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The future EU-UK partnership: a historical institutionalist perspective

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Abstract: This article takes a comparative perspective to identify the likely parameters of the future partnership between the United Kingdom (UK) and the European Union (EU). It asks why and how the EU exports institutional norms to its neighbouring countries, and what this implies for the UK-EU relationship. Drawing on historical institutionalism, the authors argue that as a specific legal-institutional order, the EU exports not only regulatory norms and values but also institutional norms into its partnerships with neighbouring countries, mainly through the mechanism of reproduction. For the UK this means that the nature of its future partnership with the EU is likely to be influenced more by established practices in and precedents from the EU's relations with European neighbours than by any sense of privilege emanating from the UK's position as a former member state.

Keywords: Brexit, historical institutionalism, institutional norms, neighbourhood, privileged partnership, United Kingdom

Introduction: the EU as an institutional norms exporter

The withdrawal of the United Kingdom (UK) from the European Union (EU) at the end of January 2020 has once again placed on the EU's political agenda the question of alternative forms of close relations with European non-member states. Although Brexit is a unique case of disintegration, the negotiations between the UK and the EU on a new partnership will be far from unique. Brexit is taking place as other neighbouring countries – beyond the

candidates and potential candidates for EU membership – seek to develop their institutionalized relations with the EU in exchange for further access to the internal market and other benefits. These evolving privileged partnerships provide through formal, legally-binding agreements with the EU for extensive reciprocal rights and obligations, selective *acquis* adoption, policy cooperation and integration. They also involve extensive institutional arrangements for governing each relationship which generally include joint bodies, monitoring and dispute settlement mechanisms, and even privileged 'decision-shaping' access to EU institutions and agencies (Gstöhl and Phinnemore 2019). Examples of such privileged partnerships include the European Economic Area (EEA) with three of the members of the European Free Trade Association (EFTA), the EU-Swiss bilateral relationship, the EU-Turkey customs union, the EU's relations with the small-sized states Andorra, Monaco and San Marino (AMS), as well as association agreements including a Deep and Comprehensive Free Trade Area (DCFTA) with European Neighbourhood Policy (ENP) countries such as Ukraine, Moldova and Georgia.

This article asks why and how the EU exports institutional norms to its neighbouring countries, and what this implies for the UK's future partnership with the EU. It draws on historical institutionalism and its emphasis on critical junctures, power asymmetry, path dependence and precedent-setting. Institutional norms are understood as forms of governance that encompass processes of decision-making, monitoring, surveillance and dispute settlement both internally to the EU and in arrangements governing its relations with third countries. We argue that the EU exports some of its institutional norms due to its distinct nature as a specific legal-institutional order and its predominant position in relation to neighbouring countries. It does so mainly through the mechanism of reproduction. For the

UK this means that the substance and nature of its post-Brexit partnership with the EU is likely to be influenced by path dependence. Established practices in and precedents from the EU's relations with European neighbours may be more important than any sense of privilege emanating from the UK's position as a former member state.

The article draws on historical institutionalism and its focus on the modes through which the EU extends 'institutionalized forms of co-ordinated action that aim at the production of collectively binding agreements', in other words governance, beyond its regulatory and organizational boundaries (Lavenex and Schimmelfennig 2009, 795-796). Regulatory boundary refers to the extension of EU rules or policies to non-member states, while organizational boundary refers to the inclusion of non-member states in EU policy-making processes. This corresponds largely to the scope and institutional arrangements of privileged partnerships that are discussed below. Lavenex and Schimmelfennig (2009, 802-804) argue that an institutionalist explanation can best account for the variation in governance in that external governance reflects the EU's internal policy-making structures complemented by patterns of asymmetric power and interdependence between the EU and the third countries. A historical institutionalist approach is compatible with this approach but goes beyond it. Taking a longer-term, comparative perspective helps explain the institutional choices made in the EU's neighbourhood relationships over time and does not limit 'reproduction' to the EU's internal governance but allows for the inclusion of factors such as critical junctures, path dependence and precedent-setting.

The article is divided into four substantive sections. The first and second sections compare, respectively, the scope and the institutional dimensions of the EU's privileged partnerships

with European countries. The third section, through the lens of historical institutionalism, explores the proliferation of partnerships. A fourth section then considers the significance of the findings for the UK's future (economic) partnership with the EU.

