²

Because there is no separate international organisation comparable to the EFTA in the field of air transport, the ECAA Agreement provides for a 'single pillar' structure instead of the 'twin pillar' solution opted for in the EEA Agreement.¹¹³ The ECAA does not feature a surveillance body other than the Commission nor a separate court. Instead, a political organ – the ECAA Joint Committee – is tasked with dispute settlement and the contracting parties have a possibility to request preliminary rulings from the Court of Justice. The extension of the powers of the Commission and the creation of new institutional links with third countries was, however, deemed by the Court to be compatible with the Treaties insofar as the nature of the powers remains intact and the question mainly concerns the

¹⁰⁹ Opinion 1/00 *ECAA* (n 73) para 5.

¹¹⁰ *ibid.*

¹¹¹ Opinion 2/94 *ECHR I* [1996] ECR I-1759, paras 30 and 35.

¹¹² Opinion 1/00 *ECAA* (n 73) para 6.

¹¹³ *ibid* para 7.

geographic expansion of the power. The draft ECAA Agreement thereby passed the test of compatibility with the Treaties.

A great advantage in terms of autonomy-conform treaty design is the conclusion of an agreement in a field of EU exclusive competence, such as the Energy Community Treaty. Where only the EU is party to the agreement there is automatically no need for the treaty organs to interpret the term 'Contracting Party' to the effect of ruling on the division of competences between the EU and its Member States in a given matter.¹¹⁴ Furthermore, only in the event of mixed agreements or agreements to which the EU is not a party yet the subject matter of which falls within EU competence there is a danger of a possible violation by the Member States of Article 344 TFEU.¹¹⁵ The conclusion of the ECT, therefore, never necessitated an opinion of the Court under Article 218(11) TFEU.

It is interesting to note that in all of its opinions on agreements exporting the *acquis* the general tone of the Court has been rather protective towards the autonomy of the EU legal order. The Court seems to almost have been taking it for granted that a solution ensuring homogeneity would nearly always conflict with the Treaties. On the other hand, the Court is undoubtedly willing to sacrifice the homogeneity objective for the need to preserve the autonomy of the EU legal order. In spite of forming a part of the EU legal order as a provision of an international agreement, the homogeneity objectives featured in, for example, the EEA and the ECAA Agreements do not belong to the core mechanisms preserving an effective functioning of the Treaties. The Court is, therefore, not bound to pursue a political agenda of expanding a homogeneous internal market beyond the EU but rather assesses the mechanisms put in place for that aim from a strict prism of maintaining the autonomy of the EU legal order.¹¹⁶

A common feature of all of the cases discussed above in this section, as well as the *MOX Plant* case in the previous section, is that they deal with the interpretation by a non-EU judiciary of either EU law or legal rules that mirror EU *acquis*. The Court has previously affirmed that it is not as such contrary to the concept of the autonomy of the EU legal order to accept the jurisdiction of an

¹¹⁴ *ibid* para 16.

¹¹⁵ *ibid* para 17.

¹¹⁶ See, for example, *ibid* para 41.

international court or tribunal for the purpose of interpreting rules of international law. A threat to autonomy occurs, however, in cases where an external judiciary is tasked with the interpretation of EU law and, thereby, potentially affects the position of the Court of Justice in the EU constitutional architecture. While the latter can be accepted as a reasonable conclusion, it is nevertheless remarkable that the Court stroke down the EEA Court for the reason that the participation of the judges of the Court would prevent them from remaining impartial when deciding on cases concerning identically worded provisions in either the EU Treaties or the EEA Agreement. The question of open minds is puzzling considering that the Court does interpret both the provisions of the EU Treaties and the EEA Agreement and does, thereby, differentiate, where appropriate, between the different objectives of the agreements. The mere fact that the judges of the Court of Justice actually deal with the interpretation of identical internal market *acquis* in two (or more) different contexts does not jeopardise the autonomy of the EU legal order. The fact of the 'double-hatting' of the judges, however, does by virtue of the fact that the judges may encounter difficulties when switching identities between the Court of Justice and the EEA Court, respectively.

A situation slightly different from those discussed above involving the autonomy of the EU occurred in *Reynolds v Commission* in which the Court had to rule on the compatibility with the concept of the autonomy of the EU legal order of a civil action that the Commission had brought before a US court against certain American tobacco manufacturers.¹¹⁷ The applicants submitted that if a US court were to determine the Commission's competence to commence proceedings in a non-Member State for recovery of allegedly unpaid customs duties and VAT this would violate the autonomy of the EU legal order and breach Article 344 TFEU.¹¹⁸ The Court swiftly overruled these arguments and stated that a third country court's decision as to the power of the Commission to bring before it legal proceedings does not bind the EU institutions to a particular interpretation of EU law in exercising their internal powers and, subsequently, does not affect the autonomy of the EU legal order.¹¹⁹ The Court can, thus, be deemed to develop

¹¹⁷ Case C-131/03 P *Reynolds v Commission* [2006] ECR I-7795.

¹¹⁸ *ibid* paras 97-98.

¹¹⁹ *ibid* para 102.

the criteria for assessing the maintenance of the autonomy of the EU legal order in a clear and systematic manner.

3.5 Opinion 1/09 Patents Court

The systematic approach of the Court was also reflected in the next opinion of the Court on the compatibility of draft international agreements with the Treaties. In Opinion 1/09,¹²⁰ the Court was requested to assess whether the envisaged agreement setting up a European and Community Patents Court was in conformity with the Treaties and, in particular, the autonomy of the EU legal order. The Court recalled that it is in general compatible with EU law to create an international court for the purpose of interpreting the provisions of an international agreement. It is in fact, part of the autonomy of the EU legal order to be able to voluntarily submit itself to the jurisdiction of an external judiciary.¹²¹ The possibility to set up such a court is, nevertheless, conditional upon the determination of whether or not the judicial mechanism so created violates the essential characteristics of the judicial power of the Court of Justice. The envisaged Patents Court was supposed not only to interpret an international agreement but also future EU patent legislation and *acquis* in the fields of intellectual property, internal market and competition policy. In addition, the Patents Court would have been able to interpret the provisions of EU law in the light of fundamental rights, general principles of EU law, and even determine the validity of an EU measure.¹²²

The Patents Court was not designed to resolve disputes between individuals in the field of EU patent law. It was not intended to replace the jurisdiction of the Court of Justice but rather to take on the respective tasks of the national courts and, thus, unify patent litigation across the EU. The fact that the national courts would, thereby, be deprived of their power to apply and interpret EU law and request preliminary rulings from the Court of Justice in the fields covered by the agreement, a task taken over by the Patents Court, would, according to the Court, deprive the former of their tasks as 'ordinary' courts and, thereby, affect the foundations of the EU legal system and render the envisaged Patents Court

¹²⁰ Opinion 1/09 *Patents Court* [2011] ECR I-1137.

¹²¹ *ibid* para 74.

¹²² *ibid* para 78.

system incompatible with the Treaties.¹²³ The ‘very nature of EU law’ would be jeopardised by an alteration of the complete system of legal remedies and procedures for reviewing the validity of EU measures that includes both the Member States’ courts and the EU judiciary without a due revision of the Treaties.¹²⁴ The autonomy of the EU legal order does, therefore, reach beyond EU law and EU institutions to include also the functions of the Member States’ institutions in the general institutional framework of the EU.

A further shortcoming of the Patents Court system was the fact that in the EU legal system individual rights are protected by the obligation of the Member States to remedy damages incurred by individuals as a result of an infringement of EU law by the Member States including, under specific circumstances, the national judiciaries. Since the Patents Court could not be subjected to infringement proceedings under Articles 258-260 TFEU nor could its decisions give ground to financial liability on behalf of the Member States, the nature of EU law was, thus, considered to be altered to the extent incompatible with the provisions of the Treaties.¹²⁵ All in all, the Court did not accept the proposed institutional format of the draft Patents Court agreement.

The Benelux Court under scrutiny in *Parfums Christian Dior*¹²⁶ was, however, deemed by the Court to be compatible with the Treaties because of its position within the judicial system of the EU and, therefore, subject to the judicial review mechanisms of the Treaties.¹²⁷ Proceedings before the Benelux Court form part of the proceedings before national courts and do not, therefore, deprive the national courts of their powers to interact with the Court of Justice by virtue of the preliminary ruling procedure. Also the Benelux Court itself is to be regarded as part of the national judicial systems to the extent that it serves to provide a common interpretation to a set of rules common to the Benelux countries.¹²⁸

¹²³ *ibid* paras 80, 85 and 89.

¹²⁴ *ibid* paras 70 and 85; citing Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677, para 40.

¹²⁵ Opinion 1/09 *Patents Court* (n 120) paras 86-89.

¹²⁶ Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013.

¹²⁷ Opinion 1/09 *Patents Court* (n 120) para 81.

¹²⁸ Case C-337/95 *Parfums Christian Dior* (n 126) paras 21-23.

3.6 Opinion 2/13 ECHR II

The most recent and, undoubtedly, most widely contested opinion of the Court concerns Opinion 2/13 on the EU's accession to the ECHR.¹²⁹ Following the first failed attempt in 1994 to design an agreement of the EU's accession to the ECHR,¹³⁰ the new draft agreement was drawn up in hope that the substantive shortcomings impeding the conclusion of the first agreement had been remedied by Article 6(2) TEU and that the new draft agreement would, therefore, be accepted by the Court of Justice. Both Article 6(2) and Protocol No 8 TEU as well as the Declaration on Article 6(2) annexed to the TEU stipulate that the EU's accession to the ECHR must preserve the specific characteristics of the EU – pertaining both to its 'constitutional structure' and the 'institutional framework'¹³¹ – and may not affect the Union's competences, the powers of the institutions, the relationship between the Member States in relation to the ECHR, nor infringe Article 344 TFEU. Unexpectedly to many observers¹³² the Court, however, refuted the compatibility of the draft accession agreement with the Treaties on a number of different reasons pertaining to, for example, the preservation of the specific characteristics and autonomy of the EU legal order.

The Court first contended that Article 53 ECHR that allows the Member States to lay down higher standards of fundamental rights protection requires coordination with Article 53 of the EU Charter in order for the Member States not to introduce standards higher than necessary under the Charter and for the primacy, unity and effectiveness of EU law to be maintained.¹³³ Secondly, the Court found that in accordance with the principle of 'mutual trust', the Member States especially in the field of the AFSJ may not, other than in exceptional circumstances, consider other Member States to breach EU law including fundamental rights and not, therefore, control the other Member States' performance in that regard.¹³⁴ The fact that the envisaged agreement provided

¹²⁹ Opinion 2/13 *ECHR II* (n 71).

¹³⁰ Opinion 2/94 *ECHR I* (n 111).

¹³¹ Opinion 2/13 *ECHR II* (n 71) para 165.

¹³² For a list of comments on Opinion 2/13, see D Halberstam, "'It's the Autonomy, Stupid!' A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105, n 3.

¹³³ Opinion 2/13 *ECHR II* (n 71) para 189. See also Case C-399/11 *Melloni* (Court of Justice, 26 February 2013), paras 56-60.

¹³⁴ Opinion 2/13 *ECHR II* (n 71) paras 191-192.

for a possibility for the Member States to check on each other's performance in protecting fundamental rights was considered by the Court to undermine both the 'underlying balance of the EU' as well as the autonomy of the EU legal order.¹³⁵ As a third aspect, the Court pointed out the possibility of the Member States under Protocol 16 of the ECHR to refer to the ECtHR requests for advisory opinions on the interpretation and application of the Convention. At the same time, upon EU's accession to the ECHR the Convention would become an inherent part of EU law and its interpretation, therefore, would fall within the jurisdiction of the Court. Insofar as the draft agreement did not regulate the relationship between the EU's preliminary ruling procedure and the advisory opinion procedure under Protocol 16 ECHR the latter would, according to the Court, jeopardise the autonomy and the effectiveness of the EU's preliminary ruling procedure under Article 267 TFEU.¹³⁶

Fourthly, the Court found that the exclusive jurisdiction of the Court provided by Article 344 TFEU was not protected by the draft agreement because the latter does not give explicit precedence to the EU dispute settlement procedure over the corresponding procedure under the ECHR in disputes concerning EU law.¹³⁷ This is different from the situation in *MOX Plant* where the convention at issue there provided a clear rule on the priority of the EU dispute settlement procedures over those provided for by the convention.¹³⁸ The essence of Article 344 TFEU is that it 'precludes any prior or subsequent external control'¹³⁹ and even a mere possibility to refer a case to a non-EU judiciary.¹⁴⁰

Fifthly, the Court scrutinised the co-respondent mechanism under the draft accession agreement and found that it infringed EU law in several ways. Pursuant to the draft agreement the ECHR would have the possibility to decide on the 'plausibility' of the request from either the Member States or the EU to become a co-respondent in a case before the ECtHR and, thereby, enable the latter court to rule on matters concerning EU law such as the division of

¹³⁵ *ibid* para 194.

¹³⁶ *ibid* paras 197-199.

¹³⁷ *ibid* paras 205-208.

¹³⁸ *ibid* para 205.

¹³⁹ *ibid* para 210.

¹⁴⁰ *ibid* para 212.

competences between the EU and the Member States.¹⁴¹ The ECtHR would also be able to decide on whether the co-respondents are jointly responsible for a violation or not including an assessment of the allocation of powers between the EU and its Member States and the ensuing allocation of responsibility.¹⁴² The latter assessment falls within the sole jurisdiction of the Court of Justice.¹⁴³

Sixthly, the draft accession agreement provided for a procedure for the prior involvement of the EU. The Court considered the procedure to, indeed, preserve the competences of the EU and the powers of its institutions including the Court of Justice.¹⁴⁴ This concerns the determination about whether a case before the ECHR has already been decided by the 'competent EU institution whose decision should bind the ECtHR'.¹⁴⁵ The safeguards provided by the draft agreement were not, however, regarded as sufficient to ensure that the ECtHR would never assess the case law of the Court of Justice and were, thus, deemed insufficient from the perspective of preserving the special characteristics of the EU legal order.¹⁴⁶ Furthermore, the Court found that it should be able to not only assess the validity of the provisions that concern the rights contained in the ECHR in EU secondary law and interpret primary law but also interpret EU secondary law that was not provided for by the draft accession agreement.¹⁴⁷ The impossibility to interpret EU secondary law would, in turn, defeat the Court's exclusive jurisdiction to give definitive interpretations of EU law.¹⁴⁸

Finally, the Court considered it problematic that the draft accession agreement would give the ECtHR the possibility to review the legality of certain CFSP acts in the light of the fundamental rights protected by the ECHR. Article 275 TFEU limits the Court's jurisdiction in the area of CFSP to monitoring compliance with Article 40 TEU that delimits CFSP and other EU policies, and reviewing the legality of Council decisions that impose restrictive measures against natural or legal persons pursuant to Article 263 TFEU. The Court, therefore, cannot exercise a similar fundamental rights review over at least some of the acts of CFSP as

¹⁴¹ *ibid* paras 220-225.

¹⁴² *ibid* paras 229-231.

¹⁴³ *ibid* para 234.

¹⁴⁴ *ibid* para 237.

¹⁴⁵ *ibid* para 238.

¹⁴⁶ *ibid* paras 239-240.

¹⁴⁷ *ibid* paras 242-245.

¹⁴⁸ *ibid* para 246.

would be granted to the ECtHR.¹⁴⁹ The Court deemed this, with reference to Opinion 1/09, to conflict with the idea that the jurisdiction of the Court in the field of EU law may not be transferred on an exclusive basis to an international court that does not belong to the EU's institutional and judicial framework.¹⁵⁰ Even if all of the previous arguments of the Court can be found justified in the light of previous case law the final statement definitely makes one question the Court's selfish attitude towards its own role in the international community of courts.¹⁵¹ From the perspective of the CFSP belonging into the same EU legal order as other policies and the ECtHR becoming an EU constitutional court by gaining jurisdiction over CFSP matters, however, the Court's approach may receive more sympathisers.¹⁵²

All of the institutional aspects of the autonomy of the EU legal order considered above have been accorded very strong protection on behalf of the Court in the name of the essential characteristics of the Union. These features of the EU legal order can, indeed, be regarded as parts of the fundamental *acquis*¹⁵³ of the Union the protection of which is paramount – the 'untouchable hard core'¹⁵⁴ of the EU's relations with other international actors.

Finally, although the majority of the examples above concern the judicial architecture of the EU, the autonomy of the EU legal order is not restricted to the safeguarding of the system of courts and remedies but also the EU's decision-making procedures. The latter aspect of the EU's autonomy is best exemplified by a speech given by De Clercq, European Commissioner for External Relations and Trade at the EC-EFTA Ministerial Meeting in Interlaken in 1987. De Clercq outlined the three principles of the EC-EFTA cooperation including, first and foremost, that 'Community integration comes first and the Community's decision-making autonomy must be preserved' for the sake of being able to finalise the internal market in the planned timeframe and not wishing to incur

¹⁴⁹ *ibid* para 254.

¹⁵⁰ *ibid* para 256.

¹⁵¹ B de Witte, 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 33.

¹⁵² D Halberstam (n 132) 141-142.

¹⁵³ P Pescatore, 'Aspects judiciaires de l'«acquis communautaire»' (1981) 20 *Revue trimestrielle de droit européen* 617, 618. See above chapter 2 section 3.1.

¹⁵⁴ C Curti Gialdino, 'Some Reflections on the *Acquis Communautaire*' (1995) 32 *Common Market Law Review* 1089, 1108.

further delays arising from the inclusion of non-member states in the decision-making processes.¹⁵⁵ The third principle concerned the balance between benefits and obligations that would not allow the EFTA States to participate fully in the activities of the EC without joining the Community because they would not share the same 'Community discipline and solidarity' as the Member States do.¹⁵⁶ These three principles have greatly influenced the decision-making framework in the multilateral agreements exporting the *acquis* and the possibilities of arriving at and maintaining homogeneity in the extended internal market.¹⁵⁷

4 Conclusion

In the context of flexibility in EU integration, the multiplicity of the types of the membership of the Union can be justified as a means to safeguard the 'integrity and autonomy' of the EU legal order.¹⁵⁸ Flexible integration does, nonetheless, require that the unconventional form of membership is identified as such and that the multiplication of membership patterns do not to have a detrimental effect on the 'core' of the EU legal order. When it comes to interaction between the EU and third countries or international organisations, the integrity and autonomy claim is ever so strong. The case law of the Court convincingly demonstrates that safeguarding the autonomy of the EU legal order is one of the key tasks of its judiciary.

The objective of the principle of autonomy is to maintain the independent operation of EU law and institutions. Autonomy serves the broad purpose of uniform application of EU law across the territory of the Union in order to enable the Union to achieve the objectives laid out in the Treaties. Meanwhile, the autonomy of the EU legal order faces dangers on both Member State and international levels. The Court is particularly assertive in reviewing the compatibility with the autonomy of the EU legal order of those agreements that seek to export EU *acquis* to third countries and set up institutional frameworks for maintaining homogeneity in the internal market thus extended.

¹⁵⁵ W De Clercq, speech held at the EC-EFTA ministerial meeting, Interlaken, 20 May 1987, SPEECH/87/32, 5-6.

¹⁵⁶ *ibid* 7-8.

¹⁵⁷ See below chapters 6 and 7, especially chapter 6 section 3.2.1.

¹⁵⁸ M Cremona, 'The "Dynamic and Homogeneous" EEA: Byzantine Structures and Variable Geometry' (1994) 19 *European Law Review* 508, 525.

Although the Court is more prone to safeguard the autonomy of the EU legal order than to further the homogeneity objective of the international agreements it does not render the extension of the EU internal market beyond the borders of the Union a mission impossible. By and large, the problems of conflicts with autonomy can be avoided if in the institutional structures of the agreements the EU and the non-EU pillar are very clearly separated, such as in the case of the ECT or, on the contrary, where one single organisation is created for all parties with distinct organs that function in parallel to those of the EU, such as the EEA. Finally, the Court has repeatedly established in its case law on autonomy that certain institutional designs are incompatible with the current provisions of the Treaties and that the Treaty amendment provisions cannot be replaced by concluding an international agreement. Virtually any institutional framework set up by an international agreement exporting the *acquis* would become compatible with the Treaties and, subsequently, the requirement of autonomy of the EU legal order if the Treaties were amended accordingly. This solution is, however, rather unlikely to be made use of in the fear of thereby opening Pandora's box.¹⁵⁹

¹⁵⁹ T Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order' (2011) 48 Common Market Law Review 1025, 1049.

Chapter 6 Institutional framework: defining the core

1 Introduction

The project of expanding the EU internal market beyond the borders of the Union cannot do without a solid institutional and procedural framework to ensure that the same fundamental characteristics of the internal market and the necessary degree of unity of the market as in the EU are incorporated in the 'extension' of the market. As discussed above in chapter 3, a homogeneous EEA, Energy Community or ECAA require, ideally, that the same core body of rules and procedures be given the same effect across the entire territory of the respective legal orders at any point of time. It thus means that in order to be considered homogeneous, the *acquis* must correspond to three requirements: unity of substance, time and territory. These aspects must be present at all stages – the adoption, implementation, application and enforcement of the *acquis*. Furthermore, homogeneity in the external dimension demands that there be a sufficient institutional link between the EU legal order and the legal orders created by the multilateral agreements.

Homogeneity does not require absolute uniformity, either within the EEA, Energy Community of the ECAA or between the above and the EU, yet a homogeneous expanded internal market must necessarily include the core elements defined above in chapter 2. These core elements comprise provisions on fundamental freedoms, competition policy and the relevant horizontal provisions that affect the scope of the former two.

This chapter focuses on two key aspects of the institutional frameworks that are set up to guarantee homogeneity in the extended internal market – the exporting of the *acquis* and the defining of its key elements necessary for achieving homogeneity. The first part of the chapter deals with legal mechanisms that enable the *acquis* adopted in the EU to be exported to the EEA, the Energy Community and the ECAA legal orders, scrutinising both institutional and procedural arrangements. The second part of the chapter focuses on the possible effects of third country participation in the stages of determining the substantive content of the core *acquis* on homogeneity in the expanded internal market and the possibilities of various non-EU actors in influencing the EU *acquis*. The

current and the following chapter deal primarily with the institutions and procedures of the EU and the EEA, the Energy Community and the ECAA and do not explore in detail the role of the institutions of the EU Member States or those of the non-EU contracting parties to the agreements under scrutiny as these fall beyond the scope of this thesis.

2 Exporting internal market *acquis* to third countries

In order to ensure homogeneity and a true extension of the internal market, the core of the internal market *acquis* - either comprehensive or characteristic of the particular sector in question, such as energy or aviation – must be transposed into the legal orders of third states in a timely and precise manner. Suitable institutional and procedural mechanisms need to be in place, set up both by the international instruments and by the third countries' national legal orders. Since the questions of primacy and direct effect were, however, already discussed above in chapter 3, this chapter will only cover the rules in the international agreements.

Uniformity at the stage of adoption means, firstly, that the same set of rules comes into force. Secondly, at the time new legislation or amendments to existing legislation in the sphere of the internal market or a sector thereof is adopted in the EU, the same *acquis* must also enter into force *vis-à-vis* the third countries. This is important both as regards the content of the legal rules – within the limits of what can be classified as 'permissible differentiation' – as well as the temporal dimension. Thirdly, homogeneity demands that the same set of rules apply at the same point of time across the entire territory of the expanded internal market, thus excluding the possibility of adopting new legislation at different times and, thereby, proceeding at different speeds.¹

Within the EU, general rules on the entry into force of new legislation apply equally to all Member States notwithstanding negotiated exceptions that are usually limited in number and scope. The entry into force following the adoption of new EU legislation is automatic across the entire Union. EU legislation becomes binding on the Member States – to the extent that the measures

¹ See above chapter 3 section 3.1.

adopted enjoy general application and have legally binding force – to all Member States at the moment of adoption or at a later date as may be specified by the instrument. Should the particular instrument have direct effect it will also be enforceable by individuals.

In the case of exporting the *acquis* outside the Union the automaticity no longer applies. The international agreements serve as a filter between the EU Treaties and the constitutional orders of non-EU Member States. As is the case with all of the multilateral agreements under scrutiny, uniformity of the *acquis* is guaranteed only for the moment of their conclusion. The updating of the *acquis* which forms part of the international agreement, either being inserted in the main text of the agreement or in an annex attached to it, amounts to an amendment of the international agreement. The amendment must take place according to the rules of international treaty law and the provisions of the agreement itself. For the purpose of inserting new *acquis* into the multilateral agreements to reflect legislative changes in the EU simplified treaty amendment procedures are often used. In the cases of the EEA and the ECAA, the updating of the *acquis* takes place in accordance with a simplified procedure whereas the ECT prescribes no special procedure. Instead, the general rules on revision and accession outlined in Article 100 ECT apply.

2.1 European Economic Area

Overall, the EEA Agreement introduces three categories of methods for achieving the homogeneity necessary for the establishment and functioning of the EEA common market – legislative, administrative and judicial.² This chapter concerns the first, legislative means, while the next chapter analyses the administrative and judicial means for maintaining homogeneity within the EEA and between the EEA and the EU. Among the multilateral agreements under scrutiny, the EEA Agreement represents the most elaborate system for updating the *acquis*. The EEA is made up of two distinct pillars, the first – the EU pillar – comprising the EU and its Member States and the institutions of the EU, and the second – the EFTA pillar – made up of the EEA EFTA States and the institutions of the EFTA,

² A Lazowski, 'Box of chocolates integration: the European Economic Area and the Swiss models revisited' in S Blockmans and S Prechal (eds), *Reconciling the Deepening and Widening of the European Union* (T.M.C. Asser Press 2007) 87.

respectively. In between the institutions of the two pillars are the EEA institutions, in which both the EU and the EFTA pillars are represented.³ The EEA's sophisticated institutional framework allows for a 'quasi-automatic' procedure for amending the annexes to the EEA Agreement that contain the relevant *acquis*,⁴ something which is indispensable considering the vast scope of the agreement.

2.1.1 Institutions

The parallel structure of the EEA comprises four joint institutions in which both the EU and the EFTA side of the EEA Agreement are represented. These include the EEA Council, the EEA Joint Committee, the EEA Joint Parliamentary Committee, and the EEA Consultative Committee. In addition, the institutions of the EFTA pillar comprise the EFTA Standing Committee, the EFTA Surveillance Authority and the EFTA Court. The EFTA Standing Committee is a forum in which the EEA EFTA States meet and adopt common positions to be presented in the EEA Joint Committee. The roles of the EFTA Surveillance Authority and the EFTA Court in the process of implementing the EEA Agreement and the *acquis* are discussed in detail in the following chapter.

The EEA Council is the main political body of the EEA. It consists of representatives of the contracting parties, including the Council of the EU, the Commission and the EEA EFTA States Iceland, Liechtenstein and Norway. Similarly to the European Council, the task of the EEA Council is to give political impetus to the EEA and lay down general guidelines for the EEA Joint Committee.⁵ It also deals with difficult questions that the Joint Committee has failed to reach a decision on, or questions which demand swift action.⁶ The EEA Council adopts decisions 'by agreement between the [Union], on the one hand, and the EFTA States, on the other'.⁷ This requirement of consensus places the two pillars of the EEA on the opposing sides of the meeting table yet compels the parties to close cooperation in order to reach the necessary consensus.

³ For an illustrative organigram see 'Joint Committee' (EEA website) <<http://www.efta.int/eea/eea-institutions>> accessed 24 June 2015.

⁴ S Lavenex, D Lehmkuhl and N Wichmann, 'Modes of external governance: a cross-national and cross-sectoral comparison' (2009) 16 *Journal of European Public Policy* 813, 818.

⁵ Article 89(1) EEA Agreement.

⁶ Article 89(2) EEA Agreement.

⁷ Article 90(2) EEA Agreement.

Consensual decision-making characterises the EEA as a whole. Furthermore, not only do the EU and its Member States as represented by the Commission and the Council have to agree on one message and communicate this with one voice but the same also applies to the EEA EFTA States. The EEA Council is led by a President, alternating twice a year between a member of the Council of the EU and a representative of an EEA EFTA State,⁸ with the aim of ensuring a balance in the EEA between the EU and the EFTA pillars. The Council meets twice a year or whenever circumstances so require,⁹ in addition to continuous dialogue on foreign policy matters,¹⁰ resembling, again, the European Council.

The institution involved in the day-to-day management of the EEA and deciding on the amendments to the EEA Agreement is the EEA Joint Committee,¹¹ the equivalent of the Council of the EU in the EEA. The division between the EU and the EFTA pillars in the EEA Council is carried on to the Joint Committee, which, too, adopts decisions by agreement between the one and the other block.¹² In the Joint Committee, the EU is represented by the Commission and the EFTA Surveillance Authority participates as an observer. The Presidency of the EEA Joint Committee, too, alternates twice a year between the Union, represented by the Commission, and a representative of one of the EFTA States.¹³ The Joint Committee meets, in principle, at least once a month, but may be convened extraordinarily at the initiative of the President or at the request of one of the contracting parties.

The EEA Joint Parliamentary Committee is an advisory body and a venue for parliamentary cooperation between the European Parliament and the parliaments of the EEA EFTA States. It is composed of an equal number of parliamentarians from the European Parliament and from the national parliaments of the EEA EFTA States,¹⁴ thus treating the two pillars of the EEA as equal. The task of the Parliamentary Committee is to raise awareness about the areas covered by the EEA Agreement through dialogue and debate without,

⁸ Article 91(2) EEA Agreement.

⁹ *ibid.*

¹⁰ See 'EEA Council' (EEA Website) <<http://www.efta.int/eea/eea-institutions/eea-council>> accessed 24 June 2015.

