1 Introduction

The competitive position of the European Union (EU) in the world depends not only on pure economic (trade) power but also on the Union's ever-increasing regulatory impact. The latter includes both participation in multilateral bodies that create global rules, standards and practices and exporting 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 Union's neighbourhood and exemplified by an array of regulatory tools varying in form and intensity.

Exporting the EU acquis to third countries has a variety of objectives, ranging from economic development in the Union and the neighbouring regions to coordinated responses to mutual threats and challenges. Regulatory approximation between the EU and the third countries' legal orders increases political and economic stability in the EU's immediate neighbourhood while assisting the non-EU Member States to reach internal policy goals, which are equally beneficial for the EU.[2] The latter holds true especially for states 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 financial and technical aid instead of a broad enlargement strategy is a possible means of dealing with the Union's accession capacity.[3]

[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] S Lavenex, 'EU External Governance in "Wider Europe"' (2004) 11 *Journal of European Public Policy* 680, 694.

[3] 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

Certain categories of agreements concluded between the Union and the neighbourhood countries share the common feature of exporting to the non-Member States the EU's norms, policies and institutions. The scope of the acquis and the depth of integration envisaged in each agreement vary to a large extent depending on 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 approximation[4] between the EU and neighbouring countries on the basis of EU acquis do not aim for total regulatory convergence encompassing 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 access to the European market.[5] Furthermore, in some instances, the process of regulatory approximation is based primarily on international or bilateral norms,[6] whereas 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 the 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.

Exporting the internal market acquis to third countries and, especially, the aim of thereby expanding the internal market is a significant

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.

[4] 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.

[5] For the purposes of this study, the internal market acquis, which is a concept of variable content, is defined broadly to include all primary and secondary law, political instruments, and case law of the EU judiciary pertaining to the establishment and functioning of the internal market, including the fundamental freedoms and competition law as well horizontal provisions and fundamental rights.

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

part of the EU's external action and the most prominent example of third countries' legal approximation to the EU. It questions the correlation between the twofold boundaries of the internal market – the geographical and the substantive. From the perspective of EU constitutional law, the blurring of the boundaries of the internal market raises a set of questions pertaining to the nature of the internal market and the EU legal order as well as the overall 'expandability' of the internal market separate from the enlargement process.

Certain multilateral agreements, in particular, have in common the ambitious objective of exporting a significant share of EU acquis to non-EU Member States to, thereby, extend the internal market. These agreements aim to create 'homogeneous' internal market spaces operating on the basis of EU acquis also outside the Union's borders. Exporting part of the EU's regulatory framework outside the Union will not, however, perforce result in a legal space that is homogeneous with the internal market. The European Communities set out to create a multi-state market in which the factors of production can move freely to create maximum efficiency. The question of whether the internal market is 'expandable' to non-EU Member States requires a close look at the concept of the internal market, the required level of compliance with the common rules and the role of the foundational principles therein. The internal market acquis has been designed to function in a supranational legal order with supranational principles and an institutional system to ensure uniform interpretation and application and effective enforcement of the common rules. When extracted from the Union's legal order, the framework in which the acquis is applied changes to a legal order governed by the principles of public international law. Beyond the EU borders, the internal market acquis does not, therefore, enjoy the same guarantees for homogeneity in substance, interpretation, application and enforcement as within the Union.

In broad terms, legal homogeneity can be achieved by legislative, administrative and judicial means.[7] Legislative means encompass the mechanisms for participation in the decision-making processes, the procedures for duly updating the acquis and the status of EU law in the third countries' legal orders; administrative means include the

[7] 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.

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 agreements that export the acquis are not, however, entirely free to choose an appropriate institutional design to achieve and maintain homogeneity between EU acquis and the acquis contained in the international agreements.