The scope of privileged partnerships

The EU's privileged partnerships focus foremost on trade in goods but also cover, at least in part, other freedoms of movement in the internal market. In a classical free trade area participating states basically agree to eliminate substantially all tariffs and quotas (and possibly certain non-tariff barriers) on trade; in a customs union participants in addition share a common external trade policy; and an internal market adds to that the free movement of goods, capital, services and labour. The free movement of capital does not figure prominently in the agreements, except for the EEA. As a minimum, Article 63 TFEU, introduced by the Treaty on European Union in 1993, stipulates that all restrictions on the movement of capital between the EU member states as well as between them and third countries shall be prohibited.

As a more detailed comparison shows, the scope varies with the level of ambition, size and state of economic development of the partner, its geographical location and degree of interdependence with the EU. Moreover, the higher the level of a third country's rights and obligations, the more developed its institutional relationship with the EU is (see below).

The most substantial partnership is the EEA which constitutes a form of internal market association extending the four freedoms to the participating EFTA countries and involving

the dynamic adoption of new relevant *acquis*. Rejected by the Swiss in 1992, the EEA has nevertheless also served as a benchmark for the EU's relations with Switzerland. The result has been a multitude of sectoral agreements between the two partners. Attempts to provide these with an overarching institutional framework eventually led to a draft agreement being reached in December 2018. It has yet to be signed, however. For the EU, adoption of an institutional framework agreement is a precondition for a consideration of new areas for further EU-Swiss cooperation (Council of the EU 2019, para. 9).

Other European countries' relations with the EU are also evolving. The AMS states, which are part of the EU's customs territory and have concluded monetary agreements allowing them to use the Euro, have since May 2015 been negotiating a more comprehensive association arrangement with the EU to gain improved market access. Turkey, the EU's longest-standing 'associate', is also seeking a modernization of its customs union with the EU established in 1996. Relations are based on the 1963 Ankara Agreement which mentioned all four freedoms although only the free movement of (non-agricultural) goods has largely been realized. The modernization of the customs union is being sought because of the unfulfilled trade potential (i.e. trade in services and establishment, public procurement, agricultural products, rules such as sustainable development or sanitary and phyto-sanitary measures) in the relationship and Turkey's poor implementation of existing commitments (European Commission 2016, 9-14). Less ambitious on customs but focused more on integration with the EU's internal market are the association agreements involving DCFTAs with ENP countries such as Ukraine, Georgia and Moldova. Establishing a different type of privileged partnership, the DCFTAs entail a gradual integration into the internal market based on legislative approximation in certain areas and subject to conditionality (see Table 1).

< insert Table 1 here or hereabouts >

The different degrees of internal market association contained in these privileged partnerships call into question the accuracy of the EU's repeatedly stated claim that the four freedoms of the internal market are indivisible and that therefore there can be no UK 'cherry-picking' (e.g. European Council 2018, 7; for a critical analysis of the freedoms' indivisibility see also Barnard 2017). Clearly not all privileged partnerships contain the same level of engagement with the internal market. Much depends on the ambition of the partnership and the extent to which it creates a level playing field for economic actors. And here, the size and the state of economic development of the partner, its geographical location and its interdependence with the EU matter. The larger and more economically developed and geographically closer a state is, the more the EU will expect – indeed demand – of it in exchange for access to the internal market. There are very limited exceptions. Liechtenstein enjoys special arrangements regarding the free movement of goods (given its customs union with Switzerland) and the free movement of people (Frommelt and Gstöhl 2011).

Ambition and the size and state of economic development of the partner are also determinants of the other forms of integration that the privileged partnerships involve. Geographical location and historical links with member states matter too as is particularly the case with the AMS states. The EEA countries, Switzerland and *de facto* Andorra, Monaco and San Marino are part of the Schengen area. The EU's association agreements with the ENP countries envisage far-reaching provisions on convergence in the area of the Common Foreign and Security Policy (CFSP). Other privileged partnerships limit themselves to a voluntary

alignment to EU statements and measures in this field (see Marciacq and Sanmartín Jaramillo 2015). Many of the EU's European partners also participate in missions of the Common Security and Defence Policy (CSDP) and/or cooperate with the EU's justice and home affairs agencies (Eurojust, Europol, Frontex).

The institutional dimensions of privileged partnerships

In the past decade, the EU has repeatedly made clear that four sets of institutional issues need to be addressed in developing relations with its neighbours: (1) how to keep agreements up-to-date in light of relevant new EU acts; (2) how to monitor partners' compliance; (3) how to ensure the uniform interpretation of agreements in line with the *acquis* from which they are derived; and, (4) how to settle disputes with partners (Council of the EU 2018). The minimal institutional set-up is a joint committee; the maximum to date is the two-pillar system of the multilateral EEA, with arrangements in bilateral agreements located somewhere in between (see Table 2 for the privileged partnerships currently in force).