¹¹ Article 92 EEA Agreement.

¹² Article 93(2) EEA Agreement.

¹³ Article 94(1) EEA Agreement.

¹⁴ Article 95(1) EEA Agreement.

however, any formal role in the EEA decision-making procedures.¹⁵ The Committee's powers are limited to the adoption of resolutions, scrutinising the annual report of the Joint Committee, and hearing the President of the EEA Council.¹⁶

The fourth EEA joint body is the EEA Consultative Committee which provides a venue for cooperation between the social partners of the EU and the EFTA States. The cooperation serves to 'enhance the awareness of the economic and social aspects of the growing interdependence of the economies of the Contracting Parties and of their interests within the context of the EEA'.¹⁷ The Consultative Committee is composed of an equal number of members of the EU Economic and Social Committee and its EFTA equivalent, the EFTA Consultative Committee. The Consultative Committee may adopt reports and non-binding resolutions to put forward its views and to, thereby, enable the EEA social partners to participate in the EEA in the absence of a role in the decision-making procedures.

2.1.2 Procedures for ensuring homogeneity

Newly adopted, amended or repealed EU *acquis* becomes part of or is excluded from the EEA Agreement only upon due amendment of the latter. The amendment procedure involves the institutions of both the EEA and the EEA EFTA States. The former conduct the amendment of the annexes or protocols whereas the latter implement the *acquis* in the national legal orders.

After the Council of the EU has adopted a legal act, the EEA EFTA States' experts first review the new piece of legislation. In fact, the first evaluation of the EEA relevance of a piece of EU *acquis* is made already by the EU declaring the legal act either EEA relevant or not.¹⁸ The purpose of the scrutiny of the EEA EFTA States' experts is to consider the EEA relevance of the legal act on their own behalf and to give an opinion as to whether an amendment of the annexes of the EEA

¹⁵ Article 95(3) EEA Agreement.

¹⁶ Article 95(4) EEA Agreement.

¹⁷ Article 96(1) EEA Agreement.

¹⁸ See, for example, Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L176/338, which provides that the text has EEA relevance.

Agreement is required.¹⁹ Occasionally, adaptations have to be made to EU legal acts before they are incorporated in the EEA including the removal of non-EEA relevant parts of the legal acts.²⁰ This procedure is coordinated by the EFTA Secretariat. The EFTA Secretariat also drafts a decision of the Joint Committee, which is following approval by the EFTA States and the subcommittees dealing with the matter in question passed on to the Commission via the European External Action Service (EEAS). After endorsement by the Commission, the draft Joint Committee decision is forwarded to either the Commission or the Council, depending on whether the revisions foreseen in the draft decision are minor or substantive. The aim of the procedure is to ensure the simultaneous entry into force of new or amended legislation in the entire EEA and, by that, to maintain homogeneity and legal certainty.²¹ A certain delay is nevertheless embedded in the procedure as the Joint Committee incorporates into the EEA Agreement *acquis* that has already been adopted in the EU, including acts that enter into force immediately or with minor delay *vis-à-vis* the EU Member States.²²

Since no voting takes place in the Joint Committee great emphasis is placed on finding consensus.²³ Consensus in the Joint Committee is the aim pursued throughout the equally elaborate 'decision-shaping' procedure in which the EEA EFTA States participate.²⁴ Should the contracting parties, regardless of the efforts made at previous stages be unable to reach an agreement on incorporating an amendment of EU *acquis* into the EEA Agreement, the Joint Committee will continue working towards a commonly acceptable solution. An eventual, albeit imperfect, solution is to recognise an equivalence of legislation in the EU and the EFTA pillars of the EEA.²⁵ Article 102(4) serves to ensure that the Joint Committee deals with every matter relevant to the good functioning of the EEA Agreement. A decision on taking notice on the equivalence of legislation will

¹⁹ Not always, though, is *acquis* that has been declared EEA relevant actually relevant to the EEA Agreement and vice versa: H Haukeland Fredriksen and CNK Franklin, 'Of Pragmatism and Principles: The EEA Agreement 20 Years On' (2015) 52 Common Market Law Review 629, 652-653.

²⁰ Norwegian Government, 'Parliament White Paper – The EEA Agreement and Norway's other agreements with the EU' No 5 (2012-2013), 12 and 16.

²¹ Article 102(1) EEA Agreement.

²² H Haukeland Fredriksen and CNK Franklin (n 19) 657.

²³ Article 102(3) EEA Agreement.

²⁴ The influence of the EEA EFTA States in the procedure of developing new EEA relevant *acquis* in the EU is discussed in detail below in section 3.

²⁵ Article 102(4) EEA Agreement.

have to be made at least six months after the matter has been referred to the Joint Committee or, at the latest, on the day of the entry into force of the corresponding EU legislation.

In the event, though, that the EEA Joint Committee fails to reach agreement by a prescribed deadline of six months or at least by the time the EU legislation enters into force, the relevant part of an annex to the EEA Agreement is suspended unless the Joint Committee decides differently.²⁶ The Joint Committee will continue work on the matter until the parties agree to a solution. The time span between the adoption of an EEA relevant EU act and the possible suspension of a part of an annex attached to the EEA Agreement will be one year in total.²⁷ The practical effect of a suspension will be discussed in and, thus, decided by the Joint Committee.²⁸ The suspension does not, however, affect the rights and obligations that individuals and undertakings have already acquired under the EEA Agreement.²⁹ To this date, no suspensions have yet taken place.

Suspension will affect an entire part of an annex to the EEA Agreement.³⁰ An opt-out by one EEA EFTA State from updating the EEA Agreement, therefore, affects all. The aim of the suspension mechanism is to avoid a patchwork situation whereby different *acquis* applies in different parts of the EEA and the idea of a homogeneous EEA legal order defeated. Nevertheless, homogeneity *vis-à-vis* the EU pillar of the EEA will in the instance of a suspension certainly be interrupted.

Joint Committee decisions are binding on the EEA contracting parties under public international law and thus subject to the national constitutional provisions. The parties to the EEA Agreement are under an obligation to ensure that the decisions of the Joint Committee are duly applied and implemented.³¹ Failure of one contracting party to do so will incur international responsibility towards the others. Subject to the applicable constitutional provisions, amendments to the EEA Agreement, its annexes or protocols may have to be approved separately by the legislatures of one or more of the contracting parties.

²⁶ Article 102(5) EEA Agreement.

²⁷ The sum of the two six-month periods provided in Article 102(4) and (5) EEA Agreement.

²⁸ Article 102(5) EEA Agreement.

²⁹ See, for example, J Pelkmans and P Böhler, 'The EEA Review and Liechtenstein's Integration Strategy' (2013) Centre for European Policy Studies, 53.

³⁰ C Reymond, 'Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area' (1993) 30 Common Market Law Review 449, 466.

³¹ Article 104 EEA Agreement.

Seeking parliamentary approval may possibly result in delays in the procedure and pose a threat to the temporal aspect of homogeneity in the EEA legal order.

Contracting parties must notify others of the date they have fulfilled their national constitutional requirements to give effect to Joint Committee decisions.³² Should one of the contracting parties fail to do so within six months' time, the Joint Committee decision will be applied provisionally until the notification is provided.³³ During that time there is, thus, a lag between the time the *acquis* becomes applicable in the EU and the time it enters into force with *vis-à-vis* one or more of the EEA EFTA contracting parties. The provisional application of a piece of the *acquis* that has not received parliamentary approval in one of the EEA EFTA States may be refused provisional application by another contracting party. Such refusal will, as well as a notification by a contracting party that the amendment has not been ratified by their parliament, result in the suspension of the relevant part of the annex to the Agreement. The suspension will take place within a month of those circumstances arising but not before the corresponding EU legal act has entered into force.³⁴

From the perspective of achieving homogeneity, one of the key provisions in the EEA Agreement is Article 97. It provides that subsequent amendments to the domestic legislation of the Contracting Parties are only compatible with the Agreement if they comply with the principle of non-discrimination and if other EEA members are duly informed of the amendments. Following a notification in this regard, the domestic legislative amendment is either given green light by the EEA Joint Committee by being deemed not to affect the good functioning of the EEA Agreement and, thus, declared not EEA relevant, or deemed to necessitate an amendment of the annexes or protocols to the EEA Agreement in accordance with Article 98. The good functioning of the EEA Agreement, therefore, should lead to legal homogeneity both within the EU and between the EU and the EEA.

Since the EEA Agreement is a mixed agreement, similarly to the EEA EFTA States and the EU Member States represented by the Council of the EU, the Union, too, has to decide on its own position to be put forward at an EEA Joint Committee

³² Article 103(1) EEA Agreement.

³³ Article 103(2) EEA Agreement.

³⁴ *ibid.*

meeting as well as on a possible amendment of the EEA Agreement or its annexes or protocols. Regulation No 2894/94 establishes procedures to be followed by the EU when implementing the EEA Agreement.³⁵ Article 1 of the said Regulation provides that at the stage where the Commission submits a legislative proposal to the Council for adoption it must indicate whether it considers the act to fall within the ambit of the EEA Agreement. Should a Member State object to the EEA relevance of the act proposed, the Council will decide on the question with a vote that requires the same voting majority as the adoption of the corresponding EU legal act. In the Joint Committee meetings where the extension of an EU legal act to the EEA is decided the position of the EU is adopted by the Commission.³⁶ All other EU positions in the EEA Joint Committee must be endorsed by the Council on a proposal from the Commission. EU positions in the EEA Council require unanimous adoption in the Council unless the EEA Council deals with an EU legal act. In the latter case the voting majority is determined by the legal basis of the legal act in question.³⁷ Analogous rules apply to the European Parliament who will, in parallel to adopting positions on EU legislation also adopt positions on the 'EEA relevance' of those acts.³⁸

In conclusion, the institutional and procedural framework of the EEA supports the objective of dynamic homogeneity to almost the greatest extent possible for an international agreement that lacks supranational character. The substantive dimension of homogeneity is safeguarded by the constant monitoring of the 'EEA relevance' of EU *acquis* by both the EU and the EEA EFTA parties to the EEA Agreement, and the subsequent action taken by the EEA Joint Committee to update the annexes to the Agreement accordingly. The two distinct pillars of the EEA – those of the EU and the EFTA – influence the territorial dimension of homogeneity insofar as the entire part of the Agreement is suspended when the Joint Committee fails to update the annexes to reflect developments in the *acquis* or when one or more of the EEA EFTA States' legislatures does so. At that point

³⁵ Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area [1994] OJ L305/6 (Regulation (EC) No 2894/94).

³⁶ Council Regulation (EC) No 2894/94, Article 1(2).

³⁷ Council Regulation (EC) No 2894/94, Article 2.

³⁸ Council Regulation (EC) No 2894/94, Article 3.

of time, the entire EFTA pillar becomes detached from the EU pillar. Homogeneity within the EEA as a whole will as a result become distorted but since no EFTA states are allowed to surpass others in keeping up with the internal market legislative changes, unless on a voluntary basis and without a corresponding rights *vis-à-vis* the EU pillar, this places extra pressure on the defaulting party. In practice, however, although the EEA Agreement allows for a time lag of a maximum of twelve months between the amendment of the *acquis* and the updating of the EEA Agreement or a suspension of a part thereof, the incorporation of EEA relevant *acquis* into the EEA Agreement has taken up to six years.³⁹

The time gap is, however, inevitable owing to the quasi-automatic system of the EEA and the need to wait for parliamentary approval in order for the amendments of the EEA Agreement to enter into force *vis-à-vis* the EEA EFTA countries. The current backlog of legal acts awaiting incorporation into the EEA Agreement⁴⁰ and implementation in the EEA EFTA States⁴¹ is not insignificant. One of the reasons for the former is the increasingly cross-border legislative activity of the EU that makes it difficult to determine the EEA relevance of EU legal acts, including whether a piece of *acquis* affects the internal market.⁴² In practice, the homogeneity aim is, therefore, more vulnerable than what the regulatory framework sets it out to be. The impossibility of always arriving at a homogeneous result is, moreover, recognised by the EFTA Court.⁴³

³⁹ See for examples H Haukeland Fredriksen and CNK Franklin (n 19) 657-658.

⁴⁰ Over 600 legislative acts in 2014, see J Breidlid and M Vahl, '20 years on: Current and future challenges for the EEA' (2015) EFTA Bulletin (forthcoming), 10.

⁴¹ For example, as of May 2014, Iceland had a transposition deficit of 3.1% (34 directives), Liechtenstein 0.9% (8 directives), and Norway 1.9% (21 directives): Commission, 'Single Market Scoreboard - Iceland 2013-2014' April 2015 <http://ec.europa.eu/internal_market/scoreboard/_docs/2015/04/member-states/2015-04-iceland_en.pdf> accessed 24 June 2015; Commission, 'Single Market Scoreboard - Liechtenstein, 2013-2014' April 2015 <http://ec.europa.eu/internal_market/scoreboard/_docs/2015/04/member-states/2015-04-liechtenstein_en.pdf> accessed 24 June 2015; Commission, 'Single Market Scoreboard - Norway, 2013-2014' April 2015 <http://ec.europa.eu/internal_market/scoreboard/_docs/2015/04/member-states/2015-04-norway_en.pdf> accessed 24 June 2015. In Iceland and Norway regulations, too, must be incorporated in their respective legal orders. In November 2014, Iceland had 34 overdue regulations and Norway 20: EFTA Surveillance Authority, 'Internal Market Scoreboard - EEA EFTA States of the European Economic Area' No 35 April 2015 <http://www.eftasurv.int/media/scoreboard/Internal_Market_Scoreboard_No_35_April_2015.pdf> accessed 24 June 2015.

⁴² Norwegian Government, 'Parliament White Paper' (n 20) 15.

⁴³ Case E-3/97 *Opel Norge* [1998] EFTA Ct Rep 1, para 30.

2.2 Energy Community

The institutional mechanisms for achieving and maintaining homogeneity in the Energy Community are significantly weaker than those of the EAA Agreement. The institutional structure of the Energy Community is much more sophisticated than that of the ECAA but the sophistication does not necessarily translate into the effectiveness of the structures in safeguarding homogeneity in the Energy Community legal order.

2.2.1 Institutions

The Energy Community comprises five institutions: the Ministerial Council, the Permanent High Level Group (PHLG), the Regulatory Board, two Fora and the Secretariat. The Ministerial Council provides general policy guidelines to the Energy Community and ensures, thereby, the attainment of the objectives of the Treaty. It adopts Measures and Procedural Acts, and may also delegate legislative tasks to other institutions.⁴⁴ The Ministerial Council is made up of one representative from each contracting party except for the EU that is represented by two persons.⁴⁵ Each contracting party holds the Presidency of the Energy Community in turn for a term of six months. Importantly, since the ECT is not a mixed agreement its institutions do not feature two blocks that would separate the EU from the non-EU contracting parties such as in the case of the EEA.

The Ministerial Council meets at least twice a year and its meetings are prepared by the Secretariat.⁴⁶ One of the tasks of the Ministerial Council is to compose an annual report which is forwarded to the European Parliament and to the Parliaments of the Adhering Parties and of the Participants.⁴⁷ Adhering Parties are the non-EU contracting parties to the ECT with the exception of Kosovo (UNMIK). Participants are those EU Member States who wish to be involved in the activities of the Energy Community despite not being able to become contracting parties themselves. They are represented and participate in the discussions at the Energy Community's institutions.⁴⁸ Not being contracting

⁴⁴ Article 47 ECT.

⁴⁵ Article 48 ECT.

⁴⁶ Article 50 ECT.

⁴⁷ Article 52 ECT.

⁴⁸ Article 95 ECT.

parties they do not take part in the voting but enjoy a higher position than third country observers who cannot participate in discussions.⁴⁹

The PHLG prepares the work of the Ministerial Council and reports to it on progress made toward achievement of the objectives of the Treaty.⁵⁰ The PHLG may take Measures upon due delegation from the Ministerial Council. It also discusses the development of the *acquis* on the basis of reports submitted on a regular basis by the European Commission. The PHLG consists of the representatives of each contracting party and two representatives of the EU.⁵¹ As with the Ministerial Council, the Secretariat prepares the meetings of the PHLG.⁵²

The Regulatory Board of the Energy Community possesses the necessary technical expertise for its proper functioning. The Board advises the Ministerial Council and the PHLG on the details of the statutory, technical and regulatory rules and issues recommendations on cross-border disputes involving two or more regulators upon request by any of them.⁵³ The Regulatory Board is composed of representatives of each contracting party's energy regulators. The EU is represented by the Commission, assisted by one regulator of each Participant, and one representative of the European Regulators Group for Electricity and Gas (EREG).⁵⁴

The two Fora on electricity and gas, respectively, represent stakeholder groups. The Fora are composed of representatives of all interested stakeholders including industry, regulators, industry representative groups, and consumers and play an advisory role in the Energy Community.⁵⁵ The Fora are chaired by a representative of the EU and adopt their conclusions by consensus.⁵⁶ The conclusions are then forwarded to the PHLG.⁵⁷

Finally, the Secretariat of the Energy Community provides administrative assistance to all of the other institutions and reviews the proper implementation

⁴⁹ Article 96(2) ECT.

⁵⁰ Article 53 ECT.

⁵¹ Article 54 ECT.

⁵² Article 56 ECT.

⁵³ Article 58 ECT.

⁵⁴ Article 59 ECT.

⁵⁵ Article 63 ECT.

⁵⁶ Articles 64 and 65 ECT.

⁵⁷ Article 65 ECT.

of the ECT by the contracting parties.⁵⁸ The Secretariat is impartial, thus also independent of the EU, and acts only in the interests of the Energy Community.⁵⁹

2.2.2 Procedures for ensuring homogeneity

The decision-making procedures for adopting Energy Community Measures differ according to whether they are adopted under Title II ECT on the extension of the *acquis communautaire*, under Title III on the Mechanism for operation of Network Energy Markets, or under Title IV on the creation of a Single Energy Market. The Measures, which are either decisions or recommendations, can be adopted by the Ministerial Council or, upon a delegation from the latter, another institution of the Energy Community.⁶⁰

What is of relevance for the purposes of the current study is the procedure for updating the relevant *acquis* in the Energy Community to mirror as closely as possible the EU's energy *acquis*. The EU Commission holds a central position in the Energy Community. The Commission coordinates all activities of the Energy Community⁶¹ as well as makes proposals for the adoption of Measures.⁶² The role of the Commission creating a strong link between the EU and the Energy Community certainly contributes to the task of maintaining homogeneity in the latter. Measures can be adopted either by the Ministerial Council, the PHLG or the Regulatory Board. Each ECT contracting party has one vote and a Measure is adopted by a majority of votes cast,⁶³ yet for a decision to be taken at least two thirds of the contracting parties need to be present.⁶⁴ Measures under Title III are adopted by the Ministerial Council, the PHLG or the Regulatory Board on a proposal from a contracting party or the Secretariat,⁶⁵ the necessary voting majority being two-thirds of the votes cast including a positive vote by the EU.⁶⁶ The EU, thereby, enjoys veto right. Measures under Title IV are adopted by the

⁵⁸ Article 67 ECT.

⁵⁹ Article 70 ECT.

⁶⁰ Article 76 ECT.

⁶¹ Article 4 ECT.

⁶² Article 79 ECT.

⁶³ Articles 80-81 ECT.

⁶⁴ Article 78 ECT.

⁶⁵ Article 82 ECT.

⁶⁶ Article 83 ECT.

Ministerial Council, the PHLG or the Regulatory Board on a proposal from a contracting party,⁶⁷ and unanimity is required to adopt the Measure.⁶⁸

As in the cases of the EEA and the ECAA, the measures adopted under the ECT are binding on the contracting parties. Each party must meet their constitutional requirements to implement Decisions addressed to them in their domestic legal systems.⁶⁹ A failure of a contracting party to implement the ECT or a measure may be brought to the attention of the Ministerial Council by a reasoned request of any party, the Secretariat of the Regulatory Board. Private bodies may issue complaints to the Secretariat.⁷⁰ The consequence, after the Ministerial Council has determined a breach of obligations by a party in accordance with the procedure of Article 91 ECT, is a suspension of certain rights that the breaching party derives from the Treaty, including voting rights and exclusion from meetings or mechanisms under the Treaty.

Should the contracting parties wish to implement other parts of the EU *acquis* on Network Energy, the treaty revision procedure under Article 100 ECT applies thus requiring a unanimous vote of all contracting parties.

Article 25 ECT states that the Energy Community 'may take Measures' to implement amendments to the *acquis communautaire* to reflect the evolution of EU *acquis*. The limited degree of automatism provided by this provision is a potential threat to homogeneity in the Energy Community. Yet its importance depends on how to interpret the phrase 'may take'. The ECT provides two alternatives: issues that the Energy Community 'shall' tackle and issues that the Energy Community 'may' address. The latter notably apply to harmonisation,⁷¹ renewable energy sources and energy efficiency.⁷²

The EU energy *acquis* that forms part of the ECT is, moreover, given some flexibility with regard to its application to the non-EU contracting parties of the ECT. The *acquis* provided in Title II of the Treaty is 'adapted to both the institutional framework of this Treaty and the specific situation of each of the

⁶⁷ Article 84 ECT.

⁶⁸ Article 85 ECT.

⁶⁹ Article 89 ECT.

⁷⁰ Article 90 ECT.

⁷¹ Article 34 ECT.

⁷² Article 35 ECT.

Contracting Parties, with a view to ensuring high levels of investment security and optimal investments'.⁷³ The adaptation is conducted by the Energy Community that adopts the necessary Measures to adjust the *acquis* according to the institutional framework of the Energy Community Treaty as well as the 'specific situation of each of the Contracting Parties'.⁷⁴ Neither the EEA nor the ECAA agreements envisage such a possibility of differentiation apart from separately negotiated exceptions.

One further point deserving attention in the context of the Energy Community is the difference in the binding force of identical *acquis* in the EU and in the Energy Community. Article 14 ECT provides that the contracting parties agree to make efforts towards the implementation of Council Directive 96/61/EC on integrated pollution prevention and control. The Directive was replaced in 2008 by Directive 2008/1/EC. The fact that the Directive in question enjoys no such binding force within the Energy Community as it does within the EU and, for example, the EEA is alarming from the perspective of achieving and maintaining homogeneity in the Energy Community. This holds true on the condition that the said Directive does, indeed, form part of the objectively defined 'core' *acquis* the absence of which would defeat homogeneity in the Energy Community and between the latter and the EU. It is not the purpose of this study to determine exhaustively whether an act of flanking policy does or does not form part of the core commitments within the internal market project, either as a whole or as represented by a specific sector. Rather, an attempt is made to outline the criteria on the basis of which it is possible to assert which elements possibly belong to the 'core' commitments within the internal market and are, therefore, indispensable for achieving and maintaining homogeneity in the expanded market.

The ECT makes no distinction between Measures adopted for the purpose of updating the *acquis* and other measures. Subsequently, no special procedure has been established to tackle specifically the failure of an Energy Community institution or a contracting party to implement changes in the relevant EU *acquis* in the ECT. The inability of an Energy Community institution to adopt a decision

⁷³ Article 5 ECT.

⁷⁴ Article 24 ECT.

to update the *acquis* contained in the Treaty has no consequences on the functioning of the Treaty. Although the situation in which a contracting party does not comply with the Treaty is considered a breach thereof, the ECT envisages no special guarantees to safeguard the homogeneity of its legal order or between EU *acquis* and Energy Community *acquis* beyond the suspension of rights deriving from the ECT in the case of a serious and persistent breach. Not reaching a homogeneous result can, however, hardly be regarded a breach in the context of the Energy Community. In sum, similarly to the ECAA, which will be discussed in the following section, there are institutional and procedural possibilities for updating the ECT to mirror developments in EU *acquis* yet similarly to the EEA and the ECAA agreements there are no absolute guarantees to the effect of maintaining homogeneity. The homogeneity of the Energy Community as well as the ECAA depends on the willingness of the contracting parties to duly update the agreements and to, thereafter, implement the amendments to the agreements in their domestic legal orders.

2.3 European Common Aviation Area

Despite following the model of the EEA, the sectoral ECAA Agreement has a much simpler institutional structure than the comprehensive EEA Agreement or even the equally sectoral ECT. The simplicity of structure applies to the institutional framework as well as the decision-making procedures of the ECAA.

2.3.1 Institutions

The ECAA Agreement set up only one institution, the ECAA Joint Committee, which is responsible for the administration and proper implementation of the Agreement.⁷⁵ The Joint Committee is composed of representatives of the contracting parties including both the EU and its Member States and non-EU Member States. Differently from its EEA counterpart, however, the ECAA Joint Committee does not strive for consensus. Decisions are adopted by a unanimous vote unless the Joint Committee itself lays down majority voting rules for certain specific issues.⁷⁶ The ECAA Joint Committee is presided over in turn by an ECAA

⁷⁵ Article 18(1) ECAA Agreement.

⁷⁶ Article 18(3) ECAA Agreement.

Partner⁷⁷ or the EU and its Member States and just as in the EEA, this arrangement mirrors two blocks – one formed by the EU and its Member States, and the other consisting of the non-EU ECAA contracting parties.⁷⁸ Owing to the more limited scope of the ECAA Agreement as compared to the EEA Agreement, the ECAA Joint Committee gathers less frequently. Its meetings are held at least once a year ‘to review the general functioning of the Agreement’ as well as under special circumstances or by request of a contracting party.⁷⁹

2.3.2 Procedures for ensuring homogeneity

Similarly to the EEA Agreement, the ECAA Agreement does not restrain the contracting parties from unilaterally adopting new or amending existing legislation in the field of air transport or other associated areas covered by the ECAA Agreement. The newly adopted or amended legislation may not, however, conflict with the provisions of the Agreement as that would result in its breach.⁸⁰ The contracting party who amends their ECAA relevant legislation must notify the others via the Joint Committee within a month of when the legislative change took place.⁸¹ The legislative changes include those of EU *acquis*. Should a contracting party so demand, the Joint Committee will discuss the amended *acquis* within a time frame of two months.⁸² The Joint Committee may either adopt a decision to revise Annex I to the ECAA Agreement and incorporate the amendment of the *acquis* into the ECAA Agreement, approve the amendment as being in accordance with the Agreement, or ‘decide on any other measures to safeguard the proper functioning of the agreement’ without specifying the exact measures.⁸³

ECAA Joint Committee decisions do not differ from the decisions of the EEA Joint Committee as regards their effect. Both are binding on the contracting parties under international law and must, therefore, be implemented in accordance with

⁷⁷ ECAA Partners include ECAA contracting parties with the exception of the EU and its Member States: Article 2 ECAA Agreement.

⁷⁸ Article 18(6) ECAA Agreement.

⁷⁹ Article 18(7) ECAA Agreement.

⁸⁰ Article 17(1) ECAA Agreement.

⁸¹ Article 17(2) ECAA Agreement.

⁸² Article 17(2) ECAA Agreement.

⁸³ Article 17(3)(c) ECAA Agreement.

national constitutional requirements.⁸⁴ The Joint Committee must be informed accordingly.

The significantly simpler decision-making procedure envisaged by the ECAA Agreement as compared to that of the EEA reflects the more limited opportunities to safeguard homogeneity in the ECAA legal order. Whilst the ECAA Agreement can be updated by following a simplified treaty amendment procedure, there are no safeguards in place against a failure to reach agreement in the Joint Committee or non-ratification of a decision of the latter by a contracting party. The ECAA Agreement does not provide for a possibility to suspend parts of it following the inability to maintain homogeneity. As a result, the ECAA legal order is much more likely than the EEA to lose its intended homogeneous character *vis-à-vis* the aviation sector of the EU internal market.

3 Defining the core of the internal market

The previous analysis dealt with the mechanisms for ensuring homogeneity in the expanded internal market through the formal procedures of updating the multilateral agreements in order to incorporate amendments of EU *acquis* in the fields relevant to the respective agreements. One important aspect of maintaining homogeneity is making sure that the contracting parties to the agreements exporting the *acquis* incorporate all relevant *acquis* in a dynamic and speedy fashion. In order to avoid unnecessary delays in the stages of updating the agreements as well as making the *acquis* part of the legal orders of the non-EU contracting parties it is necessary that sufficient information and consultation possibilities are provided to the non-EU contracting parties before the *acquis* is adopted on the EU level.

The focus of this section is on the influence that various EU and non-EU institutions and other actors have on determining the content of the *acquis*. In other words, the following analysis will consider who participates in the EU's decision-making procedures and which effect the participation of third state actors in the defining of the *acquis* may have on the homogeneity of the internal market expanded to non-EU Member States.

⁸⁴ Article 19(1) ECAA Agreement.

There are three main phases in the EU's policy-making. These phases include the pre-proposal stage of agenda setting, the decision-making stage, and the policy implementation stage.⁸⁵ Although the latter two receive the most attention in the context of exporting EU *acquis* to third countries and the essential characteristics of an optimal institutional framework for achieving and maintaining homogeneity, this section considers the importance of the first, exploratory stage of decision-shaping on the homogeneity of the expanded internal market.

It is in the legislative preparatory stage that the *acquis*, including the 'core' *acquis* which provides a benchmark for evaluating the level of homogeneity in the expanded internal market is defined. The legislators of the EU must at that stage adopt a decision on the content of the legislative text.⁸⁶ The pre-proposal stage does not only serve the purpose of elaborating the content of a legislative act but also provides a venue for including a variety of actors and thereby ensuring that the proposed act will receive the necessary support at the decision-making stage. The decision-makers notably include the EU legislator, the decision-making bodies of the international agreements exporting the *acquis* and third countries' national parliaments. The pre-proposal stage also serves to guarantee the effective implementation of the *acquis* by the EU Member States as well as by the third countries.⁸⁷ Thus insofar as the preparatory stage can and does influence the outcome of adopting and implementing the *acquis* in the EU and beyond it is indispensable to consider it in the context of achieving and maintaining homogeneity in the EEA, the Energy Community and the ECAA.

