Common Market Law Review **59 SI**: 155–180, 2022.

INTEGRATION, MEMBERSHIP, AND THE EU NEIGHBOURHOOD

MARISE CREMONA* AND NIAMH NIC SHUIBHNE**

1. Introduction

In his speech to the European Parliament on 9 May 2022, at the close of the Conference on the Future of Europe, President Macron declared that the war in Ukraine and "the legitimate aspiration of its people, just like that of Moldova and Georgia, to join the European Union, encourages us to rethink our geography and the organization of our continent".[1] The question of membership is again to the fore in discussion of the future of the EU and, strikingly, it led Macron to reflect on the relationship between the EU and its (non-member) neighbours and on the structure of the European continent. He stressed the need for "a new space" for cooperation outside the EU, which, although not pre-judging the question of EU membership, would explicitly signal a denial that "the only solution" to the unity and stability of Europe is accession. He proposed a "European political community" built upon EU values and cooperating with the EU on a range of issues, from security to energy, transport and even freedom of movement. In presenting this proposal, Macron expressly referenced the ideas of his predecessor François Mitterrand in 1989 in favour of a European confederation.[2] But in the background we can also hear Romano Prodi's "Wider Europe" speech of 2002,[3] in which Prodi declared that "[a]ccession is not the only game in town" and promoted the concept of a "proximity policy," an "open and evolving partnership" – a project which became the European Neighbourhood Policy (ENP).[4]

* European University Institute.
** School of Law, University of Edinburgh.

1. <https://presidence-francaise.consilium.europa.eu/en/news/speech-by-emmanuel-macron-at-the-closing-ceremony-of-the-conference-on-the-future-of-europe/>.

2. Mitterrand, New Year address, 31 December 1989. See further Bozo, "The Failure of a Grand Design: Mitterrand's European Confederation, 1989–1991", (2008) 17(3) *Contemporary European History,* 391–412.

3. Romano Prodi, "A Wider Europe – A Proximity Policy as the Key to Stability" Sixth ECSA-World Conference, 5 December 2002. <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619>.

4. Commission Communication "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", COM (2003) 104, 11 March 2003.

The rhetorical context of President Macron's speech is not only an expression of solidarity with Ukraine,[5] and the importance of the unity of Europe, but his desire to preserve and push forward integration *within* the European Union. A more structured form of non-membership is presented as necessary to avoid lowering the conditions of entry, and new levels of cooperation with the EU's European neighbours must not, he argues, result in "weakening the closeness built inside our European Union."

Indeed, we may see in Macron's intervention a reflection of a somewhat paradoxical position that has emerged over recent years. On the one hand, the Brexit process has prompted a desire on the part of the Union to draw a bright(er) line between membership and non-membership, to make it clear that (some of) the privileges of membership are not open to non-members.[6] On the other hand, we also see instances of the extension of some of those rights and privileges to countries which, while not EU members, participate in relationships of deep integration with the EU, such as the European Economic Area (EEA), characterized by the Court of Justice as a "special relationship … based on proximity, long-standing common values and European identity".[7] At the heart of this paradox are the operation of integration both inside and outside the EU and the ways in which the EU's internal integration, built upon foundations of common values, mutual trust and solidarity, interacts with integration in the EU's neighbourhood, built – according to Article 8 TEU – on the EU's values and good neighbourliness. Can we identify not only the rights and privileges but also the character of EU membership by reflecting on "integration without membership" in its neighbourhood?

From both an internal and external perspective, we intend in this paper to reflect, first, on the continuing evolution of the principles governing the EU's relations with its neighbours, and second, on how these might throw light on the legal principles at the heart of EU membership. Our starting point, in section 2, is Article 8 TEU as a basis for the EU's relations with its neighbours. We ask what this provision tells us about the place, and nature, of integration in that relationship. We then turn to two central principles – mutual trust and conditionality – and the ways in which they structure both internal (intra-EU) and external (neighbourhood) relationships of

5. "We feel in our heart that Ukraine, through its fight and its courage, is already today a member of our Europe, of our family and of our union."

6. "A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member." European Council Guidelines following UK notification under Article 50 TEU, 29 April 2017, EUCO XT 20004/17, para 1.

7. Case C-897/19 PPU, *I.N.,* EU:C:2020:262, para 50.

integration. In section 3, we trace the ways in which mutual trust, as a foundational principle governing intra-EU relations, has begun to play a role externally in the neighbourhood, and what this may tell us about the basis of solidarity within the Wider Europe. In section 4, we turn to conditionality, a cornerstone of the EU's neighbourhood policy which is increasingly relevant within the EU too, to maintain mutual trust as a basis for the solidarity that membership-based integration requires. Finally, in section 5, we reflect on what these "migrations" tell us about both the process of integration in the neighbourhood, and – by interrogating the member/non-member distinction – the legal nature of EU membership itself.

2. Article 8 TEU and the EU's relations with its neighbours

Article 8 TEU was introduced by the Lisbon Treaty; it provides

1. *The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.*
2. *For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.*

The significance and potential of Article 8 have been much debated,[8] but it does at least provide an anchor in the Treaties for the idea of a "special relationship" between the EU and its neighbours, and a starting point for thinking about what that might look like. It is placed, interestingly, at the end of Title I, among the "Common Provisions" of the TEU, not among the general provisions on external action, nor is it adjacent to Article 49 TEU on accession to the EU. This suggests that the EU's relation with its neighbours is a facet of its identity rather than simply another policy field.

In practice, Article 8 has never been used as a distinct legal basis for agreements with the EU's neighbours. The choice of an Association agreement for Ukraine, for example, was significant in its reflection of Ukraine's

8. See e.g. Blockmans, "Friend or Foe? Reviewing EU Relations with its Neighbours Post-Lisbon" in Koutrakos (ed), *The European Union's External Relations a Year after Lisbon*, CLEER Working Papers 2011-3; Petrov and Van Elsuwege, "Towards a New Generation of Agreements with the Neighbouring Countries of the European Union? Scope, Objectives and Potential Application of art. 8 TEU", 36 EL Rev. (2011), 688.

preference, and the EU then went on to offer Association agreements to all in the Eastern Partnership.[9] Instead, Article 8 TEU has acted as a policy point of reference, building upon existing policy frameworks and permeating neighbourhood relations, whatever legal form they take.[10] Some of the language in Article 8 reflects its ENP background, including the emphasis on EU values as a foundation for the relationship.[11] For example, the first ENP policy papers of 2003–2004 speak of "a zone of prosperity and a friendly neighbourhood – a ring of friends – with whom the EU enjoys close, peaceful and cooperative relations",[12] countries "sharing the EU's fundamental values and objectives," and "mutual commitment to common values".[13] More recent ENP strategy documents make reference to Article 8 explicitly.[14] But it is certainly not limited to the ENP context.