< insert Table 2 here or hereabouts >

When it comes to decision-making, the EEA is based on a dynamic procedure where the EEA EFTA states participate in decision-shaping. This means that the EEA EFTA states are from an early stage involved in the making of new EU legislation relevant for the EEA by contributing to and influencing policy proposals up until they are formally adopted. However, they have no right to vote, and actual decision-making is left to the EU member states and the European Parliament (Frommelt 2019, 52-53). The current Swiss approach is essentially

static, based on equivalence of laws, although there are a few exceptions. Switzerland's decision-shaping is limited to the Schengen/Dublin arrangements and a customs security agreement (Oesch 2018). In the EU-Turkey customs union the Commission informally seeks the opinion of Turkish experts on new legislative proposals, and Turkish representatives may be present without a right to vote in a small number of comitology committees (Rapoport 2012, 169-172). Turkey is in any case required by its accession process to accept new EU legal acts. For the ENP countries' DCFTAs it is the Association Council or Association Committee which may amend selected *acquis*, yet without access to any form of decision-shaping with the EU; and there is considerable variation across issue areas (Van der Loo 2019, 109-115). In the case of the AMS states, decision-making regarding new *acquis* is currently quasi-automatic – for Andorra and San Marino the Joint Committee decides, while Monaco applies the customs code as applied in France and in 2003 signed an agreement with the EU on the application of certain EU acts on its territory that require no further legislative or administrative intervention (see Maresceau 2008). In the future, the EU-AMS association agreements are likely to include common provisions laying down the key institutional and substantive principles in addition to 'country protocols' taking into account the specific circumstances and interests of each small state; the CJEU and the Commission are likely to play a more prominent role in surveillance and dispute settlement (Maiani 2019, 96-97).

Regarding surveillance, responsibility usually lies with the Association Council or Joint Committee. The exceptions are the EFTA Surveillance Authority in case of the EEA and the European Commission for the EU-Switzerland civil aviation agreement and for the monetary conventions with the AMS states. EU bodies, mainly the Commission, also monitor the areas linked to market access conditionality in the DCFTAs. Judicial enforcement follows a similar

pattern. Only the EEA EFTA pillar has its own court. The other privileged partnerships rely mainly on diplomacy in the Association Council or Joint Committee. The AMS states' monetary agreements foresee a role for the CJEU, as does the EU-Switzerland civil aviation agreement for decisions of the EU institutions. All partners are expected to interpret the incorporated (pre-signature) *acquis* in accordance with EU case law, and in some partnerships even the future (post-signature) case law is relevant.

For dispute settlement, the initial stage is in all cases bilateral diplomacy in the Association Council or Joint Committee. Should this not resolve the issue, some agreements provide the option to refer the case to the CJEU (at least for provisions identical to EU law) or to arbitration. The EEA's two-pillar model foresees that if a dispute is not solved in the EEA Joint Committee, the parties may agree, where substantively identical provisions are concerned, to refer it to the CJEU, although this has not yet happened. Each party can adopt proportionate rebalancing measures (e.g. restrictions on market access or on the free movement of persons) which may be reviewed by arbitration. The CJEU and the EFTA Court are in a constant judicial dialogue about the interpretation of EEA law (Baudenbacher 2016).

For the EU-Turkey relationship, the Ankara Agreement stipulates that the Association Council – which meets once a year – settles disputes, but it can also decide to refer a dispute to the CJEU or another existing court. The latter two options have not been used as the two parties would have to agree. By contrast, the EU's customs agreements with Andorra and San Marino foresee the establishment of a panel of three arbitrators to solve disputes by majority vote and they do not require reference to the CJEU in case of identical provisions. In the future EU-AMS association agreement(s), however, the CJEU is expected to feature

more prominently (Tobler 2017, 394-395). In the DCFTAs either side can turn to arbitration, but for provisions identical in substance to corresponding EU law it is the CJEU that provides binding rulings. The fact that arbitration panels must ask the CJEU for a preliminary ruling is an innovative element. Similar procedures exist in other EU agreements, but in those cases, the contracting parties (e.g. the EEA EFTA states) or the Association Council (e.g. in the Ankara Agreement) may but are not obliged to ask the CJEU for a preliminary ruling.

The draft institutional framework agreement between the EU and Switzerland also settled on arbitration if the competent Joint Committee is unable to resolve the dispute within a given timeframe (Swiss Federal Council 2018). Either party may request the establishment of a special arbitration panel consisting of three arbitrators, as is the case in the DCFTAs. Regarding EU law incorporated in the EU-Swiss agreements, the arbitration panel will request the CJEU to provide a binding ruling.