The following analysis looks, first, at the general legislative procedure in the EU before providing a more specific account of the new, participatory modes of governance using the examples of law making in the fields of EU social and environmental policies. The second part of the examination considers the limits of the participation of non-EU Member States in the decision-shaping stages of EU decision-making.

⁸⁵ T Christiansen and T Larsson, 'Introduction: The Role of Committees in the policy-process of the European Union' in T Christiansen and T Larsson (eds), *The Role of Committees in the Policy-Process of the European Union* (Edward Elgar Publishing 2007) 1, 3.

⁸⁶ *ibid* 4.

⁸⁷ *ibid* 5.

3.1 EU actors defining the core of the internal market

The substance of EU internal market *acquis* is defined in the legislative procedure. Post-Lisbon Treaty, Article 289 TFEU provides for two types of legislative procedures – the ordinary and the special legislative procedures. Internal market legislation based on Article 114 TFEU is usually adopted following the ordinary legislative procedure, save fiscal provisions and rules on the free movement of persons and labour law.⁸⁸

In the ordinary legislative procedure, defined in Article 294 TFEU, the main actors preparing and adopting a legislative act are the European Commission, the Council and the European Parliament. The Commission submits a proposal to the European Parliament and the Council who will then deliberate and approve or reject the proposal. The Commission gives an opinion on the proposed amendments. In order to bypass a negative opinion of the Commission the Council may adopt the act by unanimous vote.

On certain conditions, legislative act may also delegate the power to adopt non-legislative acts to the Commission for the purpose of supplementing or amending non-essential elements of the legislative act.⁸⁹ The Commission may also adopt measures to implement legislative acts in accordance with Article 291 where uniformity in the implementation of legislative acts is deemed necessary. This implementation is carried out in the so-called comitology committees.

Legislative initiative in the EU does not rest solely with the Commission. Pursuant to Article 289(4) TFEU, in special cases defined by the Treaties legislative initiative may also be taken by a group of Member States or the European Parliament, or on a recommendation from the European Central Bank, or at the request of the Court of Justice or the European Investment Bank.

A further group of institutions only recently included in the EU legislative process are national parliaments. Their role has been laid out in Article 12 TEU and Protocols 1 and 2 attached to the Treaties. In the context of the internal market, national parliaments are kept informed about the EU's legislative activity including draft legislation and they are guarding the application of the

⁸⁸ Article 114(2) TFEU.

⁸⁹ Article 290(1),(2) TFEU.

principle of subsidiarity by the EU. The legislators of the Member States are thus involved in the EU's legislative procedures beyond the ratification of the EU Treaties and amendments thereto. In addition to their individual roles in reviewing draft EU legislation there is a framework in place for cooperation between national parliaments and the EU Parliament.

Member States' parliaments do not participate in the EU's decision-making directly but may, individually or in cooperation with other national parliaments, issue reasoned opinions to the European Parliament, the Council and the Commission if they consider a draft legislative act not to comply with the principle of subsidiarity. These opinions will be forwarded to the initiator of the draft legislative act, if not the Commission. In cases that are not urgent, the national parliaments have eight weeks to express their opinion on the draft legislation.⁹⁰ The institutions that receive the reasoned opinion 'shall take account' thereof unless at least one-third of national parliaments submit a reasoned opinion. In the latter case there is an obligation to review the draft legal act.⁹¹ The institution or the group of Member States who have initiated the legislative proposal in question may, however, maintain, amend or withdraw the draft and are not, therefore, legally bound by the opinion of the national parliaments beyond the need to state reasons for their decision.⁹² This is why this parliamentary review procedure is also called the 'yellow card' procedure.⁹³ Should one-half of the national parliaments vote 'no' and the Commission decide to maintain the draft legislative act a reasoned opinion must be forwarded to the Council and the Parliament and the latter may, with specific voting majorities, stop the legislative proposal under the so-called 'orange card' procedure.⁹⁴

Importantly, local conditions are taken into account in the process of preparing legislative proposals. To this end, the Commission holds consultations with a wide range of interested parties making it possible for the former to gain an

⁹⁰ Article 4, Protocol (No 1) on the Role of National Parliaments in the European Union [2012] OJ C326/1.

⁹¹ Article 7, Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2012] OJ C326/1 (Protocol on Subsidiarity and Proportionality).

⁹² Article 7(2), Protocol on Subsidiarity and Proportionality.

⁹³ F Fabbrini and K Granat, 'Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike' (2013) 50 Common Market Law Review 115, 118.

⁹⁴ *ibid* 119.

insight into whether or not the proposed legislation should be adopted at the EU level or whether national level would be more appropriate.⁹⁵ No such consultations take place in third countries except for the EEA EFTA States but in the case of the latter subsidiarity is hardly the purpose of the consultations.

The range of policy and decision-makers in the EU is not restricted to the institutions mentioned above. One of the defining features of EU governance is participation. In an attempt to increase democracy, transparency and effectiveness of the EU's policy-making a number of actors, including stakeholders as well as other interested parties, participate in the stages of policy initiative, development, and implementation. These actors represent and reflect the political, social, economic, and regional realities across the EU and immerse those elements into internal market legislation, thus giving a face to the internal market.

The more institutionalised forms of participation in the EU's legislative procedure are represented by the Economic and Social Committee and the Committee of the Regions.⁹⁶ The Economic and Social Committee is composed of the representatives of the civil society – social partners and other interest groups from the Member States. The Committee of the Regions comprises representatives of regional and local bodies of the Member States. Both play an advisory role *vis-à-vis* the European Parliament, the Council and the Commission. Although the Committees are made up of representatives of the Member States the latter must be completely independent in their activities and act only in the general interest of the EU.

The Economic and Social Committee must be consulted by the decision-making institutions where the Treaties so provide including both under Articles 114 and 115 TFEU. In all other cases the EU institutions are free to consult the Committee. The Economic and Social Committee may also submit opinions on issues that it itself considers necessary to address.⁹⁷ The same applies to the

⁹⁵ Article 2, Protocol on Subsidiarity and Proportionality.

⁹⁶ Article 300 TFEU.

⁹⁷ Article 304 TFEU.

Committee of the Regions, except for compulsory consultation in the procedures for adopting legislation on the internal market legal bases.⁹⁸

In addition to these formalised channels of consultation, in the process of developing a proposal for future EU legislation the Commission also launches public consultations. The Commission calls for input from interested individuals as well as industry and civil society stakeholders. There are no national limitations to participation which means that foreign persons and entities, too, may submit to the Commission their opinions, observations and suggestions.

Another platform set up for citizens to participate in EU policy-making is through the European Citizens' Initiative. Introduced by the Treaty of Lisbon, Articles 11(4) TEU and 24(1) TFEU provide that at least one million citizens who are nationals of a 'significant number' of Member States may submit an initiative to the European Commission for the latter to initiate, within its powers, a legislative procedure for the adoption of a legal act which the group of citizens consider essential for the purpose of implementing the Treaties. The Citizens' Initiative falls within the broader scheme outlined in Article 11(1) TEU of bringing EU institutions closer to the people by giving an opportunity to the latter to express their views on EU policies and actions. The specific rules for the Citizens' initiative are laid out in Regulation No 211/2011.⁹⁹ The Regulation provides that the group of individuals who submit an invitation to the Commission to propose a piece of legislation must comprise nationals of at least seven Member States. Each of the Member States has to provide a certain minimum number of signatories. Differently from the public consultations in which non-EU citizens, too, can express their views, the European Citizens' Initiative, as the name indicates, is reserved exclusively to EU citizens. Therefore, while third country nationals who are not residents in the EU have a theoretical possibility to influence the outcome of EU legislation they cannot take legislative initiative to influence the course of internal market legislation in a broader sense.

Yet another form of citizen participation in EU law making is the possibility to submit petitions to the European Parliament under Article 227 TFEU. This

⁹⁸ Article 307 TFEU.

⁹⁹ Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1.

opportunity is available to all EU citizens as well as to the members of associations, companies and organizations whose headquarters are located in any of the Member States. A petition to the European Parliament must concern an issue that falls within the scope of activities of the EU and concerns the petitioner directly. Petitions that are declared admissible are then discussed by the relevant parliamentary committee.¹⁰⁰ The committee may decide to prepare an own-initiative report or a short motion on the basis of the petition and submit it for a motion.¹⁰¹ Third country nationals are generally not eligible to submit petitions to the Parliament. Rule 215(13) of the European Parliament's Rules of Procedure does, however, enable petitions submitted by non-nationals and non-residents to be filed albeit separately from the petitions submitted by EU nationals or residents, and allow for the committee responsible for petitions to familiarise themselves with the content of those petitions that they wish to consider.

A further group of persons participating in the process of preparing legislation are seconded national experts (SNEs). Working on temporary secondment from their home countries, SNEs contribute to an exchange of experience and expertise between the EU and its Member States and beyond. Importantly, SNEs are not limited to EU citizens but include experts seconded from the EFTA, EU candidate countries with whom an agreement on personnel matters has been concluded, and public intergovernmental organisations (IGOs).¹⁰² Although SNEs' possibilities to act independently in the Commission are limited¹⁰³ and they are, during their period in the Commission bound to be loyal to the Commission and not to anyone outside the Commission,¹⁰⁴ the SNEs are able to make Commission staff aware of national circumstances that may affect the contents of a proposed legislative act.¹⁰⁵

¹⁰⁰ Rule 216(1), Rules of Procedure of the European Parliament, 8th Parliamentary Term – April 2015.

¹⁰¹ Rule 216(2), Rules of Procedure of the European Parliament.

¹⁰² Commission Decision of 12 November 2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training, C (2008) 6866 final (SNE Decision), Article 1(1) and (3).

¹⁰³ SNE Decision, Article 6.

¹⁰⁴ SNE Decision, Article 7(1)(a).

¹⁰⁵ SNEs should not, however, be regarded as national 'Trojan Horses', see J Trondal, Z Murdoch and B Geys, 'On Trojan Horses and revolving doors: Assessing the autonomy of national officials in the European Commission' (2015) 54 *European Journal of Political Research* 249, 250.

In addition to individuals and entities seeking for possibilities to influence EU policies, the Commission itself, too, seeks external expertise. The external experts include formal expert groups set up by a Commission decision or by a Commission department; single consultations in the form of meetings, conferences, etc.; comitology committees, independent experts in the fields of research and technological development; social dialogue committees; and joint entities that monitor the implementation of international agreements.¹⁰⁶ All of these external expert configurations fulfil a consultative function. They provide unbinding expertise to the Commission, whereas the latter remains independent as regards the content of its legislative proposals.¹⁰⁷ Neither is the Commission bound to resort to one group of external experts only. Commission's own expert groups consist either of individuals acting in their own capacity or representing a stakeholder group, organisation or Member States' national authorities.¹⁰⁸

Advisory groups that participate in the stages of preparing and implementing EU legislation include 'expert committees' that are made up of national officials and experts, and consultative committees, also called expert groups, composed of stakeholder representatives.¹⁰⁹ Yet participation in expert groups is not open to anyone. The participation of non-governmental organisation (NGOs) and interest groups is limited to 'Europe-wide organisations'.¹¹⁰ In Directorate General (DG) Enterprise, for example, expert groups may be composed of representatives of the Member States, industry, NGOs, the non-EU EEA countries, candidate countries and notified bodies. The domination of corporate interest, however, has been subject to controversy. NGOs and the European Ombudsman have been

¹⁰⁶ Commission, 'Framework for Commission Expert Groups: Horizontal Rules and Public Register' (Communication) C (2010) 7649 final (Framework for Commission Expert Groups), 5-6.
¹⁰⁷ *ibid* 3.

¹⁰⁸ 'Horizontal Rules for Commission Expert Groups' annexed to the Framework for Commission Expert Groups (n 106) Rule 8.

¹⁰⁹ N Nugent, *The European Commission* (Palgrave Macmillan 2001) 244-245; T Larsson and J Murk, 'The Commission's relations with expert advisory groups' in T Christiansen and T Larsson (eds), *The Role of Committees in the Policy-Process of the European Union* (Edward Elgar Publishing 2007) 64, 67. The complete list of expert groups is available at the Register of Commission Expert Groups and Other Similar Entities <http://ec.europa.eu/transparency/regexpert/index.cfm?do=news.mod_groups> accessed 24 June 2015.

¹¹⁰ T Larsson and J Murk (n 109) 77.

drawing special attention to the overtly large influence on EU's legislation that is exerted by big corporations.¹¹¹

3.1.1 EU social governance

Participatory governance modes in the EU have become most institutionalised in the area of social policy. The novel and experimental approach to law making in social policy owes much to the existence of a variety of social, labour, legal and industrial relations cultures across the EU.¹¹² On the one hand, the diversity is reflected in the choice of legislative acts: in the field of social policy soft law measures are often preferred to hard law, minimum standards and partial harmonisation to total harmonisation, and directives to regulations.¹¹³ On the other hand, the making of social policy is characterised by the inclusion of social partners. Both of these aspects reflect the rise of new governance methods to complement the classic Community method of governance.

The classic Community method, partly incorporated in the 'ordinary legislative procedure',¹¹⁴ comprises the European Commission solely responsible for legislative proposals, the Council and the European Parliament adopting legislation, the Commission and the Member States in charge of implementing EU policies and the Court of Justice guaranteeing respect for the rule of law.¹¹⁵ In response to an image of the EU as complex and intrusive, the Commission proposed changing EU governance to make it more open, allow for more involvement, flexibility and coherence, create better policies and regulation and contribute to global governance.¹¹⁶ In their reaction to the White Paper on Governance, the European Parliament, however, issued a Resolution stating that the Community approach is not to be replaced completely.¹¹⁷ The Parliament found that consulting stakeholders for the purpose of improving the quality of

¹¹¹ ALTER-EU, 'A Year of Broken Promises' November 2013 <http://www.alter-eu.org/sites/default/files/documents/Broken_Promises_web.pdf> accessed 24 June 2015; 'Ombudsman to investigate EU expert groups' *EUobserver* (14 May 2014) <<http://euobserver.com/news/124137>> accessed 24 June 2015.

¹¹² C Barnard, *EU Employment Law* (Oxford University Press 2013) 47.

¹¹³ *ibid* 61 and 63.

¹¹⁴ Article 294 TFEU.

¹¹⁵ Commission, 'European Governance – A White Paper' (Communication) COM (2001) 428 final (European Governance White Paper), 8.

¹¹⁶ *ibid*.

¹¹⁷ European Parliament, 'Resolution on the Commission White Paper on European governance COM(2001) 428' A5-0399/2001, 29 November 2001.

draft legislation 'can only ever supplement and can never replace the procedures and decisions of legislative bodies which possess democratic legitimacy', including the Council and the Parliament, as co-legislators, and opinions provided by other actors specified in the Treaties, such as the Economic and Social Committee and the Committee of the Regions.¹¹⁸ The European Parliament, furthermore, defended the role of the Economic and Social Committee over expert groups.¹¹⁹

As opposed to the classic Community method, new governance is generally characterised by the following elements: participation and power-sharing, multi-level integration, diversity and decentralisation, deliberation, flexibility and revisability, and experimentation and knowledge creation.¹²⁰ Of greater relevance with respect to decision-making procedures is the first of the above-mentioned – participation and power sharing. This refers to the engagement of civil society and stakeholders, as well as the involvement of different layers of decision-making. New governance pertains both to the adoption and implementation stages, often blurring the boundary between the two.¹²¹ With regard to the former, it addresses the range of actors involved, as well as the instruments adopted; as concerns the latter, new governance departs from the idea of uniformity through harmonisation by allowing the Member States to determine the legislative outcome by consultation and coordination of national policies.¹²²

The distinction between the stages of policy-making and implementation as well as the importance in some situations accorded to the procedure rather than the uniformity of outcome is reflected in the case law of the Court of Justice. In *Standley and Metson*, in particular, the Court admitted that Member States may apply a directive in different ways without this conflicting with the nature of the directive if the latter creates instruments rather than harmonised rules and envisages wide discretion for the Member States.¹²³

¹¹⁸ *ibid* Recital 11(c).

¹¹⁹ *ibid* Recital 11(d).

¹²⁰ J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1, 5-6.

¹²¹ *ibid* 8.

¹²² *ibid* 6.

¹²³ Case C-293/97 *Standley and Metson* [1999] ECR I-2603, para 39.

One example of new governance in social policy is the Open Method of Co-ordination (OMC), which first emerged in the framework of the European Employment Strategy in the 1990s. Being an important normative system, the OMC is an intergovernmental method used in areas of Member State competence. The OMC envisages that the Member States jointly identify non-binding objectives and guidelines, measuring instruments and benchmarking in a given field. The idea behind introducing the OMC was to create a de-centralised decision-making process in which the Member States play the main role.¹²⁴ EU institutions are involved in the first and the third stage, the Council adopting the objectives and the Commission monitoring the benchmarking procedures. Since the 1990s, the OMC has been employed in a number of areas of social policy. Its use is encouraged both by the challenges of a common market and monetary policy and the interdependence between the Member States.¹²⁵ Owing to the fact that the OMC produces no hard law instruments it is questionable whether it does, indeed, form part of the *acquis*. It does certainly not belong to the *acquis* in the meaning that is relevant for the exporting of the *acquis* to third countries, yet it is relevant for the coordination of social policies among the EU Member States.

Innovative governance does not, however, only appear in the realm of soft law. Maastricht Treaty introduced a new procedure for law making – the European Social Dialogue. The social dialogue originates from the Protocol on Social Policy and its Agreement attached to the Maastricht EC Treaty. The Amsterdam Treaty integrated the Social Protocol and the Agreement into the EC Treaty.

The idea behind the social dialogue originates from the principle of subsidiarity and the assumption that the social partners are ‘as a rule closer to the reality and to social problems’.¹²⁶ The major differences between the Member States in terms of the density of unionisation, however, may well undermine this supposition.¹²⁷ The European Social Dialogue includes discussions,

¹²⁴ S Smismans, 'EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?' (2004) EUI Working Paper LAW 2004/1, 4.

¹²⁵ DM Trubek and LG Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 European Law Journal 343, 345 and 348.

¹²⁶ Council Resolution 94/C 368/03 of 6 December 1994 on certain aspects for a European Union social policy: a contribution to economic and social convergence in the Union [1994] OJ C368/6.

¹²⁷ OECD, 'Trade Union density' <http://www.oecd-ilibrary.org/employment/data/trade-unions/trade-union-density_data-00371-en?isPartOf=/content/datacollection/lfs-tu-data-en> accessed 24 June 2015.

consultations, negotiations and joint actions between the management and labour sides of industry. Comprising both legislative and collective action, it introduces into EU law making collective agreements between the Social Partners that are of cross-industry as well as sectoral scope. In essence, the legislative procedure that involves the participation of social partners is a European level collective agreement.

Using collective bargaining when implementing EU law instead of legislation is by no means without complications. Under Article 153(3) TFEU, a Member State may entrust management and labour, at their joint request, with the implementation of a directive or a Council decision adopted in accordance with Article 155 TFEU. The Member State must ensure that by the implementation deadline the management and labour have, indeed, adopted a collective agreement that effectively implements the legislative act in question. On the EU level, it is the Member State who remains responsible for the proper implementation of the directive or decision even if the social partners have been given the possibility to reach a collective agreement on the matter.¹²⁸ The legislation must be enforced with regard to all workers and not only those covered by the collective agreement if question. The Court has found that a Member State cannot avoid legislating to complement existing collective agreements where collective bargaining does not cover all workers, where a sector is not entirely covered by a collective agreement or where the agreement does not fully implement the EU measure.¹²⁹

The social dialogue rests on the process of negotiations between the labour and management – the social partners. Social dialogue does not replace social legislation; rather together they form the two pillars of the ‘Social Dimension’.¹³⁰ Social dialogue is encouraged on the EU level. The EU is required to promote the role of social partners as well as to facilitate cooperation between them.¹³¹ In the meantime, the Union must also respect national diversity in the field of social

¹²⁸ Article 153(3) TFEU.

¹²⁹ Case 143/83 *Commission v Denmark* [1985] ECR 427, para 8; Case C-187/98 *Commission v Greece* [1999] ECR I-7713, para 47.

¹³⁰ M Rhodes, 'A Regulatory Conundrum: Industrial Relations and the Social Dimension' in S Leibfried and P Pierson (eds), *European social policy: between fragmentation and integration* (The Brookings Institution 1995) 78.

¹³¹ Article 152 TFEU.

policy and the autonomy of the social partners.¹³² Where the social partners are involved in the social dialogue, therefore, the institutions cannot subject them to any EU policy agenda.

Specific tasks are placed on the Commission in this regard. The Commission must promote the consultation of the social partners on EU level and facilitate their dialogue by supporting both parties.¹³³ This means taking any relevant measures. To this end, the Commission organises meetings, supports joint studies or working groups and provides technical assistance.¹³⁴ Article 156 TFEU provides that the Commission will encourage cooperation between the Member States. The Commission provides coordinating assistance, conducts studies, delivers opinions after consulting the Economic and Social Committee, and sets up consultations. The particular aim of such assistance is to encourage the sharing of best practices, benchmarking and other forms of new governance in the field of social policy.

During the legislative procedure, the Commission first consults management and labour before submitting legislative proposals on the general direction of future EU action.¹³⁵ As the next step, should the Commission wish to pursue legislation, it must also consult the social partners on the content of the draft proposal, the latter having the opportunity to provide either opinions or recommendations.¹³⁶

During both stages of consultation, the social partners may decide to leave the legislative pillar and continue with collective bargaining in the social dialogue pillar,¹³⁷ called 'bargaining in the shadow of law'.¹³⁸ The duration of the social dialogue procedure is at the most nine months, unless the Commission, the management and the labour jointly decide to extend the length of the social dialogue phase.¹³⁹

¹³² *ibid.*

¹³³ Article 154(1) TFEU.

¹³⁴ Commission, 'The application of the Agreement on social policy' (Communication) COM (93) 600 final, para 12.

¹³⁵ Article 154(2) TFEU.

¹³⁶ Article 154(3) TFEU.

¹³⁷ Article 154(4) TFEU.

¹³⁸ B Bercusson, *European Labour Law* (Cambridge University Press 2009) 146.

¹³⁹ Article 154(4) TFEU.

The social dialogue between the management and labour may result in an agreement, but only if the parties so wish.¹⁴⁰ The resulting Europe-level collective agreements may be implemented by the Member States in accordance with their national procedures.¹⁴¹ In matters falling within the scope of Union competence and outlined in Article 153 TFEU, should both sides so desire, they may jointly request a Council decision to implement their agreement on a proposal from the Commission.¹⁴² The term ‘decision’ refers to any of the binding legal instruments provided in Article 288 TFEU – a regulation, directive or decision –, as proposed by the Commission.¹⁴³ The European Parliament, however, is excluded from collectively negotiated legislation except to the extent of being informed.

Without the Council adopting the text of the agreement reached by the social partners as legislation, the EU-level agreements have no binding legal force on the Member States. The Commission both evaluates the representativity of the participants in the social dialogue as well as assesses the content of the agreement with a view to possibly complementing it with legislation on its own proposal whereby, once again, all necessary consultation procedures will have to be followed. In practice, the Union legislation in the social field usually avoids harmonisation and rather allows the Member States or the social partners to arrive at a solution that best fits within the national circumstances.¹⁴⁴

As to the organisation, the Social Partners are autonomous to decide upon their structures and procedures for negotiating. Yet certain criteria must be conformed to.¹⁴⁵ Firstly, the participating social partners must either be of a cross-industry scope or relate to a specific sector or category, and be organised on the European level. Secondly, they cannot be separated from the Member States’ social partner structures but form an ‘integral and recognized part’ thereof. Also, if possible, the social partners must represent all Member States.

¹⁴⁰ Article 155(1) TFEU.

¹⁴¹ Article 155(2) TFEU.

¹⁴² *ibid.*

¹⁴³ See Commission, ‘Proposal for a Council Directive on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC’ COM (1996) 26 final, 7.

¹⁴⁴ C Barnard (n 112) 66.

¹⁴⁵ Commission, ‘Adapting and promoting the social dialogue at Community level’ (Communication) COM (1998) 322 final, 5-6.

Thirdly, the social partners must have 'adequate structures' to enable them to participate in the consultations.

There have been problems with the recognition of some social partners with regard to fulfilling the above-mentioned criteria. The most crucial question has been the one of representativity. In the landmark case *UEAPME*, in which a trade organisation representing craft and small and medium sized enterprises challenged the Parental Leave Directive,¹⁴⁶ the CFI asserted that because in social dialogue the European Parliament is excluded from the legislative procedure, the principle of democratic legitimacy requires that parties to the social dialogue be 'sufficiently representative'.¹⁴⁷ This criterion must be fulfilled separately in relation to each new agreement between the social partners.¹⁴⁸ Representativity contains two elements: sufficiency and collective representativity. Whereas sufficient representativity does not equal absolute participation, collective representativity demands that a wide range of Member States be represented.¹⁴⁹ Moreover, rather than the number of members it is important that an adequate number of interests are represented.¹⁵⁰

So far the Commission has recognised the following cross-industry Social Partners: the Confederation of European Business (BUSINESSEUROPE, formerly UNICE) and the European Centre of Employers and Enterprises providing Public Services (CEEP) representing private and public sector management, respectively; and the European Trade Union Confederation (ETUC) representing workers. These three organisations were participating in the original Val Duchesse talks with the Commission that became known as the social dialogue and paved way for the Social Policy Agreement attached to the Maastricht Treaty.¹⁵¹ More recently, recognition has been granted to the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME), the Council

¹⁴⁶ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by the Union des Confédérations de l'Industrie et des Employeurs d'Europe (UNICE), the Centre Européen de l'Entreprise Publique (CEEP) and the Confédération Européenne des Syndicats (ETUC) [1996] OJ L145/4.

¹⁴⁷ Case T-135/96 *UEAPME* [1998] ECR II-2335, paras 89-90.

¹⁴⁸ *ibid* para 90.

¹⁴⁹ B Bercusson, 'Democratic Legitimacy and European Labour Law' (1999) 28 *Industrial Law Journal* 153, 157-158.

¹⁵⁰ *ibid* 159.

¹⁵¹ E Franssen and ATJM Jacobs, 'The Question of Representativity in the European Social Dialogue' (1998) 35 *Common Market Law Review* 1295, 1298.

of European Professional and Managerial Staff (Eurocadres) and European Confederation of Executives and Managerial Staff (CEC), the latter two participating in negotiations as part of the ETUC delegation. However, the question of representativity mainly plays a role if the participants in the social dialogue wish that the Council implement their agreement by a decision; in every other case the agreement can be implemented by a second means – in accordance with procedures and practices of the Member States.¹⁵² Beyond the social dialogue pillar that results in an EU legislative act, the question of participation is generally a matter of mutual recognition of the social partners, rather than a prescription by the Commission.¹⁵³ The success of the social dialogue depends also on the internal rules of the representative organisations and the leeway given to them by their constituent national organisations, as reflected in the necessary voting majorities.¹⁵⁴

When it comes to the added value of the social dialogue in the EU's governance schemes it is argued that it both enhances and reduces democracy. On the one hand, social dialogue is said to represent an alternative to the democratic representation of the EU citizens in the European Parliament.¹⁵⁵ According to another opinion, the legitimacy of the social dialogue derives either from its nature as collective bargaining or from the notion of participatory democracy.¹⁵⁶ On the other hand, however, the social dialogue has several downsides including the fact that the social partners replace the European Parliament without necessarily representing a large number of industries. In practice, moreover, the EU social partners have hardly ever managed to reach agreement.¹⁵⁷

Not only the social partners of the EU Member States are engaged in the social dialogue. *BusinessEurope*, for example, includes representatives from a number of non-EU Member States including Switzerland, Iceland, Montenegro, Norway and Turkey. In the CEEP, Norway and Turkey participate. ETUC includes

¹⁵² *ibid* 1311.

¹⁵³ Commission, 'The Development of the Social Dialogue at Community level' (Communication) COM (96) 448 final, 4.

¹⁵⁴ B Keller and B Sörries, 'The New European Social Dialogue: Old Wine in New Bottles?' (1999) 9 *Journal of European Social Policy* 111, 114.

¹⁵⁵ C Barnard (n 112) 82-83.

¹⁵⁶ S Fredman, 'Social law in the European Union: The impact of the lawmaking process' in PP Craig and C Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International 1998) 386, 408-410.

¹⁵⁷ B Keller and B Sörries (n 154) 121.

participants from Iceland, Liechtenstein, Macedonia (FYROM), Norway, Montenegro, Serbia, Switzerland and Turkey. This new governance regime is, thus, rather including towards non-EU Member States. By replacing the European Commission in the legislative procedure including the consultation of expert groups by the Commission, however, some third country stakeholders are effectively eliminated from the shaping of the *acquis*.¹⁵⁸

3.1.2 EU environmental governance

Environmental protection is another example of the application of new governance methods by the European Union. The evolution of environmental governance is described by the four environmental governance regimes distinguished by von Homeyer, including the technocratic environment regime, the internal market regime of harmonisation, the integration regime of effectiveness and efficiency, and the strategy-based sustainable development regime.¹⁵⁹

While the former two represent the classic Community method, with the emergence of the integration regime in the 1990s focus shifted to efficiency and effectiveness. The new orientation signalled by the integration regime demanded that the factors that influence the efficiency and effectiveness of environmental policies be targeted already in the stage of decision-making.¹⁶⁰ As a result, attention in decision-making processes shifted to stakeholders and experts as well as locally tailored solutions through the means of consultations, negotiations, and public information.¹⁶¹ The sustainable development regime, in turn, demands the integration of environmental policy into all EU policies.¹⁶² An example of this is the environmental horizontal provision of Article 11 TFEU.¹⁶³ The environmental integration principle has been considered to be a distant equivalent to the OMC in the sphere of environmental policy.¹⁶⁴ Since it is, however, not the only horizontal provision in the TFEU it may be argued that

¹⁵⁸ The different possibilities for third-countries to participate in the EU policy-making are discussed below in section 3.2.

