



A New European Neighbourhood without the EU's Neighbourhood Clause: The (potential) special relationship in EU-UK relations under Article 8 TEU

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Abstract: For the first time in its history, a Member State has withdrawn from the EU through the process of Article 50 TEU, resulting in the UK occupying an unforeseen and unique position within the EU's neighbourhood. Unlike any other relationship that the EU has developed with a neighbouring country, the aim of EU-UK relations is the disentanglement of the UK from the European legal order instead of integration into it. This is coupled with the fact that withdrawing from the EU actually takes place in an integration-based framework and is interwoven with the values of the EU. In this context, Article 8 TEU, the often forgotten Neighbourhood clause, would seem to provide the EU with an unambiguous legal basis to develop a special relationship with neighbouring countries founded on EU values. Despite the unique starting point and nature of the relationship, the EU-UK Trade and Cooperation Agreement has been concluded, not on the basis of the Neighbourhood clause, but on the 'catch-all' provision of Article 217 TFEU. Article 217 TFEU is the substantive legal basis used to establish an association between the EU and a third country, regardless of that third country being a neighbour or not. However, the Trade and Cooperation Agreement does not establish an association between the EU and the UK but, instead, pursues the ultimate aim of Article 8 TEU, namely to establish a relationship "within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation". The role that Article 8 TEU could have played or could still play in the development of EU-UK neighbourly relations remains to be assessed.

Keywords: Article 8 TEU, Association, EU-UK Relations, Neighbourhood clause, Privileged Partnership, Withdrawal.

Introduction

Article 8 (1) TEU provides the EU with a legal basis to "develop a special relationship with

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neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.” However, since its inception, it has never been employed as the substantive legal basis to any agreement concluded between the EU and a neighbour. Instead, Article 217 TFEU, the legal basis used to establish associations, is frequently used to conclude such agreements. In the context of EU-UK relations, the UK has become the first EU Member State to leave under the Article 50 TEU process. The process of withdrawal is one that the Court of Justice of the European Union (‘CJEU’) has linked directly to the values of the EU found in Article 2 TEU and has interpreted within the context of Article 1(2) TEU, namely “the process of creating an ever closer union among the peoples of Europe.”² Article 8 TEU is potentially relevant to this relationship as it provides for the foundation of a special neighbourly relationship as an alternative path to membership and it requires that such a relationship must be founded on EU values.

The framework governing this new relationship is the EU-UK Trade and Cooperation Agreement (‘TCA’).³ Article COMPROV.1 of the TCA states that its purpose is to establish “the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties’ autonomy and sovereignty.” The TCA, therefore, does not establish an association between the EU and the UK but pursues the objective found in Article 8 (1) TEU. Despite this, the TCA was concluded on the sole legal basis of Article 217 TFEU.⁴ Consequently, it must be asked whether the EU-UK relationship should have been developed on the basis of Article 8 TEU and whether there lies any potential in the future use of the Neighbourhood clause in the context of this relationship. This paper proposes that Article 8 TEU would have been a more suitable legal basis to conclude the EU-UK TCA than Article 217 TFEU and that Article 8 TEU may still provide an appropriate legal basis for the conclusion of future sector-specific agreements between the EU and the UK.

This paper is divided into three sections. The first section outlines: (i) the nature and intended purpose of Article 8 TEU; and, (ii) the suitability of the Neighbourhood clause as a legal basis to conclude agreements with neighbouring countries not seeking EU membership. The second section discusses: (i) the special relationship that the UK has always had with the EU both prior to its accession as well as during its time as a Member State; and, (ii) the integration and value-oriented focus of the process of withdrawal under Article 50 TEU. The final section (i) analyses the suitability of Article 8 TEU as the appropriate legal basis for the conclusion of the EU-UK TCA by contrasting two schools of thought which differ in arguing whether Article 8 TEU is a self-standing legal basis or whether it is an essentially political provision without any practical legal effect. Additionally, this section (ii) examines the potential of Article 8 TEU as the

² Judgment of 10 December 2018, *Wightman and others v Secretary of State for Exiting the European Union*, C-621/18, EU:C:2018:999, paras. 61-62.

³ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, ST/5198/2021/INIT OJ L 149, 30.4.2021, 10-2539.

⁴ Council Decision of 29 December 2020 on the signing and on provisional application of the Trade and Cooperation Agreement between the European Union and the United Kingdom, OJ L 444, 31.12.2020, 2-10.

appropriate legal basis for future sector-specific agreements in providing the foundation of a privileged partnership between the EU and the UK.

1. Historical Overview of Article 8 TEU

1.1. Nature and Intended Purpose of the Neighbourhood Clause

Article 8 TEU states that:

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

For its part, Article 217 TFEU states:

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

There is extensive literature on the genesis and wording of Article 8 TEU in addition to its potential use within the context of the European Neighbourhood Policy ('ENP').⁵ Consequently, in lieu of repeating what already exists, this paper emphasises the neighbourly focus of Article 8 TEU which differentiates it from Article 217 TFEU, and underlines the importance of the "values of the Union" mentioned in Article 8 (1) TEU.

1.1.1. A Neighbourly Focus

According to the *travaux préparatoires* of the proposed Article I-57 of the Treaty establishing a Constitution for Europe ('TCE'), which has since become Article 8 TEU, the provision was intended to recognise "for the first time the importance to the EU of its immediate environment."⁶ The point of departure for Article I-57 TCE was Article 310 of the Treaty Establishing the European Community ('TEC'), which has since become Article 217 TFEU.⁷ However, Article I-57 TCE was distinct from Article 310 TEC due to the emphasis placed on relations with neighbouring

⁵ See for example Peter Van Elsuwege, Roman Petrov, "Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?" *European Law Review* 36, no. 5 (2011): 688-703; and Dominik Hanf, "The ENP in the light of the new Neighbourhood clause" in *Challenges of the European Neighbourhood Policy*, ed. Erwan Lannon (Brussels-Berlin: Peter Lang Publishers, 2011).