This brief overview of the institutional arrangements that the EU has with its privileged neighbours reveals a legal-institutional order prone to export institutional norms. Differences clearly exist, particularly when considering Switzerland's bilateral agreements with the EU. However, as the results of the negotiations on a draft institutional framework agreement show, the EU appears intent on bringing arrangements into line with existing practices elsewhere, with the EEA serving as a benchmark. All this has significance for the post-Brexit UK-EU relationship. Before turning to how the EU's institutional norms are featuring in the EU position towards the UK, however, the next section draws on historical institutionalism in order to explain why and how the EU does export its institutional norms.

A historical institutionalist approach to privileged partnerships

Historical institutionalism 'examines how temporal processes and events influence the origin and transformation of institutions that govern political and economic relations' (Fioretos, Falleti and Sheingate 2016, 3). Scholars working with this approach have generally focused on the EU's internal policies rather than its external relations; and in International Relations 'historical institutionalism has remained at the sidelines' (Fioretos 2011, 368). However, historical institutionalism offers useful concepts to explain when and how the EU exports its institutional norms. Three core facets of historical institutionalism need to be considered: critical junctures, asymmetries of power and path dependence.

Critical junctures are relatively short periods of significant change which enable freer agency and produce distinct legacies. They often mark the beginning of path-dependent processes creating a 'branching point' from which historical development moves onto a new path (Hall and Taylor 1996, 942). During a juncture the actors face a certain margin of manoeuver: 'the institutional outcome of critical junctures is not determined by macro-structural antecedents' and 'strategies and choices of political leaders, decision-making processes, coalition-building, acts of political contestation, waves of public debate' play a central role (Capoccia 2016, 98).

For example, at the end of the Cold War and with the imminent completion of the EU's internal market, the EFTA countries could have opted for further bilateral cooperation with the EU, for the multilateral EEA or for EU membership. These were plausible alternatives at that critical juncture and indeed, whereas Norway, Iceland and Liechtenstein are still in the

EEA, Austria, Finland and Sweden joined the EU in 1995 and Switzerland pursued a bilateral sectoral approach.

In the case of the EU's eastern neighbours, a key critical juncture was provided by the 'colour revolutions' in 2003-04 in Georgia and Ukraine, and the prospect of the EU's 'big bang' eastern enlargement in 2004. These led to the launch of the ENP. The Russo-Georgian war in 2008, together with the creation of the Union for the Mediterranean, helped bring about the Eastern Partnership. After the Arab Spring, starting in Tunisia in late 2010, DCFTAs were offered to the Mediterranean countries as well. Other 'windows of opportunity' were related to Armenia's decision in 2013 to join the Eurasian Economic Union instead of signing an association agreement with the EU; and the 2013-14 'Euro-Maidan revolution' in Ukraine, followed by Russia's annexation of Crimea and the war in eastern Ukraine. While Armenia has in the meantime concluded a Comprehensive and Enhanced Partnership Agreement with the EU, Ukraine was offered additional financial support, trade benefits and visa-free travel.

In the EU's privileged partnerships, there are *asymmetries of power*: as the larger market the EU enjoys more leverage because the neighbouring countries are more eager to obtain access to the internal market than vice versa. This is particularly obvious in negotiations with small states, such as the AMS countries, but is also the case with states acting on their own, e.g. Switzerland. As argued by Hall and Taylor (1996, 954), 'the power relations present in existing institutions give some actors or interests more power than others over the creation of new institutions' or privileged partnerships. On the one hand, the EU has an interest in reproducing established practice. On the other hand, third countries may accept institutional choices because of a power asymmetry with the EU, for example based on market size or

relative preference intensity (i.e. their comparatively much stronger desire to conclude an agreement). Equally, however, the EU may be willing to make exceptions where the states are small and special historical circumstances may exist. For example, the AMS states with their historical links to member states are special cases; any concessions made to them should not really be regarded as setting a precedent for other, higher-stake negotiations (Maiani 2019, 85).

Also, the functional and territorial expansion of the EU means that the potential for power asymmetries in favour of the EU has increased over time. For example, one can wonder whether the EU today would still negotiate an elaborate two-pillar association in the form of the EEA. At the time of the EEA negotiations the EU consisted of 12 member states; EFTA comprised seven states. The EU has since more than doubled in size and become a powerful actor in regional order-building; critical junctures have opened up 'windows of opportunity' to define more clearly and bring more consistency to how it structures its relations with its neighbours.