¹⁵⁹ I von Homeyer, 'The Evolution of EU Environmental Governance' in J Scott (ed), *Environmental Protection* (Oxford University Press 2009) 1.

¹⁶⁰ *ibid* 15.

¹⁶¹ *ibid* 15 and 18.

¹⁶² *ibid* 19.

¹⁶³ Discussed in detail above in chapter 2 section 5.1.1.

¹⁶⁴ J Scott and DM Trubek (n 120) 5.

other horizontal provisions too, could be regarded as examples of new governance.

New governance calls for cooperation between public and private undertakings on various levels and discretion and flexibility in the decision-making process. In addition, the instruments involved in the new governance method depart significantly from the specific objectives of the classic Community method. The objectives they define are broad and consist primarily of procedural guidelines rather than objectives of result.

Wurzel and others have divided new instruments in environmental policy into three sub-categories: suasive instruments, such as informational measures and voluntary agreements; market-based instruments, such as taxes and tradable permits; and regulatory instruments.¹⁶⁵ These measures are employed by the Member States as well as the EU. As regards the *acquis*, though, the question of uniformity arises rather at the stage of its application and implementation than adoption. Variations can, and do occur, as flexibility is an inherent component of the new governance regime. Attention on the new types of norms instead of the procedure for adopting legislation is the main contrasting feature between the application of new governance in EU social policy and environmental protection. This is notwithstanding the fact that a significant element of the new governance norms themselves is participation.¹⁶⁶

Participation includes access to information, which is generally regulated in the Aarhus Convention.¹⁶⁷ Article 1 of the Convention stipulates the right of EU citizens to receive environmental information from the EU's institutions and agencies, bodies and offices, public participation in decision-making, and access to justice in environmental matters. Article 5 confers a corresponding obligation on the EU to make information regarding the environment available to the public.

¹⁶⁵ RKW Wurzel, AR Zito and AJ Jordan, *Environmental Governance in Europe* (Edward Elgar Publishing 2013) 30-34.

¹⁶⁶ J Scott and DM Trubek (n 120) 3.

¹⁶⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998, approved by Council Decision 2005/370/EC of 17 February 2005 [2005] OJ L124/1.

Article 8 Aarhus Convention also endorses effective public participation in the drafting of legislative proposals that may have a significant effect on the environment. This rule is well applied on the EU level and not only with respect to the environment. All Commission initiatives including legislative proposals, non-legislative initiatives and implementing measures are subject to impact assessment as to their economic, social and environmental effects. Impact assessment is conducted in the form of consultations between the Commission, on the one hand, and stakeholders and interested persons, on the other. Impact assessment may take the form of Green and White papers, Commission Communications, expert groups, *ad hoc* consultations, etc.¹⁶⁸ In addition, the European Parliament and the Member States, too, gather public and expert opinions on EU legislative proposals.¹⁶⁹ Yet the sphere of environmental protection features no alternative decision-making procedure available that would be comparable to the social dialogue in the field of social policy. Nor might such a governance method be suitable in this context. As argued by Jans, a compulsory system including a legislative role for environmental policy stakeholders parallel to that of the European Commission may instead hamper the current possibilities for swift action where needed.¹⁷⁰

Contrary to what was established above with respect to social policy, in the field of environmental protection new governance has affected the range of measures rather than decision-making procedures. In the environmental sphere, the latter do not provide for increased participation of actors outside the EU's institutions yet third country participation may be enabled in the initial phases of agenda setting. Rather, the 'new' environmental policy instruments (NEPIs)¹⁷¹ raise a question as to what types of instruments belong to the internal market *acquis* and, subsequently, form the core of the internal market that is the benchmark for assessing the level of homogeneity in the expanded internal market.

¹⁶⁸ European Governance White Paper (n 115) 15.

¹⁶⁹ *ibid* 16.

¹⁷⁰ JH Jans, 'EU Environmental Policy and the Civil Society' in JH Jans (ed), *The European Convention and the Future of European Environmental Law* (Europa Law Publishing 2003) 53, 59.

¹⁷¹ A Jordan and others, 'European Governance and the Transfer of 'new' environmental policy instruments (NEPIs) in the European Union' (2003) 81 *Public Administration* 555.

3.2 Third country actors defining the core of the internal market

3.2.1 European Economic Area

Although excluded from the formal procedures of adopting EU internal market *acquis*, third countries may and do have direct influence on EU legislation. The most prominent example of such influence is the participation of the EEA countries in the EU decision-shaping process.

During the negotiations of the EEA Agreement it was considered whether to grant the EEA EFTA States a formal stake in the decision-making procedures. This would have meant an amendment of the Treaties, as well as a significant alteration of the EU's legal and institutional order. The Commission's firm position was that the EU would not make concessions for the benefit of the EEA EFTA States insofar as the Union itself is facing a challenge to complete the internal market by the 1992 deadline and needs to preserve its own decision-making autonomy.¹⁷² The reference to Community integration in De Clercq's speech comes from an assumption that the participation of countries who are not bound by the supranational principles of the EU and must, therefore, follow their national legislative procedures in order to implement EU legislation would cause undue delays in the law making process and, thereby, render the Union less efficient. De Clercq established three principles for the cooperation between the then Community and the EEA EFTA States: priority for integration within the Community, safeguarding the autonomy of the Community's decision-making, and ensuring 'a fair balance between benefits and obligations' arising from the EEA Agreement.¹⁷³ A compromise solution that took into consideration the above-mentioned constraints was to include the EEA EFTA States in the informal stages preceding the official adoption of EU legislation. In fact, involvement in the decision-shaping stage means that not only the EU but also the EEA EFTA States can preserve their decision-making autonomy, only that both exercise it at different stages and different locations – the EU in the Council and the EEA EFTA States in the EEA Joint Committee.

¹⁷² W De Clercq, speech held at the EC-EFTA ministerial meeting, Interlaken, 20 May 1987, SPEECH/87/32, 5. See also above chapter 5 section 3.6.

¹⁷³ Commission, 'Activities in May 1987 – External Relations' Bulletin of the European Communities 5-1987, 65, para 2.2.14.

Decision-shaping takes the form of EEA EFTA States participating in various committees and submitting opinions. When preparing legislative proposals, the Commission seeks national expertise from the EEA EFTA States similarly as from the Member States.¹⁷⁴ Just as the national experts of the Member States their EEA EFTA counterparts serve as independent experts and not representatives of their respective states. Article 100 EEA Agreement requires that the Commission grant EEA EFTA States 'as wide as possible' participation in the procedure of preparing draft measures before these are passed on to the committees assisting the Commission. Experts from the Member States and from the EEA EFTA countries must be included on an equal basis. Generally, the EEA EFTA States may submit comments to the EU institutions on various policy issues. The so-called 'EEA EFTA comments' are approved by the EFTA Standing Committee and, after being forwarded to the relevant EU institutions, are presented in the EEA Joint Committee.

When a proposal is submitted to the Council, the Commission must ensure that the Council is informed about the views of the EEA EFTA States. At the same time the Commission must submit a copy of the proposal to the EEA EFTA States.¹⁷⁵ This is without prejudice to the fact that the latter do not participate in the EU procedures for adopting the EU legislative act. The EEA EFTA States may be invited to attend informal Council meetings but only if the Council Presidency so decides.¹⁷⁶ A special arrangement, albeit not part of the EEA Agreement, has been established under Schengen cooperation. By virtue of being parties to the Schengen Agreement, Norway, Iceland, Liechtenstein and Switzerland participate in the Schengen Mixed Committee where proposals for new Schengen *acquis* are discussed yet lack a right to vote in the Council that adopts the new legislation.¹⁷⁷

The two keywords that best characterise the participation of the EEA EFTA States in the preparatory stages of EU's decision-making are information and

¹⁷⁴ Article 99(1) EEA Agreement

¹⁷⁵ Article 99(2) EEA Agreement.

¹⁷⁶ S Lavenex, 'Concentric circles of flexible 'European' integration: A typology of EU external governance relations' (2011) 9 *Comparative European Politics* 372, 377.

¹⁷⁷ For example, Articles 3 and 8(1) of the Agreement Concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis* [1999] OJ L176/36. See also above chapter 1 section 3.1.

consultation. All parties to the EEA Agreement must act in good faith as regards the flow of information and consultation.¹⁷⁸ Despite not possessing voting rights, EEA EFTA States must be kept well informed throughout the legislative process. At the point when the legislative proposal is submitted to the Council any EEA Contracting Party may request that the proposal be discussed at a Joint Committee meeting for a 'preliminary exchange of views'.¹⁷⁹ Information sharing and consultation continue in the Joint Committee before a decision on the draft legislation is taken by the Council.

The scope of the EEA Agreement is not strictly limited to the four fundamental freedoms and competition policy. The Agreement also includes provisions on cooperation between the EU and the EEA EFTA States in relevant EU programmes. This cooperation extends to fields such as information services, the environment, education, social policy, consumer protection, etc.¹⁸⁰ Pursuant to Article 80 EEA Agreement, EFTA States may participate in EU's framework programmes, specific programmes, projects and similar undertakings as well as, for example, joint activities, information exchange and parallel legislation. In cases where the EEA EFTA States take part in a programme, project or other action mentioned above and specified in Protocol 31 to the EEA Agreement, the EEA EFTA States enjoy full participation rights,¹⁸¹ including in programme committees that assist the Commission in the management of the particular activity. In addition to various committees, EEA EFTA States also participate in the work of thirteen EU agencies including, for example, the European Aviation Safety Agency, European Chemicals Agency, European Food Safety Authority and European Network and Information Security Agency.¹⁸² The participation of EEA EFTA States in EU agencies is subject to a decision by the EEA Joint Committee.¹⁸³

¹⁷⁸ Article 99(4) EEA Agreement.

¹⁷⁹ Article 99(2) EEA Agreement.

¹⁸⁰ Article 78 EEA Agreement.

¹⁸¹ Article 81 EEA Agreement.

¹⁸² For full list, see 'EU Agencies' (EFTA Website) <<http://www.efta.int/eea/eu-agencies>> accessed 24 June 2015.

¹⁸³ For example, Decision of the EEA Joint Committee No 160/2009 of 4 December 2009 amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms [2010] OJ L62/67, which extended the cooperation between the parties to the EEA Agreement to Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European

EEA EFTA experts are, furthermore, granted a right to participate in committees in specific areas falling outside the scope of Articles 81 and 100 EEA Agreement. This includes committees listed in Protocol 37 attached to the EEA Agreement. The list may be amended together with Protocol 37. The committees listed in Protocol 37 include, for example, the Administrative Commission for the coordination of social security systems, the Advisory Committee on Restrictive Practices and Dominant Positions, a number of committees on pharmaceuticals and medicinal products, and many others. The Protocol 37 list is subject to amendments by the Joint Committee,¹⁸⁴ when the 'good functioning' of the EEA Agreement demands the association of EEA EFTA States in more committees.¹⁸⁵

The role of EEA EFTA States in shaping EU's policies also extends to the implementation of EU law in comitology committees.¹⁸⁶ Comitology committees are in place to assist the Commission in its task to, in certain cases, implement EU law in accordance with Article 291 TFEU. Comitology committees comprise representatives of the Member States as well as, where relevant to the EEA Agreement, representatives of the EEA EFTA countries.¹⁸⁷

As Member States' national representatives control the Commission's activities in the comitology procedure so do the EEA EFTA States.¹⁸⁸ The Member States can make use of two procedures: examination and advisory procedure. Examination committees are established for the purpose of scrutinising the Commission's implementing activities. They are composed of representatives of the Member States and, where appropriate, of EEA EFTA States but chaired by the Commission. The examination procedure is used in the case of general or potentially important measures. The support of a qualified majority of the committee is sought. The Commission may, in the event of a negative opinion expressed by the committee, either amend the text or take the matter to an appeal committee for further discussion. Should the examination committee fail

Agency for Safety and Health at Work [1994] OJ L216/1 as amended by Council Regulations (EC) No 1643/95, 1654/2003 and 1112/2005.

¹⁸⁴ Article 101(2) EEA Agreement.

¹⁸⁵ Article 101(1) EEA Agreement.

¹⁸⁶ Article 100 EEA Agreement.

¹⁸⁷ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13.

¹⁸⁸ T Christiansen and T Larsson (n 85) 5.

to give an opinion, the Commission may, under certain circumstances, adopt the draft with the exception of trade policy where different rules apply. The second, advisory procedure, is used for the adoption of implementing acts in all other cases. The opinions of the advisory committee are adopted by simple majority and the Commission must take 'the utmost account' of the opinion expressed. The EEA EFTA States do not possess voting rights but are able to influence the outcome through informal means.¹⁸⁹ Furthermore, the information gathered in the committees facilitates the later implementation of the acts adopted in the comitology procedure in the EEA EFTA States.¹⁹⁰

The EEA EFTA States' participation in the various stages of EU decision-shaping procedures has a dual objective. The first is that of increasing democratic legitimacy and autonomy.¹⁹¹ Notwithstanding the possibility of the EEA EFTA States to refuse the incorporation of a new or amended EU legal act into the EEA Agreement and the purely international law character of the arrangement, the ability to influence the content of the legislation means that to some extent at least EU legislation is not completely 'foreign' to the EEA EFTA States. On the other hand, both the EEA EFTA States and the EU maintain their autonomy of decision-making in their separate pillars of the EEA and, thus, the overall balance of benefits and obligations. The second, more pragmatic reason of EEA EFTA States' participation is to ensure that through continuous information sharing and consultation throughout the legislative procedure, with the exception of the moment of adopting the legal act, a consensus will be reached in the Joint Committee both on classifying a new piece of *acquis* as EEA relevant and on amending the EEA Agreement.¹⁹² Not of less relevance is the contribution to a swift parliamentary procedure where required by the EEA EFTA States' constitutions that is crucial for a timely implementation of the *acquis*. This arrangement, therefore, seeks to reinforce both the substantive and temporal dimensions of homogeneity.

¹⁸⁹ EEA Joint Parliamentary Committee, 'EC comitology and the EEA' (Report and Resolution) M/20/R/029, 21 June 2011, 8.

¹⁹⁰ *ibid.*

¹⁹¹ Commission, 'Future Relations between the Community and EFTA' (Press Release) P/89/72, 22 November 1989.

¹⁹² Article 99(4) EEA Agreement.

Although described as ‘semi-colonial’,¹⁹³ the actual importance of the ‘mere’ participation of the EEA EFTA States in the preparatory stages of the EU’s legislative procedure should not be underestimated. Especially in the light of the increasing importance of various new governance modes, participation in the norm shaping may turn out to be almost as relevant as participation in the formal decision-making procedures.¹⁹⁴ This holds especially true for the comitology committees, which are described exercising quasi-legislative functions and in which EEA EFTA States possess participation rights equal to the EU Member States with the exception of voting.¹⁹⁵ What may curb the effectiveness of the EEA EFTA States participation in the numerous venues are, however, the limits of their own administrative capacity that requires prioritising among different policy concerns.¹⁹⁶

Finally, due to the international law character of the EEA Agreement and the ensuing need for parliamentary approval for many of its amendments the national parliaments of the EEA EFTA States are involved in the EEA decision-making to a much higher degree than their counterparts in the EU Member States. Theoretically, this role of the national parliaments poses a significant risk to the homogeneity of the EEA legal order. In practical terms, however, no EEA EFTA State parliament has vetoed an amendment of the Agreement until now.¹⁹⁷

3.2.2 Energy Community

As in most other cases, the ECAA and the Energy Community feature more simple structures than the well-elaborated framework of the EEA but all share a similar set of basic characteristics.

Similarly to the EEA Agreement, the Energy Community Treaty, too, contains provisions on stakeholder consultations. In the two Fora established under

¹⁹³ A Tovas, ‘Exploring the ‘Pros’ and ‘Cons’ of Swiss and Norwegian Models of Relations with the European Union – What Can Israel Learn from the Experiences of These Two Countries?’ (2006) 41 *Cooperation and Conflict* 203, 219.

¹⁹⁴ S Lavenex, ‘Concentric circles of flexible ‘EUropean’ integration’ (n 176) 377.

¹⁹⁵ GF Schaefer and A Türk, ‘The role of implementing committees’ in T Christiansen and T Larsson (eds), *The Role of Committees in the Policy-Process of the European Union* (Edward Elgar Publishing 2007) 182, 184.

¹⁹⁶ S Kristjánsson and R Kristjánsson, ‘Delegation and Accountability in an Ambiguous System: Iceland and the European Economic Area (EEA)’ (2000) 6 *The Journal of Legislative Studies* 105, 118.

¹⁹⁷ Foreign Affairs Committee, *The future of the European Union: UK Government policy* (HC 2013-14 1-II) 53.

Article 63 ECT, all interested stakeholders including industry, regulators, industry representative groups and consumers are represented. The Fora have an advisory function in the Energy Community, dealing with electricity and gas matters, respectively. As such, the Fora play a highly institutionalised role of stakeholder consultation in the Energy Community. As regards third country participation, Switzerland, Liechtenstein and the EFTA Surveillance Authority have been represented in the Gas Regulatory Forum, and Norway and the EFTA Surveillance Authority in the Electricity Regulatory Forum.¹⁹⁸ The ECT does not provide any information about the participation of non-EU third country experts in the Commission's committees or working groups but neither is such participation excluded.

The fact that third country experts are not necessarily represented in the committees advising the European Commission does not mean that they cannot participate through other channels. In many agencies and programmes, for example, participation is limited to EU Member States, EEA EFTA States and candidate countries. Many ECAA and Energy Community associated parties are, in fact, EU candidate countries. The current list of the latter includes Macedonia (FYROM), Montenegro, Serbia and Turkey.

Yet in a Commission Communication on the possibilities of allowing ENP partners to take part in the activities of EU agencies and programmes it is apparent that the latter are increasingly open towards external participation.¹⁹⁹ Decisions on each ENP country's participation are taken on a separate basis, thus enabling some to participate and others not. One of the objectives of opening up the agencies and programmes to participation by non-EU Member States is to prepare third countries for the adoption of the *acquis* either in the accession process or as a party to an agreement that exports EU *acquis*.²⁰⁰ Participation, therefore, is perceived as increasing the effectiveness of norms export. This is a

¹⁹⁸ See, for example, Attendance List, 27th meeting of the European Gas Regulatory Forum, Madrid, 20-21 April 2015 <<http://ec.europa.eu/energy/sites/ener/files/documents/GASFORUM-attendance.pdf>> accessed 24 June 2015; List of participants, 27th meeting of the European Electricity Regulatory Forum, Florence, 27-28 November 2014 <https://ec.europa.eu/energy/sites/ener/files/documents/meeting_027_participants.pdf> accessed 24 June 2015.

¹⁹⁹ Commission, 'General approach to enable ENP partner countries to participate in Community agencies and Community programmes' (Communication) COM (2006) 724 final.

²⁰⁰ *ibid* 7.

conclusion that can already, in a very institutionalised setting, be drawn with regard to the EEA.

3.2.3 European Common Aviation Area

Information and consultation are prominent also in the ECAA Agreement. The ECAA contracting parties exchange information on legislative changes that have a perceived relevance for the ECAA Agreement.²⁰¹ As in the case of the EEA, consultation on the matter may be taken to the Joint Committee upon request by one of the parties. The range of issues discussed in the Joint Committee notably includes social matters.

Annex II to the ECAA Agreement lays out the procedure for consultations with the associated parties within the relevant committees of the EU. The general clause on exchange of information applies.²⁰² According to Point 4 of Annex II, the Commission consults experts of non-EU ECAA states. Like EU Member State experts, ECAA experts may submit their advice and opinions whenever ECAA relevant acts are discussed in the EU committees. The consultation procedure consists of one meeting that takes place in the ECAA Joint Committee and is chaired by the European Commission. The consultation meeting is convened by the Commission and takes place prior to the meeting of the EU Committee in question. The ECAA associated parties have two weeks to prepare for the meeting with all necessary information disseminated by the Commission, unless time constraints caused by specific circumstances. Interestingly, ECAA associated parties do not, therefore, participate in the exchange of views that takes place within the Commission between the EU Member States and EEA EFTA States, wherever the legislative act in question is part of the EEA Agreement. As usual, the Commission 'shall take due account' of the views of the ECAA parties and consider them together with all other expert opinions gathered at the preliminary stage of expert consultations. The one exception regarding the consultation procedure concerns competition rules for which a special consultation procedure provided in Annex III to the ECAA Agreement applies.

²⁰¹ Article 18(4) ECAA Agreement.

²⁰² Point 5, Annex II to the ECAA Agreement.

In addition to the separate consulting committees, the ECAA associated parties may also participate in the activities of some EU committees such as the Single Sky Committee that exercises comitology functions by examining draft implementing rules before the Commission proceeds to adopt them. The Single Sky Committee is composed of the representatives of the European Commission, the EU Member States, the ECAA States as Members without voting rights, and various aviation organisations and bodies as observers.²⁰³ Importantly, Regulation No 549/2004 on the Single European Sky²⁰⁴ envisages in addition to the establishment of the Single Sky Committee also an industry consultation body that comprises air navigation service providers, associations of airspace users, airport operators, the manufacturing industry and professional staff representative bodies.²⁰⁵ The industry consultation body advises the Commission on the implementation of the Single European Sky. Insofar as this Article applies to the ECAA Agreement it can be assumed that non-EU ECAA stakeholders, too, participate in its activities. In the context of the Single European Sky, particular attention is accorded to informing and consulting the social partners on measures with substantial social implications, for example by means of consulting the Sectoral Dialogue committee established under Commission Decision 1998/500/EC.²⁰⁶

It is obvious that among non-EU Member States the EEA EFTA States have more influence on the ECAA *acquis* if the latter also forms part of the EEA Agreement. Non-EEA countries, however, have the possibility of expressing their opinion, at least in the comitology committee.

Finally, since Norway and Iceland are parties to the ECAA Agreement it is important to note that the provisions of the ECAA Agreement are without prejudice to the respective rules in the EEA Agreement.²⁰⁷ All of these rules are

²⁰³ See, for example, the list of participants: Summary Report of the 54th meeting of the Single Sky Committee (SSC), Brussels, 1 and 2 July 2014 <<http://www.eraa.org/system/files/Summary%20Report%20of%20the%2054th%20meeting%20of%20the%20Single%20Sky%20Committee.pdf>> accessed 24 June 2015.

²⁰⁴ Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky [2004] OJ L96/1.

²⁰⁵ *ibid* Article 6.

²⁰⁶ *ibid*, Recital 17 of the Preamble; Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level (98/500/EC) [1998] OJ L225/27.

²⁰⁷ Recital 11, Preamble to the ECAA Agreement; Article 5 ECAA Agreement.

of EU origin and in all probability identical in wording. Article 5 ECAA Agreement is meant to eliminate potential conflicts between the differing scopes of the EEA and ECAA Agreements with respect to the same legislation. Should the ECAA Joint Committee reject an amendment to the ECAA Agreement to adapt its content to changes in the EU *acquis*, Iceland and Norway would remain bound by the obligations assumed under the EEA Agreement. Vice versa, this would also apply in the hypothetical situations where the EEA Joint Committee rejects a change regarding a piece of EU legislation that forms part of the ECAA Agreement. What can create confusion in interpretation and application, though, are the different scopes of the ECAA and the EEA Agreements and their respective objectives and context. Council Directive 93/13/EEC on unfair terms in consumer contracts,²⁰⁸ for example, is incorporated into both the EEA and the ECAA agreements. However, the sectoral scope of the ECAA Agreement may require a narrower interpretation of the provisions of the Directive than in the EEA or the EU. The Court recognised in Opinion 1/00 the problem of two sets of identical rules – those of the ECAA and of the EU – being applicable on the same territory but not being subject to identical implementation and enforcement mechanisms.²⁰⁹ The same holds true in the EEA-ECAA axis, or even that of the EEA-Energy Community.

4 Conclusion

On the one hand, homogeneity in the extended internal market is dependent on the suitability of the institutional and procedural frameworks set up by the multilateral agreements for the task of exporting the *acquis* in a timely and comprehensive manner. On the other hand, homogeneity is affected by the willingness of third countries to incorporate new EU *acquis* into the multilateral agreement and later, where applicable, into their domestic legal orders. For the sake of ensuring the dynamic character of the agreements exporting the *acquis* it is important whether and to what extent can representatives and stakeholders of the non-EU contracting parties participate in the process of shaping the *acquis* on the EU level.

²⁰⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

²⁰⁹ Opinion 1/00 ECAA [2002] ECR I-3493, para 10.

Firstly, the level of sophistication of the institutional and procedural arrangements for ensuring homogeneity in the expanded internal market is in obvious correlation with the scope of the international agreement in question. The EEA Agreement envisages strong guarantees not only in terms of the substantive aspects of homogeneity – the transferral of a large part of relevant *acquis* from the EU to the EEA – but also in terms of the temporal and territorial aspects thereof. By imposing strict deadlines for the incorporation of new *acquis* and establishing consequences for all EEA EFTA States in the event of non-compliance by one, significant effort has, on the one hand, been made to ensure that the EFTA pillar of the EEA remains homogeneous. On the other hand, treating the EFTA pillar as one whole and subjecting all three EEA EFTA States to a potential suspension of a part of the agreement – the concept being undetermined as it has never been put to practice – is a further guarantee for maintaining homogeneity in the EU-EEA dimension. Much simpler mechanisms and, thus, weaker guarantees for homogeneity are in place in sectoral agreements. This applies to the substantive, temporal and territorial aspects of homogeneity alike.

Secondly, the increasing use of new governance methods has influenced the range of actors involved in EU's decision-shaping and decision-making procedures. Traditionally, the participation of external actors in the EU policy-making has been limited to Commission expert groups. The procedures for engaging third country representatives in the preparatory stages of decision-making are well structured in the case of the EEA but more ambiguous in relation to the Energy Community and the ECAA. Early information and consultation procedures are not only relevant from a democratic point of view but also exert a positive impact the acceptance of the *acquis* by the third countries. This may be shown either in the stage of incorporating new or amended *acquis* in the multilateral agreement or in the stage of satisfying national constitutional requirements. Early discussions are even more relevant in the case of the EEA where the Joint Committee decisions on updating the *acquis* are taken by consensus rather than by formal voting. In the Energy Community and the ECAA voting takes place although unanimity is required in

the ECAA unless the ECAA Joint Committee decides upon a different voting majority.

The new governance methods concern mostly flanking policies including those relevant to the core of the internal market – social policy and environmental protection. In addition to new, especially soft law measures, information and consultation are the essence of new governance in the EU. On the one hand, the requirement to disseminate information about new legislative proposals and include third countries in the discussions may well grant more participatory opportunities for the latter. In turn, rule making procedures that depart from the classic Community method are often not regulated by the EU Treaties and are, thus, considerably more flexible in terms of participating actors. Participation, in turn, may suggest increased compliance. On the other hand, however, where new governance translates into incorporating non-traditional participants into EU law making, such as in the case of the social dialogue, third country representatives may become more excluded from the policy-making processes than would have been the case under the classic Community method. Statistics, nevertheless, reveals that although new governance methods are emerging the prevalent means of decision-making in the EU, especially outside the flanking policies, are still the traditional Treaty procedures.²¹⁰

As concerns the effect of decision-making procedures on the quest for homogeneity in an expanded EU internal market it can be concluded that the more comprehensive the framework the more sophisticated the institutional and procedural guarantees for achieving homogeneity and the more homogeneous the outcome. It is certainly possible to achieve homogeneity through institutional and procedural means but less easy to maintain the homogeneity. Both *quasi*-sanctions such as the suspension of a part of the agreement and early participation in the EU's decision-making processes are important factors that encourage timely adaptation of the non-EU segments of the expanded internal market to changes in the relevant *acquis* in the EU. Limited by the 'balance of benefits and obligations' and the autonomy of the EU legal order, the participation of third countries in the defining of the *acquis* cannot extend to

²¹⁰ K Holzinger, C Knill and A Schäfer, 'Rhetoric or Reality? 'New Governance' in EU Environmental Policy' (2006) 12 *European Law Journal* 403.

formal decision-making. The increasing use of new governance methods that are characterised by stakeholder participation, however, opens up possibilities for deeper third country involvement in the making of the *acquis* and, thus, a larger degree of homogeneity provided that stakeholder participation is open to third countries.

Chapter 7 Institutional framework: safeguarding the core

1 Introduction

The fundamental purpose of the internal market is to create a legal space in which all market operators enjoy the same rights and obligations. In addition to the same set of rules, unity in the internal market demands that the rules be implemented and enforced in an effective manner so as to grant all market participants the rights that they derive from the EU Treaties. Most directly, the principle of effectiveness finds expression in the foundational principles of the EU, especially that of direct effect. As stated above, the purpose of the principle of direct effect is to maintain unity in the EU and to guarantee uniform application of EU law throughout the Union.