What, then, can we draw from Article 8 as a basis for the principles governing relations between the EU and its neighbours?

First, the neighbourhood relationship is "founded on the values of the Union." This reference creates a deliberate link to Article 2 TEU. It therefore both establishes a common foundation with EU membership (cf. Article 49 TEU) and reflects the EU's external mission articulated in Article 3(5) TEU to "uphold and promote its values" as well as its interests. This link is expressly made in a Joint HR/Commission communication of 2011:

> The values on which the European Union is built – namely freedom, democracy, respect for human rights and fundamental freedoms, and the rule of law – are also at the heart of the process of political

9. Hillion, "Mapping-Out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'", 12 EFA Rev. (2007), 170; Petrov, "Legal basis and scope of the new EU-Ukraine enhanced agreement. Is there any room for further speculation?", EUI Working Papers, MWP 2008/17; Petrov and Van Elsuwege, note 8, at 703.

10. See e.g. the references to Article 8 TEU in the preamble to and Article 3 of Regulation 2021/947 of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, O.J. 2021, L 209/1.

11. Cf. Article 3(5) TEU.

12. COM (2003) 104, note 4, p. 4.

13. Commission Communication, "European Neighbourhood Policy Strategy Paper", COM (2004) 373, 12 May 2004, pp. 3 and 5.

14. Eg. in Commission Communication, "The EU and its neighbouring regions: A renewed approach to transport cooperation", COM(2011) 415, under the heading "policy context" the Commission says, "With the entry into force of the Lisbon Treaty, the EU has committed itself to developing a special relationship with neighbouring countries (Article 8 TEU)." See also Joint Communication "A new response to a changing neighbourhood", COM (2011) 303 final, p. 28.

> association and economic integration which the Eastern Partnership offers. These are the same values that are enshrined in article 2 of the European Union Treaty and on which articles 8 and 49 are based.[15]

We have here a basis both for solidarity in the neighbourhood (the shared values, which are EU values) and for the element of conditionality which has been at the heart of the ENP from the start,[16] which has underpinned the process of accession (via the Copenhagen criteria) and is increasingly relevant to the internal functioning of the EU. The "movement" of conditionality from external relations to internal membership will be explored further in section 4.

Second, Article 8 TEU frames an objective ("The Union shall … "), the formation of a "special relationship" with the countries in the EU's neighbourhood. This objective is addressed to the EU: it is aspirational and cannot, of course, impose any obligations on the EU's partners. While Article 8 may be said to underpin the EU's neighbourhood policy, the varied agreements it has with its neighbours are a result of the differing priorities and objectives of these neighbours themselves and the special relationship – where it emerges – is the result of interaction between the EU and its negotiating partners.

Third, Article 8 TEU demonstrates that the EU's integration objectives extend beyond its boundaries to include (at least) its non-member neighbours, not all of which will be aspiring members. The "close and peaceful relations" and good neighbourliness that Article 8 envisages may be articulated through agreements providing for "reciprocal rights and obligations", language which recalls Article 217 TFEU (on Association agreements).[17] As already mentioned, Article 8 has not in practice been used as a separate legal basis, and there is considerable variety in the types of agreement between the EU and its neighbours: different types of Association agreements, including some which recognize their pre-accession character;[18]

15. Joint Communication, "A new response to a changing neighbourhood", COM (2011) 303 final, p. 14. The Eastern Partnership is a regional dimension of the ENP covering Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. The southern dimension of the ENP is the Union for the Mediterranean (formerly the Euro-Mediterranean and Barcelona Process): Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestine Authority.

16. See e.g. COM (2003) 104, note 15, p. 16.

17. "The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures."

18. For example, the Stabilisation and Association Agreements with Albania, North Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, Kosovo.

sectoral agreements;[19] and other agreements which simply establish structures of cooperation.[20] And these agreements are situated within different policy frameworks, among them the ENP (including the Eastern Partnership and the South Mediterranean), EU-EFTA relations, and relations with the Western Balkans.

Article 8 TEU, therefore, does not specify a specific content to the relationship, still less a trajectory. Nonetheless, its reference to a "special relationship" suggests that an agreement between the EU and a neighbouring State will be embedded in a *relationship of integration.* Integration-based agreements, however varied, have a longer-term and evolutionary perspective aiming to build a relationship over time. Such a development is not inevitable, nor is it necessarily mapped out from the start: the partner country may decide that it does not want to go further; nor, importantly, does integration necessarily signal the possibility of membership at a future date.

One might perhaps have imagined that the UK, as a former Member State, would have been especially open to an integration-based relationship,[21] but when the UK decided that instead it wanted a more arms-length relation, based on a reciprocal balance of advantage in specific fields of cooperation, not embedded in a broader institutional framework or policy agenda, the EU had to respect this choice. The Trade and Cooperation Agreement with the UK, in its name, preamble and frequent references to autonomy, reciprocity and sovereignty, presents itself as a transactional agreement with no integration agenda, an "ordinary" free trade agreement, as the Commission has called it.[22] Nonetheless, the TCA does embody some integration-oriented elements, reflecting initial EU expectations and

19. For example, the Transport Community Treaty, O.J. 2017, L 278/3.

20. For example, the Enhanced Partnership and Cooperation Agreement with Kazakhstan.

21. See, for example, the views of the European Parliament in 2018: "[A]n association agreement negotiated and agreed between the EU and the UK following the latter's withdrawal pursuant to Article 8 TEU and Article 217 TFEU could provide an appropriate framework for the future relationship." European Parliament resolution of 14 March 2018 on the EU-UK future relationship, P8_TA(2018)0069.