⁶ Title IX: The Union and its immediate environment, CONV 649/3, 2 April 2003, <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00649.en03.pdf>, 2.

⁷ *Ibid.*

countries. In this regard, while the EU had already established contractual relations with its neighbours using Article 310 TEC, the purpose of Article I-57 TCE was to provide a coherent framework to define the “privileged relationship between the Union and its neighbouring states.”⁸

One of the reasons for the necessity of a proximity-specific clause such as Article I-57 TCE was driven by the over-use of Article 310 TEC with neighbouring and non-neighbouring countries alike.⁹ In order to reflect the importance of the EU’s relations with its neighbours, a separate title on “the Union and its Neighbours” was created within the TCE,¹⁰ with Article I-57 TCE being the sole provision under this title.¹¹ It is thus clear that the Article 217 TFEU and Article 8 TEU are distinct from each other insofar as the Neighbourhood clause provides a separate framework for relations with third countries who are neighbours.

1.1.2. A Special Relationship Founded on EU Values

At the time the Neighbourhood clause was put forward, it was proposed that the provision should be amended to include a reference that the “special relationship” must “respect basic values such as democratic principles, the rule of law, and human rights”.¹² It should therefore be noted that while the original wording of the Neighbourhood clause in the *travaux préparatoires* contained no reference to EU values,¹³ Article 8 (1) TEU requires the special relationship to be “founded on the values of the Union”. This change in wording represents a deliberate choice to connect the special relationship formed under the Neighbourhood clause to EU values.

In this context, it is also worthwhile to take into account the difference between the placement of Article 8 TEU and the proposed Article I-57 TCE. While Article I-57 TCE was located immediately before the provision concerning accession to the EU,¹⁴ Article 8 TEU is found under Title I on the “Common Provisions” of the TEU. This is another element which links Article 8 TEU closer to the governing values of the EU found in Article 2 TEU and distances it from the path of membership.¹⁵

1.2. Accession, Associations, and Good Neighbourliness

⁸ *Ibid.*, 1.

⁹ Guillaume Van Der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for EU Integration Without Membership?* (Boston: Brill Nijhoff: 2016), 98.

¹⁰ *Ibid.*, 96.

¹¹ In Title VIII: The Union and its Neighbours under Part I of the now defunct Treaty establishing a Constitution for Europe, Article I-57 is the only provision found under this title.

¹² Reactions to draft Article 42 (The Union and its immediate environment), CONV 671/03, <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00671.en03.pdf>, 4.

¹³ See Title IX, 2, where the first part of the Neighbourhood clause originally states: “The Union shall develop a special relationship with its neighbouring States, aiming to establish an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation.”

¹⁴ Article I-58 TCE is now Article 49 TEU on accession to the EU.

¹⁵ Van Der Loo, *EU-Ukraine*, 98.

An interesting dynamic between Article 8 TEU and Article 217 TFEU is the position of each provision in relation to offering a membership perspective to neighbouring countries. With regard to Article 217 TFEU, it is clear that its primary purpose is to conclude “agreements establishing an association” between the EU and a third country. An association itself is a very broad and flexible legal instrument. There can be “association as a pre-accession status, association as an alternative to membership and association as a privileged status of non-European countries”.¹⁶ While an association can grant pre-accession status, association in and of itself does not grant any definitive membership dimension.¹⁷ In fact, it is quite possible to join the EU without first forming an association.¹⁸ However, the different generations of associations established with neighbouring countries are intertwined with the refinement of the enlargement process.¹⁹ As a result, establishing an association with the EU is often perceived to be a “stepping-stone” to EU membership.²⁰

The path, perceived or real, of accession through association can be contrasted with the neighbourly emphasis of Article 8 TEU. To this effect, neighbouring countries aspiring to join the EU have no desire for the use of a neighbour-focused formula such as Article 8 TEU.²¹ Such countries in fact explicitly seek to conclude an association agreement with the EU in order to advance their membership ambitions and avoid a neighbour-type *finalité* taking the place of a possible membership perspective.²² Viewed in this light, Article 8 TEU could be best described as providing the basis for a “special integration-driven 'privileged' partnership ... without the necessity, however, of having any association to be established between the parties and excluding the accession perspectives.”²³ Thus, while Article 8 TEU would not be appropriate where a neighbouring country is seeking a membership perspective, it would provide a suitable basis for neighbouring countries seeking a close neighbourly relationship in lieu of membership.

A neighbour which has withdrawn from EU membership would evidently be seeking such a relationship. Article 8 TEU would thus provide an appropriate basis for the development of EU-UK relations. Additionally, the UK’s relationship with the European project; prior to, during and even after its membership; has always been characterised by the constant push-and-pull of integration into and disentanglement from the EU legal order. As such, Article 8 TEU would be even more suited to this relationship given that the provision is connected with the integration objective of the EU but removed from the path of accession.

¹⁶ Peter Van Elsuwege, “The Meaning of ‘Association’ Under EU Law: A Study on the Law and Practice of EU Association Agreements: STUDY”, *European Parliament*, 2019, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU\(2019\)608861_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf), 8.

¹⁷ *Ibid.*, 24.

¹⁸ *Ibid.*

¹⁹ See Van Elsuwege, “Meaning of ‘Association’”, 24-31, where Van Elsuwege analyses different generations of associations as being pre-accession instruments or as alternatives to membership.

²⁰ David Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield: Sheffield Academic Press, 1999), 15.

²¹ Van Elsuwege, “Meaning of ‘Association’”, 13.

²² See Van Der Loo, *EU-Ukraine*, 105, where Van der Loo discusses the desire of Ukraine to conclude an association agreement with the EU in order to advance their membership perspective.

²³ Jenó Czuczai, “Article 8 TEU as a potential (still waiting) legal basis for “Privileged Partnership”-type agreements between the EU and its neighbours”, *JURA* 1 (2019): 42.