The main conflict lies in the need to preserve the autonomy of the European legal order – a concept keenly protected by the Court of Justice of the EU (the Court). The question of autonomy vis-à-vis international agreements concluded by the EU has been in the focus of a strand of case law of the Court.[8] A set of conditions has been distilled, which the institutional and procedural framework of an international agreement must conform to, in order to be regarded as compatible with the principle of autonomy.

The central question that hereby arises is to what extent it is feasible to extend the substantive boundaries of the internal market beyond the geographical borders of the Union. In other words, to what extent can either the entire internal market or a policy sector thereof be expanded by exporting the internal market acquis to third countries outside the enlargement process? An answer to the question necessitates an analysis of two broad issues: first, the constitutional limitations inherent to the concept of the internal market and, second, the institutional constraints to exporting the acquis outside the EU and maintaining its homogeneity while preserving the autonomy of the EU legal order. The first category comprises the concept of the EU internal market in the broadest sense: its substantive content, the perception of the EU legal order and the internal market as uniform constellations, and the effect of the uniform rules in the common legal order. The second category pertains to the requisite institutional structures to support the aim of extending the internal market to third countries in a homogeneous manner, including institutions for ensuring the dynamic export and updating of the acquis as well as the surveillance, enforcement, interpretation and application of the exported rules. The possibilities to set up any institutional structures by an international

[8] Opinion 1/76 *European laying-up fund for inland waterway vessels* EU:C:1977:63; Opinion 1/91 *EEA I* EU:C:1991:490; Opinion 1/92 *EEA II* EU:C:1992:189; Opinion 1/00 *ECAA* EU:C:2002:231; Opinion 1/09 *Patents Court* EU:C:2011:123; Opinion 2/13 *ECHR II* EU:C:2014:2454; Case C-284/16 *Achmea* EU:C:2018:158; Opinion 1/17 *CETA* EU:C:2019:341.

agreement concluded by the EU are restricted by the limitations deriving from the concept of autonomy.

This book aims to provide a legal analysis of the 'boundaries' of the concept of the internal market, which can also be understood as its 'exportability' to non-EU Member States. It highlights the possible effects of such norms export on the EU's legal order and the potential challenges for the third countries' legal orders. The book adopts the perspective of EU constitutional law rather than of the third countries' legal systems and provides a theoretical rather than practical or empirical account of the subject matter. The analysis does not, therefore, consider the practical difficulties 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 the national legal orders.

Four case studies are used in the analysis to illustrate the challenges of setting up institutions and procedures to respect both the autonomy of the EU legal order and the sovereignty of the contracting parties while achieving and maintaining homogeneity in the expanded internal market: the Agreement on the European Economic Area (EEA Agreement),[9] the Treaty establishing the Energy Community (EnCT),[10] the Agreement on the Establishment of a Common Aviation Area (ECAA Agreement)[11] and the Treaty establishing the Transport Community (TCT).[12] Agreements by which the Union exerts normative influence globally and in the neighbourhood region are many and prominently include the new generation free trade agreements concluded with, for example, Canada, Japan, Singapore, South Korea and Vietnam, as well as the Deep and Comprehensive Free Trade Areas (DCFTAs) combined with association agreements (AAs) concluded to date with Georgia, Moldova and Ukraine. However, the aims of the four multilateral agreements that are analysed in detail in the book go well beyond the objectives of the bilateral free trade agreements including those coupled with AAs, both in terms of creating homogeneous market spaces within a region rather than between the EU and individual third countries, as well as envisaging deep integration into the EU internal market or a sector thereof through extensive commitments assumed on behalf of third countries to adhere to the EU acquis. Similarly to the EU not

[9] [1994] OJ L1/3.
[10] [2006] OJ L198/18.
[11] [2006] OJ L285/3.
[12] [2017] OJ L278/3.

being constituted by a web of bilateral agreements, the multilateral case studies best illustrate the challenges of setting up elaborate institutions and procedures to support the achievement and maintenance of homogeneity in a legal space constructed upon EU acquis while respecting the limits to the EU's norms export inherent to the EU legal order.