22. See below at note 71. On the distinction between transactional and integration agreements, see further Cremona, "EU External Action – Learning from Brexit" *federalismi.it* n.10/2022, 251. For analysis of the TCA generally, see further Peers, "So Close, Yet So Far: The EU/UK Trade and Cooperation Agreement", 59 CML Rev. (2022), 49; Łazowski, "Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework – Part I", (2020) *European Papers* 1105; Craig, "Brexit A Drama, the endgame – Part II: trade, sovereignty and control", 46 EL Rev. (2021), 129; Van Elsuwege, "A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law", (2021) *European Papers* 785.

earlier UK positions:[23] despite its name, its legal basis is Article 217 TFEU (the basis for Association agreements); Article 1 TCA echoes the wording of Article 8 TEU;[24] it contains a wider range of substantive provisions than might be expected from its name, including substantive provisions on social security and justice and home affairs; and it is designed to form an institutional umbrella for a group of agreements (current and future) which could develop the relationship further.[25]

So, although the EU's integration relationships may not be confined to its neighbourhood, its neighbourhood agreements are generally (though not inevitably) integrational in character. As well put by Christophe Hillion, "Article 8 suggests that the post-Lisbon integration goal transcends the legal boundaries of the Union and those of its constituent states".[26] And this in turn invites us to consider the extent to which concepts such as mutual trust and solidarity, which are central to the intra-EU conception of integration,[27] may extend to non-members. Solidarity, indeed, as well as operating between Member States, is one of the principles which under Article 21(1) TEU govern the EU's external action.[28]

A potentially different dynamic therefore underpins neighbourhood relations flowing from Article 8 and the possibility of membership flowing from Article 49 TEU. Within the neighbourhood, the EU's mission is to attempt to build an "area of prosperity and good neighbourliness"; an element of conditionality is present (the need for shared values founded upon Article 2 TEU) and the countries in the neighbourhood may be offered – and may choose to accept – different levels of integration. The EU has of course considerable political and economic "drawing power"

23. The declaration on the future relationship negotiated by the May Government was more integrational in character: Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, O.J. 2019, C 66/1.

24. Article 1 TCA: "This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty." On this point, see further Van Elsuwege, note 22, at p. 792.

25. The UK wanted a group of separate bilateral agreements dealing with trade (FTA), energy, aviation, transport, fishing, etc. <https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu>; the EU, not wanting to replicate the "Swiss model", insisted on a strong institutional and governance framework more typical of integrational agreements: European Council guidelines, EUCO XT 20001/18, 23 March 2018, para 15; negotiating directives Council doc. 5870/20 ADD 1 REV 3, 25 Feb. 2020, paras. 147, 151, 155–156.

26. Hillion, "Leaving the European Union, the Union way. A legal analysis of Article 50 TEU", SIEPS European Policy Analysis, 2016:8, 10.

27. On mutual trust, see e.g. Opinion 1/17 paras. 128–129, and further below section 3.1.

28. Case C-848/19P, *Germany* v. *Commission*, EU:C:2021:598, para 39.

but legally speaking (and in practice) there is room for much variation, and room too to reject the offer.

Membership, on the other hand, is not only a matter of accepting the values of Article 2 TEU but also of accepting the "conditions of eligibility" defined by the European Council,[29] the Union's *acquis* and the "essential characteristics" of the "new legal order," including primacy and direct effect, ensuring its implementation and enforcement. This, we argue, is both a necessary precondition for the mutual trust expected of Member States, and a reflection that membership entails accepting the "structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other," designed to further "the process of integration that is the *raison d'être* of the EU itself".[30] In the following sections, we show how in reality the membership and non-membership legal worlds are not always as neatly distinguished as this might suggest, and especially how principles ostensibly central to the EU legal order (and thus to membership) also find expression in neighbourhood relations – and vice versa. What does it mean to say, in Prodi's words, that the EU could "share everything but institutions"?[31]

3. Principles migrating from the inside to the outside

In this part of the paper, we begin our exploration of whether and, if so, to what extent fundamental principles of EU law can be shared with neighbouring third states. We look first at the main features of mutual trust and solidarity in EU internal relations (section 3.1) before showing, second, that these membership congruent principles are also evident in EU neighbourhood relations (section 3.2). We argue that while mutual trust and solidarity can be seen to operate in external agreements between the Union and neighbouring states, it is how those principles are framed and governed in their internal application that starts to suggest the distinctive legal register of EU membership.

3.1. *Mutual trust and solidarity in the "internal" perspective*

According to the Court of Justice, "each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2

29. Article 49(1) TEU.
30. Opinion 2/13, paras. 167 and 172.
31. Note 3, p. 6.

TEU".[32] It is this, for the Court, that "implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected".[33] Moreover, "[i]t is precisely in that context that the Member States are obliged, by reason *inter alia* of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU".[34]

These ideas have a long history in EU law. At first, as a mutual recognition-supporting principle of internal market law, the Court emphasized "the trust which Member States should place in each other".[35] Later, the idea that the Member States have mutual trust in each other's criminal justice systems[36] enabled mutual recognition to constitute the "basis" on which "Member States shall execute any European arrest warrant".[37] Importantly for present purposes, mutual trust was also used to draw a line between internal and external relations. In particular, the Court engaged the idea of "mutual trust *within* the Community" to distinguish Member State relations with third countries.[38] Note, in contrast, the Court's membership-focused statement in Opinion 2/13, that "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained".[39] The Court subsequently decoupled mutual recognition and mutual trust, observing that both are "of fundamental importance given that they allow an area without internal borders to be created and maintained" but, "[m]ore specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law".[40]

32. Case C-284/16, *Achmea*, EU:C:2018:158, para 34.
33. Ibid.
34. Ibid.
35. Case 46/76, *Bauhuis*, EU:C:1977:6, para 22. See similarly, Case C-5/94, *Hedley Lomas*, EU:C:1996:205, para 19.
36. Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge*, EU:C:2003:87, para 33.
37. Article 1(2) of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, O.J. 2002, L 190/1.
38. Opinion 1/75, EU:C:1975:145 (emphasis added).
39. Opinion 2/13, EU:C:2014:2454, para 191.
40. Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, para 78.