2. The Unique Case of a Neighbour resulting from Withdrawal

2.1. British Membership in the European Union

The UK's relationship with the European project began in 1946 when the British expressed their support for European integration with the caveat, however, that the UK would remain uninvolved in such a project and would be "the friends and sponsors of the new Europe".²⁴ In particular, the UK declined to join at first because it wished to retain its own independent trade policy.²⁵ Indeed, the UK was one of the primary actors in establishing the European Free Trade Association ('EFTA') which was a rival organisation to counter the influence of the European Economic Community ('EEC').²⁶ In contrast to the economic integration of the EEC, EFTA promoted tariff-free trade in industrial goods by opting for a looser form of intergovernmental cooperation between its members.²⁷ Nonetheless, due to the EEC's economic success, the UK applied to join on two different occasions.²⁸ However, the UK was rejected both times,²⁹ with France expressing the deepest opposition as it was concerned that enlargement would prevent greater European integration.³⁰ The UK finally acceded to the EEC in 1973, but then attempted to renegotiate its membership in 1974 in order to retain sovereignty over regional, economic and industrial policies, and negotiate changes to the EEC Budget.³¹ The negotiations concluded with mixed results and the UK held a referendum on its membership in 1975 with the government recommending that the UK should remain in the EEC.³²

In its journey to joining the EEC, it can be seen that the UK desired to remain separate from as well as be a part of the European project. Its membership is likewise defined by this characteristic due to the many opt-outs the UK secured from European integration. These opt-outs began to materialise in tandem with the intensified integration of the European project around the time of the Single European Act in 1986.³³ By the time of its departure, the UK had four operative opt-outs from EU law, namely from participation in the Economic and Monetary Union ('EMU') (Protocol No. 15), the Schengen *acquis* (Protocol No. 19), the area of freedom, security and justice ('AFSJ') (Protocol No. 21) and the Charter of Fundamental Rights ('CFR') (Protocol No. 30). The UK desired to fully exercise its opt-outs and it employed both judicial and political

²⁴ Winston Churchill, Speech [on a Council of Europe], Zurich, September 19, 1946, <https://rm.coe.int/CoERM-PublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806981f3>.

²⁵ Kenneth Armstrong, *Brexit Time: Leaving the EU-Why, How and When?* (Cambridge: Cambridge University Press, 2017), 11.

²⁶ Maurice Torrelli, *La Grande-Bretagne Et L'Europe Des Six: L'Echec d'une Negociation* (Montréal: Pressesdel 'Ecoledeshautesétudes commerciales (Cahiers du C.E.D.E, 2), 1969), 17.

²⁷ Armstrong, *Brexit Time*, 11.

²⁸ *Ibid.*

²⁹ For an examination on the failure of the original British negotiations on accession, see Torrelli, *La Grande-Bretagne Et L'Europe*.

³⁰ Armstrong, *Brexit Time*, 13.

³¹ *Ibid.*, 22.

³² *Ibid.*, 24.

³³ Andrew Glencross, *Why the UK Voted for Brexit: David Cameron's Great Miscalculation* (London: Palgrave Macmillan (Palgrave studies in European Union politics), 2016), 30.

means to maximise their effectiveness.

In the context of its EMU opt-out, the UK managed to enhance its position by securing further concessions both by judicial action through the CJEU³⁴ and by political means through negotiations³⁵ to safeguard, respectfully, against additional financial obligations and the risk of discriminatory action from eurozone Member States. The opt-out from Schengen operated in parallel to the bespoke arrangements of the Common Travel Area between the UK and Ireland which are explicitly recognised in Article 2 of Protocol No. 20. However, despite effectively exercising its opt-outs from the EMU and the Schengen *acquis*, the UK was less successful in exercising its other opt-outs from the AFSJ and the CFR.

Prior to its departure, there was a trend whereby the UK sought to increase the use of its opt-out from the AFSJ. The UK brought three separate actions against the Council regarding the EEA Agreement, the EU-Switzerland Agreement on the free movement of persons and the EEC-Turkey Association Agreement.³⁶ The disputes concerned the correct legal basis for the adoption of the EU position within the Joint/Association Committees, established by those agreements, in order to update the agreements to reflect new EU social security legislation.³⁷ The UK contested the use of Article 48 TFEU (an Internal Market provision) as the legal basis for the contested decisions and argued instead that Article 79 (2) (b) TFEU (an AFSJ provision) should have been used. As Article 79 (2) (b) TFEU belongs to the AFSJ, the UK would have had the option to opt-out from any measures based on this provision.

In all three cases, however, the CJEU rejected the legal basis of Article 79 (2) (b) TFEU and held that Article 48 TFEU was the correct legal basis for the adoption of the EU position (although the CJEU held that a combined legal basis of Article 217 TFEU and Article 48 TFEU was required in the case of Turkey).³⁸ As a result, the UK was unable to exercise its opt-out. Nonetheless, while the UK did not fare well judicially in its attempts to broaden the scope of its opt-out from the AFSJ, it did succeed in doing so politically. In the conclusion of the EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area ('AA-DCFTA'), the UK, in essence, obliged the Council to separate the provisions relating to the treatment of third country nationals legally employed as workers in the territory of the parties from the remainder of the agreement.³⁹ While the rest of the AA-DCFTA was concluded on the basis of Article 217 TFEU, these provisions were concluded separately on the basis of Article 79 (2) (b) TFEU, which enabled the UK to exercise its opt-out from Protocol No. 21.⁴⁰

³⁴ Judgment of 4 March 2015, *United Kingdom v European Central Bank*, T-496/11, T:2015:133, para. 110.

³⁵ European Council Conclusions, Brussels, February 19, 2016, <https://www.consilium.europa.eu/media/21787/0216-euco-conclusions.pdf>, 13.

³⁶ Judgment of 26 September 2013, *UK v Council (EEA Agreement)*, C-431/11, EU:C:2013:589; Judgment of 27 February 2014, *UK v Council (Switzerland)*, C-656/11, EU:C:2014:97; and Judgment of 18 December 2014, *UK v Council (EEC-Turkey Association Agreement)*, C-81/13, EU:C:2014:2449.