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

The book consists of two main parts. Following Chapter 2 which situates the practice of exporting the internal market acquis to third countries in the context of the EU's external relations, the first part of the book deals with the constitutional limitations to expanding the internal market by international agreements deriving from the specificities of the concept of the internal market and the legal framework in which it operates. The second part of the book addresses the institutional limitations to achieving and maintaining homogeneity in the expanded internal market that arise from the need to preserve the autonomy of the EU legal order and the sovereignty of the non-EU Member State parties to the multilateral agreements.

Chapter 2 conceptualises the phenomenon of exporting the internal market acquis and thereby expanding the internal market to non-EU Member States without membership in the Union. The Chapter explores the evolving role of the internal market acquis in the EU's external relations by analysing the dynamics between the aims of various international instruments and the character and scope of the internal market acquis contained therein. The various functions of the acquis are identified and presented in a progression in time and across various country groups in the EU's neighbourhood.

Chapter 3 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 on the principles that constitute the economic core of the internal market, such as the four fundamental freedoms and

competition policy, and their interaction with horizontal provisions, fundamental rights and EU citizenship. In addition to looking at the internal market as a whole, the Chapter also explores whether the specific sectors of the internal market feature distinctive cores.

Chapter 4 scrutinises the notion of unity as an essential characteristic of the EU legal order and the internal market, and the aims of the multilateral agreements to achieve 'homogeneity' in the expanded internal market. The Chapter provides an examination of the notions of 'unity' and 'homogeneity' and the nature of the homogeneity provision in the acquis-exporting agreements. The Chapter seeks to establish the level of legislative commonality – as opposed to flexibility and differentiation – necessary in the extended internal market to be able to consider the position of the third country market participants equal to that of their EU counterparts.

Chapter 5 addresses the role of the foundational principles of EU law – primacy, direct effect, consistent interpretation and state liability – in ensuring the proper functioning of the internal market. The EU-specific principles are juxtaposed with their equivalents in public international law and in the EEA, the Energy Community, the ECAA and the Transport Community legal orders. The analysis helps to determine the implications of a possible absence of the supranational principles in the agreements exporting the acquis on the effectiveness of the acquis transferred to third countries by means of agreements operating under public international law.

Chapter 6 defines the concept of the autonomy of the EU legal order and examines its implications for the choice of the most effective institutional framework for achieving and maintaining homogeneity in the expanded internal market. The Chapter scrutinises the concept of autonomy from the perspectives of domestic law and public international law, analyses its content and application by the Court of Justice as well as its ramifications for the acquis-exporting agreements concluded by the Union.

Chapter 7 scrutinises the institutional and procedural structures necessary for achieving homogeneity in the process of exporting the acquis to third countries. The first part of the analysis addresses the necessary institutional and procedural frameworks for dynamically updating the multilateral agreements to reflect changes in the internal market acquis. The second part considers the procedures for defining the key elements of the internal market acquis and the modalities of third country participation in the process of defining the acquis on the

EU level. This includes an examination of the implications of the increasing use of new governance methods in the EU policy-making on the third country actors' possibilities to influence the content of the internal market acquis and to, thereby, increase the effectiveness of the norms transfer.

Chapter 8 explores the essential institutional characteristics for maintaining homogeneity in the expanded internal market in the stages of the application and the implementation of the acquis. The analysis focuses on the institutional and procedural frameworks in the EU and in 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 analysis is divided into two parts dealing with the centralising and decentralising dynamics, respectively. The former pertains to the centralised institutions and procedures for surveillance, enforcement and judicial protection in the EU and the multilateral agreements; and the latter to the procedural links between the international or supranational institutions, on the one hand, and national authorities and individuals, on the other.

The final Chapter 9 addresses both the substantive and institutional aspects of the process of expanding the internal market to third countries without enlarging the Union and provides a conclusion on the viability of the ambition to truly extend the internal market to third countries, either in a comprehensive or a sectoral manner, by means of exporting internal market acquis by international agreements.