In this light, mutual trust seems indissociable from membership: indeed, mutual trust has been characterized as an *obligation* of membership imposed on all the Member States by EU law.[41] Moreover, having established that the right to an effective remedy – as protected by Article 47 of the EU Charter of Fundamental Rights – is one of the rights that a Member State should assume is complied with by the other Member States, the Court stated in Opinion 1/17 that the principle of mutual trust "with respect to, *inter alia*, compliance with the right to an effective remedy before an independent tribunal, *is not applicable in relations between the Union and a non-Member State*".[42]

In *Achmea*, the "existence of mutual trust between the Member States" was also connected directly by the Court to the values in Article 2 TEU. For present purposes, we focus specifically on the principle of solidarity since it can only be meaningfully realized when mutual trust is first in place. Solidarity also emits a tone that is suggestive of membership. It is, according to Article 2 TEU, one of the principles that "prevail[s]" in a society where the Union's values are "common to the Member States". Indeed, Advocate General Sharpston went as far as to describe solidarity as the "lifeblood of the European project".[43] While its absence is perhaps what had historically drawn most attention,[44] the extent to which the TFEU's various appeals to a "spirit of solidarity" have been legally stimulated is notable more recently – as seen in some detail, for example, in the context of energy solidarity.[45] Similarly, Article 80 TFEU establishes that the Union's policies on border checks, asylum and immigration are "governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States". Thus, the Court confirmed in infringement proceedings against Poland, the Czech Republic and Hungary that "the burdens entailed by the provisional measures provided for in Decisions

41. Opinion 2/13, EU:C:2014:2454, para 194. See also the TFEU's "Solidarity Clause" (Article 222 TFEU), which compels the Union and the Member States to "act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster" and provides the framework within which such action should be taken.

42. Opinion 1/17, EU:C:2019:341, para 129 (emphasis added).

43. A.G. Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Czech Republic and Hungary*, EU:C:2019:917, para 253 of the Opinion.

44. E.g. Somek "Solidarity decomposed: being and time in European citizenship", 32 EL Rev. (2007), 787; Sangiovanni "Solidarity in the European Union", (2013) 3 OJLS 213; Kucuk "Solidarity in EU law: an elusive political statement or a legal principle with substance?", (2016) 23 MJ 965.

45. Building on Article 194(1) TFEU, see Case C-848/19P, *Germany* v. *Poland*, EU:C:2021:598. See further, Boute "The principle of solidarity and the geopolitics of energy: *Poland v Commission (OPAL pipeline)*", 57 CML Rev. (2020), 889.

2015/1523 and 2015/1601 [on the relocation of applicants for international protection], since they were adopted under Article 78(3) TFEU for the purpose of helping the Hellenic Republic and the Italian Republic to better cope with an emergency situation characterised by a sudden influx of third-country nationals on their territory, must, in principle, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States".[46]

However, as evident also in the Court's early crafting of the principle of reciprocity,[47] what we would highlight here is that solidarity between the Member States is not just a value shared or aspired to in the abstract but one governed by the systemic obligations that they assume as members of the Union. For example, quickly consolidating but also building on the rulings in *Van Gend en Loos* and *Costa*,[48] the Court of Justice, in *Commission* v. *Luxembourg and Belgium*, rejected a decentralized approach to bilateral enforcement of Community obligations, emphasizing instead that "the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it".[49] Put plainly, "the basic concept of the Treaty requires that the Member States shall not take the law into their own hands".[50]

We see exactly the same threads in the Court's finding, almost six decades later, that "it is not permissible, if the objective of solidarity inherent to Decisions 2015/1523 and 2015/1601 and the binding nature of those acts is not to be undermined, for a Member State to be able to rely, moreover without raising for that purpose a legal basis provided for in the Treaties, on its *unilateral assessment* of the alleged lack of effectiveness, or even the purported malfunctioning, of the relocation mechanism established by those acts".[51] In that light, it is particularly interesting to note Advocate

46. Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Czech Republic and Hungary*, EU:C:2020:257, para 80. Decision 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (O.J. 2015, L239/146); Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (O.J. 2015, L248/80).

47. See esp. Case 325/82, *Commission* v. *Germany,* EU:C:1984:60, para 11.

48. Case 26/62, *Van Gend en Loos,* EU:C:1962:42; Case 6/64, *Costa* v. *ENEL*, EU:C:1964:66.

49. Joined Cases 90 and 91/63, *Commission* v. *Luxembourg and Belgium*, EU:C:1964:80.

50. Ibid.

51. Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Czech Republic and Hungary*, EU:C:2020:257, para 180 (emphasis added).

General Sharpston's observation that "other Member States facing problems with their relocation obligations, such as Austria and Sweden, *applied for and obtained temporary suspensions of their obligations under those decisions*, as provided for by Article 4(5) and (6) thereof. If the three defendant Member States were really confronting significant difficulties, that – rather than deciding unilaterally not to comply with the Relocation Decisions … – was clearly the appropriate course of action to pursue in order to respect the principle of solidarity".[52]

The case law therefore underlines the futility, both substantively and procedurally, of going it alone (or attempting to do so) in the context of EU membership. Member States are deeply connected to each other, as well as to the Union, through the bonds of mutual trust and solidarity, but also through the system that governs their application. Is it possible to extend this "ecosystem", as the Commission took to describing it over the Brexit process, beyond the context of membership? We show below that, with respect to applying mutual trust and solidarity in substance, it is. But how mutual trust and solidarity are enforced within the EU system, as shown above, does not travel beyond membership in the same way.

3.2. *Mutual trust goes outside through non-member relationships of integration*

Mutual trust, then, may be regarded as one of the foundations on which EU membership-based integration is built, a consequence of shared values and a component of the EU's system of remedies, the autonomy of which the Court of Justice is concerned to protect. This may suggest that it has little or no role to play in EU external relations. Disputes arising in the context of those (external) relations may be governed by arbitral tribunals, and the EU may have recourse to such dispute settlement procedures which "stand outside the EU judicial system",[53] and which do not rule on matters of Union law. This, in contrast with the mutual trust which applies between Member States mediated by the Court of Justice, reflects "the reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations".[54]

We noted in section 3.1 above that, in Opinion 1/17, the Court explicitly stated that the principle of mutual trust "with respect to, *inter alia*,

52. A.G. Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Czech Republic and Hungary*, EU:C:2019:917, para 235 of the Opinion (emphasis in original).

53. Opinion 1/17, para 134.

54. Ibid., para 117.

compliance with the right to an effective remedy before an independent tribunal, *is not applicable in relations between the Union and a non-Member State*".[55] But Opinion 1/17 was concerned with dispute settlement procedures in a free trade agreement with Canada that was not part of a wider integration process. When we consider the principles underlying integration-based external relationships such as the EEA, especially the values referenced in Article 8 TEU, the conclusion appears less clear cut. When the Court first considered the draft EEA agreement, the principle of autonomy was an issue precisely because the degree of integration envisaged was such that the projected EEA Court would interpret provisions designed to mirror EU law and its membership overlap with the EU Court of Justice.[56] Autonomy was eventually preserved by creating a separate EFTA Court which operates only within the EFTA "pillar" of the EEA and is not concerned with disputes arising between the EU and EFTA parties.[57] Institutionally, then, there are limits to the degree of integration of third states into the EU system flowing from what the Court refers to as the "essential characteristics of the European Union and its law".[58] But in terms of the depth of substantive integration, the rights recognized as belonging to EEA nationals, based on the "special relationship" created by that agreement, are – by the Court of Justice itself – being effectively aligned with EU citizenship and embedded in the concept of an area of freedom, security and justice, itself underpinned by the principle of mutual trust.