In order to achieve the objective of creating a common market, including the uniform protection of individual rights, the EEC Treaty set up ‘institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens’.¹ Comprising a number of sovereign states it is indispensable for the internal market to have common institutions that have been conferred with independent powers to enforce the common rules as well as to be able to effectively coordinate the actions of its constituent states.² EU individuals both benefit from and participate in the functioning of the EU and its internal market. In order to expand the internal market to non-EU Member States, therefore, the individuals of the latter, too, should be able to both benefit from and participate in the functioning of the market either individually or via the institutions of their respective states.

As regards EU institutions, the primary actors dealing with the enforcement of EU law are the Commission and the EU judiciary. The bulk of the enforcement duty is, however, performed by Member State authorities. National influence is very notable in the EU’s institutional architecture. The EU legal order is supranational but the EU is not a federal state. The Member States are sovereign and maintain a high degree of procedural autonomy. In such circumstances, it is impossible for the Union to exercise its surveillance and enforcement activities

¹ Case 26/62 *Van Gend en Loos* [1963] ECR 1.

² R Barents, *The Autonomy of Community Law* (Kluwer Law International 2004) 201.

in a manner comparable to nation states. Instead, the effective functioning of the internal market must be ensured through means of close cooperation between the centralised procedures for surveillance and enforcement on the EU level and the Member States' national authorities acting as constituent parts of the EU institutional system. Both the centralising and the decentralising dynamics play a role in the effective protection of individual rights in the Union and the internal market.

In the process of creating an expanded internal market that is homogeneous both in its internal and external dimensions, the uniformity of rules goes hand in hand with their uniform application and effective enforcement. The former ensures that individuals and economic operators across the expanded EU internal market have the same rights whereas the latter make sure that the individuals can, indeed, enjoy the rights thus conferred to an extent equal to EU nationals regardless of whether they find themselves on the EU or the non-EU side of the expanded internal market. Institutional and procedural mechanisms equivalent to those established by the EU Treaties must, therefore, necessarily be created by the international agreements that export the *acquis* in order to allow for a true extension of the internal market.

There is nothing, not even the case law of the Court of Justice, to compromise the general objective of setting up institutions endowed with similar tasks as the EU institutions for the purpose of maintaining homogeneity within the expanded internal market. The only restrictions are imposed, from an EU law perspective, by the necessity to safeguard the autonomy of the EU legal order³ and, from the perspective of the expanded market, by a sufficient degree of efficiency of the institutional framework. It is the judicial system of the EU that is particularly sensitive towards external influence. A system of courts established by an international agreement conferred with jurisdiction to settle disputes between parties to an international agreement and to interpret its provisions has, nevertheless, been deemed compatible with the EU Treaties. This is so even if the decisions of that court will be binding on the institutions of the EU, including the Court.⁴

³ Discussed above in chapter 5.

⁴ Opinion 1/91 *EEA I* [1991] ECR I-6079, paras 39-40.

The following analysis is based on the assumption that an adequate level of protection of individual rights through procedural means is guaranteed by the system set up by the EU. In order to be deemed equally effective, the system of institutions, procedures and remedies must contain at least certain core elements of surveillance, enforcement and judicial protection as provided by the EU Treaties. This chapter explores the different models of surveillance and enforcement set up by Treaties and the multilateral agreements exporting the internal market *acquis*, respectively. The analysis focuses on the characteristics of the various institutional mechanisms and their relative efficiency in terms of ensuring the identical interpretation and the effective enforcement of the *acquis* in the broadened internal market. Although the institutions and procedures involved in the application and enforcement of EU law and the exported *acquis* are numerous, the current analysis focuses on the procedures of surveillance, on the one hand, and the interpretation and application of the *acquis* by courts, on the other. The latter discussion is limited to courts primarily because it is mainly in the case law of courts where legal problems are identified, the core of the Union system revealed and questions about judicial dialogue, hierarchies, autonomy and independence answered.

The chapter is structured according to the modes of centralisation and decentralisation. The first part of the chapter deals with the centralised institutions and procedures for surveillance and enforcement in the EEA, the Energy Community and the ECAA, and the cooperation between these institutions and those of the Union. The second part of the chapter focuses on the procedural links between the international or supranational institutions on the one hand and national authorities and individuals on the other hand. The analysis aims at identifying whether and if, then how different institutional and procedural safeguards help achieve and maintain the homogeneous application of the *acquis* in an expanded internal market.

2 Safeguarding homogeneity: centralising dynamics

2.1 Surveillance and enforcement

The main guardian of the functioning of the EU Treaties, including the internal market, is the European Commission. Within the EU legal order, the Commission

is specifically tasked to investigate the proper performance by the Member States of their duties under the Treaties. There are several procedures designed for scrutinising the Member States' compliance with their obligations under EU law.

Firstly, the Commission may take initiatives itself under Article 258 TFEU. Suspecting that a Member State has infringed the Treaties, the Commission may issue a reasoned opinion and allow the Member State to submit observations.⁵ If the Member State in question fails to comply with the reasoned opinion the Commission may initiate infringement proceedings before the Court of Justice.⁶

Secondly, the Commission may follow the initiative taken by the Member States under Article 259 TFEU. In such cases, the Commission acts as a middle link between a Member State alleging infringement by another Member State, on the one hand, and the Court of Justice, on the other. The Commission receives complaints from Member States, hears each State concerned and submits a reasoned opinion after which the matter may be brought to the Court.⁷ Member States cannot take infringement actions directly to the Court without first informing the Commission and allowing the latter to issue a reasoned opinion within three months' time. Should the Commission fail to deliver an opinion in the given timeframe, the Member State may nevertheless refer the matter to the Court.

A decision of the Court establishing a breach of Treaty obligations is binding on the Member State concerned.⁸ The Commission must further monitor the Member State's compliance with the judgment. In case of a failure to rectify the breach, the Commission may bring a new case to the Court of Justice specifying a lump sum or penalty payment due by the Member State.⁹

The Commission plays a central role also where breaches of EU law by individual market participants are concerned. The Commission's role is especially significant in the field of competition law that is one of the cornerstones of the internal market. The Commission conducts investigation of suspected

⁵ Article 258 TFEU.

⁶ *ibid.*

⁷ Article 259 TFEU.

⁸ Article 260(1) TFEU.

⁹ Article 260(2) TFEU.

competition law infringements as well as proposes measures to bring them to an end.¹⁰ Similarly to cases of infringement against Member States, the Commission may either act on its own initiative or on application by a Member State. If the proposed measures prove inefficient, the Commission may issue a reasoned decision and authorise the Member State in question to remedy the situation.¹¹ A special surveillance and enforcement procedure in the field of state aids is provided in Article 108 TFEU.

In the area of competition law, the EEA Agreement meticulously replicates the surveillance system of the EU. The EEA Agreement envisages the establishment of both ‘an independent surveillance authority’ – the EFTA Surveillance Authority (ESA) – and ‘procedures similar to those existing in the [Union]’ for the purposes of both monitoring compliance with the EEA Agreement and for reviewing the legality of the acts of the ESA.¹² For the latter purpose, the SCA¹³ was concluded between the EEA EFTA States. Neither the EU nor its Member States are parties to the SCA.

In terms of set-up, the ESA resembles a smaller sibling of the European Commission. The ESA has three independently acting members who are the equivalent of EU Commissioners.¹⁴ At least two EFTA states must be represented among the members. The specific tasks of the ESA are to monitor the functioning of the EEA Agreement and the SCA.¹⁵ Just like the Commission, the ESA monitors the compliance of EEA EFTA States both with the EEA Agreement generally¹⁶ and competition rules specifically.¹⁷ If the ESA considers an EEA EFTA State to have breached its obligations under the EEA Agreement, it delivers a reasoned opinion upon which the state concerned has the possibility to submit observations.¹⁸ If the state concerned fails to comply with the opinion the ESA may bring the matter to the EFTA Court.¹⁹ Differently from the EU Member

¹⁰ Article 105(1) TFEU.

¹¹ Article 105(2) TFEU.

¹² Article 108 EEA Agreement.

¹³ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/3.

¹⁴ Articles 7 and 8 SCA.

¹⁵ Article 22 SCA.

¹⁶ Article 31 SCA.

¹⁷ Articles 23-25 SCA.

¹⁸ Article 31 SCA.

¹⁹ *ibid.*

States, though, the EEA EFTA States have no possibility to initiate infringement proceedings against another EEA EFTA State.

Compliance with EEA competition rules is monitored by both the European Commission and the ESA, both acting within their respective pillar of the EEA yet in close cooperate in order to guarantee uniformity in the surveillance of the EEA Agreement.²⁰ To this end, the Commission and the ESA are bound to exchange information and consult each other both on general surveillance policy issues and on individual cases.²¹ When one institution receives a complaint about the application of the EEA Agreement it must forward it to the other. Should a complaint be handed in to the wrong institution, the case must be passed on to the institution that is competent to handle the issue.²² In the case of disagreement between the Commission and the EFTA Surveillance Authority concerning the action to be taken with regard to a complaint or the results of an examination, either body may refer the issue to the EEA Joint Committee, rather than either of the courts.²³ No similar penalty system as provided by Article 260(2) TFEU exists under the ESA, though.

The Commission and the ESA investigate suspected competition law infringement cases in the EEA either on their own initiative, by request of an EEA EFTA State on its respective territory or by the other surveillance authority.²⁴ In the investigation process, the Commission and the ESA receive assistance from each other and from the states concerned.²⁵

The European Commission and the ESA each act on cases arising within their designated area.²⁶ The ESA deals with cases which either only affect trade between the EEA EFTA States or where the turnover of the undertakings concerned in the territory of the EFTA States equals 33 per cent or more of their turnover in the entire EEA territory. The remaining cases fall on the Commission to decide, including those where trade between the EU Member States is

²⁰ Articles 58 and 109(1) EEA Agreement; Protocols 23 and 24 to the EEA Agreement.

²¹ Article 109(2) EEA Agreement.

²² Article 109(3) and (4) EEA Agreement.

²³ Article 109(5) EEA Agreement.

²⁴ Article 55(1) EEA Agreement.

²⁵ *ibid.*

²⁶ Article 56(1) EEA Agreement.

affected. If the latter is not appreciable the case is decided by the ESA.²⁷ Cases concerning the abuse of a dominant position are dealt with by the surveillance authority in the territory of whom the dominant position is found to exist.²⁸ If dominance exists in the territories of both surveillance authorities, the regular rules apply. Special rules apply to the division of case law between the Commission and the ESA in cases of concentrations.²⁹ Even where one of the surveillance authorities is not competent to decide a case it may request copies of important documents from the other authority during all stages of the procedure as well as make observations.³⁰

Should one of the surveillance authorities find that the implementation of state aid control by the other fails to uphold equal conditions for competition within the EEA the two institutions will hold an exchange of views within a timeframe of two weeks. If they fail to find a common solution then the 'competent authority of the affected Contracting Party' may immediately adopt interim measures in order to remedy the resulting distortion of competition. A commonly acceptable solution will thereafter be sought in the EEA Joint Committee. If the Joint Committee has not found such a solution within three months and if the practice in question causes or threatens to cause distortion of competition that affects trade between the parties to the EEA Agreement, the interim measures may be replaced by definitive measures. The latter will be strictly limited to those necessary to offset the effect of distortion to competition. Priority will be given to measures that will least affect the functioning of the EEA Agreement. The fact that differences will be solved in the EEA Joint Committee rather than through judicial means – which more likely than not would have granted exclusive jurisdiction to the Court of Justice – ensures that in the field of surveillance of the functioning of the EEA Agreement the EU and the EFTA pillars of the EEA are on an equal footing without the one being granted a more significant role in safeguarding homogeneity at the expense of the other.

A uniform effect of surveillance decisions is granted by virtue of Articles 280 and 299 TFEU and Article 110 EEA Agreement pursuant to which the enforcement

²⁷ Article 56(3) EEA Agreement.

²⁸ Article 56(2) EEA Agreement.

²⁹ Article 57 EEA Agreement.

³⁰ Article 7 Protocol 23 to the EEA Agreement.

decisions of the Commission and the ESA that impose a pecuniary obligation on individuals is enforceable in the EU as well as in the EEA. The same applies to the judgments of the EEA and EU judiciaries.³¹

Both the Commission and the ESA can be held liable for failure to act. The institutions can be subject to infringement proceedings under Article 265 TFEU and Article 37 SCA, respectively. An infringement action can be brought before the Court of Justice by an EU Member State and to the EFTA Court by an EEA EFTA State. Importantly, the surveillance authorities may only become subject to infringement proceedings if they have previously been called upon to act. The timeframe for the infringement action is two months in both cases. If the surveillance authority in question has not defined its position regarding a plea from an EU Member State or an EEA EFTA State within two months, the state involved has two more months to bring the action. Any natural or legal person may complain to the Court of Justice or the EFTA Court, respectively, alleging that an institution, body, office or agency of the Union or the ESA has failed to address to that person 'any act other than a recommendation or an opinion' in the case of the EU or a decision in the case of the EEA EFTA States. In the meantime, EEA EFTA nationals can bring to national courts cases challenging the legality of national legal acts implementing ESA decisions whereas EU individuals can only challenge individual decisions in the Court of Justice.³²

The grounds on which enforcement and surveillance of the internal market *acquis* takes place in the ECAA and the Energy Community are very different from those of the EU and the EEA. Neither the ECAA Agreement nor the ECT envisage the creation of a separate surveillance authority. The surveillance of the functioning of the ECAA Agreement and the ECT is conducted by the Commission in the EU pillar of the agreements and by national authorities of the non-EU contracting parties in the non-EU pillar. EU institutions, primarily the Commission, exercise surveillance duties in the ECAA and the Energy Community where the competition rules or secondary legislation of the respective treaties so provide.³³ For example, the Commission enjoys special

³¹ Article 110 EEA Agreement.

³² HP Graver, 'The Efta Court and the Court of Justice of the EC: Legal Homogeneity at Stake?' in P-C Müller-Graff and E Selvig (eds), *EEA-EU Relations* (Berlin Verlag Arno Spitz 1999) 31, 40-42.

³³ Opinion 1/00 *ECAA* [2002] ECR I-3493, para 7.

powers as granted to it under EU *acquis* in cases that may affect the authorisation of actual or potential air services,³⁴ and may monitor compliance with aviation security rules.³⁵ Whereas the EEA Agreement features substantial institutional safeguards for maintaining homogeneity in the EEA and between the EEA and the EU *acquis*, no such special guarantees are envisaged by the sectoral agreements. This does not necessarily mean that homogeneity is in danger, though. In situations where EU institutions including the Commission have a power to act one may assume that the level of homogeneity can be even higher than in the EEA where homogeneity is to be secured by two institutions – the Commission and the ESA. In cases where EU institutions have no powers to act they equally lack such powers in the EU Member States, leading to a rather equal outcome in terms of homogeneity. This is notwithstanding the practical difficulties that the Commission or other EU institutions may encounter when exercising their powers to investigate the implementation of the *acquis* in non-EU Member States rather than within the EU.

In the Energy Community, surveillance is conducted by the Energy Community's own institutions rather than the European Commission. Any party to the ECT, the Secretariat or the Regulatory Board may notify the Ministerial Council of a failure of a contracting party to comply with a Treaty obligation or implement a decisions addressed to it.³⁶ Private bodies may submit complaints to the Secretariat. The party against whom a request or complaint has been addressed may make observations in response.³⁷ The Ministerial Council determines the existence of a breach by a simple majority of votes in case of extension of the *acquis communautaire*, by a two-third majority in the case of network energy, and by unanimity in case of the Single Energy Market.³⁸ A simple majority of votes in the Ministerial Council is required for revoking any previous decisions.³⁹ At the request of a contracting party, the Secretariat or the Regulatory Board the Ministerial Council may, by unanimous vote, establish the existence of a serious and persistent breach of the treaty obligations by a party and suspend certain

³⁴ Article 15(2) ECAA Agreement.

³⁵ Article 12(4) ECAA Agreement.

³⁶ Article 90(1) ECT.

³⁷ Article 90(2) ECT.

³⁸ Article 91(1) ECT.

³⁹ Article 91(2) ECT.

rights conferred to it under the Treaty.⁴⁰ Again, the Ministerial Council may revoke any such decisions by a simple majority vote. Since the Energy Community lacks an independent surveillance authority the procedures for determining the existence of an infringement are fully political. The link between the Commission and the institutions of the Energy Community is limited to the participation of the Commission in the voting. This mechanism is based completely on international law and hardly possesses the necessary synchronising tools, such as close cooperation between the surveillance authorities of the Energy Community and the EU, to, indeed, guarantee uniformity in the protection of rights arising from identical *acquis* within the EU and within the non-EU segments of the Energy Community.

2.2 Interpretation and dispute settlement

2.2.1 European Economic Area

The EU judiciary, especially the Court of Justice and the General Court, provide authoritative interpretations of EU law and, thereby, the benchmark for uniformity in the interpretation and application of EU *acquis* in the expanded internal market. Pursuant to Article 19(1) TEU the Court of Justice shall observe that in the interpretation and application of the Treaties the law is observed. The Court rules on direct actions brought by Member States, EU institutions or natural and legal person, and in other cases provided in the Treaties,⁴¹ whereas the General Court decides on all other cases that are neither assigned to the Court nor to a specialised court under Article 257 TFEU.⁴² Article 273 TFEU, furthermore, allows the Member States grant the Court of Justice jurisdiction in any dispute between them that relates to the subject matter of the Treaties under a special agreement. In the meantime, Article 344 TFEU forbids the Member States to submit a dispute concerning the interpretation or application of EU law to any other forum than the courts of the EU. The rulings of the Court of Justice are binding and enforceable in the Member States.⁴³

While in the EU the task of maintaining of judicial homogeneity is in the hands of

⁴⁰ Article 92(1) ECT.

⁴¹ Article 19(3) TEU.

⁴² Article 256(1) TFEU.

⁴³ Articles 280 and 299 TFEU.

the Court of Justice, the EEA system of ensuring homogeneity in the interpretation and application of the *acquis* is hybrid in that it includes both judicial and political elements.⁴⁴ The EEA judicial system consists of independent courts including the EFTA Court, the Court of Justice of the EU, the General Court, and the courts of last instance of the EEA EFTA States.⁴⁵

The EFTA Court is established under Article 108(2) EEA Agreement. Its tasks are to conduct surveillance in EEA EFTA States, decide on appeals on the decisions of the ESA in the field of competition law, and to settle disputes between the EEA EFTA States.⁴⁶ The EFTA Court consists of three judges all of whom must participate in the deliberations in order for a decision of the EFTA Court to be valid.⁴⁷ The jurisdiction of the EFTA Court comprises disputes between two or more EEA EFTA States regarding the interpretation or application of the EEA Agreement,⁴⁸ penalties imposed by the ESA,⁴⁹ and actions brought by an EFTA state against a decision of the latter.⁵⁰ Individuals, too, may institute proceedings against a decision of the ESA on the same grounds provided that the decision was addressed to the individual or otherwise if the decision is of direct and individual concern to the person initiating proceedings.⁵¹ The EFTA Court may declare the challenged decision of the ESA void.⁵²

The EU and the EFTA courts do not exist and work in isolation from each other. The EEA Agreement sets up a system of exchange of information concerning the judgments of the Court of Justice, the General Court, the EFTA Court and the courts of last instance of the EEA EFTA States. To this end, the Registrar of the Court of Justice receives copies of the judgments of the above courts in which the latter have interpreted and applied either the EEA Agreement or the EU Treaties or EEA relevant *acquis* and passes the relevant documents on to the EEA contracting parties.⁵³

⁴⁴ C Reymond, 'Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area' (1993) 30 Common Market Law Review 449, 475.

⁴⁵ Article 106 EEA Agreement.

⁴⁶ Article 108(2) EEA Agreement.

⁴⁷ Articles 28 and 29 SCA.

⁴⁸ Article 32 SCA.

⁴⁹ Article 35 SCA.

⁵⁰ Article 36 SCA.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Article 106 EEA Agreement.

Maintaining homogeneity in the interpretation of common rules across the EEA is, however, primarily the task of the EEA Joint Committee. The Joint Committee is assigned to ensure homogeneity on top of the efforts in this respect made by the EU judiciary and the EFTA Court. Pursuant to Article 105(2) EEA Agreement, the Joint Committee constantly reviews the development of the case law of the Court of Justice of the EU as well as the EFTA Court. By doing so, the Joint Committee thus also compares the interpretation of identical rules provided by the two courts. The EU courts and the EFTA Court refer their judgments to the Joint Committee that will, if necessary, 'act so as to preserve the homogeneous interpretation of the Agreement'. Should the Joint Committee fail to find a solution within two months' time, the matter will be dealt with under the dispute settlement procedure provided in Article 111 EEA Agreement.⁵⁴ It has been questioned whether the EEA Joint Committee could, in the process of preserving the homogeneous interpretation of the EEA Agreement also incorporate new Court of Justice case law into the EEA.⁵⁵ As homogeneity advancing as this solution may be, it is highly questionable whether the Joint Committee could in effect amend the EEA Agreement and SCA which in Articles 6 and 3(2), respectively, stipulate that post-1992 case law is not binding on the EEA EFTA States and institutions.⁵⁶ Because of the independence of the judiciary, moreover, it would be questionable for the EEA Joint Committee to compel the EFTA Court to follow the case law of the Court of Justice, especially case law that is not binding on the EFTA Court neither by virtue of Article 6 EEA Agreement nor Article 3(2) SCA. Neither could the political institutions of the EU exert such pressure on the Court of Justice.

The process of determining the existence of a divergence in case law pursuant to Article 105(2) EEA Agreement as well as the outcome in terms of preserving homogeneity are strictly political, not judicial. Homogeneity, in turn, is limited to what the contracting parties consider homogeneous.⁵⁷ The means of action

⁵⁴ Article 105(3) EEA Agreement.

⁵⁵ C Baudenbacher, 'Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area' (1997) 3 Columbia Journal of European Law 169, 220.

⁵⁶ *ibid*, 220.

⁵⁷ This applies also to the legislative means of achieving and maintaining homogeneity in the form of, for example, updating the EEA Agreement and the, in practice rather subjective, determination of whether a piece of EU *acquis* is EEA relevant or not. See above chapter 6 section 2.1.2, especially n 19.

available for the Joint Committee are not specified in the EEA Agreement but the means made use of by the Joint Committee may certainly not affect the case law of the Court of Justice as was agreed by the drafters of the EEA Agreement.⁵⁸ Since it is not clear whether the prohibition concerns only the Court's rulings on EU law or also on EEA law one must assume that it concerns both. Insofar as the solution found by the Joint Committee is an outcome of political negotiations it may, theoretically, diverge from the interpretation of EU law given by the Court of Justice. Nevertheless, the Joint Committee may not adversely affect the binding nature of the decisions of the Court of Justice within the EU legal order.⁵⁹ If the Joint Committee were to bind the EEA Contracting Parties, which include the EU and its Member States, to an interpretation of EEA law that is in substance identical to EU law that diverges from the interpretation given by the Court, the Joint Committee would itself undermine the homogeneity in the EEA. Whether the Joint Committee could challenge an interpretation provided by the EFTA Court is, furthermore, questionable from the point of view of judicial independence.⁶⁰ Clearly, the Court of Justice is the source of authoritative interpretations of internal market *acquis* not only in the EU but also in the EEA.

In the case of disputes arising from the application or interpretation of the EEA Agreement, either the EU or an EEA EFTA State may bring the matter before the EEA Joint Committee.⁶¹ The EU Member States have no such possibility. The task of the Joint Committee is to gather all relevant information and endeavour to find an acceptable solution to the case at hand by examining 'all possibilities to maintain the good functioning of the EEA Agreement'.⁶² The link between Articles 105(3) and 111 EEA Agreement 'necessarily implies' that the 'procès-verbal agréé ad article 105' and Protocol 48 to the EEA Agreement also apply to the EEA dispute settlement procedure meaning that the case law of the Court of Justice must not be affected.⁶³

⁵⁸ *Procès-verbal agréé ad article 105*, see Opinion 1/92 *EEA II* [1992] ECR I-2821, para 6; Also Protocol 48 to the EEA Agreement concerning interpretation of Articles 105 and 111, which reads: 'Decisions taken by the EEA Joint Committee under Articles 105 and 111 may not affect the case-law of the Court of Justice of the European Communities.'

⁵⁹ Opinion 1/92 *EEA II* (n 58) para 22.

⁶⁰ C Baudenbacher, 'Between Homogeneity and Independence' (n 55) 222-223.

⁶¹ Article 111(1) EEA Agreement.

⁶² Article 111(2) EEA Agreement.

⁶³ Opinion 1/92 *EEA II* (n 58) para 28.

The Joint Committee must find a solution to divergent interpretations of EEA *acquis* that is identical to EU law within three months' time.⁶⁴ If it cannot arrive at a solution the parties to the dispute may decide to request a binding interpretation of the rules under dispute from the Court of Justice.⁶⁵ In practice, it is unlikely that the Court will be called upon to rule on whether its own interpretation or that provided by the EFTA Court will prevail.⁶⁶ In any event, this solution demonstrates once again the strong position of the Court of Justice *vis-à-vis* the EFTA Court in interpreting the *acquis* of the expanded internal market. If no solution has been found by the Joint Committee in six months and if the parties have not requested a ruling from the Court, the contracting parties may either take safeguard measures or apply the procedure of Article 102 EEA Agreement, which is used in cases of inability to duly incorporate changes in EU *acquis* into the EEA Agreement.⁶⁷ The latter includes assessing the situation in the Joint Committee,⁶⁸ taking all efforts to arrive at an agreement on matters relevant to the EEA Agreement,⁶⁹ or, as a last resort, the EEA Joint Committee examining 'all further possibilities to maintain the good functioning of [the] Agreement' and taking 'any decision necessary to [that] effect' within six months of referral.⁷⁰ This solution calls for political agreement, not necessarily strict judicial homogeneity. The ultimate solution is to suspend the affected part of the EEA Agreement under Article 102(5). Since the final remedy is the suspension of the Agreement rather than a possibility to appeal, the hybrid system of dispute resolution is, in general, not likely to benefit the weaker party, which is the EEA EFTA States.⁷¹ Only in some specific cases that do not involve an interpretation of the *acquis* may a dispute between the EEA contracting parties be referred to arbitration under Protocol 33 of the EEA Agreement.⁷²

As stated in the introduction above, the meaning of homogeneity is to allow the same rules to be applied in an equally effective manner across the expanded

⁶⁴ Article 111(3) EEA Agreement.

⁶⁵ Article 111(3) EEA Agreement; C Reymond (n 44) 473.

⁶⁶ T van Stiphout, 'Homogeneity vs. Decision-Making Autonomy in the EEA Agreement' (2007) 9 European Journal of Law Reform 431, 442-443.

⁶⁷ Article 111(3) EEA Agreement.

⁶⁸ Article 102(2) EEA Agreement.

⁶⁹ Article 102(3) EEA Agreement.

⁷⁰ Article 102(4) EEA Agreement.

⁷¹ C Reymond (n 44) 475-476.

⁷² Article 111(4) EEA Agreement.

market. The homogeneity provision laid down in Article 1(1) EEA Agreement is neutral as to the authoritative source of the interpretation and application of internal market *acquis* that would serve as a benchmark for homogeneity. From several provisions of the EEA Agreement it appears, however, that the upper hand in determining the effect that the homogeneous *acquis* must have in the EEA as a whole rests with the Court of Justice. Seemingly, the EEA EFTA States have retained their sovereignty whereas in practice this appears not to be the case entirely.

EEA law is polycentric.⁷³ Both EU and EEA EFTA courts, including national courts interpret internal market *acquis*. A homogeneous outcome in the EEA requires all of those judicial bodies to arrive at the same interpretation as concerns the rights conferred on individuals by the EEA Agreement. Certain provisions of the EEA Agreement and the SCA clarify how the uniform result in interpretation should be reached. Article 6 EEA Agreement stipulates that the provisions of the EEA Agreement that mirror EU *acquis* must be interpreted in conformity with the rulings of the Court of Justice of the EU, including the Court of Justice and the General Court,⁷⁴ given prior to the date of signature of the EEA Agreement. The Agreement was signed in Oporto on 2 May 1992. The EFTA Court and the national courts of the EEA EFTA States are not obliged to follow the post-1992 case law of the Court of Justice yet neither are they discouraged from doing so. Quite to the contrary, owing to the institutional shortcomings of the EEA Agreement as concerns the lack of obligation of the numerous judiciaries of the EEA to always follow one others' rulings, homogeneity of the EEA legal order can in practice only be upheld by the goodwill of the contracting parties. Furthermore, the case law of the Court of Justice has no *stare decisis* effect of precedent. Although such situations occur very seldom,⁷⁵ the Court of Justice may deviate from the previously given interpretations of EU law. In this respect, the concept of homogeneity necessarily requires careful consideration of the

⁷³ H Haukeland Fredriksen, 'One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area' (2010) 79 *Nordic Journal of International Law* 481, 482.

⁷⁴ Case E-2/94 *Scottish Salmon Growers* [1994-1995] EFTA Ct Rep 59, para 13.

⁷⁵ For example, Case 192/73 *Hag I* [1974] ECR 731 and Case C-10/89 *Hag II* [1990] ECR I-3711; and Case 120/78 *Cassis de Dijon* [1979] ECR 649 and Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

evolution of the Court's case law in time instead of stagnating in the pre-1992 state of the internal market.