³⁷ Van Der Loo, *EU-Ukraine*, 169-170.

³⁸ C-431/11 *UK v Council (EEA)*, para. 68, C-656/11; *UK v Council (Switzerland)*, para. 64; C-81/13, *UK v Council (EEC-Turkey Association Agreement)*, para. 63.

³⁹ Van Elsuwege, "Meaning of 'Association'", 16.

⁴⁰ *Ibid.*, 16-17.

The UK's opt-out from the CFR arose in the case of C-411/10 *NS*,⁴¹ where the CJEU held that Protocol No. 30 did "not call into question the applicability of the Charter in the United Kingdom".⁴² The Court also stated that the Protocol did not intend to exempt "the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions."⁴³ It should be noted that while Article 1 (2) of Protocol No. 30 provides that "nothing in Title IV of the Charter creates justiciable rights applicable to ... the United Kingdom", the CJEU reserved its interpretation on that provision as the rights at issue in *NS* did not fall under Title IV of the CFR.⁴⁴ Thus, while some uncertainty remained regarding the applicability of the provisions under Title IV of the CFR, the opt-out did not exempt the UK from its obligation to comply with the provisions under the CFR.

The culmination of British efforts to disassociate from European integration resulted in a unique and innovative fifth opt-out that the UK secured in 2016 but was never implemented because of the UK's decision to withdraw from the EU. This opt-out was from Article 1 (2) TEU, regarding "the process of creating an ever closer Union", and would have been explicitly recognised in the EU Treaties in the form of a Treaty amendment.⁴⁵ Article 1 (2) TEU is acknowledged as neither extending the scope of EU law nor increasing the competences of the institutions,⁴⁶ however, it is accepted that the provision does hold interpretative value for the CJEU.⁴⁷ However, even if its value is substantially symbolic, it is, nonetheless, an important symbol and the UK would have been unique as the only Member State to possess this opt-out. It can thus be seen that while the UK sometimes had mixed results in exercising its opt-outs, the outcome was that its membership was a special membership with more opt-outs from European integration than any other Member State. In this way, the UK continued its aspiration of establishing a relationship that sought to be involved with the European project but simultaneously endeavoured to distance itself from the process of integration. This trend continued up to and even beyond its decision to leave the EU due to the integration and value-based context of withdrawal under Article 50 TEU.

2.2. Integration and Value-Oriented Process of Withdrawal from the EU

In C-621/18 *Wightman*, the CJEU placed Article 50 TEU within the context of Article 1 (2) TEU, on "the creation of an ever closer union among the peoples of Europe", and Article 2 TEU, namely the "common values ... [which] form part of the very foundations of the European Union

⁴¹ Judgment of 21 December 2011, *NS v Secretary of State for the Home Department and others*, C-411/10, EU:C:2011:865.

⁴² *Ibid.*, para. 119.

⁴³ *Ibid.*, para. 120.

⁴⁴ *Ibid.*, para. 121.

⁴⁵ European Council Conclusions, 2016, 16.

⁴⁶ *Ibid.*

⁴⁷ Vaughne Miller, "'Ever Closer Union' in the EU Treaties and Court of Justice case law", *House of Commons Library, Briefing Paper No. 07230*, November 16, 2015, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7230#fullreport>.

legal order”.⁴⁸ In interpreting Article 50 TEU this way, the CJEU held that a withdrawing Member State, which has given the notification of its intention to withdraw from the EU, retains the right to unilaterally revoke its notification and resume its membership.⁴⁹ It is notable that Article 1 (2) TEU, from which the UK had secured an opt-out as discussed above, should be used here in an interpretative capacity. Advocate General Campos Sánchez-Bordona provided further clarification on this point in his Opinion of C-621/18 *Wightman*.⁵⁰ He noted that the objective under Article 1 (2) TEU of creating “an ever closer union among the peoples of Europe” supports the interpretation of allowing for the unilateral revocation of the notification.⁵¹ This is because such an interpretation, which allows the Member State concerned to continue its membership unimpeded, conforms to the objective of European integration.⁵² It can thus be seen that, although Article 50 TEU provides for the unilateral right of a Member State to withdraw from the EU, the CJEU placed the process of withdrawal within an integration-based context.

Additionally, the CJEU described Article 50 TEU on withdrawal as the direct counterpart to Article 49 TEU on accession by linking them both to the foundational values of the Union found in Article 2 TEU.⁵³ The result of this triangular connection between accession and withdrawal and EU values is that just as “a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will”.⁵⁴ In being intrinsically connected to the values of the EU, Article 50 TEU has reinforced the voluntary nature of participation in the European project through membership of the EU. It can thus be seen that “withdrawal is not an expression of disintegration, but a manifestation of the premises on which the Union is based”.⁵⁵ The EU objective of creating an ever closer union would seem to be ill at ease with the value of respecting the democratic will of a Member State withdrawing from the Union. However, it must be pointed out that withdrawing from the EU is very different to disassociating from its legal order. The EU’s relationship with the EEA/EFTA states and its bilateral arrangements with Switzerland demonstrate that “non-membership need not mechanically result in non-participation in, let alone rejection of, the European integration process.”⁵⁶

In the context of a Member State which has withdrawn from EU membership, Hillion proposes that Article 8 TEU should be used to develop the new relationship as the former Member State becomes a new neighbour with which the EU is bound to engage.⁵⁷ He argues that the mandate

⁴⁸ C-621/18, *Wightman*, paras. 61-62.

⁴⁹ *Ibid.*, para. 73.

⁵⁰ Opinion of Advocate General Campos Sánchez-Bordona delivered on 4 December 2018, *Wightman and others v Secretary of State for Exiting the European Union*, C-621/18, ECLI:EU:C:2018:978.

⁵¹ *Ibid.*, para. 133.

⁵² *Ibid.*, paras. 133-137.

⁵³ C-621/18, *Wightman*, para. 63.