In *UK* v. *Council*, the Court took the view that a Council decision related to the amending of an EEA annex on social security coordination to bring it into line with the internal EU *acquis* should be based on Article 48 TFEU, the "internal" social security legal basis. It rejected as a substantive legal basis Article 79(2)(b) TFEU, which deals with the rights of legally resident third country nationals in the EU, and ignored the suggestion of using Article 217 TFEU, the legal basis of the EEA itself. Its reasoning was based on the degree of integration envisaged by the EEA agreement:

> The contested decision is thus precisely one of the measures by which the law governing the EU internal market is to be extended as far as possible to the EEA, 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. Were it not for the amendment contemplated by the contested decision, free movement of persons could

55. Ibid., para 129 (emphasis added).
56. Opinion 1/91, EU:C:1991:490.
57. Opinion 1/92, EU:C:1992:189.
58. Opinion 1/17, para 109. See further, Nic Shuibhne "What is the autonomy of EU law, and why does that matter?", (2019) 88 *Nordic Journal of International Law* 9.

> not be exercised within the EEA under the same social conditions as within the European Union, which would undoubtedly undermine the development of the association and the realisation of the objectives pursued by the EEA Agreement.[59]

The reference to the "same social conditions" applying throughout the EEA carries an implication that the EEA extension of the internal market includes an element of social solidarity, and is not simply about "economic and commercial cooperation".[60] Thus the judgment both prioritizes the homogeneity of the EEA as an "area" of free movement, and sees that free movement as an essentially "internal" question for the EU.[61]

In *UK* v. *Council*, the Court was building on the extension of the EU *acquis* on free movement and social security in the EEA agreement and its annexes. In *IN*, it took a step further, mapping out a new conception of the integration implied by the EEA and recognizing the importance of the network of agreements binding the EU and its EFTA partners in addition to the EEA, including those extending Schengen and the operation of the surrender procedure of the European Arrest Warrant to Iceland and Norway.[62] Indeed, it used the existence of the latter as a guide to its interpretation of the EEA. In a case concerning the potential extradition by Croatia to Russia of a Russian/Icelandic dual national who was visiting Croatia on holiday,[63] the Court accepted that Articles 18 TEU and 21 TFEU

59. Case C-431/11, *UK* v. *Council (EEA social security)*, EU:C:2013:589, paras. 58–59.

60. The phrase comes from *IN* (note 63 below), para 44. On social solidarity in the EEA, see further Bekkedal, "The Internal, Systemic and Constitutional Integrity of EU Regulation 883/2004 on the Coordination of Social Security Systems: Lessons from a Scandal", 2020/3 OsLaw 145.

61. That implication is also reflected in the Court's language rejecting the application of Article 79 TFEU, which is included in the TFEU chapter on immigration policy, on the ground that its use and the free movement objectives of the EEA would be "manifestly irreconcilable". The measures in question will apply to EU citizens in the EEA EFTA States as well as to EEA EFTA nationals in the EU: the integration is reciprocal and would be undermined were the UK to have opted-out of the Council decision, as would have been possible had it been based on Article 79(2)(b) TFEU: Case C-431/11, *UK* v. *Council*, paras. 64–65. See also Case C-656/11, *UK* v. *Council*, applying similar reasoning to the relationship with Switzerland, although it cannot be assumed that an "internal market" approach will always be adopted for the EU-Switzerland Agreement on freedom of movement of persons: Case C-355/16, *Picart*, EU:C:2018:184, para 29.

62. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*, O.J. 1999, L 176/36; Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, O.J. 2006, L 292/2.

63. Case C-897/19 PPU, *IN (Ruska Federacija)*, EU:C:2020:262.

(conferring rights of non-discrimination and citizenship respectively) apply only to EU citizens, and that the European Arrest Warrant applies only to EU Member States, not third states. However, it went on to say that Iceland has "a special relationship" with the EU, which "goes beyond economic and commercial cooperation" and is "based on proximity, long-standing common values and European identity".[64] It then went on:

> It is appropriate to add that not only the fact that the person concerned has the status as a national of an EFTA State, which is a party to the EEA Agreement, but also the fact that that State implements and applies the Schengen acquis, renders the situation of that person *objectively comparable with that of an EU citizen* to whom, in accordance with Article 3(2) TEU, the Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.[65]

This justified the Court in applying reasoning on how to approach an extradition request by a third state in the context of free movement within the EEA, which in *Petruhhin* it had previously developed for EU citizens.[66]

This remarkable judgment not only states that an Icelandic national is "objectively comparable" to an EU citizen but situates EEA free movement rights within the area of freedom, security and justice instead of simply referring to the internal market, as the Court has done before. Moreover, the reference is to Article 3(2) TEU, according to which the Union *offers its citizens* an area of freedom, security and justice without internal frontiers, rather than to Article 3(3) TEU. The shift is appropriate given the extradition/surrender context and also raises the importance of mutual trust in the operation of the ASFJ in compliance with fundamental rights.[67] As the Court goes on to point out, the provisions of the Agreement on surrender with Iceland and Norway are "very similar" to those of the framework decision on the European Arrest Warrant, and in its preamble the parties to the Agreement "expressed their mutual confidence in the structure and functioning of their legal systems and their capacity to guarantee a fair trial".[68] In other words, the Court is not simply applying *Petruhhin* by analogy; it is also establishing that the legal context of mutual trust in fundamental rights compliance within the AFSJ is "objectively comparable."

64. Ibid., paras. 44 and 50.
65. Ibid., para 58 (emphasis added).
66. Case C-182/15, *Petruhhin*, EU:C:2016:630.
67. Opinion 2/13, para 191.
68. Case C-897/19 PPU, *IN,* paras. 73–74.

