EU’s External Relations, Instrument for the Externalisation of the Acquis Communautaire

Thank you Miss President

My presentation will attempt to explain the interesting phenomenon that I call the externalisation of the acquis communautaire via external relations as a special emphasize to treaty relations.

Let me start please with a banality:

The economic globalization and the internationalization of world markets increased interdependence between national economies, and expanded significantly the scope and effects of national or regional legal norms. As a result of this evolution, the necessity to harmonize laws has oriented the struggle for influence between main actors of the international system to the ground of external promotion of their economic, legal and social models.

The concepts of normative influence and normative power help us to qualify this particular aspect of contemporary international relations.

And many scholars discussed the EU as a normative power. Without challenging the quality of these analyses, I think that the legal dimension of “normative power” notion has been neglected. Indeed small attention has been accorded to the effective normative influence of the EU.

However there is no doubt that the EU pursues a real strategy to export its acquis into the legal order of other countries.

In order to understand this strategy, I think that it is important to try to settle a theoretical framework that “asks whether and how EU institutions, rules, policy-making processes and broader international ‘actorness’ [...] constitute independent variables that impact the legal, regulatory, and administrative structures and conduct of entities well beyond the EU’s borders” (Magen, p. 365).

It is also important to ask why and how partner countries accept the injection of EU standards into their domestic legal system?

The aim of this presentation is not to provide an exhaustive framework of analysis, but to discuss some fundamental elements of the method adopted by the EU for its external normative influence strategy.
In order to answer these questions, I want first discuss the normative power aspect of the EU. The first question is: How to identify the particularity of the EU as an international actor?

Then I will discuss the method adopted for the normative influence strategy, and will try to explain how it functions. Finally, a very short case study will help me to test the model proposed.

1. Normative influence? Some elements for analysis

It is true that the EU experience, as a model of successful economic and legal integration exert an important attractive effect on third countries. This is more a *de facto* effect of a socio-economic model than the result of a conscious and coherent external policy.

However, the EU’s external influence is not solely spontaneous.

It is not possible to explain the real attraction capacity of the EU, if we ignore its strategy to promote its model internationally. This strategy guides the EU’s external action in order to transform its capacity of attraction into a real normative influence.

a. The EU is an International Actor but in a Different Way

The EU is a global player which attempts to, according to its interests and values. It is an unprecedented type of power: A normative power which does not possess the level of internal and external consistency of a Nation-State.\(^1\)

More, it is a producer of norms who succeeded a legal order even before being a political entity.\(^2\) This is both the mark of its specificity and one of the strongest reasons for its success.

The EU is an atypical international organisation, and shows some particularities that distinguish it from other subjects of international law. It is more than an IO but less than a State.

The EU is not simply an international organisation but also and foremost a political entity in formation. Its competences are varied and of an extensive character. It also disposes of a wide range of external relations tools, for example the common commercial policy, the

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cooperation through bilateral and multilateral agreements, the development cooperation, and to a lesser extent the CFSP, the humanitarian aid and financial assistance, as well as external aspects of its internal policies.

These mainly economic and commercial instruments are a sign of an active foreign policy that contributes to the external visibility of the EU, more than any other International organization. However, the economic and commercial action still remains the basic and almost exclusively dimension of its foreign policy.

That is why, although it is more than an IO, the EU is less than a State because it is a creation of law serving mainly as an instrument for political and economic integration between Member States.

Its competences are of attributed nature. This means that any action of the EU, whether internal or external, must be based on an express or implied competence. However the EU’s external competences are diverse, and attributed through several dispositions of the establishing Treaties. And, while some competences are exclusive, others are shared with member states.

More, these competences may correspond to different methods, namely supranational or intergovernmental. As a result of this hybrid nature of the EU competences, overlap between decisions under supranational and intergovernmental methods is not rare. Such is the case, for instance, for economic sanctions against third countries or individuals: they are decided under a common position within the Common Foreign and Security Policy, but the implementation is a matter of supranational competences under the article 215 of the Treaty on the Functioning of the European Union (TFEU).