The concept of *path dependence* describes situations in which reversing a path becomes more difficult over time, in particular because of self-reinforcing processes involving positive feedback effects such as increasing returns for political actors. It also 'recognizes the importance of existing institutional templates to processes of institutional creation and reform' (Hall and Taylor 1996, 954). Institutions embody shared understandings or interpretive frames. New privileged partnerships tend to be similar to existing ones 'because even when policymakers set out to redesign institutions, they are limited in what they can conceive of by these internalized cultural constraints' (Conran and Thelen 2016, 55). Patterns

of institutional reproduction can thus be expected. While this might not involve perfect replication, 'it is a mode of change that neglects more radical forms of institutional innovation' (55).

The EEA benchmark led to a certain path dependence in that Switzerland largely sought to replicate in substance on a bilateral basis with the EU the market access and cooperation offered by the EEA. The fact that the EEA Agreement has not been reformed since 1992 despite a growing discrepancy in primary law resulting from later EU treaty reforms – and despite the growing power asymmetry in favour of the EU – is another example of path dependence. Moreover, the EEA EFTA states are 'locked into' the EEA's two-pillar structure because withdrawal would be very costly despite the unintended consequences the structure has had such as an increasing delegation of decision-making power to EFTA and EU bodies.

The EU-Turkey customs union arrangement 'inherited' the institutions from the EU-Turkey association of which it is part without adapting them (Peers 1996, 423). It could also be argued that the costs of an elaborate institutional set-up for the customs union were considered too high given that the customs union was perceived as a step towards EU membership. The customs union's supposedly temporary arrangement might also explain why an effective consultation mechanism is missing and why Turkey agreed to accept not just past but also relevant future EU case law. Consultation is also lacking for the conclusion of EU FTAs which open the Turkish market for goods from third countries on a non-reciprocal basis.

A lot has been written about the path dependence between the EU's enlargement policy and the ENP. Magen (2006, 410), for instance, argues that the pattern of replication from the eastern enlargement process to the Stabilization and Association Process with the Western Balkans and then to the ENP shows evidence of the EU's 'effort to emulate the influence mechanisms template employed by the EU in the pre-accession process' and 'displays [not only] heavy path dependency, but also a degree of adaptation to the absence of a membership perspective for the ENP countries'. Moreover, the European Commission (2003, 15) stated that the long-term goal of the ENP was 'to move towards an arrangement whereby the Union's relations with the neighbouring countries ultimately resemble the close political and economic links currently enjoyed with the European Economic Area'. Van Elsuwege and Van der Loo (2017, 112) therefore conclude that also in the ENP 'the search for new bilateral relations is largely determined by past experiences'. The EU is clearly drawing on precedents. However, the existence of a privileged partnership may also create expectations and make it more likely that other countries will ask for a similar agreement. 'Subsequent institutional choices are to some extent constrained by prior choices, and they enjoy a lower degree of freedom' (Rixen and Viola 2016, 13).

Also to note here is that even though not always perceived as such by third countries, the EU's negotiating arenas are interconnected, and there are linkages and spillover – or 'cross-pollination' (Maiani 2019, 96) – effects between the different privileged partnerships and those under negotiations. For example, the EU has been quick to point out that the Swiss sector-by-sector approach was not an option for the UK (European Council 2017, para. 1). Switzerland's position in the aftermath of its 2014 immigration referendum has been complicated by the internal EU debate on its future relations with the UK and a wariness 'of

creating a flexible precedent that Britain might be able to use in negotiating a new bilateral relationship with the bloc' (*The Guardian* 2016). Meanwhile, the dispute settlement arrangements in Ukraine's DCFTA have turned out to be a model for Swiss-EU relations and a blueprint for the UK as well (*Financial Times* 2018). The EU's negotiations with Switzerland and with the AMS states have influenced each other as well (*Neue Zürcher Zeitung* 2015).

Implications for a future EU-UK partnership

Comparative analysis of the EU's privileged partnerships with its European neighbours reveals considerable similarities in terms of institutional norms and principles underpinning them. In this respect, the EU draws on practices and precedents as well as asymmetries of power to promote – some might argue impose – its institutional norms in relations with neighbours. The argument is now being tested in the development of the post-Brexit UK-EU relationship. and at a time of not one but two critical junctures: UK withdrawal from the EU and the COVID-19 pandemic, Moreover, although a power asymmetry exists – the EU market of 446 million people is more than 6.5 times the size of the UK market of 67 million – the UK is clearly economically more significant for the EU than any of its other neighbours. To what extent, therefore, will the relationship ultimately reflect a high degree of EU path dependence and spillover?