The picture which is emerging, of a group of non-Member States whose special relationship with the EU is built not only upon an extension of the internal market *acquis* but also on shared values and mutual trust, is reinforced in a different context by the Commission's opinion on the UK's application to become a party to the Lugano Convention on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[69] UK accession to the Convention would require the consent of all parties and although the non-EU parties signalled their consent, the EU has refused.[70] The Commission's reasoning in recommending refusal is suggestive:

> … the Lugano Convention supports the EU's relationship with third countries which have a *particularly close regulatory integration with the EU*, including by aligning with (parts of) the EU acquis. … it is not the appropriate general framework for judicial cooperation with any given third country. … The United Kingdom is, since 1 January 2021, *a third country with an "ordinary" Free Trade Agreement* facilitating trade but not including any fundamental freedoms and policies of the internal market. The Convention is based on *a high level of mutual trust* among the Contracting Parties and represents an essential feature of a common area of justice commensurate to the high degree of economic interconnection based on the applicability of the four freedoms.[71]

The Commission insists on the distinction between an integration-based relationship based on mutual trust and an "ordinary" FTA.[72] The UK has opted for the latter and the Commission therefore argues that the EU's relations with the UK in the civil justice field should be governed by multilateral instruments, such as The Hague Choice of Court and

69. Lugano Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial cases, O.J. 2007, L 339/3. The current parties to the Convention are the EU, Denmark, Iceland, Norway and Switzerland, Denmark being a party in its own right as a result of its opt-out from EU policy on Justice and Home Affairs (Protocol 22 to the TEU and TFEU).

70. Note Verbale from the Commission to the Swiss Federal Council, as depository, 1 July 2021.

71. Commission Communication, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention" COM (2021) 222 final, 4 May 2021, pp. 2–3 (emphasis added).

72. Compare, before the withdrawal of the UK from the EU, the highly obliging tone of the Court's ruling in Case C-327/18 PPU, *RO*, EU:C:2018:733, where the Court was at pains to nurture commonality on both the values of and processes applicable within the UK in trying to convey that similar standards of, and approaches to, fundamental rights protection would endure post-Brexit. This was, however, before the actual shape of the future relationship had emerged.

Judgments Conventions. This statement implies a qualitative difference between "a common area of justice" based on a high level of mutual trust (albeit deriving from a network of international agreements, such as the Schengen and surrender agreements and the Lugano Convention), and "ordinary" free trade agreements and multilateral conventions.

However – even accepting this characterization – there are limits to "external integration". Within the EU, mutual trust is, as we have seen, closely tied to the solidarity which requires Member States not to "go it alone," even when they think that other Member States or the EU institutions are failing in their obligations. This expectation of solidarity does not operate in the same way between the EEA EFTA States and the EU. The EEA *acquis* is implemented and enforced through two parallel institutional arrangements, each committed to furthering its substantive homogeneity but possessing their own institutional characters and legal relationship to their members. Indeed, the principle of autonomy which "protects" the essential characteristics of the EU legal order, *prevents* a fully integrated enforcement system beyond its boundaries.

4. Principles migrating from the outside to the inside

Here, we reverse our analytical starting point, showing that the principle of conditionality exemplifies the opposite direction of travel – that it has migrated over time from its role in EU external relations (section 4.1.) to playing a part at the core of Union membership (section 4.2).

4.1. *Conditionality, accession, and the neighbourhood*

Conditionality, both positive and negative, has long been an important instrument of EU external policy.[73] We find it in the essential elements clauses in the EU's external agreements, albeit criticized for the EU's reluctance to use them.[74] We find it too, in the EU's General System of Preferences, in both the possibility of suspension and the conditions under

73. Positive conditionality operates when incentives are offered in return for compliance with specific commitments or progress in achieving specific benchmarks. Negative conditionality is a threat to remove preferences (e.g. trade preferences) in the case of failure to comply with certain (normally international) standards or norms.

74. Reidel and Will, "Human Rights Clauses in External Agreements of the EC" in Alston (ed), *The EU and Human Rights* OUP 1999; E Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff, 2003); Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005).

which increased preferences may be granted.[75] Here, we are concerned with pre-accession conditionality, and with conditionality as one of the instruments of the European Neighbourhood Policy.[76] While it can certainly be argued that ENP conditionality was a tool "borrowed" from the post-1992 accession process,[77] conditionality has taken different form in these two contexts.

Pre-accession conditionality is intended to ensure that a new Member State is prepared (in the different senses of that word) to participate in the Union system. And as we have seen, a key dimension of that system is solidarity based on mutual trust: the duty on each Member State to presume that all the other Member States are complying with EU law, and particularly with the fundamental rights recognized by EU law. In this sense, then, pre-accession conditionality is aimed at creating the conditions for post-accession solidarity. But solidarity may also be said to play a role during the pre-accession process: structurally, in the fundamental openness suggested by Article 49 TEU, and in the EU's commitment to the accession States to assist them in that process.[78] Thus conditionality operates in the context of a *shared purpose*: pre-accession solidarity aims at assisting potential Member States to meet the EU's membership conditionality.

Conditionality has operated rather differently in the context of the ENP. From the start, the degree and level of integration offered was linked to "concrete progress" in meeting specific reform targets, the idea of "more for more".[79] While referring to the EU's values,[80] which Article 8 TEU suggests are fundamental to all neighbourhood relations, ENP conditionality is set politically by the EU institutions working with their ENP partners through Action Plans, partnership priorities and Association agendas. In

75. Regulation 978/2012 applying a scheme of generalized tariff preferences, O.J. 2012, L 303/1; in 2020 the Commission withdrew tariff preferences from Cambodia on the grounds of serious and systematic violations of principles laid down in four core human and labour rights conventions: Commission Delegated Regulation 2020/550, O.J. 2020, L 127/1.

76. Outside the ENP, in contrast, notably within the EEA and the agreements with Switzerland, relations are based on a shared commitment to comply with (parts of) the EU *acquis*, and there are no distinct conditionality mechanisms.

77. Cremona, "The European Neighbourhood Policy: More than a Partnership?" in Cremona (ed) *Developments in EU External Relations Law* (OUP, 2008), 283–285.

78. Sjursen, "Why Expand?", (2002) 40 JCMS 491; Cremona "EU enlargement: solidarity and conditionality", 30 EL Rev. (2005), 3.

79. See e.g. COM (2003) 104, note 4, p. 10: "In return for concrete progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*, the EU's neighbourhood should benefit from the prospect of closer economic integration with the EU."