Article 6 EEA Agreement is, furthermore, without prejudice to Article 3 SCA. The SCA was concluded between the EEA EFTA States and is, thus, only binding on them. While Article 3(1) SCA replicates in essence Article 6 EEA Agreement, paragraph 2 of the same Article stipulates that the ESA and the EFTA Court 'shall *pay due account* to the principles laid down by the relevant rulings by the Court of Justice of the European [Union]'⁷⁶ post-1992 when interpreting and applying EEA law that is identical to EU *acquis* contained in the EEA Agreement and the SCA. Taken by its wording, paying due account to the Court of Justice's case law is not the same as being obliged to follow the Court's interpretation. The EFTA Court has held that it is 'an inherent consequence' of the institutional system of the EEA that consists of two judiciaries that occasionally the two may arrive at different interpretations of common rules.⁷⁷ In practice, the EFTA Court has been accommodating towards the rulings of the Court of Justice regardless of their time of delivery.⁷⁸ There are numerous examples of case law that illustrate the EFTA Court's homogeneity-prone attitude.⁷⁹

The same does not hold true in the case of the Court of Justice. As witnessed above, the responsibility of maintaining judicial homogeneity in the EEA leans significantly towards the EFTA Court. One of the reasons for this is the fact that the Court of Justice is not only tasked with upholding homogeneity in the EEA but also with securing the uniform interpretation of EU law. When interpreting EEA rules that replicate EU *acquis* it is to be expected that the Court of Justice, first and foremost, bears in mind the development of the internal market. This would normally only pose problems in cases where EEA law is not interpreted in a manner identical to EU law, i.e. where the particular context of the EEA rule is different from that of the EU provision. The latter usually requires interpretation

⁷⁶ Emphasis added.

⁷⁷ Joined Cases E-9/07 and E-10/07 *L'Oréal* [2008] EFTA Ct Rep 259, para 28.

⁷⁸ *ibid.*

⁷⁹ EFTA Court cases citing post-1992 Court of Justice case law include, among others, Case E-1/94 *Restamark* [1994-1995] EFTA Ct Rep 15; Case E-6/96 *Wilhelmsen* [1997] EFTA Ct Rep 53; Joined Cases E-8/94 and E-9/94 *Mattel and Lego* [1994-1995] EFTA Ct Rep 113; Case E-8/97 *TV 1000* [1998] EFTA Ct Rep 68; Case E-1/95 *Samuelsson* [1994-1995] EFTA Ct Rep 145; Case E-2/95 *Eidesund* [1995-1996] EFTA Ct Rep 1; Case E-2/96 *Ulstein and Røiseng* [1995-1996] EFTA Ct Rep 65; Case E-3/96 *Ask* [1997] EFTA Ct Rep 1; Case E-3/98 *Rainford-Towning* [1998] EFTA Ct Rep 205; Case E-5/98 *Fagtún* [1999] EFTA Ct Rep 51.

that takes account of the deeper integration objectives in the EU. There are not many such examples, though.⁸⁰ Whenever the Court of Justice has provided an interpretation of internal market *acquis* the EFTA Court is likely to follow that by virtue of both Article 6 EEA Agreement and Article 3 SCA. Problems, from the perspective of homogeneity, arise when the EFTA Court is the first of the two to be faced with the task of interpreting a provision of EEA legislation that the Court of Justice, either in the context of the EU or the EEA, has not yet reviewed. This situation is also known as a 'going first constellation'.⁸¹ The EEA Agreement and the SCA are silent as to whether the Court of Justice, too, has an obligation to maintain homogeneous interpretation of EEA law by following the case law of the EFTA Court. The practice of the Courts reveals that the Court of Justice, too, often follows the interpretation provided by the EFTA Court. In a number of cases where the EFTA Court has ruled on a matter first the Court of Justice has subsequently upheld the EFTA Court's interpretation.⁸² Yet it is highly doubtful that the Court of Justice would consider itself bound by any obligation in this regard, including the objective of maintaining a homogeneous EEA. The Court of Justice has also on several occasions decided either not to refer to⁸³ or to deviate from previous interpretations given by the EFTA Court.⁸⁴ There are, moreover, examples of the EFTA Court deviating from the case law of the Court of Justice, albeit not to the extent of triggering a dispute settlement procedure under Article 111 EEA Agreement.⁸⁵

The best-known cases dealing with deviations from and re-alignment with previous case law are those belonging to the *Maglite-Silhouette-L'Oréal* saga. All

⁸⁰ For an example, see the discussion on *Maglite-Silhouette-L'Oréal* cases below.

⁸¹ C Baudenbacher, 'The EFTA Court and the European Court' in P-C Müller-Graff and E Selvig (eds), *EEA-EU Relations* (Berlin Verlag Arno Spitz 1999) 69, 81.

⁸² Joined Cases E-8/94 and E-9/94 *Mattel and Lego* (n 79) in Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini* [1997] ECR I-3843; Case E-3/00 *Kellogg's* [2000-2001] EFTA Ct Rep 73 in Case C-192/01 *Commission v Denmark* [2003] ECR I-9693 and Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375; Case E-3/02 *Paranova* [2003] EFTA Ct Rep 101 in Case C-348/04 *Boehringer Ingelheim* [2007] ECR I-3391. Advocates General, too, refer to EFTA Court's case law. See, for example, Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini* [1997] ECR I-3843, Opinion of AG Jacobs.

⁸³ For example, in Case C-189/95 *Franzén* [1997] ECR I-5909 the Court of Justice did not refer to the EFTA Court's advisory opinion in Case E-6/96 *Wilhelmsen* (n 79). The Court of Justice reached the same conclusion as the EFTA Court but on a different justification.

⁸⁴ Cases in which the Court of Justice deviated from previous EFTA Court case law include, for example, Joined Cases C-34/95, C-35/95 and C-36/95 *de Agostini* (n 82) deviating from Case E-5/96 *Nille* [1997] EFTA Ct Rep 30, and Case C-379/05 *Amurta* [2007] ECR I-9569 deviating from Case E-1/04 *Fokus Bank* [2004] EFTA Ct Rep 11.

⁸⁵ C Baudenbacher, 'The EFTA Court and the European Court' (n 81) 80-81.

of the cases concerned the interpretation of Article 7(1) of the Trade Marks Directive⁸⁶ and the question of whether the Directive settled in addition to EEA-wide exhaustion of trade mark rights also the question of international exhaustion or whether that determination was left for the national courts to make.⁸⁷ In *Maglite*, the EFTA Court found that the different objectives and contexts of the EU and the EEA – the one being a customs union and the other not – may justify different interpretation of the rule of international exhaustion of trade mark rules and that the Directive as it applies to the EEA, therefore, does not prohibit compulsory international exhaustion of trade mark rights.⁸⁸ In *Silhouette*, however, the Court of Justice found that the Directive did, indeed, preclude the Member States from applying the principle of international exhaustion of trade mark rights in addition to the EEA-wide exhaustion.⁸⁹ The differences in the two interpretations arose from the fact that the EFTA Court approached the issue from the angle of free trade and competition whereas the Court of Justice emphasised the functioning of the internal market.⁹⁰ Although in this case a difference in interpretation arose the matter did not become subject to a procedure in the EEA Joint Committee. Instead, the next time the EFTA Court dealt with the matter, in the *L'Oréal* case,⁹¹ it followed the Court of Justice's interpretation in *Silhouette* and, thus, ensured homogeneity by using the judicial means at hand.⁹² The EFTA Court held that the differences between the EU Treaties and the EEA Agreement did not, after all, call for a need for it to interpret the provision in question differently from the Court of Justice.⁹³ The EFTA Court considered both approaches to be equally relevant in the EU and the EEA context and, therefore, decided to abide by the choice made by the Court of Justice for the sake of upholding homogeneity.

Cases where the EFTA Court goes first involve, moreover, a valid concern for legal certainty. In spite of the homogeneity claim the specific legal issue at hand

⁸⁶ Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1.

⁸⁷ O-A Rognstad, 'The Conflict between Internal Market and Third Country Policy Considerations in the EEA. *Maglite Vs. Silhouette*' in P-C Müller-Graff and E Selvig (eds), *EEA-EU Relations* (Berlin Verlag Arno Spitz 1999) 131, 132.

⁸⁸ Case E-2/97 *Maglite* [1997] EFTA Ct Rep 127, paras 25-28.

⁸⁹ Case C-355/96 *Silhouette* [1998] ECR I-4799, para 52.

⁹⁰ Joined Cases E-9/07 and E-10/07 *L'Oréal* (n 77) para 30.

⁹¹ *ibid.*

⁹² H Haukeland Fredriksen, 'One Market, Two Courts' (n 73) 497.

⁹³ Joined Cases E-9/07 and E-10/07 *L'Oréal* (n 77) para 37.

cannot be considered to have been settled authoritatively in the EEA for as long as the Court of Justice has not expressed itself on the same matter and, should the Court depart from the interpretation previously given by the EFTA Court, until the latter has had the opportunity to pronounce itself on the same matter again and possibly align its case law with that of the Court of Justice. In the particular case of *Maglite*, it must be added that the EFTA Court's change of mind was not unpredictable. In the judgment, the EFTA Court did provide a reservation by establishing a minimum standard of exhaustion subject to future developments of case law.⁹⁴ Because of this proviso the impact of the later change in direction on individuals in terms of legal certainty cannot be considered significant.⁹⁵

With respect to the EFTA Court's reservation in *Maglite*, van Stiphout has deemed the EFTA Court to perceive itself as not having more than 'provisional authority'.⁹⁶ Magnússon claims that the same can be said about the Court of Justice.⁹⁷ Whereas both opinions can be considered justified to a certain extent the scales of provisional authority lean more strongly towards the EFTA Court. The seeming difference between the two courts is that the Court of Justice changes path in its case law because of its own determination whereas the EFTA Court in the *L'Oréal* case reversed its previous interpretation in order to realign itself with a ruling of the Court of Justice.

The Court of Justice is the final and authoritative interpreter of EU law. This does not mean that the Court may not accept the EFTA Court's interpretation of EEA law or even make references to it. One should not, however, imply from these references that the Court of Justice accepts the EFTA Court's interpretation because it perceives the latter to exercise judicial authority over its own judicial activity. Rather, the Court refers to the judgments of the EFTA Court because it finds no reason to deviate from the interpretation given by the latter in the given

⁹⁴ Case E-2/97 *Maglite* (n 82) para 22.

⁹⁵ S Magnússon, 'Judicial Homogeneity in the European Economic Area and the Authority of the EFTA Court. Some Remarks on an Article by Halvard Haukeland Fredriksen' (2011) 80 *Nordic Journal of International Law* 507, 532.

⁹⁶ T van Stiphout, 'The *L'Oréal* Cases - Some Thoughts on the Role of the EFTA Court in the EEA Legal Framework: Because it is worth it!' (2009) 1 *Jus & News* 7, 15.

⁹⁷ S Magnússon, 'Judicial Homogeneity in the European Economic Area' (n 95) 531.

case and, possibly, because it regards such references relevant from the point of view of homogeneity in the EEA.

The mere fact that two courts try to align their case law to that of one other does not mean that either of the courts considers itself bound to do so. There is a distinction between the binding and persuasive authority of judicial decisions.⁹⁸ The former category comprises judgments that must be followed in later case law unless the judge can find good reasons for not doing so, or even if the judge could, in fact, give good reasons for not doing so.⁹⁹ The latter category refers to previous decisions that have informative, rather than obligatory value.¹⁰⁰ The rulings of the Court of Justice given prior to 1992 have binding authority on the EFTA Court but no rulings of the EFTA Court have binding authority on the Court of Justice. It is apparent from *Maglite* and *Silhouette* that the Court of Justice does not set the homogeneity objective of the EEA Agreement above its own judicial authority. Contrary would be proven in cases in which the EFTA Court would depart from the case law of the Court of Justice and the Court of Justice would later follow the EFTA Court's precedent but to this date this has never happened.

When the Court of Justice arrives at a similar interpretation as the EFTA Court, these references are, therefore, informative in the sense of demonstrating that the EFTA Court has previously arrived at the same conclusion that the Court of Justice would make. Whereas agreeing with the approach of the EFTA Court in given cases may be coincidental the references that the Court of Justice makes to the EFTA Court's case law are, however, hardly that. Instead, the fact that the Court does refer to the EFTA Court's rulings, regardless of who had first ruled on the issue in question, shows that the Court of Justice, too, implicitly perceives that the proper functioning of the EEA Agreement requires, in practice, homogeneity in the interpretation of identical rules and that there is, thus, a need to signal the existence of such homogeneity where this does not conflict with the Court's own judicial authority. Even though formally the rulings of the EFTA Court do not bind the Court of Justice and neither do the post-1992 rulings of the Court of Justice bind the EFTA Court beyond 'duly taking them into account' it

⁹⁸ AG Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects' (1984) 4 Yearbook of European Law 1, 20.

⁹⁹ R Cross and JW Harris, *Precedent in English Law* (Oxford University Press 1991) 4.

¹⁰⁰ AG Toth (n 98) 20.

cannot be denied that the persuasive authority of these rulings is, still, to some extent an authority, even if very 'soft'.

In comparison to the Court of Justice, the EFTA Court certainly enjoys a lesser degree of independence in interpreting EEA *acquis* than the Court of Justice even if this loss of independence is at times voluntary. One further example illustrating the generally weaker position of the EFTA Court in the EEA equation is the fact that the Court of Justice but not the EFTA Court has jurisdiction to rule on the validity of internal market *acquis*. The Court of Justice enjoys the exclusive jurisdiction to review the legality of legislative acts adopted by EU institutions and, if necessary, declare them void.¹⁰¹ In the EU pillar of the EEA the Court of Justice may, moreover, rule on the validity of the Council decision that concluded the EEA Agreement and Council decisions by which the Union's positions to be taken in the EEA Joint Committee are adopted.¹⁰² Should the Court of Justice declare void the Council decision concluding the EEA Agreement, the international obligations of the EU *vis-à-vis* the other contracting parties would remain in place until the Agreement is denounced in accordance with the rules of international treaty law. The EFTA Court, on the other hand, enjoys no similar powers. The EFTA Court can neither review the legality of EU law nor the legality of the decisions of the EEA Joint Committee.¹⁰³ In the EFTA pillar of the EEA only the EEA EFTA States' national courts can review the validity of the national legislation implementing EEA law following their own constitutional procedures.

In addition to the provisions on taking into account each other's case law there are procedural provisions in place with the aim of promoting homogeneity in the EEA. The EU and the European Commission may intervene in proceedings before the EFTA Court¹⁰⁴ and the EEA EFTA States and the ESA may intervene in proceedings before the Court of Justice in cases that concern the application of EEA law or EU *acquis* replicated by the EEA Agreement. To this end, Articles 20 and 37 of the Statute of the Court of Justice and the Court of First Instance of the

¹⁰¹ Articles 263-264 TFEU.

¹⁰² See, for example, Case C-431/11 *United Kingdom v Council* (Court of Justice, 26 September 2013).

¹⁰³ The EFTA Court has, however, under Article 34 SCA the jurisdiction to assess the limits of the competences of the EEA Joint Committee. See, for example, Case E-6/01 *CIBA* [2002] EFTA Ct Rep 281, paras 21-23.

¹⁰⁴ Article 36 of the Statute of the EFTA Court, Protocol 5 to the EEA Agreement.

European Communities (now Articles 23 and 40 of the Statute of the Court of Justice of the European Union) were amended accordingly.¹⁰⁵ The EEA EFTA States and the ESA may appear in proceedings between EU institutions and EU Member States as well as in preliminary ruling proceedings provided that the cases concern one of the fields of application of the EEA Agreement.¹⁰⁶ The second paragraph of Article 40 of the Statute, however, provides that natural or legal persons, including the ESA, may only intervene in a case before the Court of Justice of the EU if they can establish an interest in the result of that case, with the exception of cases between Member States, between EU institutions or between EU institutions and Member States.¹⁰⁷ Article 36 of the Statute of the EFTA Court does not restrict the intervention rights of the EU and the Commission in a similar manner. Only recently has the Court of Justice actually refused to allow the ESA to intervene in the proceedings of a case that did concern a field covered by the EEA Agreement because the parties to the case were an EU institution and an EU Member State.¹⁰⁸ Previously In other similar cases had EEA EFTA States been granted leave to intervene in proceedings before the Court.¹⁰⁹

The lack of reciprocity in the intervention rights under the Statute of the Court of Justice and the Statute of the EFTA Court, respectively, has prompted many authors to note the lack of procedural homogeneity in the EEA.¹¹⁰ While generally unknown as a concept within EU law, procedural homogeneity has been recognised by the EFTA Court.¹¹¹ Although it is not explicit in either the

¹⁰⁵ Declaration by the European Community on the Rights for the EFTA States before the EC Court of Justice annexed to the Final Act of the EEA Agreement [1994] OJ L1/3, para 1.

¹⁰⁶ Council Decision of 22 December 1994 amending the Protocol on the Statute of the Court of Justice of the European Community (94/993/EC) [1994] OJ L379/1, Article 1(4).

¹⁰⁷ Order of 19 January 2012 in Joined Cases T-289/11, T-290/11 and T-521/11 *Deutsche Bahn* (General Court, 6 September 2013), para 7.

¹⁰⁸ Order of 15 July 2010 in Case C-493/09 *Commission v Portugal* [2011] ECR I-9247, paras 11-12.

¹⁰⁹ See, for example, Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; Order of 10 July 2006 in Joined Cases C-14/06 and C-295/06 *Parliament and Denmark v Commission* [2008] ECR I-1649.

¹¹⁰ S Magnusson, 'Procedural Homogeneity v. Inconsistency of European Courts - Comments on Order of the EFTA Court President of 15 June 2012 in Case E-16/11 EFTA Surveillance Authority v. Iceland', (2012), 196 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140717> accessed 24 June 2015; C Baudenbacher, 'The EFTA Court and Court of Justice of the European Union: Coming in Parts But Winning Together', *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (T.M.C. Asser Press 2013) 183.

¹¹¹ '[...] for the sake of procedural homogeneity [...]': Order of 25 March 2011 in Case E-14/10 *Konkurrenten.no* [2011] EFTA Ct Rep 266, para 9.

EEA Agreement, the ECT or the ECAA Agreement that the homogeneity principle would extend to the procedural realm, it is for the sake of homogeneity that the institutions set up for ensuring the proper functioning of these agreements should also be equipped with the tools necessary to safeguard the uniform interpretation and application of the internal market *acquis*. This necessarily includes interpreting the identical procedural and institutional rules of the EU and the multilateral agreements in a coherent and uniform manner.¹¹²

2.2.2 Energy Community

Neither the ECAA nor the Energy Community establishes any judicial institutions. Article 94 ECT allocates the task of interpreting the aspects of the Treaty that mirror EU *acquis* to the Ministerial Council who may, in turn, delegate the matter to the PHLG. Energy Community law that replicates EU *acquis* must be interpreted in conformity with the case law of the Court of Justice. Compared to the EEA, Article 94 of the ECT contains no reservation for post-signature case law suggesting that Energy Community *acquis* might be more dynamic than EEA *acquis*. When no interpretation has yet been given by the Court, 'guidance' on how to interpret the ECT will be provided by the Ministerial Council or, upon delegation from the latter, the PHLG. The interpretation provided by the political institutions of the Energy Community does not, however, bind the Court subsequently to a certain interpretation of EU law. Article 94 ECT clearly states that it is the 'institutions' of the Energy Community that must interpret Energy Community law in conformity with the case law of the Court without any reference to the national courts of the non-EU parties to the ECT. Neither Article 6 EEA Agreement nor Article 16(1) ECAA Agreement restricts the requirement of conforming interpretation to the institutions only. To the contrary, they refer to the 'implementation and application' of identical provisions. Nevertheless, the cases in which the Energy Community institutions interpret Energy Community *acquis* include the dispute settlement procedures in the Ministerial Council. There is, thus, a centralised means of ensuring judicial homogeneity in the Energy Community even if political in nature.

¹¹² S Magnusson, 'Procedural Homogeneity' (n 110) 4-5. See also C Baudenbacher, 'The EFTA Court and the Court of Justice of the European Union' (n 110) 194.

2.2.3 European Common Aviation Area

In the ECAA, the same rule applies with regard to the judgments of the Court of Justice on legislative acts reproduced in the ECAA Agreement as in the EEA – only judgments given before the date of signature of the ECAA Agreement are subject to conforming interpretation.¹¹³ Later decisions are communicated to the contracting parties and at the request of one of the latter the implications of such later rulings and decisions will be determined by the ECAA Joint Committee. The decisions of the ECAA Joint Committee taken in this regard must conform to the case law of the Court of Justice.¹¹⁴ The ECAA Joint Committee must keep the development of the case law of the Court under constant review. The EU forwards to the ECAA Partners all relevant judgments of the Court. Just as the EEA Joint Committee, the ECAA Joint Committee shall act so as to preserve the homogeneous interpretation of the ECAA Agreement and has three months to do so.¹¹⁵

Dispute settlement in the ECAA is conducted by the ECAA Joint Committee. Matters of dispute concerning the application or interpretation of the ECAA Agreement may be brought to the Joint Committee by the EU acting together with its Member States or by an ECAA Partner.¹¹⁶ The dispute settlement procedure starts with immediate consultations between the parties to the dispute. The EU is always involved in the procedure, if not as a party to the dispute then as an invited participant to the consultations. If the disputing parties manage to agree to a solution they draft a proposal in that regard and submit it to the ECAA Joint Committee. In the absence of an ECAA court, the ECAA Joint Committee is more likely to become involved in the settlement of disputes between the parties than the EEA Joint Committee.¹¹⁷

Also in the case of the ECAA, the Court of Justice enjoys a special position as an authoritative interpreter of EU *acquis*. The ECAA Joint Committee must respect the case law of the Court of Justice in the dispute settlement procedure.¹¹⁸ Furthermore, if the ECAA Joint Committee is unable to solve a dispute between

¹¹³ Article 16(1) ECAA Agreement.

¹¹⁴ *ibid.*

¹¹⁵ Article 18(7) ECAA Agreement.

¹¹⁶ Article 20(1) ECAA Agreement.

¹¹⁷ Opinion 1/00 ECAA (n 33) para 8.

¹¹⁸ Article 20(2) ECAA Agreement.

the contracting parties within four months, the parties to the dispute may refer it to the Court whose decision shall be final and binding.¹¹⁹ In such an event the parties to the dispute may, moreover, take appropriate safeguard measures for a period of maximum six months. After six months each Party may denounce the ECAA Agreement with immediate effect. It is noteworthy that referring a dispute to the Court of Justice precludes the adoption of safeguard measures except in cases of aviation safety or compliance with mechanisms provided for in individual acts.¹²⁰ Finally, similarly to the EEA and also the Energy Community, although not explicit in the ECT, the jurisdiction of the Court of Justice also extends to a legality review of the decisions taken under the ECAA Agreement by EU institutions.¹²¹

3 Safeguarding homogeneity: decentralising dynamics

3.1 Surveillance and enforcement

In the area of surveillance, the decentralising dynamics of the EU legal order is reflected in the role of the EU Member States' institutions in the EU institutional architecture. The concepts of unity of the internal market and of the EU legal order assume particular relevance in this context. In order to preserve the 'Community character'¹²² or the 'Community nature'¹²³ of EU law the Union relies on a set of common procedures and institutions, including those of the Member States. Direct administration of EU law on the Union level is limited to certain specific areas only; instead, the Member States are the primary implementers and enforcers of EU law.¹²⁴ For example, the Member States' customs authorities act as EU customs authorities,¹²⁵ and the Member States' competition authorities assist the Commission in the investigation procedures.¹²⁶ National authorities are also empowered to implement and apply EU *acquis* exported to non-member states as well as to investigate breaches of

¹¹⁹ Article 20(3) ECAA Agreement.

¹²⁰ Article 20(4) ECAA Agreement.

¹²¹ Article 15(3) ECAA Agreement.

¹²² Case 166/73 *Rheinmühlen I* [1974] ECR 33, para 2.

¹²³ Case 104/81 *Kupferberg* [1982] ECR 3641, para 14.

¹²⁴ HCH Hofmann and AH Türk, 'Policy implementation' in HCH Hofmann and AH Türk (eds), *EU Administrative Governance* (Edward Elgar Publishing 2006) 74, 74.

¹²⁵ See, for example, Report of the Panel, *European Communities - Customs Classification of Certain Computer Equipment (LAN case)*, WT/DS62/R, WT/DS67/R, WT/DS68/R, para 4.14.

¹²⁶ Article 105(1) TFEU.

those rules. When implementing EU law, the national authorities are not entirely free in their activities. The Member States are under a general obligation to abide by the principles of unity and solidarity with the EU.¹²⁷ The Member States must ensure the ‘effective defence of the common interests of the [Union]’¹²⁸ and may not act where concurrent action would compromise the ‘unity of the [Internal] Market and the uniform application of [Union] law’.¹²⁹

Decentralisation also finds expression in the possibilities of individuals and economic operators to indirectly trigger infringement proceedings for non-compliance with EU law. Individuals may, for example, submit complaints to notify the Commission of possible breaches of EU law by a Member State. However, there is no guarantee for an EU individual to have their rights under EU law upheld by the Commission. The Commission enjoys discretion as to whether to initiate infringement proceedings against a Member State for failure to fulfil their obligations under EU law. Considering the vast amount of individual complaints received, the number of cases actually taken up by the Commission is very low.

In the EEA, individuals may lodge complaints either to the ESA against an EEA EFTA State allegedly infringing of EEA law, or to the European Commission against assumed breaches of the EEA Agreement by the EU or its Member States. In the Energy Community and the ECAA no such general complaints can be submitted. Since anyone can lodge a complaint to the Commission regarding a breach of EU law by a Member State, theoretically, also nationals of the non-EU contracting parties to the ECT or the ECAA Agreement may lodge complaints. This means of recourse is not applicable for complaints against non-EU Member States, though. Finally, the complaints procedure is established for the purpose of informing the Commission of potential breaches only. Individual remedies must always be sought in national courts.

¹²⁷ Opinion 1/76 *European laying-up fund for inland waterway vessels* [1977] ECR 741, para 12.

¹²⁸ Opinion 1/75 *Re Understanding on a Local Costs Standard* [1975] ECR 1355, paras 15-18.

¹²⁹ Case 22/70 *AETR* [1971] ECR 263, para 31.

3.2 Interpretation and dispute settlement

3.2.1 European Union

Individual rights derived from internal market law within and outside the EU are protected by the judicial system. The protection of individual rights rests on the principle of effective legal protection. The principle is provided in Article 67(4) TFEU that obliges the Union to facilitate access to justice and in Article 47 of the Charter of Fundamental Rights that establishes the right to an effective remedy and to a fair trial. Underlying the constitutional traditions of the EU Member States, effective legal protection is a general principle of EU law.¹³⁰ Moreover, by virtue of Articles 6 and 13 ECHR the principle is binding on all EU Member States as well as all non-EU parties to the EEA Agreement, the ECT and the ECAA Agreement.

The duty of cooperation enshrined in Article 4(3) TEU obliges the Member States to contribute to the protection of the rights that individuals derive from EU law.¹³¹ The duty is engrained in the institutional architecture of the EU. The two-tier judicial system of the EU envisages that not only the Court of Justice but also national courts participate the protection of individual rights arising from the Treaties. Member States' courts form an indispensable part of the EU judicial architecture.¹³² The EU and the Member States' judiciaries are separate yet 'closely interlinked, dependent on and related to each other'.¹³³ Where no jurisdiction has been conferred upon the Court of Justice, it is the national courts that must apply EU law and do so in a manner that 'ensures the effective application of [EU] law [...] in line with the deeper philosophy of unity and diversity underlying the Union itself.'¹³⁴

¹³⁰ Case 222/84 *Johnston* [1986] ECR 1651, para 18. Case C-432/05 *Unibet* [2007] ECR I-2271, para 37.

¹³¹ Case 33/76 *Rewe* [1976] ECR 1989, para 5; Case 106/77 *Simmenthal* [1978] ECR 629, para 21; Case C-432/05 *Unibet* (n 130) para 38;

¹³² Case 26/62 *Van Gend en Loos* (n 1); Case 166/73 *Rheinmühlen I* (n 122) para 2; Case 348/89 *Mecanarte* [1991] ECR I-3277, para 44; Case C-210/06 *Cartesio* [2008] ECR I-9641, Opinion of AG Poiares Maduro, para 19; Opinion 1/09 *Patents Court* [2011] ECR I-1137, paras 83-85.

¹³³ I Pernice, 'Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited' (1999) 36 *Common Market Law Review* 703, 710; also I Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 *Columbia Journal of European Law* 349, 374.

¹³⁴ K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625, 1625; Case 166/73 *Rheinmühlen I* (n 122) para 2.

In *Simmenthal*, the Court ruled that national courts as ‘organ[s] of a Member State’ must protect the rights conferred on individuals by EU law in cases that fall within their jurisdiction.¹³⁵ National courts must, firstly, apply EU law in an effective manner. The Member States have an obligation under Article 19(1) TEU to ensure the effective legal protection of individual rights in areas covered by EU law through appropriate remedies. Secondly, national courts must make proper use of the preliminary ruling procedure. Under Article 267 TFEU the Court of Justice has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of secondary EU legislation.¹³⁶ This procedure is central to the protection of individual rights in the EU.¹³⁷

The proper use of the preliminary ruling procedure includes two elements. Firstly, a national court of last instance must refer a case involving EU law for preliminary ruling if necessary for it to give a judgment in the case. Secondly, the preliminary ruling given by the Court is binding on the national court.¹³⁸ Member State courts or tribunals may request the Court to give a ruling when they consider it necessary to enable them to give a judgment in the case before them whereas courts of last instance must do so.¹³⁹ These measures are to ensure that all questions relating to the interpretation and application on which the Court has not already given a preliminary ruling¹⁴⁰ or which do not constitute an *acte clair*¹⁴¹ are, indeed, decided centrally by the Court of Justice. The decision on whether or not to refer a request to the Court of Justice is strictly for the national court to make because it is the national courts that court responsible for adjudicating the case and the Court is, in principle, bound to give the ruling.¹⁴²

The preliminary reference procedure has primarily been considered a measure to provide for a judicial dialogue between the EU and the national judiciaries but

¹³⁵ Case 106/77 *Simmenthal* (n 131) para 16.