This particular aspect of the external relations requires consistency between intergovernmental and supranational methods under EU external action.

This requirement of consistency is crucial regarding, first, the credibility of the external action of the Union in general, because a lack of consistency between actions under different external policies might harm the image of EU and consequently the effectiveness of its external action as a whole.

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Second, it is an issue of the preservation of supranational policies from being invaded by the *intergovermentalisation* of external relations. It is therefore crucial to ensure balance between national sovereignty under foreign policy and EU action within the framework of external supranational policies.

The difficulties arising from the legal nature of the EU are not only internal; they have also an external aspect. For example, its legal nature will be source of difficulty for the participation to different international organizations whose importance is constantly growing⁵.

Or, the external representation of the Union might be source of complexity and complication: the Commission, the Presidency of the European Council, the High Representative of the Union, the member States are often in competition...

Furthermore, as a result of the attributed nature of its competences, the EU is forced to conclude mixed agreements when establishing a privileged relationship with a third country⁶. The necessity for mixed agreements to be ratified by each Member State might be source of long delays for the entry in force.

The EU has to deal with all these difficulties to settle its position as an international actor.

From this set of considerations results a particular international actor. This latter develops a particular external action strategy through which it ensures its international visibility.

**b. The EU develops a particular external action strategy**

As one author notes, because it does not possess traditional external relations instruments, the EU’s unique instrument for being ‘heard’ on international scene is not the power but the norms⁷.

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That is why the EU considers the external promotion of its acquis (legal and democratic) as an intrinsic part of its foreign policy. It uses its global trading power “in order to create a comparable and friendly legal environment beyond [its] existing and potential boundaries”.

Therefore, when we talk about the normative influence of the EU, we necessarily refer to the *acquis communautaire*. The acquis is the master piece of its external action; it is through this notion that the EU expresses its specificity as an international actor.

What does *acquis communautaire* mean? What is the scope, content and the real meaning of the notion?

While some try to define it from a purely legal perspective, others consider it simply as "a political concept or policy", rejecting the idea that the acquis is merely a legal concept. They consider the acquis as a unifying framework "in which shared policies / values are established and through which they are implemented".

As Wiener notes, “*beyond its role as a legal concept, and hence a guiding set of rules for European governance at any one time [...] the Acquis also represents the continuously changing institutional terms which result from the constructive process of ‘integration through law’*”.

Magen draws an interesting conclusion: “*in the EU order, the acquis is both the result and the driver of integration through law*”.

I think that we should keep in mind the very nature of the European integration in order to understand the role of the *acquis* in external relations.

The EU is, by construction, a phenomenon of progressive development, comparable to a living organism.

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This is a system which seeks to preserve its own patrimony and to continue evolving in perpetuity. Therefore, within the EU edifice the *acquis* is the substance that ensures continued socio-political construction\(^{13}\).

From this point of view, the *acquis communautaire* signifies more a method than a content. And by method, one should understand the “Community method” which is “simply synonymous with “method of integration”. The Community method “constitutes the *acquis communautaire* within the qualitative and fundamental sense of the expression”\(^{14}\).

It is through both safeguarding and exporting its *acquis* that the EU tries to protect and promote its system which produces this acquis.

Thereby, when I refer to the externalisation of the *acquis communautaire*, I do not necessarily mean the content or a part of the *acquis*, in other words, a substantive rule or norm of the EC law, but a method that qualifies the logic of European integration.

It is important, however, to stress that the EU is more than a body of legal rules and processes. Like the State in its traditional meaning, which gives rise to its own conditions of existence, the EU becomes also producing of its own: *raison d’intégration* replaces *raison d’Etat*.