80. See e.g. Joint Communications, "Eastern Partnership policy beyond 2020", JOIN (2020)7, p. 1; "Renewed partnership with the Southern Neighbourhood A new Agenda for the Mediterranean", JOIN (2021)2, p. 6.

some cases, such as the Association Agreements with Ukraine, Moldova, and Georgia, we find both a commitment to align with parts of the EU *acquis* and a significant level of conditionality, including linking market opening (internal market treatment) to progress in legal approximation and implementation of specific measures.[81]

The difficulty of effective conditionality where there is no articulated shared objective, and the tension between conditionality and the "joint ownership" on which the ENP is supposedly based, has long been recognized,[82] but the conditionality tools of goal-setting and reporting are still very much in play, and allocation of funds is linked to commitment to and implementation of reform.[83] Meeting conditionality targets opens the way to accessing solidarity in the form of both financial resources and closer integration with the EU.

This picture suggests that while conditionality might be seen as inherent to the ENP, and thus to at least some of the EU's neighbourhood relations (and indeed as shaping the degree of integration which the EU is prepared to offer), and while it plays a part in the pre-accession process for candidate States, it is a tool of external policy designed to be "left at the door" once a State joins the Union and becomes part of a community based on solidarity and mutual trust. Conditionality would appear to be essentially external to EU membership. Indeed, it could be argued that conditionality is antithetical to the creation of a shared legal space, at least when it is uni-directional, applying only to some parties to the relationship. However, as the next section shows, conditionality is increasingly being given a role *within* the Union – precisely to preserve that shared legal space – with a

81. For example, the Preamble to the EU-Ukraine Association Agreement (UAA), O.J. 2014, L 161/3, recognizes that "the political association and economic integration of Ukraine with the European Union will depend on progress in the implementation of this Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas". For market access conditionality, see Article 475(5) UAA. See further Van der Loo, Van Elsuwege and Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument", (2014) EUI Working Papers LAW 2014/09; Cremona "Extending the Reach of EU Law: The EU as an International Legal Actor" in Cremona and Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019), 93–98.

82. See further Cremona, "The European Neighbourhood Policy: More than a Partnership?", note 75; Joint Communication, "Review of the European Neighbourhood Policy", JOIN (2015) 50.

83. See, e.g. JOIN (2020)7 (note 80 above), p. 1: "The EU's incentive-based approach ('more for more' and 'less for less') will continue to benefit those partner countries most engaged in reforms." Regulation 2021/947 establishing the Neighbourhood, Development and International Cooperation Instrument, O.J. 2021, L 209/1, Arts. 19(2) and 20.

consequent shift in the relationship between conditionality, mutual trust and solidarity.

4.2. *Conditionality comes inside (to membership)*

As Section 4.1. suggested, the pre-accession process is dominated by conditionality, because it marks the phase before a formerly third state becomes absorbed into "the structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other".[84] However, different forms of conditionality have increasingly been imported into the paradigm of Union membership too.

A first significant discussion responded to the conditionality mechanisms built into measures to address the Eurozone crisis, which, in effect (and having regard especially to the amended wording of Article 136 TFEU),[85] qualified the extension of solidarity to the Member States receiving financial assistance – suggesting, relatedly, *qualified* mutual trust that the assistance being provided would be managed appropriately. With their legality in principle confirmed by the Court of Justice,[86] most analyses of the conditionality mechanisms applied in that context assessed their form (measures of EU law or not?) and their compliance with the principles of the EU legal order, notably the requirements of democracy and protection of fundamental rights.[87]

84. Case C-284/16, *Achmea*, EU:C:2018:158, para 33. See further Cremona, "EU enlargement: solidarity and conditionality", 30 EL Rev. (2005), 3, especially at 21.

85. Article 1 of European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (O.J. 2011, L 91/1) added the following text to Article 136 TFEU: "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

86. Case C-370/12, *Pringle*, EU:C:2012:756, especially para 143: "the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy". Enabling review against the Charter of Fundamental Rights, see later, e.g. Joined Cases C-8/15P to C-10/15P, *Ledra Advertising*, EU:C:2016:701.

87. E.g. Poulou, "Financial assistance conditionality and human rights protection: what is the role of the EU Charter of Fundamental Rights?", 54 CML Rev. (2017), 991; Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP, 2014); Kilpatrick, "Are the bailouts immune to EU social challenge because they are not EU law?", (2014) 10 *EuConst* 393; and Armstrong "The new governance of EU fiscal discipline", 38 EL Rev. (2013), 601.

More recently, the Court's rulings on Hungary and Poland's respective challenges to the validity of the Conditionality Regulation[88] are especially relevant. The Court characterized the Union budget as "one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law" and noted that "the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources".[89] But how the Court reasoned that point goes to the very heart of Union membership. It first confirmed the standard view that respect for the values in Article 2 TEU is a "prerequisite for the accession to the European Union of any European State applying to become a member of the European Union".[90] Reflecting the presumption discussed above that pre-accession conditionality is replaced by EU membership, the Court observed that "once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded", a premise which is, in turn, "based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law".[91]

These findings were already familiar from Opinion 2/13 and *Achmea.* But the Court then held that "compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State" – that, in other words, "[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession".[92] Advancing beyond the idea of defending the "common interest" in Opinion 1/75, the Court considered that "the values in Article 2 TEU "define the very identity of the European Union as a common legal order. Thus the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties".[93]

88. Regulation of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, O.J. 2020, L 433 I/1.

89. Case C-156/21, *Hungary* v. *Parliament and Council*, EU:C:2022:97 and Case C-157/21, *Poland* v. *Parliament and Council,* EU:C:2022:98, paras. 129 and 147 respectively.

90. Ibid., paras. 124 and 142 respectively.

91. Ibid., paras. 125 and 143 respectively. The linchpin of mutual trust is also recalled in these paragraphs.

92. Ibid., paras. 126 and 144 respectively.

93. Ibid., paras. 127 and 145 respectively.

This is a remarkable ruling in terms of articulating the persisting purpose of conditionality within Union membership. The threat to mutual trust and solidarity here does not come from the outside, but instead, from within the community of States that comprise the Union. As it had in its European Arrest Warrant case law, the Court recognizes exceptional circumstances in which the presumption of mutual trust that normally guides Member State relations can be set aside. Differently here, though, the symbiosis of the Union and its Member States is displaced when a Member State does not comply with the values in Article 2 TEU – the Union must have the capacity to defend these values against a *Member State's* failure to respect them, opening a new dimension of membership that posits the Union and its Member States in opposition. Compliance with the values in Article 2 TEU is thus entrenched as part of the legal code for sustaining *valid* membership.