Initial indications suggest that a high degree of path dependence at least is characterising the EU's position. Alongside the Withdrawal Agreement in October 2019, the UK and the EU adopted a Political Declaration that aspired to 'an ambitious, broad, deep and flexible

partnership across trade and economic cooperation' including 'a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation' (*Official Journal* 2019, para. 3). Both parties noted that the envisaged 'ambitious, wide-ranging and balanced economic partnership' would be 'underpinned by provisions ensuring a level playing field for open and fair competition' (para. 17). The Political Declaration was explicit: owing to the UK's 'geographic proximity and economic interdependence', the future relationship would have to ensure 'open and fair competition, encompassing robust commitments to ensure a level playing field' and these would have to be 'commensurate with the scope and depth of the future relationship and the economic connectedness' of the UK and the EU. Moreover, 'common high standards' would have to be maintained for state aid, competition, social and employment standards, environment, climate change, and relevant tax matters. Accompanying this would have to be 'appropriate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement' (para. 77).

The UK and the EU also agreed that their future relationship:

> 'will be based on a balance of rights and obligations, taking into account the principles of each Party. This balance must ensure the autonomy of the Union's decision making and be consistent with the Union's principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms' (para 4).

Given established EU practice, the position should not have surprised, although the explicit reference to the indivisibility of the four freedoms was new. Since immediately after the UK

voted ‘leave’ in June 2016 EU leaders regularly re-stated that the future UK-EU relationship would need to contain a balance of rights and obligations and respect the EU’s decision-making autonomy (e.g. European Council 2017, para. 1). In March 2018, the European Council (2018, 7) had been clear: ‘any agreement with the United Kingdom will have to be based on a balance of rights and obligations, and ensure a level playing field’. The UK was not going to be allowed to ‘cherry-pick’ those aspects of EU activity with which it wished to engage.

The European Commission in February 2020 when presenting its draft mandate for the negotiations was also clear. So too were the members states in endorsing the Commission position. Advocating an ‘ambitious’ partnership comprising general, economic and security arrangements, the mandate envisaged ‘a free trade area, with customs and regulatory cooperation … underpinned by robust commitments ensuring a level playing field for open and fair competition, as well as by effective management and supervision, dispute settlement and enforcement arrangements, including appropriate remedies’ (Council of the European 2020, 19). In a section notable for the use of bold text in the original Commission draft (text below from ‘State aid’ to ‘appropriate remedies’) and with reinforcing language subsequently added by the Council, the agreed mandate then stated:

> ‘the envisaged agreement should uphold the common high standards, *and corresponding high standards over time with Union standards as a reference point,* in the areas of State aid, competition, state-owned enterprises, social and employment standards, environmental standards, climate change, and relevant tax matters *and other regulatory measures and practices in these areas*. In so doing,

> the agreement should rely on appropriate and relevant Union and international standards. It should include *for each of those areas* adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement, including appropriate remedies' (94, italicized text added by Council; compare European Commission 2020a, 89).

The Commission and the Council, mindful of the need for the EU to avoid a repeat of its experiences with Switzerland, were also clear that tied to the completion of negotiations on a free trade agreement would be agreement on overarching governance arrangements for both the free trade agreement and further agreements covering wider areas of cooperation to be concluded in the future.

All this was reflected in the draft text for a UK-EU agreement published by the Commission soon after negotiations were launched (European Commission 2020b). Beside the proposed scope and substance of the envisaged UK-EU partnership, it also included a detailed institutional framework comprising a 'Partnership Council' with decision-making authority, 15 'Specialised Committees', including notably ones on regulatory cooperation and 'the Level Playing Field and Sustainability'; a provision for joint working groups; and a Parliamentary Partnership Assembly. Processes for dispute settlement and arbitration were also included with ultimate jurisdiction over matters of EU law being reserved for the CJEU.

The EU's re-statement of principles and insistence on an institutional framework in the mandate and the draft text for a UK-EU agreement suggest that the critical juncture that is Brexit is unlikely to lead to any significant compromise on the part of the EU, particularly

given that the power asymmetry is in the EU's favour. The UK has, however, challenged the EU position. Indeed, in February 2020, while signalling a preference for a 'comprehensive free trade area covering substantially all trade' as well as agreements on fisheries, internal security, aviation and civil nuclear cooperation, Prime Minister Johnson appeared to be backtracking on the commitments made in the Political Declaration. He notably rejected 'any regulatory alignment, and jurisdiction for the CJEU over the UK's laws or any supranational control in any area' (2020a). Moreover, 'future cooperation in other areas does not need to be managed through an international Treaty, still through shared institutions'. In an accompanying speech, Johnson (2020b) was clear: 'there is no need for a free trade agreement to involve accepting EU rules on competition policy, subsidies, social protection, the environment, or anything similar any more than the EU should be obliged to accept UK rules'.