¹³⁶ Furthermore, Article 256(3) TFEU provides that in specific areas laid down by the Statute of the Court of Justice the General Court has jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU.

¹³⁷ Case C-224/01 *Köbler* [2003] ECR I-10239, para 35.

¹³⁸ Opinion 1/91 *EEA I* (n 4) para 61.

¹³⁹ Article 267 TFEU.

¹⁴⁰ Case 283/81 *CILFIT* [1982] ECR 3415, para 13.

¹⁴¹ ‘Where the correct application of Community law [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved’: *ibid* para 16.

¹⁴² Case C-36/02 *Omega* [2004] ECR I-9609, para 19.

judicial dialogue alone does not always lead to effectiveness in legal protection. The national judicial systems must also feature certain effectiveness-ensuring elements. The quest for effectiveness may, therefore, in some circumstances conflict with the notion of national procedural autonomy.¹⁴³ The Court has, however, asserted that it will not itself get involved in the particular procedures of the national legal systems provided that the Member States do guarantee the effective protection of individual rights.¹⁴⁴

The duty of sincere cooperation also requires national courts to ensure the legal protection of individuals by upholding the direct effect of EU law.¹⁴⁵ Encompassing both rights and specific requirements for remedies, the notion of 'effectiveness' brings together the principles of primacy and direct effect in an even wider concept.¹⁴⁶ National rules must not be 'less favourable than those governing similar domestic actions (principle of equivalence)' or 'render virtually impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)'.¹⁴⁷ The domestic legal orders must, consequently, guarantee that individuals do not find it more difficult or even impossible in practice to uphold their rights acquired through directly effective EU law than from national law, as long as there are no EU rules on the matter.¹⁴⁸ If no national procedures that would ensure the effectiveness of EU law exist in the national legal systems, the Court has ordered a national court to create the procedure missing in national law.¹⁴⁹

It is apparent that the judicial architecture of the EU cannot itself guarantee complete uniformity of interpretation and application of EU law as compared to the uniformity of the legal systems of the Member States. The question is whether the apparent impossibility of achieving uniformity should be accepted as inevitable in a supranational legal order while maintaining the sovereignty of the constituent states or whether the idea of uniformity should prevail at all

¹⁴³ The two are closely linked. See M Accetto and S Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' (2005) 11 *European Public Law* 375, 394.

¹⁴⁴ Case C-224/01 *Köbler* (n 137) para 47.

¹⁴⁵ Case 45/76 *Comet* [1976] ECR 2043, para 12.

¹⁴⁶ S Weatherill, *Law and Integration in the European Union* (Clarendon Press 1995) 117.

¹⁴⁷ Case C-129/00 *Commission v Italy* [2003] ECR I-14637, para 25, summarising earlier cases 33/76 *Rewe* (n 131) para 5, and C-255/00 *Grundig Italiana* [2002] ECR I-8003, para 33.

¹⁴⁸ Case 45/76 *Comet* (n 145) paras 13 and 15-16.

¹⁴⁹ Case C-213/89 *Factortame* [1990] ECR I-2433, para 21.

costs for the purpose of effective legal protection. The principle of effectiveness obviously has its natural limits and these can be found within the need to include national courts. The latter enjoy their own autonomy and express certain reluctance towards authority coming from the outside.

Overall, because of the national courts' possibility to consider whether or not it is necessary in a particular case to refer a question to the Court for a preliminary ruling and because of the national court being able to determine how, if at all, to apply the preliminary ruling given, the Court depends to a very large extent on national courts to maintain judicial uniformity within the EU. Since individuals generally lack direct access to the Court their only possibility of directly enforcing their rights under the Treaties is through the national judiciaries. Should a national court refrain from referring a request to the Court if it is obliged to do so or should it fail to implement a ruling by the Court, the Member State will be in breach of its obligations under the Treaties. Similarly as under international law, the liability of a Member State for a breach of EU law is irrespective of the national authority whose act or omission gave ground to the breach.¹⁵⁰ This includes the judiciary, as under international law the state is generally regarded as a single entity.¹⁵¹ Under EU law, too, the fact that a Treaty obligation is breached by means of an act of the judiciary does not liberate the Member State of its obligations under the Treaties.¹⁵² The duty of sincere cooperation imposes an obligation on the Member States to take 'all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.¹⁵³ In the context of state liability, the duty of sincere cooperation was already established by the Court in *Francovich*.¹⁵⁴

Holding a Member State liable for breaches of EU law committed by courts of last instance is, moreover, central to the question of effectiveness of EU law, as the highest courts' in compliance with the preliminary ruling procedure severely

¹⁵⁰ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paras 32 and 34.

¹⁵¹ Case C-224/01 *Köbler* (n 137) para 32.

¹⁵² Case 77/69 *Commission v Belgium* [1970] ECR 237, para 15.

¹⁵³ Joined Cases C-397/01 to C-403/01 *Pfeiffer* [2004] ECR I-8835, para 110.

¹⁵⁴ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci* [1991] ECR I-5357, para 36.

limits the remedies available to individuals for asserting their rights under EU law.¹⁵⁵ If a national court adjudicating at last instance has, indeed, failed to defend the rights of a party bestowed upon the individual by EU law, the individual cannot appeal the decision but must instead file a new claim in a national court for reparation for the loss incurred.

In practice, the Court of Justice has been very cautious to establish state liability in cases of a national court failing to make proper use the preliminary ruling procedure. This is notwithstanding the fact that it had long been established by the Court that actions or omission of all institutions of the Member States, including those 'constitutionally independent' may constitute failures of the Member State to fulfil its obligations under EU law.¹⁵⁶ Whether this includes an obligation on behalf of the Member State to provide restitution to the individual affected was not as clear.

A string of case law of the Court illustrates the move towards the liability of national judiciaries for breaches of EU law. In *Köbler*, an Austrian court submitted a request for a preliminary ruling to the Court.¹⁵⁷ During the proceedings the Court notified the Austrian court that it had given a ruling in a similar case. Supposing that the preliminary ruling already given might enable it to adjudicate on the matter, the Austrian court subsequently withdrew its request. The Austrian court's interpretation of the Court's ruling in the other case was, however, wrong, and the applicant's request was wrongly dismissed. In other cases, too, national courts have failed, either by mistake or deliberately, to refer questions to the Court at all.¹⁵⁸ In *Köbler*, the Court found that the protection of individual rights necessarily entails redress for the damage caused to an individual by a breach of EU law by a national court adjudicating at last instance.¹⁵⁹ State liability follows such a breach when three conditions are fulfilled: firstly, if the infringed rule is intended to confer rights on individuals; secondly, if the breach is sufficiently serious; and, thirdly, if there is a direct causal link between the breach of the obligation and the loss or damage suffered

¹⁵⁵ Case C-224/01 *Köbler* (n 137) paras 33-34.

¹⁵⁶ Case 77/69 *Commission v Belgium* (n 152) para 15.

¹⁵⁷ Case C-224/01 *Köbler* (n 137).

¹⁵⁸ For examples, see DWK Anderson and M Demetriou, *References to the European Court* (Sweet & Maxwell 2002) 177-180.

¹⁵⁹ Case C-224/01 *Köbler* (n 137) paras 36-37.

by the injured party.¹⁶⁰ National rules may set lower thresholds for establishing liability¹⁶¹ but not higher.¹⁶² The existence of a right for reparation originates from EU not national law but the latter provides the procedural framework for making reparation for the damages.¹⁶³ Importantly, the bearer of the responsibility is the Member State not the national court or judge, thus not affecting the independence of the judiciary.¹⁶⁴

While the first and the third condition can be fulfilled more easily, the Court has been reluctant to recognise the existence of a ‘sufficiently serious breach’. This is largely due to the sensitivity involved in one court – the Court of Justice – ‘condemning’ another, usually a supreme court of a Member State.¹⁶⁵ In *Köbler*, the Court noted that the ‘specific nature of the judicial function’ and legal certainty do play a role in establishing a sufficiently serious breach, leaving only ‘exceptional case[s] where the court has manifestly infringed the applicable law’ as potentially incurring state liability.¹⁶⁶ Again, the assessment is to be made by the national court that hears the claim for reparation. The national court must assess the clarity and precision of the infringed rule, the possible intention of the infringing court, whether the error was excusable or not, the position taken by the EU and, finally, whether the court had failed to comply with an obligation to make a reference for a preliminary ruling to the Court.¹⁶⁷ The clear indication that the Court gave of a sufficiently serious breach was a ‘manifest error’ in following the Court’s case law.¹⁶⁸ The criterion is almost tautological and definitely difficult to apply, leaving the national courts with very little guidance or authority to criticise a decision of a higher court.

In *Köbler*, the Court found that the Austrian court had misread the previous preliminary ruling and was thus excused without referring to the conditions it

¹⁶⁰ Case C-424/97 *Haim* [2001] ECR I-5123, para 36.

¹⁶¹ Case C-224/01 *Köbler* (n 137) para 57.

¹⁶² Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177, para 46.

¹⁶³ Case C-224/01 *Köbler* (n 137) para 58.

¹⁶⁴ *ibid* para 42. AG Geelhoed, however, interprets the independence of the judiciary as independence from external influence when deciding on specific cases, not independence from a declaration that the case law of the national court has constituted an infringement of EU law by the Member State: Case C-129/00 *Commission v Italy* [2003] ECR I-14637, Opinion of AG Geelhoed, para 56.

¹⁶⁵ K Lenaerts, I Maselis and K Gutman, *EU Procedural Law* (Oxford University Press 2014) 102-103.

¹⁶⁶ Case C-224/01 *Köbler* (n 137) para 53.

¹⁶⁷ *ibid* para 55.

¹⁶⁸ *ibid* para 56.

had established itself previously in the analysis of the case. The judgment, although significant in making an introduction to the line of case law establishing the conditions for state liability for the omissions of the national judiciary, gave ground to loud critique. The critique has been directed both towards the confusing array of criteria for establishing a breach¹⁶⁹ as well as the final outcome of the case.¹⁷⁰

One further argument often raised in the context of holding national courts liable for breaches of EU law is the proper application of the principle of *res judicata*. National legal orders usually feature a system of complete legal remedies the exhaustion of which in all available instances leads to an expectation that the final decision will be final and that the legal relations can return to a *stabile state*. It was argued in the proceedings of *Köbler* that reopening a case due to new proceedings seeking to establish whether an infringement of EU law had taken place could harm the legal certainty of the parties. The Court addressed the question and stated that the principle of *res judicata* will not be called into question because the case that the national court has finished reviewing would not be reopened. Instead, new proceedings will be begun for the purpose of establishing reparation for eventual damage caused by an unlawful decision of a national court adjudicating at last instance. Neither the purpose of the new proceedings nor necessarily the parties will be the same as in the original dispute.¹⁷¹ In sum, the Court found that state liability for judicial decisions does not conflict with the principle of *res judicata*.¹⁷²

In general terms, the conflict between the principle of *res judicata*, on the one hand, and the supranational judicial architecture of the EU and the principle of effective judicial protection in EU law, on the other hand, is enrooted in the EU legal order and, especially, the institutional architecture of the EU. The conflict translates into a choice between allowing for errors of the judiciary, including the possibility of deliberate errors, or insisting on the uniformity of the EU legal system for the price of interfering with the established institutional balance and

¹⁶⁹ P Cabral and MC Chaves, 'Member State Liability for Decisions of National Courts Adjudicating at Last Instance' (2006) 13 Maastricht Journal of European and Comparative Law 109, 120-121.

¹⁷⁰ *ibid* 123.

¹⁷¹ Case C-224/01 *Köbler* (n 137) para 39.

¹⁷² *ibid* para 40.

hierarchies in the national judicial orders. Clearly, the Court has made its choice for the latter and for the effectiveness of the protection of individual rights.

In addition to constitutional law concerns, the idea of a national court reviewing the decisions of a higher court is surrounded by practical difficulties. As AG Léger pointed out in his opinion in *Köbler*, referring a request for a preliminary ruling to the Court may be the best way for a national court to deal with the situation – both because of removing doubts about the impartiality of the national court as well as circumventing the sensitive issue of a lower court reviewing a decision of a higher court.¹⁷³ The Court would, however, once again be asked to express itself on the interpretation of a rule of EU law rather than to ascertain the responsibility of a national court in the particular instance. This is notwithstanding the fact that the Court of Justice can provide rather specific guidance to the national court on how to classify the situation of an alleged breach.

Köbler has been followed by a number of cases specifying the liability of Member States for breaches of EU law by the national judiciary and especially the highest courts. The line of significant cases includes *Kühne & Heitz*,¹⁷⁴ *Commission v Italy*,¹⁷⁵ *Traghetti del Mediterraneo*,¹⁷⁶ and, most recently, *Commission v Spain*.¹⁷⁷

Concerns have been raised about the possible damage that the principle of state liability for actions and omissions of the national judiciaries causes to the judicial dialogue between the EU and the Member States' national courts. After all, it defeats the purpose of a dialogue if the one party can force the other to align with its side of the story.¹⁷⁸ Member States have expressed numerous objections to the case law of the Court discussed above.¹⁷⁹ There is, indeed, a delicate balance between ensuring the effective protection of individual rights across the Union and, thereby, the unity of EU law, on the one hand, and national procedural autonomy and other procedural principles, on the other. Neither of

¹⁷³ Case C-224/01 *Köbler* [2003] ECR I-10239, Opinion of AG Léger, para 111.

¹⁷⁴ Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.

¹⁷⁵ Case C-129/00 *Commission v Italy* (n 147).

¹⁷⁶ Case C-173/03 *Traghetti del Mediterraneo* (n 162).

¹⁷⁷ Case C-154/08 *Commission v Spain* [2009] ECR I-187.

¹⁷⁸ J Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 *Common Market Law Review* 9, 23.

¹⁷⁹ PJ Wattel, '*Köbler*, *CILFIT* and *Welthgrove*: We can't go on meeting like this' (2004) 41 *Common Market Law Review* 177.

these aspects can light-heartedly be sacrificed for the other. The dilemma only proves that not even the EU's institutional framework is flawless when it comes to the objective of setting up an internal market in which all market participants enjoy the same set of rights and obligations. Insofar as several layers of institutions are involved in the interpretation and application of identical rules without one clear hierarchy such as in the national court systems, discrepancies are likely to happen and some of them rather difficult if not impossible to remedy.

3.2.2 European Economic Area

The EEA Agreement, too, contains the principle of effective judicial protection,¹⁸⁰ confirmed by the EFTA Court in *Ásgeirsson*.¹⁸¹ In the EEA, an advisory ruling procedure is in place to contribute to the 'proper functioning of the EEA Agreement to the benefit of individuals and economic operators'.¹⁸² In *Bellona*, the EFTA Court stated that access to justice formed an essential element of the EEA legal framework, subject to conditions and limitations following from EEA law.¹⁸³ Furthermore, similarly to the Court of Justice *vis-à-vis* the EU legal order, the EFTA Court stated that in the absence of EEA rules it is for the national legal systems to create procedures for the protection of the rights that individuals derive from EEA law with the qualification that national procedures may not discriminate against persons deriving their rights from EEA law or restrict their fundamental freedoms.¹⁸⁴

Both the EEA and the ECAA Agreements promote judicial dialogue as a means of ensuring the effectiveness of the *acquis*. Under Article 107 EEA Agreement, EEA EFTA States may allow their courts or tribunals to ask the Court of Justice to decide on the interpretation of an EEA rule. This procedure is explained in Protocol 34 of the EEA Agreement. The EEA EFTA States are at liberty to determine the scope and modalities of this possibility, and communicate their intentions in this regard to the Depositary of the Court of Justice who will then

¹⁸⁰ Recital 8, Preamble to the EEA Agreement.

¹⁸¹ Case E-2/03 *Ásgeirsson* [2003] EFTA Ct Rep 185, para 28.

¹⁸² *ibid* para 24.

¹⁸³ Case E-2/02 *Bellona* [2003] EFTA Ct Rep 52, para 36.

¹⁸⁴ Case E-5/10 *Kottke* [2009-2010] EFTA Ct Rep 320, paras 26-27.

notify the other contracting parties.¹⁸⁵ However, none of the EEA EFTA States have enabled their courts to benefit from the possibility of direct dialogue with the Court.¹⁸⁶

The EEA also features other types of judicial dialogue. The Court of Justice and the EFTA Court function as a 'system of parallel functions and competencies'.¹⁸⁷ Since the EEA Agreement is part of the EU legal order, the EU Member States are bound to apply it as EU law.¹⁸⁸ Failure to do so, including in the form of not requesting a preliminary ruling from the Court or not upholding the Court's interpretation of the EEA Agreement may result in infringement proceedings being brought against the Member State and possible state liability for damage caused to individuals. In the EFTA pillar of the EEA, the EFTA Court provides advisory opinions on the interpretation of the EEA Agreement.¹⁸⁹ Any court of tribunal of the EEA EFTA States may, if faced with a question about the interpretation of the EEA Agreement, request the EFTA Court for an advisory opinion if it considers such opinion necessary for being able to give a ruling in a pending case. The SCA endows the right to request an advisory opinion upon all EEA EFTA States' national courts. The states themselves may decide, but are under no obligation, to limit the possibility to make requests to those courts and tribunals only against whose decisions there are no judicial remedies under national law.¹⁹⁰

Instead of preliminary rulings, the EFTA Court gives advisory opinions. Pursuant to the EFTA Court, the advisory opinion is 'a specially established means of judicial co-operation between the Court and national courts'.¹⁹¹ National courts are 'entitled' rather than obliged to request an advisory opinion from the EFTA Court.¹⁹² In the meantime, the EFTA Court recognised the identical wording of Articles 267 TFEU and 34 SCA in the essential elements of the provisions,¹⁹³ as well as interpreted the prerogatives of the national court to request an advisory

¹⁸⁵ Article 2 Protocol 34 to the EEA Agreement.

¹⁸⁶ H Haukeland Fredriksen, 'One Market, Two Courts' (n 73) 487.

¹⁸⁷ HP Graver (n 32) 49.

¹⁸⁸ Case 181/73 *Haegeman* [1974] ECR 449; Case 87/75 *Bresciani* [1976] ECR 129.

¹⁸⁹ Article 34 SCA.

¹⁹⁰ *ibid.* No EEA EFTA State has made such a restriction, see S Magnússon, 'On the Authority of Advisory Opinions' (2010) 13 *Europarättslig Tidskrift* 528, n 61.

¹⁹¹ Case E-1/95 *Samuelsson* (n 79) para 13.

¹⁹² *ibid* para 13.

¹⁹³ *ibid* para 13.

opinion in the light of the case law of the Court of Justice.¹⁹⁴ Importantly, the EFTA Court considered the procedures to be identical as to their essential elements regardless of the one being compulsory for the courts adjudicating at last instance whereas the other is not. The EFTA Court did not discuss the non-compulsory nature of its advisory opinions.

Not always is the title of a procedure indicative of its binding nature. The advisory opinions of the ICJ given under Article 96 UN Charter and Article 65 of the ICJ Statute may be conferred binding force in disputes between parties.¹⁹⁵ The opinions of the Court of Justice given under Article 218(11) TFEU are definitely binding to the effect that an envisaged international agreement that the Court deems incompatible with the Treaties may not enter into force unless either the draft is amended or the Treaties revised.¹⁹⁶ Similarly, Article 105(2) and (3) EEA do not distinguish between rulings in direct actions and preliminary rulings/advisory opinions. The treaty makers' choice for an 'advisory opinion' rather than a 'preliminary ruling' in the EEA Agreement, however, speaks the clear language of the EEA EFTA contracting parties' intention not to vest the EFTA Court with a similar authority as the Court of Justice of being the sole authoritative interpreter of EEA law in the EEA EFTA States, notwithstanding the possibility of applying Protocol 34 of the EEA Agreement. This conclusion is confirmed by the text of Article 34 SCA that provides that the courts or tribunals of an EEA EFTA State 'may' if they consider it necessary request the EFTA Court to give an opinion.

The objective of advisory opinions is, on the one hand, homogeneity and, on the other hand, the equal protection of individual rights arising, firstly, from the EEA Agreement and, secondly, from the EU internal market *acquis*. The EU and the EFTA pillars of the EEA Agreement are to function in the spirit of equality and reciprocity.¹⁹⁷ According to the EFTA Court, the principle of homogeneity creates a presumption that provisions worded identically in the EU Treaties and the EEA Agreement will be interpreted in the same way,¹⁹⁸ notwithstanding the specific

¹⁹⁴ Case E-5/96 *Nille* (n 84) para 12.

¹⁹⁵ R Ago, 'Binding Advisory Opinions of the International Court of Justice' (1991) 85 *American Journal of International Law* 439.

¹⁹⁶ Opinion 1/91 *EEA I* (n 4) para 61.

¹⁹⁷ Recital 4, Preamble to the EEA Agreement.

¹⁹⁸ Case E-2/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Ct Rep 164, para 59.

differences between the agreements that may eventually lead to diverging interpretations.¹⁹⁹

The EFTA Court is eager to find parallels between the procedures established by the EU Treaties and the EEA Agreement. The requirement in Article 3(1) SCA that the *acquis* that originates from the EU be interpreted in conformity with the case law of the Court of Justice law does not extend to the main part of the EEA Agreement or to the SCA that lays down the procedural rules concerning the EFTA Court and the ESA. Voluntarily, however, the EFTA Court has striven towards homogeneity also in procedural law finding it necessary to align its case law on concepts of EU law that are identical in substance to those of EEA law with the relevant rulings of the Court of Justice.²⁰⁰ As mentioned above, part of maintaining homogeneity must necessarily take place through procedure in order to ensure uniformity in the level of protection accorded to individuals. The cases that have reached the Court of Justice concerning violations of EU law by Member State judiciaries have demonstrated that it may be impossible for individuals to assert their EU rights in practice due to the reluctance of national courts to uphold those rights.

The explicit differences between the EU's preliminary ruling procedure and the EEA's advisory opinion procedure provoke the question of the role played by the EEA EFTA national courts in the legal architecture of the EEA. The EU Member States' national courts are 'EU courts' but are EEA EFTA States' national courts 'EEA courts'? The EFTA Court has not been minded by the different title of the procedure and has held that the objective of the advisory opinion procedure, too, is to ensure uniform interpretation of the EEA Agreement.²⁰¹ The judicial dialogue in this case is explained by the need to maintain homogeneity not by the explicit need to give effect to the EEA provisions although this, too, can be implied. Moreover, roughly the same conditions, with the exception of the obligation to refer, apply to the advisory opinion procedure of the EFTA Court.²⁰² This is without prejudice to the fact that the lack of exclusive jurisdiction of the EFTA Court renders the hierarchical relationship between the EFTA Court and

¹⁹⁹ Case E-3/98 *Rainford-Towning* (n 79) para 21.

²⁰⁰ See, for example, Case E-1/94 *Restamark* (n 79) paras 23-24; Case E-2/94 *Scottish Salmon Growers* (n 74) paras 11 and 15.

²⁰¹ Case E-1/94 *Restamark* (n 79) para 25.

²⁰² Case E-1/95 *Samuelsson* (n 79) para 15.

the EEA EFTA States' national courts weaker. The latter, therefore, have a stronger role as interpreters of EEA law.

The question of a national judiciary's liability for breaches of EEA law, too, is relevant to this discussion. The EFTA Court remotely touched upon the issue in *Kolbeinsson*.²⁰³ In that case, the applicant first applied for compensation for work-related injury in an Icelandic court. In infringement of EEA law, the Icelandic courts including the Supreme Court dismissed his claim. Subsequently, the applicant brought another case against the state of Iceland for compensation for the damages incurred as a result of the wrongful decision by the courts. A district court decided to refer, upon request by the applicant, two questions to the EFTA Court for an advisory opinion. On appeal, however, the Supreme Court refused to refer to the EFTA Court the question asking for an assessment of the Supreme Court's own liability for a wrongful interpretation of Icelandic law. The EFTA Court could only consider a possible breach by the legislature. In the meantime, Icelandic procedural law does not allow for a possibility of a lower court reviewing the decisions of the Supreme Court. Because of the Supreme Court's refusal to submit to the EFTA Court both questions requested by the applicant the EFTA Court missed the opportunity of expressing itself in the matter. Instead, the EFTA Court referred to its previous rulings in *Karlsson*²⁰⁴ and *Nguyen*²⁰⁵ where it had found that it is for the national court to assess the facts of the case and to determine whether the conditions for state liability for a breach of EEA law have been met while the EFTA Court can provide some indication.²⁰⁶ Since the EFTA Court continuously referred to the interpretation given by the Court of Justice to the procedural elements relating to state liability for breaches of EU law, and considering the generally dynamic interpretation²⁰⁷ that the EFTA Court usually gives to the EEA Agreement there is little doubt that had the EFTA Court been given the chance it would have ruled for state liability of the judiciary of an EEA EFTA State. Surely, the dynamic interpretation of the

²⁰³ Case E-2/10 *Kolbeinsson* [2009-2010] EFTA Ct Rep 234.

²⁰⁴ Case E-4/01 *Karlsson* [2002] EFTA Ct Rep 240.

²⁰⁵ Case E-8/07 *Nguyen* [2008] EFTA Ct Rep 224.

²⁰⁶ Case E-2/10 *Kolbeinsson* (n 203) para 81.

²⁰⁷ Case E-4/04 *Pedicel* [2005] EFTA Ct Rep 1, para 28.

EEA Agreement exercised by the EFTA Court does lead to a more 'supranational' EEA Agreement than initially planned.²⁰⁸

The appeal system that the EEA EFTA States have set up for submitting requests for advisory opinions to the EFTA Court is peculiar in itself. The preliminary ruling system is deemed by the Court of Justice to serve as 'direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties' and dependent only on the referring court's assessment of necessity.²⁰⁹ In *Cartesio*, the Court further specified the scope of the direct cooperation between itself and a national court, stating that any appeal system against a Member State national court's requests for preliminary ruling to the Court would be contrary to the Treaties as it would jeopardise the 'autonomous jurisdiction' which Article 267 TFEU confers on the referring court.²¹⁰

In *Irish Bank*, the EFTA Court finally got the possibility to express itself on the appeals system.²¹¹ The facts of the case as regards the request for an advisory opinion were similar: an Icelandic district court wished to make a request to the EFTA Court, the defendant appealed against the ruling on the request to the Supreme Court of Iceland and the latter upheld yet amended the questions referred to the EFTA Court. The district court submitted both its own ruling and the ruling of the Supreme Court as regards the questions to be referred to the EFTA Court. During the proceeding at the EFTA Court the plaintiff claimed that the ruling of the Court of Justice in *Cartesio* constitutes a precedent in EEA law because of the similarity of the purposes of Article 267 TFEU and Article 34 SCA. Moreover, the plaintiff submitted that the objective of achieving a balance of rights for individuals and economic operators in the EEA means that equal access to courts and judicial remedies must be granted across the EEA including equivalent access to the respective referral procedures,²¹² especially since

²⁰⁸ H Haukeland Fredriksen, 'The EFTA Court 15 Years on' (2010) 59 *International and Comparative Law Quarterly* 731, 756.

²⁰⁹ Case C-2/06 *Kempton* [2008] ECR I-411, paras 41-42.

²¹⁰ Case C-210/06 *Cartesio* [2008] ECR I-9641, para 95.

²¹¹ Case E-18/11 *Irish Bank* [2012] EFTA Ct Rep 592.

²¹² *ibid* para 44.

Iceland had not reserved the right to request advisory opinions only to courts adjudicating at last instance.²¹³

In earlier case law, the EFTA Court had found that only the national court before which the dispute has been brought is to decide both on whether to request an advisory opinion and what questions to submit to the EFTA Court.²¹⁴ The EFTA Court noted the differences between the preliminary ruling and the advisory opinion procedures finding its relationship with the national supreme courts of the EEA EFTA States to be 'more partner-like' and recalled the duty of loyalty enshrined in Article 3 EEA Agreement.²¹⁵ Not being able to make an equally frank statement as the Court of Justice, the EFTA Court instead referred to the possibility that a refusal by a court of last instance to permit a request to the EFTA Court by a lower court may infringe the principle of access to justice laid out in Article 6(1) ECHR.²¹⁶ With reference to the case law of the ECtHR, the EFTA Court specified that the infringement is particularly apparent if the refusing court fails to provide adequate reasoning for its decision.²¹⁷ Moreover, in addition to a refusal to refer a national court of last instance may also breach the ECHR when it upholds the decision to refer but amends the question referred.²¹⁸

The voluntary nature of EFTA advisory opinions is in some respects comparable to an EU Member State national court determining whether an interpretation of EU law in a case before it constitutes an *acte clair* or not and whether, subsequently, a preliminary reference to the Court of Justice is due. Compared to the EFTA pillar of the EEA, though, the EU Member States' national courts' omission to make a request may, if it constitutes a manifest error of appraisal, give rise to the Member State breaching its obligations under EU law. Establishing potential state liability of an EEA EFTA state in a similar case is much more complicated. The preamble to the EEA Agreement states that uniformity in the interpretation and application of the EEA Agreement must be maintained 'in full deference to the independence of the courts'.²¹⁹ At first glance,

²¹³ *ibid* para 45.

²¹⁴ Case E-13/11 *Granville* [2012] EFTA Ct Rep 400, para 18.