Even more importantly from our perspective, though, non-compliance with the values in Article 2 TEU could lead to the unravelling of the "new legal order", which is both constructed by and dependent upon an agreed – and continuing – commitment to membership. For the Court, referring explicitly to the "specific and essential characteristics" and autonomy of EU law, mutual trust is based on a commitment "to *continue* to comply" not only with the values in Article 2 but also with "the commitment of each Member State to comply with its obligations under EU law".[94]

As a result, the legal template of EU membership does require respect for the fundamental principles of EU law and for the values in Article 2 TEU – though these can be, and are, shared in relations with near neighbours. However, it is a State's commitment to the autonomous system that governs the *application and enforcement* of those principles that truly distinguishes "external" and "internal" integration, and thus the legal character of EU membership.

5. Concluding remarks: integration, the neighbourhood and EU membership

In this paper, we have explored the legal features of integration in the Union's neighbourhood in order to shed more light on the nature of integration in "Europe" and thus also on the legal distinctiveness of EU membership. Reflecting on what it means, legally, to be a Member State in

94. Ibid., paras. 129 and 147 respectively (emphasis added); reflecting recital 5 of the Regulation.

counterpoint to the Treaty-mandated "special" neighbourly relationships that the Union has developed in a variety of *almost* membership ways proves enlightening in seeking to identify and resolve "fundamental questions about the parameters of the EU legal order and the duties incumbent upon Member States".[95]

As the Union matures, its relations with proximate third states reflect more authentically "a real commonality of interest between the EU and its neighbours, while avoiding the easy assumption that the EU's interests are those of its neighbours".[96] At one level, through our discussion of how the principles of mutual trust and solidarity have migrated *outwards* and how the concept of conditionality has migrated from the neighbourhood *inwards*, it becomes harder to identify the legal principles that apply *only* in the context of Union membership. In this way, both the commitment in Article 8 TEU to building "a special relationship with neighbouring countries" and the fact that this relationship must, according to the same provision, be "founded on the values of the Union" hold true. Where both a commitment to shared values and instances of fundamental principles of EU law are transferred to the context of neighbourhood relations, integration is normally fostered.

Sometimes that is not the case, as the more transactional arrangements currently in place with the United Kingdom also show. Advocate General Collins goes too far, we think, in the assertion that "the United Kingdom's sovereign choice to leave the European Union amounts to a rejection of the principles underlying the European Union, and [as] the Withdrawal Agreement is an agreement between the European Union and the United Kingdom to facilitate the latter's orderly withdrawal from the former, the European Union was in no position to insist that the United Kingdom fully adhere to any of the European Union's founding principles".[97] As the patchwork of the Union's neighbourhood shows, there is room for relationships and arrangements of varying closeness and of varying commitment to further integration.

At the same time, while the process of delivering Brexit, from the Union side, arguably hardened the EU's insistence that there is a sharp distinction between Member States and third states, the deep specialness of the Union's relationship with EEA States was articulated quite strikingly (in *IN*, for example) at the very same time. Through the vector of

95. A.G. Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v. *Poland, Czech Republic and Hungary*, EU:C:2019:917, para 238 of the Opinion.

96. Cremona, note 84 above, 14.

97. A.G. Collins in Case C-673/20, *Préfet du Gers*, EU:C:2022:129, para 75 of the Opinion.

integration, we know that the simple binary of Member State/third state does not capture either the rich diversity of relations progressed by the Union in general or the closeness of (most of) the Union's relations within the neighbourhood more specifically.

But if special neighbourly relationships can, both through Article 8 TEU and in practice, be premised on sharing the Union's values, in different ways and to different degrees, and if we see evidence within these arrangements of fundamental principles of EU law also in play, what, then, remains legally distinctive about EU membership?

In the Conclusions following its meeting on 23 and 24 June 2022, the European Council acknowledged its discussion on the Union's "relations with its *partners* in Europe", which included President Macron's "proposal to launch a European community", his vision for which we outlined at the beginning of this paper.[98] This aim of the community he envisions is "to offer a platform for political coordination for European countries across the continent", which "could concern all European countries with which we have close relations". For Macron, this initiative answers a central question – "how can we organize Europe from a political perspective and with a broader scope than that of the European Union?"[99] – and the ambition to deliver it emits the "special relationship" and "good neighbourliness" qualities of Article 8 TEU. This "new European organization" would allow "democratic European nations *that subscribe to our shared core values* to find a new space for cooperation". Macron also asserted that "[j]oining it would not prejudge future accession to the European Union necessarily, and it would not be closed to those who have left the EU. It would bring our Europe together, respecting its true geography, on the basis of its democratic values, with the desire to preserve the unity of our continent and by preserving the strength and ambition of our integration".

Perhaps reining in the free-for-all thinking sketched by President Macron to some extent, the European Council Conclusions, notably more sober in tone, make it clear that the proposed "framework will not replace existing EU policies and instruments, notably enlargement". Even more importantly from our perspective, while the values of the Union are not referenced, it *is* explicitly stated that the new community "will fully respect the European Union's decision-making autonomy".[100]

98. European Council meeting of 23 and 24 June 2022, Conclusions (EUCO 24/22), <https://data.consilium.europa.eu/doc/document/ST-24-2022-INIT/en/pdf>.

99. Speech by Emmanuel Macron at the closing ceremony of the Conference on the Future of Europe, Strasbourg, 9 May 2022, available at <https://presidence-francaise.consilium.europa.eu/en/news/speech-by-emmanuel-macron-at-the-closing-ceremony-of-the-conference-on-the-future-of-europe/>.

100. We are grateful to Sara Canducci for raising this point.

That brief reference to autonomy in the Conclusions signals powerfully both the constitutional limits to EU integration with third States and the distinctiveness of Union membership. It is participation in the Union's systemic constitutional distinctiveness that matters, expressed time and again by the Court through the fact that "the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law", and that these relate "in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves".[101]

Sharing the Union's values is therefore necessary, but it is not sufficient; neither is being willing to be bound by some of the Union's "essential"[102] constitutional principles. It is agreed, and sustained, participation in the "new legal order" that fixes the parameters of membership of the Union.[103] Without this, there can be deep and significant neighbourly integration. But there cannot be membership.

101. Case C-284/16, *Achmea*, EU:C:2018:158, para 33.

102. Ibid.

103. See e.g. Opinion 1/91 (*EEA Agreement I)*, EU:C:1991:490; para 21 summarizes the "new legal order" created by the EEC Treaty "[i]n contrast" to the EEA Agreement, also to emphasize that "[t]he context in which the objective of the [EEA] agreement is situated also differs from that in which the Community aims are pursued" (para 19).