Johnson's opening position was a clear challenge for the EU and raised the question as to how far the EU will compromise – if at all – on principles and precedents. The experience to date of neighbours suggests it will not. This is not to say that the EU has been wholly inflexible in responding to the UK demands. Most notably, the Withdrawal Agreement's Protocol on Ireland/Northern Ireland provides for privileged and differentiated treatment of Northern Ireland, essentially for historical political reasons associated with the post-'Troubles' peace process and the desire to avoid the re-emergence of a 'hard border' on the island of Ireland. Therefore, Northern Ireland, although it is formally part of the UK customs union, in effect remains in the EU's customs territory and the internal market for goods. Dedicated institutional arrangements including a Specialised Committee and an unprecedented Joint Consultative Working Group, have been put in place. However, key

principles seen elsewhere in the EU's privileged partnerships are as prominent as ever in the arrangements for Northern Ireland. The EU's decision-making autonomy is fully respected, there is automatic and dynamic alignment with the *acquis* on the free movement of goods and the customs union, and the CJEU has ultimate judicial authority for most issues.

Such principles are also evident in the provisions governing the post-withdrawal transition period for the UK as whole. This lasts until at least the end of 2020 and potentially until 31 December 2022. During this time, the UK essentially retains the obligations of membership but without participation in the EU institutions and decision-making processes. Instead, decision-shaping opportunities may be on offer where new *acquis* has to be adopted (see Table 3). For decisions over the implementation of the Withdrawal Agreement, a dedicated UK-EU Joint Committee is established. A number of specialized committees assist the Joint Committee. In terms of dispute settlement, a dedicated arbitration panel is responsible, albeit with an obligation to refer questions of EU law to the CJEU for a binding ruling.

Overall, and despite the critical juncture that Brexit presents, the explanatory factors put forward by historical institutionalism to explain the EU's privileged partnerships from a longer-term, comparative perspective appear to hold up as parameters for a future EU-UK partnership. Path dependence points to the precedents set and a mechanism of reproduction, especially since the power asymmetry between the two is to the EU's favour.

< insert Table 3 here or hereabouts >

Conclusion

This article examined why and how the EU exports institutional norms to its neighbouring countries and what this means for the UK's envisaged future partnership with the EU. We have argued that the EU exports institutional norms mainly through the mechanism of reproduction due to its distinct nature as a specific legal-institutional order and its relative power position with regard to neighbouring countries. Critical junctures like Brexit are conducive to the emergence and proliferation of privileged partnerships. Yet, any new partnership has to deal with constraints set by precedents which encourage reproduction. Even as an ex-member state the UK cannot get a better deal than the EEA as this would open Pandora's box. Besides this path dependence, spillover effects between different EU negotiations (such as those with Switzerland and the UK) are likely to occur.

There has been limited institutional innovation since the creation of the EEA almost three decades ago. Most privileged partnerships appear to take the form of association agreements, with a varying degree of homogeneity requirements. Regarding the scope, there is some flexibility and different additions to the free movement of goods are possible, but the EU continues to insist on a balance of rights and obligations. Yet, the higher the degree of *acquis*-based integration, the more likely is an inclusion of the third countries into the EU's decision-making processes via decision-shaping. Such an inclusion compensates the countries' relative loss of autonomy and helps ensure the homogeneity of the shared legal space.

Only in the cases of very small countries, such as Liechtenstein or the AMS states, might the relative power asymmetry with the EU allow for more tailor-made and exceptional

arrangements, yet it might also lead to a bigger role for EU institutions such as the European Commission or CJEU in the privileged partnership.

The power asymmetry generally works in favour of the EU, but it takes the level of economic development and the related administrative capacity of its partners into account, for instance in the form of political or market access conditionality or insistence on a level playing field. It is worth mentioning that all EFTA countries are making substantial financial contributions to reduce economic and social disparities in certain EU member states. These grants are largely seen as being part of the price to pay for privileged access to the internal market.

To conclude, the challenge is the same for all neighbours interested in a privileged partnership with the EU: they need to find an acceptable balance in the fundamental trade-off between the benefits resulting from broad participation in the internal market and the lack of real participation in EU decision-making.