The *acquis communautaire*’s inherently collective nature provides it with an important structural strength as an EU external influence mechanism: It represents an institutionally convenient and instrumental mechanism for promoting EU interests in political, economic and regulatory transformation in third countries\(^{15}\).

There appears the real signification of preserving and promoting the *acquis* in EU’s external action: the *acquis* constitutes not only the *raison d’être* or the object, but also the main instrument of this action.

On the one hand the *acquis* determines the scope of EU’s internal or external action, because of the attributed nature of its competences. On the other hand, as a legal creation, the EU cannot by definition have any other goal than the preservation, the development and the promotion of the *acquis* which constitutes its substance. Consequently, promoting the *acquis communautaire* externally equals promoting its identity, its own existence.

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\(^{13}\) A. Magen, *op.cit.*, pp. 369-370.


\(^{15}\) *Ibid*, p. 392.
Once this quite excessive theoretical framework presented, I want now to complement it with concrete observations. That’s what I will try to do through external conventional relations of the EU.

**2. The basic logic of EU’s normative influence: the triggering effect of the free trade goal**

I have previously said that the EU functions as a magnetic force. Let me add now that this is the web of economic and political association or partnership relations that constitutes the main instrument of its attraction strategy.¹⁶

The analysis of EU’s external treaty relations confirms that the preferential agreements constitute undoubtedly the main parameter to understand the mechanisms of EU’s external normative influence.

**a. Preferential agreements as an instrument**

The preferential agreement fulfills a double function: first it determines the framework of the relationship, thus sets the limits of the normative influence; second it serves as tool for this normative influence.

Indeed, association, cooperation and partnership agreements enable the EU to channel the *acquis communautaire* as a legal and economic model into the domestic law of the partners.

This is a non-reciprocal unilateral process, requiring that partner countries mobilize substantial efforts to reach the legislative level of the EU.

However, this process is not self functioning: the consent of the partner country is to be acquired. This is the condition *sine qua non* for the penetration of EU norms to partner’s legal order.

Therefore, the EU attempts to propose a "carrot" that persuade partner countries to accept its norms and standards: A carrot that compensates the cost of compliance with European standards.

Preferential access to European market or the perspective of economic integration are likely to meet such a necessity.

When negotiating the inclusion of the *acquis* into the agreements, partner countries are more disposed to accept EU’s conditions, if they are convinced that it will grant them a privileged access to the wide and prosperous EU market.

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This point is of a crucial importance. It means that the objective of the agreement is likely to strengthen the negotiating advantage of the EU. It will constitute the main argument that justifies the exportation of EU norms into partner country’s domestic legislation.

For instance, ambitious objectives, such as membership or a Customs Union (CU), will necessitate deep economic and political cooperation which will imply substantial adoption of the *acquis communautaire*.

The objective of the agreement determine also the nature of the legal convergence: while the objective of membership implies a compulsory adoption of the *acquis communautaire*, other objectives imply an adoption or harmonization on a voluntary basis.

b. The WTO framework as a facilitator

But one question still remains unanswered: Why do the partners need harmonization or approximation of laws?

We know that the GATT/WTO framework (namely the article XXIV) requires that Parties to preferential agreements realize substantial liberalization of their mutual trade relations.

This means that they must eliminate custom duties and other restrictive regulations of commerce on substantially all the trade. For this reason, the gradual liberalisation of trade through the establishment of a free trade area (FTA) or a Customs Union (CU) is a common objective to the preferential agreements concluded by the EU.

Such an objective implies the harmonization of laws so as to effectively establish a FTA or CU. Indeed legal approximation between two economic areas is a facilitating factor for trade relations. Approximation of national legislations is a crucial instrument to ensure conditions for a functioning market. Contrary, significant divergences are likely to constitute an important barrier to trade.

This necessity of legal approximation generates a quasi mechanical process in the framework of the preferential agreements.

The aim of the relationship, endorsed by the framework of the agreement induces contracting Parties after each step of legal approximation in a field, to consider an additional approximation in one or more related fields.