⁵⁴ *Ibid.*, para. 64.

⁵⁵ Christophe Hillion, “Withdrawal Under Article 50 TEU: An Integration-Friendly Process” *Common Market Law Review* 55, no. 3 (2018): 53.

⁵⁶ *Ibid.*, 54.

⁵⁷ *Ibid.*, 55.

under Article 8 TEU to develop a special relationship with neighbouring countries would bolster the normative basis for a negotiated withdrawal and demonstrate post-exit engagement by the EU with its former Member State.⁵⁸ Hillion notes that the new neighbour can continue to participate in the integration process through an integration agreement, such as the EEA Agreement, which provides for an alternative form of participation for a neighbour not seeking membership.⁵⁹ Indeed, in line with the Protocol on Ireland/Northern Ireland attached to the EU-UK Withdrawal Agreement,⁶⁰ it is already the case that UK has a unique participation in the integration process due to the position of Northern Ireland within the EU legal order. The Protocol sets out the necessary arrangements to avoid a hard border, i.e. without customs and regulatory checks or controls and related physical infrastructure at the border, between Ireland and Northern Ireland.⁶¹ These arrangements are unique as they result in Northern Ireland, but not the rest of the UK (England, Scotland and Wales), adopting a large amount of the EU's internal market *acquis* in order to remain to a significant degree within the EU's customs union and single market.⁶²

Article 8 TEU, which is intertwined with the integration objective and values of the EU, can thus provide a suitable basis for the development of relations with a neighbouring country that has emerged from withdrawal. This is because such a country seeks the *finalité* of a neighbourly relationship and because of the integration and value-oriented process of withdrawal itself. Additionally, the history of British participation within the European project is characterised by integration into and separation from the EU legal order. Moreover, the UK has emerged from withdrawal, not with a rejection of the European integration process, but rather with a different and unique participation within it. Article 8 TEU would also provide an appropriate legal basis for the development of such a relationship due to its mandate to develop a special relationship with neighbouring countries founded on the values of the Union. It now needs to be examined whether the EU-UK TCA should have been concluded on the basis of Article 8 TEU instead of Article 217 TFEU, and whether the Neighbourhood clause could be used to conclude future sector-specific agreements between the EU and the UK.

3. The Case for Article 8 TEU

3.1. As the legal basis for the EU-UK TCA

As recalled above, Article COMPROV.1 of the TCA outlines that its purpose is to establish “the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community OJ L 29, 31.1.2020, 7-187.

⁶¹ Article 1 (3) of the Protocol on Ireland/Northern Ireland.

⁶² For a full analysis on Northern Ireland's participation within the EU's customs unions and single market see: Stephen Weatherill, "The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's" *European Law Review* 45, no. 2 (2020): 222-236.

Parties' autonomy and sovereignty". Although the substantive legal basis of the EU-UK TCA is Article 217 TFEU, the TCA does not establish an association between the parties and its purpose aligns with the objective pursued by Article 8 (1) TEU. It must therefore be asked why Article 8 TEU was not used to conclude the EU-UK TCA.

There are two recent distinct schools of thought regarding the use of Article 8 TEU as the legal basis to conclude an agreement of a general nature. One is the proposition put forward by Czuczai that Article 8 TEU has a completely different purpose than Article 217 TFEU and that, in effect, the two provisions are separate, distinct and self-standing legal bases which should not be mixed up.⁶³ The other is the view adopted by Van Elsuwege that Article 8 TEU is an essentially political provision without any practical legal effect and Article 217 TFEU is capable of being the sole legal basis for such agreements on its own.⁶⁴

3.1.1. Article 8 TEU as the appropriate legal basis

Czuczai argues, in relation to the Neighbourhood clause, that "there is *effet utile veritable* of this so far unused legal basis."⁶⁵ Among its potential uses, Czuczai outlines that Article 8 TEU "is a distinct and self-standing so-called 'catch all' legal basis".⁶⁶ He notes that the objective of Article 217 TFEU, establishing an association with a third country, is "as a rule, done typically in the first paragraph of the concerned association agreements".⁶⁷ He contrasts this with the aim pursued by Article 8 (1) TEU and concludes that the two provisions have "completely different purposes and aims".⁶⁸

Additionally, Czuczai argues that a combined legal basis of Article 8 TEU and Article 217 TFEU would not be possible as the two provisions exclude each other by virtue of both being catch-all provisions.⁶⁹ In this regard, he asserts that the recent jurisprudence of the CJEU on Article 217 TFEU would preclude the combined legal basis of two general provisions.⁷⁰ Therefore, under this interpretation, the EU-UK TCA should have been concluded under Article 8 TEU alone in light of the objective pursued by the TCA and the lack of any association established between the parties.

3.1.2. Article 217 TFEU as the appropriate legal basis

Van Elsuwege notes that due to its broad scope and general nature, Article 217 TFEU by itself provides an appropriate legal basis for agreements covering a wide variety of substantive areas without requiring additional substantive legal bases.⁷¹ Concerning the lack of an association

⁶³ Czuczai, "Article 8", 41.

⁶⁴ Van Elsuwege, "Meaning of 'Association'", 13.

⁶⁵ Czuczai, "Article 8", 39, emphasis original.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 41.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, 42.

⁷⁰ *Ibid.*

⁷¹ Van Elsuwege, "Meaning of 'Association'", 16.

established by the EU-UK TCA, Van Elsuwege notes that, while it is possible to indicate the intention of concluding an association agreement from the outset of negotiations, the legal basis to conclude an agreement is usually chosen only at the end of the procedure and is solely reflected in the Council's decision to conclude an agreement.⁷² It is thus not a requirement for an agreement concluded under Article 217 TFEU to explicitly establish an association and this explains why certain agreements legally based on this provision contain no reference to "association" in their text or title.⁷³ Article 217 TFEU is thus capable of providing a suitable legal basis for the conclusion of a general agreement such as the EU-UK TCA, even without any reference being made to "association" in the TCA itself.