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Table 1. Privileged partnerships: the four freedoms and Schengen

	EEA	**Switzerland**	**Turkey**	**AMS**	**Ukraine**
Free movement of goods	yes, except agriculture & fisheries; *plus* competition, intellectual property, public procurement	far-reaching liberalization, *except* largely agriculture & fisheries; *plus* competition, intellectual property, public procurement	partial customs union for industrial goods & processed agricultural goods; *plus* competition, intellectual property	(partial) customs union for Andorra and San Marino; Monaco included via France	far-reaching liberalization, *except* partially for agriculture; *plus* competition, intellectual property, public procurement
Free movement of services	yes	no, *except* short-term service provision, transport, insurances	no	no	liberalization in some sectors
Free movement of capital	yes, explicitly (Article 40 EEA Agreement)	no	no	no	Ukraine also committed to liberalization
Free movement of persons	yes	yes	no	no	no
Schengen	yes (via bilateral agreements outside EEA)	yes	no	*de facto* free movement	no

Table 2. Privileged partnerships: institutional arrangements

	EEA	**Switzerland**	**Turkey**	**AMS**	**Ukraine**
Decision-making regarding new *acquis*	EEA Joint Committee (dynamic adoption of relevant *acquis;* decision-shaping)	most agreements are based on equivalence of laws; *except acquis*-based civil aviation, customs security, Schengen/Dublin agreements	Association Council (mutual consultation of experts and in Customs Union Joint Committee)	Joint Committee decides on the relevant new *acquis* to be incorporated (for Monaco automatic via France); European Commission for monetary agreements	in some areas adoption of or approximation to selected *acquis* or equivalence; Association Council (or Committee) may amend selected *acquis*
Surveillance	EFTA Surveillance Authority in EEA EFTA countries	Joint Committees; *except* for civil aviation	Association Council; Customs Union Joint Committee issues recommendations to Association Council	Joint Committee(s); *except* European Commission for monetary agreements	Association Council (or Committee); in some areas additional market access conditionality with legislative approximation monitored by EU
Judicial enforcement	EFTA Court in EEA EFTA countries; EEA Joint Committee constantly reviews relevant EFTA Court and EU case law	no, bilateral diplomacy in Joint Committees; *except* CJEU in civil aviation for decisions of EU institutions; in free movement of persons and civil aviation selective (quasi-) obligations to	no, (quasi-) obligations of national authorities to follow relevant (past and future) EU case law	no, bilateral diplomacy in Joint Committee(s); selective (quasi-) obligations of national authorities to follow relevant (past and future) EU case law; CJEU for	no, bilateral diplomacy in Association Council (or Committee); in some areas Ukrainian courts must follow (past and future) EU case law to varying degrees

		follow relevant past EU case law; for Schengen/Dublin Joint Committees constantly review Swiss and EU case law to ensure uniform interpretation		monetary agreements	
Dispute settlement between contracting parties	EEA Joint Committee; possibility to agree to refer to CJEU for questions of interpreting EU law	Joint Committees	Association Council; possibility to agree to refer to CJEU	Joint Committee(s); possibility by either side to turn to arbitration; *except* CJEU for monetary agreements	Association Council/Committee; possibility by either side to turn to arbitration, but for questions of interpreting EU law, the arbitration panel shall request the CJEU to give a binding ruling

Table 3. EU-UK institutional arrangements

	transition	**post-transition** (based on Political Declaration)	**Northern Ireland**
Decision-making regarding new *acquis*	automatic adoption of *acquis*; decision-shaping via 'exceptional' attendance at meetings of EU committees and expert groups; dispute settlement applies	Joint Committee to make recommendations on evolution of relationship	automatic adoption of updates to and replacement of relevant *acquis* with information sharing process; Joint Committee for relevant 'new' *acquis;* dispute settlement applies
Surveillance	mix of EU institutions (*acquis*) and Joint Committee and specialized committees (Withdrawal Agreement)	bilateral diplomacy in Joint Committee	mix of EU institutions, Joint Committee and specialized committee
Judicial enforcement	EU institutions; obligation of national authorities to conform with (past) and pay due regard to (future) EU case law	no, bilateral diplomacy in Joint Committee	mix of CJEU, Joint Committee and arbitration panel
Dispute settlement between contracting parties	arbitration panel, but for questions of interpreting EU law, the arbitration panel shall request the CJEU to give a binding ruling	bilateral diplomacy in Joint Committee; possibility to agree to turn to arbitration, but for questions of interpreting EU law, the arbitration panel shall request the CJEU to give a binding ruling	mix of CJEU, Joint Committee and arbitration panel