I call it the *triggering effect* or the *domino effect* of the free trade goal.

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Concretely, the establishment of a FTA will imply in a first step the harmonization of fields such as technical rules and standards, or rules of origin which concern directly the effective access to respective markets.

Or, the creation of a Customs Union will firstly require the adoption of a Common Tariff Rates and a Duties framework or a common commercial policy.

The realization of this first step will induce the Parties to consider, in a second phase, the harmonization of the rules on competition in order to avoid distortion of competition.

However, fair competition cannot be realized without common or harmonized rules as regards for instance to the protection of intellectual property or environmental standards, sanitary and phytosanitary measures, and so on...

Certainly, this hypothetical automaticity is less obvious in practice because there is no doubt that the effective functioning of such a mechanism depends on conditions of social, economic and especially political dimension.

It also presupposes that the contracting Parties show a real determination to achieve the objective of the agreement and that they are able to do it.

But when it functions, it functions!

The articulation of the free trade goal with the requirements of the article XXIV, makes it possible both to justify this objective and “to mechanize” the domino pr triggering effect that this objective generates.

This enables the EU to take support of the WTO framework in order to justify the content and scope of its preferential agreements. The EU can thereby avoid using political and economic pressure on its partners.

The normative influence at the bilateral level is thus partly legitimated by a reference to commitments on the multilateral level.

That is probably why one might have a déjà vu feeling when reading different preferential agreements concluded by the EU. The negotiations about the content and the scope of the agreement are often a matter of detail once the Parties agree on the final goal...

A point remains however unclear: what makes that the necessity for harmonization or approximation of laws result in the exportation of the acquis communautaire into the legal order of the partner countries?
The *triggering or domino effect* of the free trade goal does not generate a reciprocal harmonization process between partners. The EU disposes of an important advantage in terms of legal production which enables it to inject elements of this legal production into partner’s legal order. However, this injection is not done automatically, but it corresponds to a technique of progressive transfer of law.

**c. Methods**

Which are the methods of the normative influence within the contractual framework?

Two principal categories can be distinguished. The first is the reproduction in the agreements of EC Treaty provisions\(^{18}\). The number and the accuracy differ according to the level of integration sought by the Parties\(^{19}\).

This method of direct reference to the EU legislation presents the disadvantage of rigidity which endangers the dynamism of the contractual relation. Indeed, even if the content of the agreement is exactly the same with the EU legislation, the evolution of the acquis communautaire is hardly followed by the agreement. It is mainly due to technical difficulties and the slowness of revision procedures.

The second method is more recurrent: provisions that imply approximation or harmonization of law\(^{20}\).

Three different types of disposition involve this method: a) homogeneity; b) binding and soft-harmonization commitments; c) approximation clauses. The level of commitments depends on the aimed degree of integration.

The approximation is performed either by a pure and simple transposition of the EU legislation, or by the adoption of new legislation in conformity with or equivalent to the EU law\(^{21}\).

### 3. How it functions? Different partners, different results

\(^{18}\) Accord de Porto sur l’Espace économique européen, *J.O.C.E.*, du 03.01.1994, n° L 1, articles 8 à 52 sur les quatre libertés; articles 53 à 64 (règles de concurrence), art. 65, par. 1 et Annexe XVI (marchés publics, propriété intellectuelle, industrielle et commerciale). Décision n° 1/95 du Conseil d’association CE-Turquie, art. 32, 33, 34.

\(^{19}\) Articles 36, 37, 38 et 39 des accords conclus avec la Tunisie et le Maroc.


The contractual relations of the EU with neighbouring countries constitute an ideal laboratory for testing this theoretical framework.

The neighbours accept the *acquis communautaire*, either completely through membership negotiations, or partially through integration to the internal market, or the establishment of a Customs Union or a free trade area.

Here I will limit the analysis to the cases of the European Economic Area and the Customs Union with Turkey.