However, Van Elsuwege does acknowledge the possibility that Article 8 TEU could be added to the substantive legal basis of an association agreement concluded as an essentially political provision, i.e. without affecting the legal practice of the EU's external action, in order to clarify the agreement's specific nature and objectives of good neighbourliness.⁷⁴ A combined Article 8 TEU and Article 217 TFEU approach was in fact proposed in a 2018 resolution by the European Parliament which explicitly suggested that "an association agreement negotiated and agreed between the EU and the UK ... pursuant to Article 8 TEU and Article 217 TFEU could provide an appropriate framework".⁷⁵ Under this perspective of Article 8 TEU, it is evident that the most appropriate course should have been to employ a combined legal basis of Article 217 TFEU and Article 8 TEU together, with the first provision reflecting the broad scope and general nature of the agreement and the latter reflecting the purpose of the agreement.

3.1.3. The correct legal basis to conclude the EU-UK TCA

Despite the suitability of Article 8 TEU to conclude the EU-UK TCA, it was concluded solely on the basis of Article 217 TFEU. However, there does not appear to be a definitive reason that explains why Article 8 TEU was not used. Van Elsuwege argues that its "general wording and unusual location under Title I on 'Common Provisions' of the TEU as well as the absence of specific procedural guidelines under Article 218 TFEU" support the interpretation that Article 8 TEU cannot be used as an autonomous substantive legal basis.⁷⁶ Nonetheless, these arguments are not conclusive reasons that would prevent the use of the Neighbourhood clause.

Van Elsuwege himself observes that, in principle, nothing in the Treaties seems to prevent Article 8 TEU from being used to conclude agreements with neighbouring countries.⁷⁷ He further reinforces this proposition by noting that "Article 216 (1) TFEU makes clear that a legal basis for concluding international agreements can also be found in the TEU."⁷⁸ The wording and

⁷² *Ibid.*, 15.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 13.

⁷⁵ European Parliament Resolution of 14 March 2018 on the framework of the future EU-UK relationship, P8 TA(2018)0069, para. 5, https://www.europarl.europa.eu/doceo/document/TA-8-2018-0069_EN.html.

⁷⁶ Van Elsuwege, "Meaning of 'Association'", 13.

⁷⁷ Van Elsuwege and Petrov, "Article 8 TEU", 696.

⁷⁸ *Ibid.*

placement of Article 8 TEU, therefore, do not prohibit its use as a legal basis. Concerning the absence of specific procedural guidelines under Article 218 TFEU, it must first be noted that, regardless of the substantive legal basis used, Article 218 TFEU provides a general procedure that applies to the conclusion of all international agreements.⁷⁹ Consequently, where there are no specific procedural rules applicable to a substantive legal basis, as is the case with Article 8 TEU, the general procedure found under Article 218 TFEU automatically applies.⁸⁰ As such, there is no reason why Article 8 TEU should not have been used.

However, Van Elsuwege offers a possible explanation for the use of Article 217 TFEU to conclude the EU-UK TCA. He notes that the application of the association formula to the EU-UK relationship is advantageous as “[f]rom a pragmatic point of view, it avoids potentially complex discussions regarding the choice of the correct legal basis for the new legal arrangement”.⁸¹ This is, however, an argument of convenience that Article 8 TEU should not be used. Moreover, in light of the purpose of the EU-UK TCA, Van Elsuwege’s reasoning results in an extension of the association formula to the space that is meant to be occupied by Article 8 TEU, i.e. an agreement concluded under Article 217 TFEU pursues the objective outlined in Article 8 (1) TEU of establishing a neighbourly relationship “within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation”. The conclusion of the EU-UK TCA on the basis of Article 217 TFEU thus has the effect of reducing the *effet utile* of Article 8 TEU to virtually nothing regarding the conclusion of general agreements with neighbouring countries.

Additionally, Article 8 TEU was not even referenced as an essentially political provision to clarify the aims of the agreement. However, Van Elsuwege again provides a reason for this. Regarding this use of the Neighbourhood clause, he states that “the added value of such a reference is not very clear because this type of privileged relations can be perfectly established under Article 217 TFEU alone”.⁸² Nonetheless, the purpose of adding a reference of Article 8 TEU to an agreement concluded under Article 217 TFEU would be, as noted by Van Elsuwege, “to clarify its specific nature and objectives of ‘good neighbourliness’.”⁸³ The added value of including such a reference is found because Article 8 TEU has its own defined aims, distinct from Article 217 TFEU, which align with the purpose of the EU-UK TCA. Even if one does proceed on the basis that Article 8 TEU cannot be a substantive legal basis, it is evident that a reference to Article 8 TEU should have been added to the conclusion of the EU-UK TCA in order to clarify its aims as the TCA does not establish an association but pursues the objective of the Neighbourhood clause.

⁷⁹ Allan Rosas and Lorna Armati, “*EU Constitutional Law: an Introduction*” (Oxford: Hart Publishing, 2018), 248.

⁸⁰ Czuczai, “Article 8”, 43, where Czuczai outlines the general procedure under Article 218 TFEU that applies in relation to the conclusion of “neighbourhood agreements” under the substantive legal basis of Article 8 TEU.

⁸¹ Van Elsuwege, “Meaning of ‘Association’”, 32.

⁸² *Ibid.*, 13.

⁸³ *Ibid.*

3.2. As the legal basis for future sector-specific EU-UK agreements

While Article 8 TEU was not used to conclude the EU-UK TCA, it may still provide an appropriate legal basis for the conclusion of future sector-specific agreements between the EU and the UK. The second part of Article 8 TEU explicitly distinguishes itself from the far-reaching and comprehensive nature of Article 217 TFEU by providing that “the Union may conclude specific agreements”. Concerning such agreements, Czuczai proposes that Article 8 TEU could provide the basis to establish a privileged partnership with a neighbouring country through the conclusion of sector-specific agreements.⁸⁴ Those agreements would all have the same ultimate objective, namely to establish an area of prosperity, peace, good neighbourliness and close cooperation between the EU and its concerned neighbour.⁸⁵ The potential to apply Article 8 TEU this way in the context of EU-UK neighbourly relations lies in the fact that, unlike in other agreements concluded with neighbouring countries,⁸⁶ it is envisaged in Article COMPROV.2 of the EU-UK TCA that the parties will “conclude other bilateral agreements between them [which] shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements”.