²¹⁵ Case E-18/11 *Irish Bank* (n 211) paras 57-58.

²¹⁶ *ibid* para 64.

²¹⁷ *ibid* para 64.

²¹⁸ *ibid* para 64.

²¹⁹ Recital 15, Preamble to the EEA Agreement.

and bearing in mind the fact that the EEA is not a supranational legal order, the sovereignty of the EEA EFTA States may rule out any obligation on behalf of the EEA EFTA States' national courts to follow the case law of the Court of Justice. The EFTA Court, nevertheless, has found that the objectives of the EEA Agreement as well as the homogeneity clause provided in Article 3 oblige national courts to interpret national law in conformity with EEA law, as well as apply to teleological interpretation in the limits provided by the national legal order.²²⁰

Magnússon has argued that the aims of the EEA Agreement as expressed in Article 3 EEA place an obligation on the national courts of the EEA EFTA States to request advisory opinions from the EFTA Court even in the absence of such an obligation in the EEA Agreement.²²¹ Magnússon's suggestions could be supported by the EFTA Court's ruling in *Pedicel* where the EFTA Court recognised the necessity of a dynamic interpretation of EEA law in order to achieve the objective of homogeneity.²²² Although the case concerned a substantive provision of the EEA Agreement, this interpretation could be extended by the EFTA Court also to the procedural provisions of the Agreement or the SCA. In *Fokus Bank*, the EFTA Court moreover stated that the homogeneity claim that is provided in Article 3 EEA Agreement and mirrors Article 4(3) TEU by seeking to secure the protection of individual rights limits the procedural autonomy of EFTA States.²²³ The question remains, though, whether one could interpret Article 34 SCA in a dynamic manner and arrive at the conclusion that the EEA EFTA States have an obligation under the EEA Agreement to request advisory opinions without arriving at a *contra legem* interpretation of the provision. The homogeneity obligation of Article 3 EEA Agreement applies to the contracting parties not specifically to national courts, and does not contain an obligation of result but rather of best efforts, notwithstanding the concrete legal obligations contained in the Agreement that serve the purpose of achieving and maintaining homogeneity. In this regard, Article 3 EEA Agreement should not be interpreted as imposing upon EEA EFTA States' national courts an obligation to

²²⁰ Case E-1/07 *Criminal Proceedings against A* [2007] EFTA Ct Rep 246, para 39.

²²¹ S Magnússon, 'On the Authority of Advisory Opinions' (n 190) 539-540.

²²² Case E-4/04 *Pedicel* (n 207) para 28.

²²³ Case E-1/04 *Fokus Bank* [2004] EFTA Ct Rep 11, para 41.

make references for advisory opinions to the EFTA Court as this would clearly conflict with Article 34 SCA.

Furthermore, Article 33 SCA provides that the EEA EFTA States are required to take the measures necessary to comply with the judgments of the EFTA Court but does not refer to advisory opinions. The preliminary rulings of the Court of Justice, on the other hand, are binding on the national court.²²⁴ Although this entails no explicit obligation on behalf of other courts or the same court in other cases to follow the Court's ruling such obligation, nevertheless, follows implicitly. A decision by a national court to divert from an interpretation of EU law provided by the Court of Justice would collide with the obligation of a national court – if adjudicating at last instance – to request a preliminary reference from the Court. This is the case regardless of whether the national court falsely applied the *acte claire* doctrine or overlooked the fact that the Court of Justice had already ruled on the matter. Failure to comply with the obligation to make a reference for a preliminary ruling may result in infringement proceedings against the Member State under Article 260(2) TFEU. The Court of Justice may impose on the Member State a lump sum or penalty payment in order to exert pressure on the Member State to comply with its obligations under the EU Treaties.²²⁵ In order to receive compensation for damages, the individual has to file a new claim to a national court. The SCA, however, contains no equivalent to Article 260(2) TFEU, and thus no obligation of an EEA EFTA State to pay a financial penalty for a failure to comply with the rulings of the EFTA Court or, for that matter, 'advisory' opinions. Yet the EEA EFTA States do have an obligation to compensate for the damage caused to individuals on the basis of the principle of state liability.²²⁶ An EEA EFTA State's failure to perform the obligations under the EEA Agreement may result in infringement proceedings under Article 31 SCA against the EEA EFTA State but not on grounds of an EEA EFTA State national court not requesting an advisory opinion from the EFTA Court or, if it does, for not following it. Only indirectly, through the EFTA Court's interpretation of a provision of the EEA Agreement in infringement proceedings may an EEA EFTA national court, by virtue of that EEA EFTA State's obligation to conform with the

²²⁴ Case 69/85 *Wünsche* [1986] ECR 947, para 13.

²²⁵ Case C-304/02 *Commission v France* [2005] ECR I-6263, para 91.

²²⁶ Case E-18/10 *EFTA Surveillance Authority v Norway* [2011] EFTA Ct Rep 202, para 28.

judgment of the EFTA Court, be persuaded to bring their interpretation of EEA law in conformity with that of the EFTA Court.

While the general attitude among the supreme courts of the EEA EFTA States has been accommodating towards the advisory opinions given by the EFTA Court, the Norwegian Supreme Court recently set aside an advisory opinion in *STX*²²⁷ with reference to the advisory nature of the procedure.²²⁸ Strangely enough, the EFTA Court then imposed the duty of cooperation under Article 3 EEA Agreement directly on the national courts of last instance noting that 'EFTA citizens and economic operators benefit from the obligation of courts of the EU Member States against whose decision there is no judicial remedy under national law to make a reference to the ECJ'.²²⁹ In *Jonsson*, the EFTA Court referred to its advisory opinions in both *STX* and *Irish Bank* and recalled the importance of referring questions to the EFTA Court under the advisory opinion procedure in order to ensure the effectiveness of the EEA Agreement by avoiding errors in the interpretation of the EEA Agreement and ensure the coherence and reciprocity of the rights of EEA citizens.²³⁰ The strong recommendation does not, however, have the legal effect of amending Article 34 SCA.

3.2.3 Energy Community

The ECT contains no provisions on a judicial dialogue between the Court of Justice and the non-EU and non-EEA parties of the Energy Community, nor even an obligation of the contracting parties to ensure EU law conforming interpretation of the Energy Community *acquis*. The only means of upholding homogeneity in the interpretation and application of the internal market *acquis* in the Energy Community is, therefore, the non-judicial dispute settlement mechanism provided in Articles 90-93 ECT in the framework of which Energy Community institutions are bound to interpret identical *acquis* in conformity with the law of the Court of Justice.²³¹

²²⁷ Case E-2/11 *STX* [2012] EFTA Ct Rep 4.

²²⁸ Case HR-2013-00496-A *STX* (Norges Høyesterett, 5 March 2013), para 46.

²²⁹ Case E-18/11 *Irish Bank* (n 211) para 58.

²³⁰ Case E-3/12 *Jonsson* [2013] EFTA Ct Rep 136, para 60.

²³¹ Article 94 ECT.

3.2.4 European Common Aviation Area

The ECAA Agreement contains a hybrid system of referrals for authoritative interpretations of the ECAA Agreement containing elements of the respective systems of the EU and the EEA. Firstly, each state party to the ECAA Agreement must ensure that individuals can invoke their rights under the Agreement before national courts.²³² Secondly, an ECAA Partner's court or tribunal that is faced with a task of interpreting a provision of the ECAA Agreement identical in substance to EU *acquis* must refer a question to the Court of Justice if it deems the latter's interpretation necessary in order to be able to give a judgment in the case.²³³ Differently from the EEA, thus, the non-EU – and, for that matter, non-EEA-EFTA – national courts are under an obligation to ask the Court of Justice for a preliminary ruling. For the sake of maintaining 'a degree of uniformity'²³⁴ and in the absence of a separate ECAA court, this can be considered as the only viable solution. An ECAA Partner state may decide upon the extent and modalities of the request for a preliminary ruling from the Court.²³⁵ The extent and modalities may, for example, include a specification as to whether to allow any national court to submit the ruling or to reserve the possibility to courts adjudicating at last instance only.²³⁶ Importantly, the preliminary rulings may concern both the validity and the interpretation of the ECAA Agreement, including the adopted *acquis*. Pursuant to Article 1(1) of Annex IV to the ECAA Agreement the preliminary rulings of the Court of Justice are binding, thus complying with the requirements established by the Court in Opinion 1/91.²³⁷ The ECAA contracting parties can moreover participate in the proceedings before the Court by submitting observations to the Court on the same grounds as EU Member States.²³⁸

If an ECAA Partner's national court of last instance is unable to make a referral to the Court of Justice any judgment of that court must be passed on to the ECAA Joint Committee 'which shall act so as to preserve the homogeneous

²³² Article 15(1) ECAA Agreement.

²³³ Article 16(2) ECAA Agreement.

²³⁴ Opinion 1/00 *ECAA* (n 33) para 7.

²³⁵ Article 16(2) ECAA Agreement.

²³⁶ Article 2(1) of Annex IV to the ECAA Agreement.

²³⁷ Opinion 1/91 *EEA I* (n 4) para 61. See above chapter 5 section 3.2.

²³⁸ Article 1(2) of Annex IV to the ECAA Agreement.

interpretation of [the ECAA] Agreement'.²³⁹ The Joint Committee must act within two months after receiving the judgment of a Partner state court that conflicts with the case law of the Court of Justice.²⁴⁰ Should the Joint Committee fail to act within the given timeframe, the dispute settlement procedures of Article 20 ECAA Agreement may be applied including the possibility under Article 20(3) of the parties to the dispute to bring the matter to the Court of Justice. In the end, the Court of Justice will be the final judicial authority deciding on the interpretation of internal market *acquis* exported by the ECAA Agreement.

4 Conclusion

The notion of homogeneity refers to equivalence of the applicable rules containing individual rights and obligations, and their interpretation and application. In addition, the idea of a homogeneous internal market, or a sector thereof, extended to non-EU Member States necessarily entails a similar level of effectiveness in safeguarding individual rights. In order to be able to extend the internal market or a sector thereof to non-EU Member States the international agreements must, therefore, provide for procedural and institutional safeguards that at least in the core aspect are equivalent to those enshrined in the EU Treaties.

To achieve this, each of the multilateral agreements under scrutiny has set up a different institutional system for ensuring homogeneity through systems of surveillance and interpretation of EU law as well as dispute settlement. The EEA features parallel institutions with rules on coordinating the activities between the Commission and the ESA, whereas the ECT and the ECAA Agreement either subordinate the tasks of surveillance and authoritative interpretation of the *acquis* directly to EU institutions or, on the contrary, entrust the domestic legal orders of the non-EU contracting parties with the task of ensuring the effective functioning of the agreements. The dispute settlement procedures under all of the multilateral agreements exporting the *acquis* are political or hybrid, including in the EEA and the ECAA the possibility to refer a question on the interpretation of the *acquis* subject to dispute to the Court of Justice. Moreover, the judicial systems of two out of the three agreements reflect the decentralising

²³⁹ Article 16(3) ECAA Agreement.

²⁴⁰ *ibid.*

dynamics present in the EU. Only the ECT stands out by precluding any judicial dialogue between the national courts of the contracting parties and either a common court established by the agreement or the Court of Justice.

The elaborateness of the institutional design mirrors rather exactly the explicit objectives of the agreements as expressed in their texts. The EEA Agreement strives after a true, if partial, extension of the EU's internal market whereas the homogeneity objectives in the sectoral agreements are worded more modestly.

In the case of the EEA, the clash between the objectives of the EEA Agreement and the legal and institutional framework that it sets up is apparent. The EFTA Court, demonstrating goodwill in terms of maintaining homogeneity, attempts to interpret into the provisions of the EEA Agreement means of judicial protection equivalent to those in place in the EU but does this on the limits of what can be considered legally acceptable and what the EEA EFTA States' national courts, legislatures and executives can tolerate. It is apparent that the tensions in the EEA Agreement between the ambitious objectives of an expanded EU internal market and the reality of the agreement functioning in a regular international law setting that features sovereignty EEA EFTA States as contracting parties are not easy to reconcile with one another. A truly homogeneous outcome necessitates that the rights and remedies under the EEA Agreement be aligned with those in place in the EU. This requirement, however, clearly collides with the wish of the EEA EFTA States to retain their sovereignty to the fullest and not become part of a supranational legal order such as the EU. But as critics say, one cannot have their cake and eat it, too.²⁴¹ In the end, the losers are the individuals of the EEA EFTA States who may find themselves in a position of being unable to assert the rights conferred upon them by the EEA Agreement. This reasoning applies equally to the Energy Community and the ECAA.

A tension is also written into the institutional and procedural provisions of the multilateral agreements exporting the *acquis*. When the EFTA Court rules on a provision of EU law that is replicated in the EEA Agreement without the Court of Justice previously having expressed itself on the matter and the Court subsequently decides to go in another direction, the homogeneity band between the EU and the EFTA pillar is cut. This, however, is a flaw written in the original

²⁴¹ S Magnússon, 'On the Authority of Advisory Opinions' (n 190) 549-550.

homogeneity code of the EEA Agreement that aims to maintain both the homogeneity of the whole and the sovereignty or autonomy of the constituent parts. However, since neither the Court of Justice nor the EFTA Court has an obligation to follow the precedents of the other or even itself, the EEA homogeneity concept cannot be perceived to include a requirement for absolute uniformity of case law. After all, as the concept of *stare decisis* does not apply to the Court of Justice it may deviate from previously given interpretations should the circumstances of a new case before it so require. This situation is not even precluded from happening by virtue of the objective of the internal market to closely resemble that of a national market as neither does the principle of *stare decisis* apply in the legal orders of most of the EU Member States.

While the multilateral agreements try to mirror certain aspects of the EU surveillance and judicial system, they can only be considered equivalent for the purposes of achieving a homogeneous expansion of the internal market if they ensure efficient enforcement of the agreements exporting the *acquis* and the effective protection of individual rights deriving from the agreements. Insofar as the EU Member States have had to surrender a part of their national sovereignty to accommodate the common framework of rights and remedies, the same must be expected from third countries wishing to participate in the EU internal market project to the same extent as the EU Member States. Otherwise the outcome can merely resemble an extension of equal rights and obligations without reaching up to safeguarding their enjoyment in reality.

Chapter 8 Conclusion

The practice of expanding the EU internal market by exporting internal market *acquis* to non-EU Member States is no longer a novelty. The EEA Agreement has celebrated its 20 years' anniversary and the citizens of Europe take free movement between the EU and the EEA EFTA States for granted. The two – soon three – multilateral sectoral agreements concluded or negotiated more recently in the fields of energy, aviation and transport cooperation cement the trend in both the EU's external relations and internal policies towards strongly integrating neighbouring countries into the EU's internal market. The trend is not likely to end soon. Rather, new opportunities for expanding the internal market await in the conclusion of the new generation association agreements/DCFTAs with the eastern neighbourhood countries. Comprehensive, EEA-type solutions can, moreover, be employed in the hypothetical scenario of one or more of the current Member States leaving the EU and seeking for new, more market-focused legal and political cooperation frameworks to govern their future relationship with the EU. Instead of joining the EEA one might wish to design a new type of arrangement for integrating a non-EU Member State into the internal market or, reversely, for not disconnecting from the internal market a current Member State that plans to leave the Union.

The objective of any of such exporting/expanding/extending/integrating exercise is to allow a third country, which in practice comprises countries in the EU's immediate neighbourhood, to become a full participant of the internal market or a sector thereof without becoming a party to the EU Treaties and having to, thereby, adhere to all EU policies. For the EU, in addition to the economic benefits of gaining access to third countries' domestic markets, the expansion of the internal market also entails political advantages in the form of a more prosperous neighbourhood and current or future candidate countries that are better prepared for eventual membership in the Union. The practice of concluding multilateral sectoral agreements serves the same purpose of mutual market access as the comprehensive EEA Agreement. The sectoral agreements have, moreover, enabled those neighbourhood countries that would not be able to align their legal orders to that of the EU to the same extent as the EEA

Agreement to, nevertheless, participate in the internal market in fields where cross-border cooperation is inevitable.

Full participation in the internal market or a sector thereof means that in the areas covered by the particular agreements non-EU market actors are able to trade and move on equal footing with their EU counterparts. The non-EU Member States gain full participation rights in the internal market on condition of adopting and implementing EU internal market *acquis*. Since the expanded internal market also includes third countries the EU market participants, too, enjoy the same access to those countries' domestic markets. The precondition of placing non-EU market actors on an equal footing with the EU actors is the enjoyment of the same set of rights and obligations. The same rights and obligations are, firstly, derived from the substantive rules of the *acquis*. Secondly, the equivalence of rights and obligations across the internal market requires that the differences between the *acquis* as it applies in the different states are minimal or at least remain within certain previously agreed limits. Thirdly, equal rights and obligations necessarily call for a similar degree of effectiveness in the application of the identical set of rules in order to provide individuals a possibility to enforce their rights. The achievement of all of these three stages requires appropriate institutional and procedural structures. On the one hand, institutions and procedures are important for making sure that the same rules are applicable in all states participating in the internal market, or a sector thereof, at any point in time. On the other hand, institutions and procedures help ensure that identical rules are given the same effect in the course of implementation, interpretation and application across the expanded internal market. Only if all of these elements are in place and function properly can one speak of a true extension of the internal market.

The thesis has sought to establish whether the ideal situation of an internal market, or a sector thereof, extended beyond the borders of the Union to non-EU Member States could be attained in the framework of the Treaties of the EU and the case law of the Court of Justice and if so, then in what ways does participation in the expanded internal market differ from membership in the EU, or if not, then what are the main limitations. An ideal situation of an expanded internal market is such where the third country market participants are, indeed, placed on the

same footing with EU market operators by enjoying the same rights and obligations, including the same degree of effectiveness in the protection of those rights as EU nationals.

In order to establish the content of the same rights and obligations recourse must be had to the concept of the internal market. While initially perceived as including the four fundamental freedoms and competition policy only, the developments of the past few decades have seen a transformation of the concept. The four freedoms and competition policy are strongly influenced by a number of non-economic considerations both in the policy-making and interpretation stages. These considerations include mainly horizontal provisions, such as environmental protection, social policy, consumer protection and public health, as well as fundamental rights and reflect the 'social function' of the internal market that is ancillary to its economic function. The effect of non-economic policy concerns on the traditional content of the internal market also has an impact on expanding the EU internal market by exporting the *acquis*. In order to ensure that, indeed, the same rules are in place in the EU and the non-EU segments of the expanded market the non-economic factors, insofar as they are indispensable for the functioning of the internal market, need to be included in the exported *acquis* in order to make it possible for the economic core of the exported rules to be interpreted and applied in the same manner outside the EU as in the Union.

The same set of rules also entails a certain level of coherence. The concept of the EU internal market is characterised by unity and unity is also an essential feature of the EU legal order. Neither demands complete uniformity but adherence to at least a core set of key elements is necessary for the internal market to retain its special characteristics. The core elements may vary somewhat from one sector of the internal market to another in that not all of the elements of the internal market, for example all of the fundamental freedoms are equally relevant for all sectors of the internal market. The aviation and transport sectors, for example, are heavily service-dominated whereas emphasis in the agriculture and fisheries sectors is on the free movement of goods. Nevertheless, this does not defeat the importance of the application of all fundamental freedoms to all sectors of the internal market. The full realisation of the objectives of the internal market,

including in its individual sectors, precludes the exclusion of any of the fundamental freedoms and rules on competition policy as well as the relevant non-economic considerations.

Maintaining the unity of the internal market is highly relevant in the case of expanding the internal market to third countries. The fact that exporting the *acquis* takes place via an international agreement means that unity must be ensured in two dimensions – the dimension of the international agreement, such as the EEA Agreement, itself and also the dimension of the international agreement *vis-à-vis* the EU. Unity in the latter dimension means that the states parties to the exporting agreements cannot pick-and-choose their preferred depth and breadth of integration – an entire sector of the internal market being an exception in the case of sectoral agreements – without the expanded single market constellation losing one of the inherent qualities of the EU internal market.

A true extension of the internal market further requires that the same set of rules that is applied in the territory of the extended internal market at one time also be given similar effect for the purposes of the effective protection of individual rights. Individuals enjoy a special status in the EU internal market and that special status must necessarily be upheld when the internal market is extended to third countries. The quest for effectiveness in the internal market pertains to the direct effect of the provisions, the rank of the exported *acquis* in the hierarchy of norms, the interpretation of national law in conformity with the *acquis* and the liability of the state for breaches of the *acquis*. These four elements refer to the foundational principles of the EU – the doctrines of direct effect, primacy, consistent interpretation and state liability. The challenge of the international agreements endeavouring to expand the internal market is to ensure that comparable safeguards for maintaining the effectiveness of the exported *acquis* are in place in the legal orders created by the agreements. In an international law setting, the principle of state sovereignty may affect the effectiveness of the domestic application of the internal market *acquis* to a larger degree than in the supranational EU legal order. The EU has itself established the necessary legal means for ensuring the effective protection of individual rights whereas in the case of the international agreements exporting the *acquis* the

effective application of the internal market rules depends primarily on the third countries' national legal orders unless the agreements themselves or the institutions they have set up develop supranational principles analogous to those of the EU.

Two crucial elements of the project of expanding the internal market are the institutional and procedural arrangements that support the norms export and the uniform interpretation and application of the *acquis*. The greatest challenge to setting up appropriate institutions and procedures that would ensure that the same rules apply across the wider market and have the same effect is posed by the EU's own legal order and, more specifically, the principle of autonomy keenly protected by the Court of Justice. The principle of autonomy prescribes that no international agreements may alter the essential character of the EU's powers and institutions and that in the EU legal order the authority to interpret EU law rests with the institutions of the Union. Both of the requirements are illustrated by many examples developed in the case law of the Court of Justice. The Court has deemed several international agreements, one of them being the first version of the EEA Agreement, incompatible with the principle of autonomy and thus prevented their conclusion. Even in the light of the often criticised and certainly stringent case law of the Court it cannot be concluded, however, that a true extension of the internal market to third countries is impossible. The Court interprets and applies the provisions of the Treaties as they are. In order to conclude an international agreement that comprises elements that the Court does not permit the Member States have to amend the Treaties. The possibility exists in theory even if it is not always feasible politically and in practice amendments concern rather the draft international agreements.

An agreement that seeks to expand the internal market in a homogeneous manner must, first, make sure that all relevant internal market *acquis* is exported to the third country legal orders in its entirety and in a timely manner. There are two factors that play a crucial role. Firstly, the system must be sufficiently dynamic in order to ensure a swift process of updating the *acquis* in all parts of the extended market. Secondly, international agreements concluded by the EU operate under public international law and their application is largely dependent on the national constitutional procedures and the approval of the *acquis* by the

national legislatures of the third countries and, in the case of mixed agreements, the EU Member States. It must, therefore, be guaranteed that new EU *acquis* is incorporated into the third countries' legal orders fully and without delay. This places strong emphasis on the pre-decision-making stage in the EU in which the third countries' early acceptance of the new *acquis* can be promoted through information sharing and consultations. New governance methods of decision-making in the EU, especially visible in the area of social policy, can both promote and restrict the participation of non-EU actors in the policy and law making stages. Third country stakeholders may either be given the possibility to participate in policy-making outside the 'classic Community method' or, conversely, their participation in expert committees and expert groups that prepare legislative proposals in the traditional law-making procedure may be limited when recourse is instead had to alternative policy-making fora.

Finally, whether all market participants in and outside the EU can enjoy the same rights and obligations depends heavily on the existence of surveillance and enforcement procedures and the institutional safeguards as regards the uniform interpretation and application of the *acquis* across the expanded market that are comparable to the institutions of the EU. Whereas the institutional and procedural framework of the EU serves as the benchmark for evaluating the adequacy of corresponding frameworks set up by the international agreement that exports the *acquis* it cannot be disregarded, however, that the EU system, especially as regards the uniform interpretation and application of EU law in all Member States, is not flawless. This owes to the fact that the EU is an international organisation, albeit a supranational one, and that its constitutive entities – the Member States – are sovereign states with their own sovereign institutions and national procedural autonomy. The judicial dialogue between the EU judiciary and the judiciaries of the Member States both strengthens and obstructs uniformity. In the name of fostering a continuing cooperative relationship between itself and the national courts of the Member States it is difficult for the Court of Justice to condemn the highest courts in the national legal systems even when the latter act in breach of EU law. Insofar as this element of ineffectiveness is embedded in the EU system of judicial protection of rights deriving from EU law it cannot be maintained that the same fault should

be remedied by an international agreement exporting the *acquis* for the sake of expanding the internal market. Rather, this particular element is an intrinsic part of the institutional structures supporting the EU internal market and the multi-level character of the EU more generally.

The thesis scrutinised in detail three international agreements exporting internal market *acquis* to third countries with the objective of expanding the internal market. One of the agreements – the EEA Agreement – is comprehensive in scope whereas the ECT and the ECAA Agreements only cover the energy and aviation sectors of the internal market, respectively. The analysis has demonstrated that a genuine extension of a sector of the internal market is somewhat more difficult to achieve than an expansion of the internal market in its entirety. First and foremost, it is politically challenging to justify a general extension of the fundamental freedoms and competition policy to third countries if the agreements only cover one, or possibly more, specific sectors. All of the fundamental freedoms would, therefore, have to be restricted to apply only *vis-à-vis* the particular sector at hand. The difficulty of extending to third countries also all non-economic aspects that form part of the core of the internal market is common to the sectoral as well as the comprehensive agreements exporting the *acquis*.

Secondly, all international agreements endeavouring to extend the internal market to non-EU Member States must feature a suitable framework of institutions and procedures. The main factor affecting the elaborateness of the institutional and procedural structures in the EEA, the Energy Community and the ECAA is the scope of the agreement. The number of non-EU contracting parties in the multilateral agreements, on the other hand, has no particular effect on the intricacy of procedures and institutions.

The EEA Agreement features both the most elaborate institutional and procedural framework but also the most explicit aim of homogeneity as regards the connection between EU and EEA law. The parallel institutions set up by the EEA Agreement, the parallel procedures, the strong links between the respective actors and processes of the EU and the EFTA pillars of the EEA and the independent institutions of the latter help ensure that the EEA legal order closely mirrors that of the EU. However, a large part of the homogeneous result in

practice can be attributed to the EFTA Court. On the one hand, the EFTA Court has developed a set of principles applicable in the EEA legal order that are analogous to those in the EU. On the other hand, the EFTA Court has been promoting a continuous dialogue with the Court of Justice of the EU even regarding the interpretation of the EEA Agreement in the light of the post-1992 case law of the Court that the EFTA Court is only obliged to take due account of. Not without importance in the context of the success of the EEA system of expanding the internal market is the fact that the EEA EFTA States have, indeed, surrendered a part of their sovereignty and thereby made the EEA legal order partly a supranational one, if not explicitly under the EEA Agreement then implicitly by means of the mechanisms of the EEA Agreement that render it politically difficult for the EEA EFTA States to refuse an update of the EEA Agreement.

The Energy Community has a number of institutions but compared to the EEA, the institutions and procedures envisaged by the ECT are of a political nature and have very little if any connection to the parallel institutions of the EU apart from the fact that the Commission coordinates the activities of the Energy Community and participates in the Energy Community institutions. Among the agreements studied, the ECT is the most traditional international agreement functioning under the rules of international treaty law rather than any supranational principles. The ECAA, on the other hand, features one institution only – the Joint Committee – but has also set up direct links with the EU institutions in the areas of, for example, dispute settlement, interpretation of the *acquis* and surveillance that in some fields covered by the ECAA Agreement is conducted by the Commission. The administrative capacity of the sectoral agreements in terms of maintaining homogeneity between the exported *acquis* and the *acquis* as applicable in the EU internal market is not as high as that of the EEA. For that reason, the main burden of ensuring a homogeneous outcome in the expanded market falls on the third country national courts. The difficulty of establishing an equally effective institutional system as in place in the EU is, therefore, another reason for why expanding to non-EU Member States a sector of the internal market is more complicated, even if not impossible, than in the case of comprehensive frameworks such as the EEA.

The success of the project of expanding the internal market is in correlation with the loss of sovereignty on behalf of the third countries to which the internal market is extended. On the one hand, the loss of sovereignty concerns the position that third country national constitutional systems accord to rules of EU origin in the national hierarchies of norms. On the other hand, the processes of ensuring the dynamic updating of the agreements to reflect the changes in the EU *acquis* and the effective application of the exported *acquis* depend on appropriate institutional and procedural arrangements that may impinge upon national sovereignty. The loss of sovereignty of the Member States holds equally true for the EU itself and shows that exporting the internal market *acquis* may lead to a true extension of the internal market without granting third states the status of EU Member States on the condition that the non-EU Member States surrender their independence to a similar degree as their EU counterparts. The EU Treaties impose certain limitations on homogeneity-advancing institutional and procedural solutions but the latter serve as a guarantee for the proper functioning of the internal market rather than a precondition. The effectiveness of the internal market can, in theory, also be safeguarded if the institutions of the non-EU Member States voluntarily assume the task of maintaining homogeneity with EU *acquis* in the absence of supranational institutions. There is nothing in the nature of the EU legal order, therefore, that would exclude the possibility of expanding the internal market without enlarging the Union provided that there are third countries that wish to participate in the EU internal market sharing everything but membership.¹

¹ Cf 'sharing everything with the Union but institutions': R Prodi, 'A Wider Europe – A Proximity Policy as the key to stability', speech held at the Sixth ECSA-World Conference 'Peace, Security And Stability International Dialogue and the Role of the EU', Brussels, 5-6 December 2002, SPEECH/02/619.

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