While the EEA illustrates the effects of an extensive economic integration of non member countries; the EC-Turkey Customs Union illustrates the convincing effect of membership perspective, may it be uncertain.

The Porto Agreement establishing the EEA\(^{22}\) foresees a particularly deep integration near to a fully fledged membership. It creates a real mirroring internal market. Such an ambitious extension of the European internal market to third countries can succeed only if the same rules are observed and in a uniform way on the territory of the Parties.

The EEA agreement is thus founded on the quasi integral adoption of the internal market *acquis*. More than 80% of the EC internal market legislation is applicable in the EEA.

But the EEA also implies the adoption of the future acquis, because it aims “to promote a homogeneous normative evolution” within the economic area\(^{23}\).

The principle of homogeneous normative evolution is based on two elements

**FIRST:**
The timely implementation of EC legislation into the EEA Agreement: to this end, as soon as a new relevant EC rule has been formally adopted within the EU, the EEA Joint Committee must take a decision concerning the appropriate amendment of the EEA Agreement (Article 102(1) EEA Agreement)

**SECOND:**
The homogeneity also necessitates the uniform interpretation of the *acquis* and EFTA rules in order to avoid any divergent application of the rules. The principle of uniform interpretation and application of the legislative texts are covered by article 6 of the Porto Agreement:

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\(^{22}\) Accord de Porto sur l’Espace économique européen, *J.O.C.E.*, du 03.01.1994, n° L 1, pp. 3-36

Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.

A similar approach can be observed within the EU–Turkey Customs Union. For instance, it is stated that provisions of Decision 1/95 establishing the EU-Turkey CU which are identical in substance to the corresponding provisions of the EC Treaty should be interpreted in conformity with the relevant ECJ case law to ensure the proper functioning of the Customs Union24.

The economic integration of Turkey and the progressive implementation of the Customs Union is also accompanied by provisions concerning approximation of laws.

The article 6 of the additional protocol of 1970 stipulates that, “the Contracting Parties shall, in so far as may be necessary for the proper functioning of the Association, take steps to approximate their law, regulation or administrative action in respect of customs matters, taking into account the approximations already effected by the Member States of the Community”25.

Although the formulation seems to adopt a reciprocal approach, there is no doubt that the general spirit of the decision n° 1/95 establishing the CU implies an asymmetrical alignment of Turkish legislation to the acquis.

For instance, the decision implies that Turkey aligns itself to EC common commercial policy. It is stipulated that

“within five years […], Turkey shall incorporate into its internal legal order the Community instruments relating to the removal of technical barriers to trade”.

From the date of entry into force of the Decision, Turkey shall […] apply provisions and implementing measures which are substantially similar to those of the Community's commercial policy.

24 Article 66 Decision 1/95 (OJ 1996 L 35/1)
Moreover, in relation to countries which are not members of the Community, Turkey aligns itself on the Common Customs Tariff of the EC\textsuperscript{26} (art. 12 and 13 decision 1/95).

The article 16 stipulates:

*With a view to harmonizing its commercial policy with that of the Community, Turkey shall align itself progressively with the preferential customs regime of the Community within five years as from the date of entry into force of this Decision. This alignment will concern both the autonomous regimes and preferential agreements with third countries*.

These provisions and especially article 16 confirm the asymmetrical approach adopted for the implementation of a “commercial policy founded on uniform principles”, which is actually the alignment of Turkey on the common commercial policy.

The declaration of the EC, annexed to the agreement of association concluded with Chile, illustrates this asymmetrical character of the CU.

Concerning Turkey, the EU declares recalls that “this country has the obligation, in relation to countries which are not members of the Community, to align itself on the Common Customs Tariff and, progressively, with the preferential customs regime of the Community”\textsuperscript{27}.