The closest relationship resembling the privileged partnership put forward by Czuczai is the EU-Swiss relationship. Switzerland possesses its own special relationship with the European project due to its geographical location at the centre of the EU, its status as one of the EU’s largest trading partners and the fact that it shares the same history and values of the EU.⁸⁷ Switzerland also has a unique integrated position of sectoral association within the EU legal order.⁸⁸ In a similar fashion to the UK deciding to withdraw from the EU, Switzerland rejected European integration in a popular referendum and opted instead for a relationship based on “a dense network of bilateral agreements”.⁸⁹ In 1999, the EU and Switzerland concluded seven sectoral agreements, known as the Bilaterals I, under the legal basis of Article 217 TFEU.⁹⁰ While these agreements are distinct from one another, they are all interconnected through a guillotine clause, with the effect that, upon termination of one of the agreements, all of the agreements will be terminated together.⁹¹ A second set of nine sectoral agreements were concluded in 2004, known as the Bilaterals II.⁹² While these agreements were negotiated in parallel, each agreement was concluded separately and they are distinct from one another.⁹³ As the agreements under the Bilaterals II were concluded separately, Article 217 TFEU was not employed

⁸⁴ Czuczai, “Article 8”, 44.

⁸⁵ *Ibid.*

⁸⁶ For example, there is no such provision to be found in the association agreements concluded with Georgia, Moldova, Ukraine or the Stabilisation and Association Agreement concluded with Kosovo.

⁸⁷ Matthias Oesch, *Switzerland and the European Union: General Framework, Bilateral Agreements, Autonomous Adaptation* (Zurich: Dike, 2018), 14-16; Marc Maresceau, “EU-Switzerland: Quo Vadis?”, *Georgia Journal of International and Comparative Law* 39, (2011): 729-732.

⁸⁸ Van Elsuwege, “Meaning of ‘Association’”, 29.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Maresceau, “EU-Switzerland”, 734.

⁹² *Ibid.*

⁹³ *Ibid.*

as the legal basis for the Bilaterals II.⁹⁴

In analysing the above sets of agreements, the main difference is that the agreements under the Bilaterals I are interconnected through the legal basis of Article 217 TFEU while those under the Bilaterals II are separate and distinct from one another. It is noted, however, that both sets of agreements suffer from different defects:

- (i) Regarding the Bilaterals I, Article 217 TFEU is best suited to conclude agreements of a general nature and it is not appropriate to be used as the legal basis to conclude sector-specific agreements as such agreements are related to more specific legal bases in the EU Treaties.⁹⁵ In this regard, one of the significant limitations of the Bilaterals I, in comparison to traditional association status, is that there is no common institutional framework for managing the development of the bilateral relationship which is a “lacunae [that] creates legal uncertainty for citizens and businesses.”⁹⁶
- (ii) Regarding the Bilaterals II, the agreements avoid the disadvantage of being connected through Article 217 TFEU. However, they suffer from not having any connection at all between them, despite being negotiated in parallel by the same parties and forming an integral part of the overall bilateral relationship between the EU and Switzerland.

Therefore, it is seen that either interconnecting these agreements under the basis of Article 217 TFEU or providing for no connection at all between them present a less-than-ideal situation. Article 8 TEU has the capacity to remedy the above defects by providing an appropriate legal basis for the conclusion of sector-specific agreements, and simultaneously providing the foundation of a privileged partnership, such as the one described by Czuczai. The unsuitability of applying Article 8 TEU in the context of EU-Swiss relations, however, is found simply because the Bilaterals I and Bilaterals II were concluded prior to the existence of the Neighbourhood clause. This can be contrasted with EU-UK neighbourly relations which have only just commenced and the starting point of this relationship is the opposite of the EU-Swiss relationship. Although the EU has yet to conclude an institutional framework agreement with Switzerland,⁹⁷ EU-UK relations are governed from the outset by an overarching framework, namely the EU-UK TCA.

Additionally, further and more specific agreements are likely to be concluded between the EU and the UK in line with Article COMPROV.2 of the TCA. For example, although there are no provisions in the TCA regarding cooperation in the areas of Common Foreign and Security Policy (‘CFSP’) and Common Security and Defence Policy (‘CSDP’), such cooperation is nonetheless

⁹⁴ Van Elsuwege, “Meaning of ‘Association’”, 29.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Van Elsuwege, “Meaning of ‘Association’”, 30.

envisaged between the EU and the UK.⁹⁸ It is thus very possible that agreements concerning cooperation in these areas might be concluded. Additionally, the conclusion of an agreement regarding sanitary and phytosanitary measures may be desirable in relation to the implementation of the Ireland/Northern Ireland Protocol.⁹⁹ Such agreements would invariably contribute to the aim of establishing “an area of prosperity and good neighbourliness”. Given the overarching purpose governing EU-UK relations and the potential use of Article 8 TEU to provide the basis of a privileged partnership through the conclusion of sector-specific agreements, in addition to the unsuitability of Article 217 TFEU to be used in this manner, the most appropriate legal basis for such agreements would be Article 8 TEU.

Conclusion

Article 8 TEU was envisaged to provide a privileged framework for relations between the EU and its neighbours. This distinguishes it from Article 217 TFEU as the need for the Neighbourhood clause was partly driven by the overuse of Article 217 TFEU with both neighbouring and non-neighbouring countries alike. In its development, the wording of Article 8 TEU evolved to explicitly refer to “the values of the Union”, and its location in the Treaties changed from originally preceding the Accession clause to being placed within the Common Provisions of the TEU. Consequently, the connection between Article 8 TEU and the EU values found in Article 2 TEU was strengthened and the provision was further removed from the path of accession to the EU.

Another aspect that distinguishes Article 8 TEU from Article 217 TFEU is the connection between establishing an association with the EU and pursuing a membership perspective. On the one hand, neighbouring countries aspiring to join the EU object to the use of neighbourly terms to define their relationship and instead seek to conclude an association agreement under Article 217 TFEU in order to advance their membership ambitions. On the other hand, Article 8 TEU provides the basis for a special integration-driven partnership without the necessity of establishing an association or offering a membership perspective. Article 8 TEU is thus appropriate for use in circumstances where a neighbouring country seeks the *finalité* of a neighbourly relationship in lieu of membership. As a neighbour which has withdrawn from the EU would evidently be seeking such a relationship, Article 8 TEU would provide a suitable legal basis for the development of EU-UK relations.

Analysing the potential of Article 8 TEU in the context of this relationship, it is seen that the UK’s participation within the European project has always been characterised by a constant push-and-pull of integration into and disentanglement from the EU legal order. The UK’s withdrawal from the EU is also defined by this same characteristic as the CJEU has interpreted the

⁹⁸ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom 2020/C 34/01, OJ C 34, 31.1.2020, 1–16, point 95.

⁹⁹ See: European Commission Vice-President M. ŠEFČOVIČ, Speech [on the implementation of the Protocol on Ireland / Northern Ireland], London, June 9, 2021, https://ec.europa.eu/commission/presscorner/detail/en/speech_21_2927; and, UK Parliament Motion on a UK-EU veterinary agreement, EDM (Early Day Motion)1658: tabled on March 18, 2021, <https://edm.parliament.uk/early-day-motion/58287/ukey-veterinary-agreement>.

process of withdrawal under Article 50 TEU within the objective of further European integration under Article 1 (2) TEU. However, the CJEU also explicitly connected Article 50 TEU to the EU values found in Article 2 TEU, namely the value of respecting the democratic will of a Member State to withdraw from the EU. While this value appears to be directly opposed by the objective of further integration, withdrawing from the EU does not automatically result in either rejection of or disassociation from the EU legal order. It is already seen that the UK has emerged from the withdrawal not with a rejection of the European integration process but rather with a new participation within it due to the unique position of Northern Ireland within the EU legal order. Within this context, Article 8 TEU, with its mandate to develop a special relationship with neighbouring countries, is capable of strengthening the basis to develop relations with a country that has renounced its membership and is seeking to develop a new relationship with the EU as a neighbouring country.

The suitability of Article 8 TEU to be used in the context of EU-UK relations is supported by the fact that the basis of the new relationship found in Article COMPROV.1 of the TCA aligns with the objective pursued by Article 8 (1) TEU. In the interpretation proposed by Czuczai, the EU-UK TCA should have been concluded on the basis of Article 8 TEU, instead of Article 217 TFEU, due to the purpose of the TCA and the lack of any association established between the parties. In the interpretation offered by Van Elsuwege, Article 217 TFEU is perfectly capable of providing a suitable legal basis to conclude the EU-UK TCA due to its broad scope and general nature, and because an agreement concluded under this provision does not need to make any reference to the term “association”. Additionally, Van Elsuwege regards Article 8 TEU only as an essentially political provision that could be added to the substantive legal basis of an association agreement in order to clarify the agreement’s specific nature and objectives of good neighbourliness.

Van Elsuwege argues that the wording and location of Article 8 TEU as well as the absence of specific procedural guidelines under Article 218 TFEU support the proposition that the Neighbourhood clause cannot be used as a substantive legal basis. However, these are not conclusive arguments as a legal basis for concluding international agreements can be found in either the TEU or the TFEU, and the general procedure for EU treaty-making found under Article 218 TFEU applies in relation to a substantive legal basis for treaty-making where there are no specific procedural guidelines. Nonetheless, Van Elsuwege also notes that the application of Article 217 TFEU is desirable from a pragmatic perspective as it avoids potentially complex discussions regarding the choice of the correct legal basis for the new EU-UK relationship. However, this amounts to an argument of convenience against the use of Article 8 TEU and results in an extension of the association formula to the space that is meant to be occupied by Article 8 TEU. As Article 217 TFEU is capable of concluding an agreement that has for its purpose the objective pursued by Article 8 (1) TEU, this reduces the *effet utile* of the Neighbourhood clause to virtually nothing regarding the conclusion of general agreements. Even if Article 8 TEU cannot be used as a substantive legal basis, its role as an essentially political provision was not realised as there is no reference to Article 8 TEU in the conclusion of the TCA to clarify the purpose of the agreement.

If Article 8 TEU does indeed have no utility regarding the conclusion of general agreements with neighbouring countries, its remaining potential concerns the conclusion of specific agreements with those countries. The Neighbourhood clause is suitable to be used in this manner as Article 8 (2) TEU provides that “the Union may conclude specific agreements”. The future potential use of Article 8 TEU in the context of EU-UK relations lies in the fact that Article COM-PROV.2 of the TCA envisages the conclusion of other bilateral agreements between the parties. As put forward by Czuczai, Article 8 TEU has the potential to build a privileged partnership between the EU and the UK by providing an appropriate legal basis to conclude sector-specific agreements. The suitability of Article 8 TEU to be used this way is reinforced by the fact that Article 217 TFEU is not a suitable legal basis for the conclusion of specific agreements, which is demonstrated by its past use to conclude such an agreement in EU-Swiss relations. Article 8 TEU, however, does have the potential to properly remedy the defects in the Swiss relationship model. In this regard, the Neighbourhood clause would be the most appropriate legal basis for the conclusion of multiple specific agreements such as cooperation in the areas of CFSP or CSDP or relating to the implementation of the Ireland/Northern Ireland Protocol. These agreements would be distinct from one another, but would nonetheless still form an integral part of the overall EU-UK bilateral relationship and pursue the ultimate aim of Article 8 TEU.

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