One step further is the prohibition of taking independent initiatives concerning external commercial policy. Customs union with the EC prohibits the establishment of preferential commercial relations with third countries without the approval of the EC. For instance, concerning the Regional co-operation in the Black Sea area, the European Commission stated that, Turkey as an associate country to the common commercial policy cannot grant a preferential tariff regime to the products of a third country exceeding certain quantities without obtaining the prior agreement of the EC-Turkey Association Council\textsuperscript{28}.

In addition to the alignment on the Community commercial policy, the CU also implies the alignment of Turkish legislation on UE law.

The decision 1/95, in its Chapter IV (entitled “Approximation of laws”) reproduces the provisions of Treaty EC on State aids and rules of competition.

\textsuperscript{26} Art. 12 and 13 of the Decision n° 1/95 of the EC-Turkey Association Council of 22 December 1995 on Implementing the Final Phase of the Customs Union, *OJ* n° *L 035*, 13.02.1996.

\textsuperscript{27} Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, *OJ* n° *L 352*, 30/12/2002. Declaration of the European Community regarding Turkey.

It also requires that Turkey harmonize its legislation. Article 39 stipulates that “with a view to achieving the economic integration sought by the Customs Union, Turkey shall ensure that its legislation in the field of competition rules is made compatible with that of the European Community, and is applied effectively”.

Similar observations can be made concerning other preferential agreements. The effective realisation of the Free Trade objective implies, as we saw, legal approximation. For instance in legal documents related to Euro-Mediterranean association agreements; we can find formulations such as:

“convergence of economic legislation”; “legislative and regulatory approximation”; “focusing on the most relevant elements of the acquis for stimulation of trade and economic integration”; “harmonisation with EU legislation”; “convergence with the Union’s laws and regulatory structures”; “convergence with EU standards”; “regulatory convergence in key trade-related disciplines”.

Furthermore, the agreements established a mechanism of co-operation in order to harmonize the legislation of associated countries with EU law. The provisions implying approximation of laws may vary:

For example, while in the case of Tunisia, Algeria and Morocco, the agreements stipulate that “cooperation shall be aimed at helping [the partner country] to bring its legislation closer to that of the Community in the areas covered by this Agreement”;

in the agreements concluded with Jordan, Lebanon and Israel, it is stipulated that “The Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement”.

However, it is worth noting that decision n° 1/95 aims to establish ambitious legal framework for the integration of Turkey in the Community internal market. It goes far beyond the objectives of the euro-Mediterranean association agreements. And that makes the difference. The result is far being comparable.

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31 See for ex. art. 52 of the Euro-Mediterranean Agreements with Tunisia (OJ, n° L 097, 30.3.1998) and Morocco (OJ, n° L 070 du 18.3.2000); art. 41 of the agreement with Palestinian Authority.
Indeed, neither a calendar nor the methods with regard to the approximation of the laws are specified. Moreover the scope of legal approximation is more limited. And finally the binding nature of approximation provisions is open to discussion.

**Some concluding remarks**

There is no doubt that the identity of the EU as an international actor cannot be settled by reference to its capacity of political influence. But things are different concerning its normative influence capacity. The EU is a normative power which is able to export its legal patrimony to other countries.

There is no doubt that especially countries of EU’s geographical proximity are deeply influenced by its normative production.

Nevertheless, the *acquis communautaire* is the result of a specific experience, namely the European integration between mostly advanced West European countries. The same solutions may not always fit the situation of other countries, even if they share the same geography but not necessarily the same historical, cultural and social background.

So, albeit experiences in the "European laboratory" demonstrate that the construction of legal pluralism is possible when political will, common concepts and 'institutional machinery' coexist, the current crisis proves that the law cannot be isolated from politics. And nothing guarantees that this experience is transposable to a global scale\textsuperscript{33}.

As judge Oliver Holmes observed in the late 19\textsuperscript{th} century:

"The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics"\textsuperscript{34}.

\textsuperscript{33} Mireille Delmas Marty,